3

The Rule of Law

Delineating the rule of law is a task worthy of several books in and of itself. Though it forms one of the core governance principles of modern states, the rule of law remains an elusive concept that has been defined in numerous ways throughout its rich history.[1] My aim here is not to recreate this history in all its glory. Instead, I merely seek to elucidate this concept for the purpose and context of this book. This means that my conceptualisation of the rule of law will be limited to its implications for the actions of public authorities and, more concretely, authorities that are part of the executive branch of power. As I already noted in the Introduction, while the rule of law also plays an important role in the organisation of relationships between private parties,[2] this falls outside the scope of my analysis.

In this chapter, I will first examine how the rule of law has been defined in legal theory, and how it has been distinguished from the rule *by* law, which is a distortion thereof (Section 3.1). Second, I will assess how the rule of law has been conceptualised in the context of the EU, as this book focuses primarily on the EU legal order (Section 3.2). In this regard, I will also draw on the acquis of the Council of Europe. The Council of Europe is a distinct jurisdictional order, yet it heavily influenced the 'EU' conceptualisation of the rule of law, and the EU regularly relies on Council of Europe sources in its own legal practices. Finally, I will draw on those findings to identify the rule of law's core principles and to distil the concrete requirements that

[1] See Aziz Z Huq, *The Rule of Law: A Very Short Introduction* (Oxford University Press 2024). Regarding the context of algorithmic regulation, see also Monika Zalnieriute and others, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 259.

[2] Indeed, citizens must obey the law too. As noted by James Madison in Federalist No. 51 (1788): "*in framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself*". See Alexander Hamilton, James Madison, John Jay and Lawrence Goldman, *The Federalist Papers, October 1787–May 1788* (Oxford University Press 2008).

public authorities must fulfil to comply therewith (Section 3.3). Identifying these requirements – and the inherent challenges to achieve them – will subsequently allow me to build a normative analytical framework that I can use as a benchmark in Chapter 4 to assess how algorithmic regulation impacts the rule of law, and how it can lead to algorithmic rule by law.

3.1 A THEORETICAL INTRODUCTION TO THE RULE OF LAW

Before diving into primary sources of law, I will first consider how the rule of law has been conceptualised in legal theory and how it has been distinguished from other values, as this will provide a useful foundation to examine the role of this concept in the EU legal order later on. In this section, I start by setting out the various ways in which the rule of law has been defined thus far (Section 3.1.1) and conclude that – despite the fact that it is often conceptualised as a list of principles – there is something that can be called the 'spirit' of the rule of law which captures the protective role it plays in liberal democracies, beyond any formal list (Section 3.1.2). Building on this observation, I then distinguish between formal and substantive conceptions of the rule of law and underline that, in this book, the emphasis will lay on the latter (Section 3.1.3). Finally, I discuss the relationship between the rule of law and illiberal and authoritarian practices, by distinguishing the rule *of* law from the rule *by* law – a distinction that is central to this book's argument (Section 3.1.4).

3.1.1 *A Plethora of Definitions*

The idea behind the rule of law dates back at least to ancient times.[3] Aristotle alluded to it in several of his works and most famously in his *Politics*, where he insisted on a 'rule of law' rather than a 'rule of man',[4] given that "*he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of*

[3] The idea behind this notion arguably dates back even further, depending on which principles one considers to be part of the rule of law. The Code of Hammurabi, for instance, composed around 1755–1750 BC, already reflected a certain commitment to governance by law, based on general, clear and publicly known rules. See Larry May, *Ancient Legal Thought: Equity, Justice, and Humaneness from Hammurabi and the Pharaohs to Justinian and the Talmud* (Cambridge University Press 2019). Note also the statement by Amichai Magen and Laurent Pech that "*the idea and ideal of the rule of law has ancient roots in Babylonian, Hebraic, Hellenic, Roman, and in some respects Chinese political thought*", in 'The Rule of Law and the European Union' in Christopher May and Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 235.

[4] Aristotle's reference to 'man' can be taken quite literally here. Under Greek 'democracy', women (as well as slaves and strangers) were not considered to be citizens with voting rights or any other privileges tied to the legal and political system. This remained true in virtually every subsequent century, up until the twentieth, when women were finally admitted to participation in political life.

rulers, even when they are the best of men".[5] For Aristotle, not only citizens, but also 'the guardians of the law' ought to obey the law.[6] A similar idea was espoused by other Greek thinkers. Mirko Canevaro offers the example of an oration by Hypereides, who led the Athenian resistance against King Philip II of Macedonia and Alexander the Great, stating that: "*For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their masters and slander our citizens but on our confidence in the law*."[7]

Evidently, the notion of the rule of law in the fourth century BC does not fully coincide with its modern version(s), yet one can reasonably argue that its essence was already present back then. Both quotes express a clear opposition against governance through arbitrary rules that depend on the whims and interests of the people who happen to be in power. Both accounts argue in favour of governance through legal rules as a remedy against the arbitrariness of man. And both consider that, by placing confidence in 'the voice the law', which subjects rulers and the ruled alike to norms that are stable and bidding to reason, the corrupting nature of power can be curbed, and the liberty of citizens can be protected. This is also the spirit behind the concept of the rule of law that was espoused by more modern theorists, both in the European continent and in the Anglo-American world.[8]

One of the most influential conceptualisations of the rule of law stems from A. V. Dicey, a nineteenth-century British constitutional theorist.[9] Of particular interest is Dicey's caution against arbitrary rule-setting by the executive power, which he pronounced against the background of the enlargement of the state and its functions, and the birth of modern bureaucracy.[10] He put forward three essential

[5] Aristotle, *Politics* (Benjamin Jowett tr, Batoche Books 1999) 77. See also Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137, 142.

[6] See Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 8; Tom Bingham, *The Rule of Law* (Penguin Books 2011) 3.

[7] Mirko Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in the Greek City States' (2017) 9 Hague Journal on the Rule of Law 211, 213.

[8] Rule of law-conceptualisations in the continent and Britain took different shapes, given the diverse political contexts in which they developed. A thorough discussion of these differences is not necessary for the purpose of this book, the more given that theorists from both sides of the pond undoubtedly influenced each other. Suffice it to say that the continental notions of the *Rechtsstaat* or *État de droit* typically embodied a more constitutional perspective – in emphasising the fact that the state's legality derives its exercise of power by means of law, and that the constitution can set certain limits on the kind of laws that can be adopted – whereas Anglo-American rule of law conceptions emphasised Parliament's sovereignty and the common law system of legal precedents. See, e.g., Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 315 and following.

[9] Martin Loughlin goes as far as to say that it is no exaggeration to say Dicey invented the concept of the rule of law. See 'The Apotheosis of the Rule of Law' (2018) 89 The Political Quarterly 659, 659.

[10] See also Mark Bovens and Stavros Zouridis, 'From Street-Level to System-Level Bureaucracies: How Information and Communication Technology Is Transforming Administrative Discretion and Constitutional Control' (2002) 62 Public Administration Review 177.

principles that underlie the 'rule or supremacy of the law' in the British legal system, namely: (1) the need to curb the exercise of arbitrary power by persons in authority (*non-arbitrariness of power*); (2) the subjection of every man, whatever his rank or condition, to the ordinary law of the realm by ordinary tribunals (*equality*);[11] and (3) the protection of individual rights through general rules of constitutional law based on common law remedies, rather than a written constitution or Bill of Rights (*general principles through common law*).[12] While, as I will discuss below, the first two principles resonate with other rule of law-conceptions in Europe, the third principle clearly denotes a dissociation from the continental legal system,[13] seemingly implying that the rule of law is inherently a common law concept. This view has been criticised,[14] yet for the purpose of this book, we can bracket this discussion and continue exploring other rule of law conceptions. After all, Dicey arguably did not intend to put forward a general constitutional theory, but rather aimed to set out the principles of 'British constitutional law'.[15]

Dicey was not the only one whose fears of an unbounded administrative state or Leviathan proved particularly conducive of rule of law-theorising.[16] For Friedrich Hayek, who explicitly drew on Dicey's work,

> nothing distinguishes more clearly conditions in a free country from those in a country under arbitrary government than the observance in the former of the great principles known as the Rule of Law. Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[17]

[11] Note, however, that this concept of equality is unlikely to be substantive in nature, but rather concerned with equal access to courts in a formal way, as argued by Paul Craig in 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] Public Law 467, 472.

[12] AV Dicey, *Introduction to the Study of the Law of the Constitution [1885]* (10th edn, Macmillan 1968). See also Craig (n 11) 470–474.

[13] Dicey believed that written legal documents such as bills of rights could all too easily be rescinded, and hence placed more faith in common law remedies, which he found more robust. See, e.g., James E Pfander, 'Dicey's Nightmare: An Essay on The Rule of Law' (2019) 107 California Law Review 737, 745.

[14] See, for instance, also Judith Shklar's critique that this formulation of the rule of law merely entails "*an outburst of Anglo-Saxon parochialism*" in Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology*? (Carswell 1987) 5.

[15] Loughlin (n 9) 659.

[16] Bovens and Zouridis (n 10) 176.

[17] Friedrich A von Hayek, *The Road to Serfdom (1944)*, (Bruce Caldwell ed, Routledge 2008) 112. This definition is also cited by Joseph Raz as "*one of the clearest and most powerful formulations of the ideal of the rule of law*". See Joseph Raz, in 'The Rule of Law and Its Virtue' in his book *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 195.

Another influential account of the rule of law can be found in Lon Fuller's *The Morality of Law*, in which eight elements are put forward as "*the morality that makes law possible*". [18]These concern the fact that (1) there should be general rules that can be applied to concrete cases (*generality*), (2) the rules should be made public so that those subjected thereto can know them (*publicity*), (3) the rules should be adopted before they are being applied to concrete cases (*prospectivity*), (4) the rules should be clear and understandable (*intelligibility*), (5) the rules should not contradict each other (*consistency*), (6) it should be possible practically to conform to the rules (*conformability*), (7) the rules should be relatively stable over time (*stability*) and (8) the application and implementation of the rules by the state should correspond with the promulgated rules (*congruence*). Fuller's rule of law conceptualisation can be described as an anatomical or list-based approach, as it offers a list of features that the law should have to speak of its morality and hence of its legal character.

A similar approach was also embraced by Lord Bingham, whose list is slightly different.[19] His eight rule of law ingredients comprise the fact that: (1) the law must be accessible and so far as possible intelligible, clear and predictable (*accessibility*); (2) questions of legal right and liability should be resolved by application of the law rather than by arbitrary discretion (*non-arbitrariness*); (3) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation (*equality*); (4) public officers must exercise the powers conferred to them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding those powers' limits, and not unreasonably (*fair and reasonable exercise of power*); (5) the law must afford adequate protection of human rights (*human rights*); (6) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes (*means for dispute resolution*); (7) adjudicative procedures provided by law should be fair (*fair trial*); and (8) the rule of law requires compliance by the state with its obligations in international law as in national law (*respect for the international legal order*).

3.1.2 *The Spirit of the Rule of Law*

List-based approaches have been criticised as overly focusing on the formal features of the law, rather than considering the purpose that underlies these principles.[20] Without a consideration of the rule of law's underlying purpose, the danger exists that its principles are applied in a way that does not actually achieve their aims. Martin Krygier therefore argued in favour of a 'teleological' approach to the rule of law, inviting reflection on the overarching purpose or 'spirit' of this

[18] Lon L Fuller, *The Morality of Law* (Yale University Press 1969) 33–94. See also Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) 69 Boston University Law Review 781, 784.

[19] See Bingham (n 6).

[20] Rosalind Dixon, 'Rule of Law Teleology: Against the Misuse and Abuse of Rule of Law Rhetoric' (2019) 11 Hague Journal on the Rule of Law 461.

concept.[21] In short, a teleological approach focuses on the *why* rather than the *what*. Once we identified this 'why', we can use it as normative guidance for institutional design and action, rather than being fixated on the list of its constitutive elements. The question is hence: what is the purpose or spirit of the rule of law?

Of course, that goal may be manifold when considered from the point of view of various actors, and it is also likely to be defined differently by different people. Yet if we consider a contextual approach in light of this book and focus on the role it plays in the public sector, it can be reasonably argued that the rule of law entails a commitment to set limits to the exercise of public power in order to ensure legal accountability and to safeguard human liberty, dignity and agency.[22] By subjecting public authorities to the law and ensuring their actions can be reviewed against that law, natural and legal persons are protected against overly broad encroaches on their rights and freedoms. Moreover, the fact that public authorities are bound by rules that are proclaimed in advance also enables citizens to plan their lives in accordance with those rules.[23]

The chief merit of the teleological approach to the rule of law is that it puts this overarching purpose into perspective. The rule of law is not a goal in and of itself that should be fetishised, but a means that can help achieve other related values, such as the protection of human rights and public accountability, and thus democracy.[24] Based on that purpose, one can then logically derive that the features that the legal system must have in order to ensure the realisation of the rule of law's spirit, such as the need for public authorities to comply with the law and the ability to hold them to account when they do not, as well as the need for the law and its application to be foreseeable, accessible and intelligible. This order of things is important, as the rhetoric of the rule of law can also be abused. As noted by Dixon, given the complexity of the ideal of the rule of law, it is "*especially susceptible to superficial forms of abusive borrowing*", a practice she describes as "*involving the use of one or more related techniques, namely radical: (1) superficiality, (2) selectivity, (3) decontextualisation, and (4) anti-purposive usage in the application of liberal democratic*

[21] Martin Krygier, 'The Rule of Law: Pasts, Presents, and Two Possible Futures' (2016) 12 Annual Review of Law and Social Science 199. See also Martin Krygier, 'What's the Point of the Rule of Law?' (2019) 67 Buffalo Law Review 743.

[22] Jeremy Waldron, 'The Rule of Law' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Summer 2020, Metaphysics Research Lab, Stanford University 2020) <https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>, chapter 6. See also Dixon (n 20) 461; Paul Dermine, 'The New Economic Governance of the Eurozone: A Rule of Law Analysis' (PhD thesis, Maastricht University 2020) 31. As will be discussed further in Chapter 5, according to Endicott and Yeung, this includes not only private agency but also public agency. See Timothy Endicott and Karen Yeung, 'The Death of Law? Computationally Personalized Norms and The Rule of Law' [2022] University of Toronto Law Journal 72(4), 373–402.

[23] See also Hayek (n 17).

[24] At least under the conception of the rule of law in constitutional liberal democracies, as further discussed *infra*.

norms".[25] When focusing solely on an anatomical or list-based approach, there is thus a risk that public authorities select only those principles on the list that suit them and that may be used precisely to undermine the underlying spirit of the rule of law. I will come back to this risk when distinguishing the rule *of* law from the rule *by* law.

3.1.3 *Formal and Substantive Notions of the Rule of Law*

Related to this discussion is the question whether the rule of law embodies only procedural aspects of the law, or whether it also covers substantive elements. Does the rule of law have anything to say about the law's substance, such as the fact that it should be compatible with human rights and with democratic principles? Or are 'human rights' and 'democracy' distinct notions that are not part of the rule of law's spirit? Glancing again over the descriptions above, one can note that respect for human rights is, for instance, featured in the 'ingredients list' proposed by Lord Bingham, but does not appear in the account of Lon Fuller. These conceptual differences lay at the heart of the distinction between *formal* and *substantive* notions of the rule of law, also referred to as *thin* and *thick* notions.[26]

Formal or thin conceptions of the rule of law attach importance to the procedural aspects of the law's promulgation (Was the law enacted through a valid procedure? Was the norm made public and is it sufficiently clear to safeguard legal certainty? Is the law administered by an impartial and independent tribunal?). However, as explained by Paul Craig, such conceptions "*do not seek to pass judgment upon the actual content of the law itself*".[27] This does not necessarily mean that those who support such thin conceptions do not care about matters like human rights and democracy. However, they consider these aspects to be embodied by values other than the rule of law. In contrast, substantive rule of law notions are 'thicker' since they suggest that any rule of law definition, in addition to formal requirements, should also comprise a minimum of substantive requirements regarding the *content* of the rules and the *type of procedure* to enact them. In fact, they believe such substantive requirements to be an *inevitable* part of the rule of law, since the line between substance and procedure is too blurred to draw, and both aspects are inherently entwined.[28]

The distinction between formal and substantive notions of the rule of law can arguably be seen as part of the broader distinction between two major strands in legal philosophy: positivism and naturalism. The former (on which the formalistic rule of law notion is based) holds that the authority of law stems from the validity of the

[25] Dixon (n 20) 462. See also Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

[26] See in this regard, e.g., Radin (n 18) 783; Craig (n 11); Brian Z Tamanaha, 'The History and Elements of the Rule of Law' [2012] Singapore Journal of Legal Studies 232.

[27] Craig (n 11) 467.

[28] Waldron (n 22).

procedures by which it is adopted, while the latter (corresponding to a substantive notion of the rule of law) holds instead that the authority of law *also* depends on a substantive standard based on which its content can and should be judged.[29] Hence, under a substantive view, immoral laws (such as those enacted in Nazi Germany, for instance) should not be considered as law at all, even if clear, publicly proclaimed and adopted by the established procedure. It is, in fact, precisely in reaction to these atrocious laws that naturalism started to gain more ground again after the Second World War.[30] Lord Bingham's explicit inclusion of respect for human rights as part of his rule of law-ingredients list reflects this view. As he explains: "*a state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountain-side is the subject of detailed laws duly enacted and scrupulously observed*".[31]

While a substantive notion of the rule of law is intuitively attractive, opponents claim that it is unworkable as it presupposes an inherent element of justice or morality based on which a law should be judged to be considered as having the authority of law. Yet arguably, once we open the door to the law's contestation based on whether it is deemed moral or just, we *either* enable all legal subjects to oppose any law they consider to be 'unjust', *or* we at the same time need to proclaim that an objective standard of 'justice' exists. After all, by bringing in 'justice' as a substantive standard against which the law's authority should be judged, we also need to define that standard – and risk stumbling upon different conceptualisations thereof. Hence Carl Schmitt's critique on substantive notions of the law, which he describes as the idea that: "*law should above all be what I and my friends value*".[32]

Joseph Raz was likewise critical of overly thick rule of law conceptions: "*If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.*"[33] Proponents of a

[29] This sentiment is captured quite well by Martin Luther King Jr., who stated that "*an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law*", in his 'Letter from Birmingham Jail', 1963.

[30] Ronald Dworkin has been one of the strongest opponents of positivism, pointing out the immoral excesses that an overly positivistic approach to law can engender. His discussion with HLA Hart, who instead defended legal positivism and the so-called 'rule of recognition' as the basis for legal validity, has been highly influential in legal philosophy and also left its mark on modern conceptualisations of the rule of law. See respectively, Ronald Dworkin, *Law's Empire* (Hart Publishing 1998); HLA Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012). See also See also Scott J Shapiro, 'The "Hart-Dworkin" Debate: A Short Guide for the Perplexed' [2007] Public Law and Legal Theory Working Paper Series <https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Shapiro_Hart_Dworkin_Debate.pdf>.

[31] Bingham (n 6) 67.

[32] Carl Schmitt, *Legality and Legitimacy [1932]* (Duke University Press 2004) 14.

[33] Raz (n 17) 211.

formal rule of law-notion therefore prefer to conceptualise it as a self-standing value, which remains distinct from values like democracy, human rights, justice or the more abstract 'good'. Tamanaha[34] and Waldron, too, express reservations, the latter claiming that

> once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law. [...] The result is likely to be a general decline in political articulacy, as people struggle to use the same term to express disparate ideals.[35]

Consequently, Waldron argues that the rule of law is a so-called essentially contested concept,[36] defined by WB Gallie as concepts "*the proper use of which inevitably involves endless disputes about their proper uses on the part of their users*".[37] Others have gone further in their critique and suggested to do away with the concept altogether,[38] as they find it to be too vague, encompassing too many different things for different people, and thus ultimately 'meaningless'.[39]

[34] Tamanaha states that "*to insist that the rule of law requires human rights and democracy has the effect of defining the rule of law in terms of institutions that match liberal democracies*", which "*is unjustifiable. It smacks of stuffing the meaning of the rule of law with contestable normative presuppositions to produce a desired or presupposed outcome which is then imposed on everyone by definitional fiat*". Tamanaha (n 26) 234.

[35] Waldron (n 22).

[36] See Richard H Fallon, '"The Rule of Law" as a Concept in Constitutional Discourse' (1997) 97 Columbia Law Review 1, 6; Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (n 5); Jeremy Waldron, 'The Rule of Law as an Essentially Contested Concept' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021).

[37] WB Gallie, 'Essentially Contested Concepts' (1955) 56 Proceedings of the Aristotelian Society 167, 169.

[38] Shklar (n 14) 1. The reasoning goes as follows: if it is a concept that anyone can lay claim on regardless of the underlying practice or value, what purpose can the rule of law still serve? Also Martin Loughlin, drawing on Carl Schmitt's critique, cautions against rule of law-advocates who make a claim on this concept to brand their opponents as rule of law-enemies. According to him, the concept "*has value only for its aspirational qualities*" and "*although a coherent formulation of the general concept can be devised, this formulation is entirely unworkable in practice*". See Loughlin (n 8) 314.

[39] Loughlin (n 8) 314. Driving this point to the extreme, one could compare 'the rule of law' with concepts like 'the common good' or 'the public interest', which have likewise been criticised as inherently contested and vague, and prone to ideological abuse precisely because of their vagueness. See, e.g., Clarke E Cochran, 'Political Science and "The Public Interest"' (1974) 36 The Journal of Politics 327; Donna Dickenson, 'The Common Good' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2017). Consider also Stephen Humphreys account, which criticises rule of law-rhetoric as a 'theatre' – empty, fungible and therefore (ab)used by certain countries to impose economic, political and social reforms on other countries behind the facade of 'rule of law promotion'. See Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010).

While one can sympathise with these views to some extent, it would be a mistake to throw away the baby with the bathwater. In my view, the aspirational quality of the rule of law does not deduct from its value, nor does it deprive one from judging concrete government practices based on whether they respect, advance or impede this ideal. Rather than merely showing disaccord, the vast scholarly literature about the rule of law and its various conceptualisations can be seen as an attestation of its continuous importance in modern legal systems. Furthermore, the binary choice presented above is too simplistic. In modern liberal democracies, the values of human rights and democracy can unapologetically be identified as minimum substantive standards, without needing to navigate between the Scylla of bare proceduralism and the Charybdis of unbounded moral relativism. One does not need to open the door to infinite subjective sentiments of 'justice' to support a conceptualisation of the rule of law that requires public authorities to ensure the legal rules they adopt respect human rights and the democratic process. Certainly, the rule of law is an ideal type, as it is never fully achieved in practice.[40] Yet it represents something to be striven towards and can serve as a useful normative framework to guide public action – and to orientate my analysis in this book.

More importantly, as I will explain in Section 3.2, in the EU legal order, the rule of law is *more* than a normative principle. It is a value enshrined in both primary and secondary union law that all Member States and the EU itself must *legally* comply with.[41] This also counts for Member States of the Council of Europe, for whom compliance with the rule of law is a legally enshrined obligation, entwined with the obligation to comply with human rights and democracy.[42] Accordingly, while acknowledging the existence of both thick and thin notions of the rule of law in legal scholarship, this divergence does not stand in the way of rendering it both an aspirational value that should be striven towards, and a normative source from which concrete requirements can be derived that public authorities must legally abide by – including when they rely on algorithmic regulation. In what follows, I will thus dive into EU legal sources with the aim of distilling a more concrete conceptualisation of the rule of law in the context of the public sector to build my analytical framework.

Before doing so, I must however clarify one more theoretical point, namely the relationship between the rule of law on the one hand and authoritarian and illiberal practices on the other. As stated in the Introduction, the increase of such practices in modern liberal democracies – including in the EU – is a development that this book seeks to problematise. In the next section, I will therefore explain how they relate to the rule of law, and how this relationship informs the broader hypothesis of this

[40] Tamanaha (n 26) 234.

[41] Pekka Pohjankoski, 'Rule of Law with Leverage: Policing Structural Obligations in EU Law with the Infringement Procedure, Fines and Set-Off' (2021) 58 Common Market Law Review 1341.

[42] See Council of Europe, 'The Council of Europe and the Rule of Law' (Council of Europe 2008) CM(2008)170 5.

book, namely that public authorities' reliance on algorithmic regulation, in addition to potentially undermining the rule of law, can also dilute the law's protective function against illiberal and authoritarian tendencies in society.

3.1.4 *The Rule of Law and the Rule by Law*

In political theory, authoritarianism is typically juxtaposed to democracy, not to the rule of law. While many different definitions of these concepts exist, put very simply, in a democracy, those subjected to the law must be able to have a say in it.[43] How such 'say' is organised depends on the type of democratic system, of which numerous variations exist,[44] yet they all differ from authoritarian or autocratic regimes, where the law can be decided by a sole person or entity with absolute power, without accountability to the governed people.[45] Note that, in both of these descriptions, the law plays a role. Of course, in the latter, the ruler can also unilaterally decide to govern arbitrarily, based on whims rather than legal rules, and it is *that* precise feature, the absence of laws, that proponents of a thin conceptualisation of the rule of law consider to be its opposite.[46] For this reason, some scholars have argued that the rule of law is compatible with authoritarianism, and that some authoritarian states can be meaningfully said to adhere to the rule of law.[47]

Both in the past and in the future, states have indeed been relying upon laws (i.e., legal rules that were adopted in accordance with a given procedure[48]) to implement illiberal and authoritarian practices. However, proponents of a substantive notion of the rule of law would qualify such states as adhering to a rule *by* law instead. The rule by law embodies a purely formalistic notion of the law, whereby the power of the law serves to advance authoritarian and illiberal purposes which are incompatible with the spirit of the rule *of* law,[49] namely the aim of taming excessive public power and protect human liberty. Recall in this regard also the quote by Lord Bingham cited above. It is not because a state persecutes minorities through legal rules that it abides by the rule of law. Accordingly, while the rule *of* law entails the

[43] See also Philippe C Schmitter and Terry Lynn Karl, 'What Democracy Is . . . and Is Not' (1991) 2 Journal of Democracy 75; Robert Alan Dahl, *On Democracy* (Yale University 1998).

[44] See, for instance, Susan Rose-Ackerman, *Democracy and Executive Power: Policymaking Accountability in the US, the UK, Germany, and France* (Yale University Press 2021).

[45] Victor V Ramraj, 'Democracy and Authoritarianism' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020).

[46] See in this regard also Craig (n 11).

[47] See, for instance, Tamanaha (n 26).

[48] Which Hart would denote as 'secondary rules'. See Hart (n 30).

[49] Of course, the distinction between the rule of law and the rule by law is only meaningful for those who consider the rule of law to encompass something that goes beyond mere procedural requirements. As Dyzenhaus explains, "*only if one holds to a fairly substantive or thick conception of the rule of law will one think that there is a point on a continuum where rule by law ceases to be in accordance with the rule of law*". See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press 2006) 42.

idea that "*the law should stand above every powerful person and agency in the land*", the rule *by* law, "*in contrast, connotes the instrumental use of law as a tool of political power*".[50]

The rule by law can hence be seen as a distortion of the rule of law, as it undermines the law's protective role. Governments can indeed deploy the law to legitimise their actions – even if oppressive or unjust – and to consolidate rather than to limit their power. As noted by Joseph Weiler: "*The rule of law, outside a democracy is simply the most effective instrument of authoritarianism and worse.*"[51] Besides legal scholars, also the Council of Europe's Venice Commission (which, as we shall see below, is responsible for advising Member States on rule of law-related matters) underscored this distinction, stating that "*over time, the essence of the rule of law in some countries was distorted so as to be equivalent to 'rule by law', or 'rule by the law', or even 'law by rules'. These interpretations permitted authoritarian actions by governments and do not reflect the meaning of the rule of law today*".[52] In its 2008 rule of law report, the Council of Europe's Committee of Ministers explained it as follows: "*There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.*"[53]

Already centuries ago, authors like de Tocqueville stressed that democracy is *more* than the mere rule of the majority, as this could lead to a so-called tyranny of the majority.[54] That is why the maintenance of a liberal democracy requires a deliberative process that enables participation and the protection of certain rights and liberties, including for minorities, that cannot simply be overturned by a majority – even if it does so by law.[55] Moreover, as already touched upon in Section 2.3, the relationship between the government and its citizens is also subjected to a set of principles that enable administrative justice and ensure the government can be held to account when infringing the law. In other words, whereas the rule *of* law underpins human rights and democracy, under the rule *by* law, the law merely provides a veneer of legality for actions that are not compatible therewith, as it

[50] Waldron, 'The Rule of Law' (n 22), chapter 4. As Waldron notes in the same chapter, some authors consider this distinction to be superfluous and defend the merits of a rule *by* law approach.

[51] Joseph HH Weiler, 'Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States*, vol 298 (Springer Berlin Heidelberg 2021) 5.

[52] Venice Commission, 'Report on the Rule of Law – Adopted by the Venice Commission at Its 86th Plenary Session' (2011) CDL-AD(2011)003rev-e 5.

[53] Council of Europe (n 42), §26.

[54] See Alexis de Tocqueville, *Democracy in America (1835)* (Barnes & Noble 2003).

[55] These rights can hence be shielded from the 'the democratic will'. See also Denis J Galligan, 'Public Administration and the Tendency to Authoritarianism' in András Sajó (ed), *Out of and into Authoritarian Law* (Brill–Nijhoff 2002) 190.

undermines the protective role that the law plays in safeguarding human rights and democracy.

Today, authoritarian tendencies are prevalent across the globe. Importantly, these tendencies are also surfacing in liberal democracies, and are eroding its normative pillars incrementally.[56] According to the authors of the Authoritarian Playbook,

> before the 1990s, authoritarian leaders bent on upending democracy typically came to power forcefully and swiftly, often by means of a military coup d'état. The moment democracy ceased to exist could be timestamped and reported on with a block headline. Yet for at least the last thirty years, the threats to democracy have evolved. Today, democracy more often dies gradually, as the institutional, legal, and political constraints on authoritarian leaders are chipped away, one by one.[57]

In other words, the threat hence comes from within, through the incremental erosion of legal protection mechanisms that are meant to safeguard the rule of law, democracy and human rights. Instead, the law is being used to bolster regimes that are moving away from liberal democracy, without (yet) meriting the connotation of an authoritarian regime.[58]

Authoritarian-minded leaders that know the rules of the game and are eager to uphold the veneer of legality, which facilitates international legitimacy and hence entails financial benefits,[59] are increasingly facilitating illiberal and authoritarian practices by adopting new laws or legal reforms, seemingly in 'full accordance with the law', yet at the same time undermining the law's protective function.[60] Furthermore, these practices typically occur cumulatively and incrementally rather

[56] See also David Murakami Wood, 'The Global Turn to Authoritarianism and After' (2017) 15 Surveillance & Society 357.

[57] Protect Democracy, 'The Authoritarian Playbook – How Reporters Can Contextualize and Cover Authoritarian Threats as Distinct from Politics-as-Usual' (2022) <protectdemocracy.org/project/playbook-media-primer> 5.

[58] These regimes have also been denoted as 'hybrid regimes', whereby "*the executive branch concentrates powers to the detriment of nonstate and opposition actors. Hybrid regimes are sometimes called 'competitive authoritarian' because, while the ruling party competes in elections (usually winning), the president is granted an array of autocratic powers that erode checks and balances.*" See Javier Corrales, 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' (2015) 26 Journal of Democracy 37, 37.

[59] See in this regard also Ken Godfrey, 'How the EU Can Better Avoid Bankrolling Authoritarianism' (*Carnegie Europe* 4 March 2021), <https://carnegieeurope.eu/2021/03/04/how-eu-can-better-avoid-bankrolling-authoritarianism-pub-83992>.

[60] The implementation of illiberal and authoritarian practices is thus legitimised by reference to the law, which has also been referred to as 'autocratic legalism' or – when accompanied by deliberate constitutional reforms with the same purpose – as 'constitution authoritarianism'. See in this regard Kim Lane Scheppele, 'Autocratic Legalism' [2018] The University of Chicago Law Review 545; Orlando Scarcello, 'Authoritarian Constitutionalism: An Oxymoron? The Case of Costantino Mortati's Early Writings (1931–1940)' (2021) 3/21 Jean Monnet Working Paper, <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-03-Orlando-Scarcello.pdf>.

than through one sweeping reform, which keeps the harm they cause under the radar for a longer time, and can hence fail to mobilise sufficient opposition.

It is, however, important to note that the distortion of the rule of law into the rule *by* law need not necessarily stem from a deliberate intention to undermine the law's protective role. An overly rigid and disproportionately severe interpretation of the law can also lead to practices that run counter to the ideal of the rule of law. Reference can in this regard be made to the Venice Commission's Opinion of 2021[61] regarding the 'childcare allowance case' in the Netherlands, which I will discuss further in Chapter 4. In this case, the Dutch tax authorities applied an overly strict approach to the implementation of a law against alleged fraudsters, and targeted parents even without the proven intention of fraud, with disproportionate reimbursement claims for the so-called undue benefits they had received. The authority's (and later the courts')[62] reluctance to apply a hardship clause and ensure a proportionate balance of the interests at stake, tragically impacted a large number of families, causing 'unprecedented injustice' and irreparable damage.[63] In its opinion, the Venice Commission noted that it has "*consistently cautioned against considering 'the rule of law' as a purely formal concept in the meaning of 'rule by law' and not as a substantive concept, meaning that the law must be accompanied with guarantees against abuse of legal powers.*"[64] It also noted that an "*exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the Rule of Law*" which, it concluded, "*has been done by several Dutch authorities*".[65] This demonstrates how the rule *by* law is not only the product of deliberate action, but can also be the consequence of negligence on behalf of public authorities to ensure that their exercise of power does not violate the rule of law.

Throughout this book, I will rely on the distinction between the rule of law and the rule by law, and argue that negligent or deliberately problematic reliance on algorithmic regulation might eventually foster *algorithmic rule by law*. I hence do not reserve this term solely for practices that consciously and purposely undermine the protective power of the law while upholding the veneer of legality, but also for practices that do so inadvertently by paying insufficient attention to this very risk. With this in mind, I will now examine how the rule of law is conceptualised in the European Union. While its entwinement with democracy and human rights is henceforth taken as a baseline, I still need to further concretise this 'elusive' concept[66] before I can distil therefrom the requirements that public authorities

[61] Mr Richard Barrett and others, 'The Netherlands: Opinion on the Legal Protection of Citizens' (Venice Commission 2021) Opinion no. 1031/2021 CDL-AD(2021)031.

[62] Also the Council of State's Administrative Jurisdiction Division, which carried out judicial reviews of the tax authority's actions, followed suit in this approach. See ibid, §16.

[63] Parliamentary Inquiry Committee, 'Unprecedented Injustice' (House of Representatives of the States General 2020) 35 510, no. 1.

[64] Barrett and others (n 61), §118.

[65] ibid, §118.

[66] Tamanaha (n 6) 3.

must fulfil when taking administrative acts and examining how reliance on algorithmic regulation can affect them.

3.2 THE RULE OF LAW IN THE EUROPEAN UNION

The rule of law is typically part of a national legal order, where it functions as a normative value or guiding principle for the institutional design of a nation state. Yet, ever since the rise of international and supranational organisations in the twentieth century, the rule of law has also been considered beyond the context of the nation state.[67] Many international organisations have this value incorporated into their mandate or into their policy agenda, for instance in the form of 'rule of law promotion initiatives'.[68] In addition, a number of non-governmental organisations have started mapping rule of law indicators and used this as a basis to create indexes that measure and compare states' compliance with the rule of law.[69] Arguably, the most important international organisation mandated to set rule of law standards is the Council of Europe. While the Council of Europe's legal order is distinct from that of the European Union, it has had a tremendous influence on the EU's understanding of the rule of law, and effectively shaped its EU conceptualisation. In this section, I therefore start with an introduction to the Council of Europe's work on the rule of law, and examine the authority it has in the European Union (Section 3.2.1). Next, I discuss the origins of the rule of law in the EU legal order (Section 3.2.2) and distinguish between its vertical and horizontal dimensions (Section 3.2.3). I then examine how the rule of law is conceptualised in primary sources of EU law and identify the six core principles associated therewith (Section 3.2.4). Finally,

[67] Martin Loughlin even credits the increased international reliance on 'the rule of law' with the concept's revival after having been criticised for its 'contested nature'. See Loughlin (n 9) 664.

[68] Such initiatives consist of development aid schemes, whereby adherence to the rule of law is typically set as a precondition to benefit from the aid. Rule of law promotion schemes have been the subject of heavy criticism, as their rule of law-definitions – upon which receipt of the aid depends – has been argued to encompass Western and capitalistic elements, hence 'sneaking in' a liberal economic agenda under the guise of a so-called neutral conception of the rule of law. For a detailed analysis and critique, see also Humphreys (n 39).

[69] These rule of law-indexes are not devoid of criticism either since, to enable comparisons, they need to set a common standard for a not-commonly agreed upon concept. At the same time, these initiatives can build on existing literature and output by international organisations that sought to define the rule of law at global level, and allow for interesting insights not only as regards how countries fare comparatively to each other, but also how their scores decline or increase over time. One of the most well-known rule of law indexes is prepared by the World Justice Project and focuses on eight factors: Constraints on Government Powers, Absence of Corruption, Open Government, Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice, and Criminal Justice. See, e.g., World Justice Project, 'Rule of Law Index 2020' (World Justice Project 2020) <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>. The European Commission's rule of law framework, discussed further below, takes a similar approach by considering how each EU member state performs based on a number of criteria (see *infra* Section 5.2).

I conclude with a discussion of the so-called EU 'rule of law crisis' and draw attention to the rule of law's fragility (Section 3.2.5).

3.2.1 *The Rule of Law and the Council of Europe*

When the Council of Europe was founded in 1949, the notion of the rule of law was already part of its establishing statute, stating in Article 3 that every member "*must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms*".[70] Pursuant to Article 8 of the Statute, any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation, and can eventually even be expelled from the organisation.[71] The European Convention on Human Rights (ECHR), signed under the Council of Europe's auspices a year later, likewise evokes the rule of law in its preamble as part of a 'common heritage' of the governments of European countries. Since then, the Council of Europe produced a broad set of guidelines and recommendations regarding the rule of law, constituting one of its three pillars, together with democracy and human rights.[72] Accordingly, the idea of the rule of law as a concept that is common to signatory member states, and that can be given a common conception at the international level, started taking shape. This occurred not merely in theory, but through the explicit desire of states to work towards and commit to a common understanding of the rule of law, anchored in an international legally binding instrument.

In 1999, the Council of Europe established the European Commission for Democracy through Law (better known as the Venice Commission) which is an advisory body on constitutional matters.[73] Its 2011 report on the rule of law aimed at identifying a 'consensual definition' of this concept, in order to facilitate its interpretation and application. As already hinted at, the Venice Commission explicitly

[70] See Article 3 of the Statute of the Council of Europe 1949 (CETS 001).

[71] Note how the Treaty's preamble also reaffirms its member states' "*devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy*". Following Russia's invasion of Ukraine on 24 February 2022, the Council of Europe's Committee of Ministers adopted a resolution to cease Russia's membership under Article 8 of the Statute. See Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies.

[72] See also Jörg Polakiewicz and Julia Katharina Kirchmayr, 'Sounding the Alarm: The Council of Europe as the Guardian of the Rule of Law in Contemporary Europe' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer 2021) 361.

[73] Besides the forty-six Council of Europe Member States, the Venice Commission also counts representatives from fifteen other countries, namely Algeria, Brazil, Canada, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the USA. Argentina, the Holy See, Uruguay and Japan have Observer Status.

rejects a thin conception of the rule of law, in favour of one that also embraces substantive elements, including respect for democracy and human rights. The report states that "*a consensus can now be found for the necessary elements of the rule of law*", namely: (1) legality, including a transparent, accountable and democratic process for enacting law; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law. Based on those six elements, the Venice Commission subsequently prepared a rule of law-checklist to facilitate the evaluation of the condition of the rule of law in individual states.[74] The rule of law-checklist was subsequently endorsed by the Committee of Ministers and by the Council of Europe's Parliamentary Assembly.[75]

This work proved highly influential for the European Union, which came into existence a few years after the establishment of the Council of Europe. The EU acknowledged the Council of Europe's 'normative pre-eminence'[76] in the 2007 Memorandum of Understanding between the Council of Europe and the EU, stating that "*the Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe*".[77] All EU Member States are also a member of the Council of Europe. At the same time, both institutions agreed to cooperate and complement each other's work as regards the protection of the rule of law based on common standards.[78] When building this book's normative framework and distilling concrete rule of law requirements for public authorities, I therefore

[74] Venice Commission, 'Rule of Law Checklist' (Council of Europe 2016) Study no. 711 / 2013 CDL-AD(2016)007rev.

[75] Parliamentary Assembly, 'Venice Commission's Rule of Law Checklist' (2017) Resolution 2187 (2017).

[76] Joelle Grogan and others, 'The Crystallisation of a Core EU Meaning of the Rule of Law and Its (Limited) Normative Influence beyond the EU' (Reconnect – Reconciling Europe with its Citizens through Democracy and Rule of Law 2021) 27.

[77] 'Memorandum of Understanding between the Council of Europe and the European Union' (Council of Europe 2007) 3 <https://rm.coe.int/16804e437b>.

[78] Note also that the EU is committed to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and declared that fundamental rights – as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States – shall constitute general principles of EU law. See in this regard Article 6 (2) TEU, introduced in the Treaty after the CJEU's Opinion 2/94 in 1996 that the Treaty did not provide for the EU with the competence to enact rules on human rights or to conclude international conventions in this field, which meant that it also did not have the competence to accede to the ECHR – see *Opinion 2/94* (European Court of Justice, 28 March 1996). Nevertheless, when on the basis of this Treaty provision a draft accession agreement was subjected to the Court's review in 2014, the latter again issued a negative opinion, highlighting potential adverse effects on the autonomy of the EU legal order – see *Opinion 2/13* (European Court of Justice (Full Court), 18 December 2014). Negotiations between the EU and the Council of Europe were taken up again in 2019 and are still ongoing at the time of writing this book.

consider not only EU legal sources but also the output of Council of Europe bodies.[79]

Cooperation between the European Union and the Council of Europe became ever closer over the years,[80] particularly considering the EU's increasing competence in matters related to the Council of Europe's working sphere, including the rule of law, which thus started to play a role not only at the *national* and *international* level, but also at the *supranational* level. In fact, the establishment of the EU as a supranational legal order can be seen as a turning point for the rule of law. Under the auspices of the Council of Europe, Member States already accepted to adhere to common standards, as further developed in the case law of the European Court of Human Rights (ECtHR). However, one could argue that this adherence is 'softened' by the intergovernmental nature of the Council of Europe, as well as the margin of appreciation doctrine that offers national authorities some room for manoeuvre in fulfilling their obligations under the ECHR, precisely in light of the acknowledged difficulty of identifying uniform European standards for the rule of law and human rights across states.[81] In the European Union, however, an independent legal order arose with the competence to autonomously define legal concepts, harmonise legislation, and create laws that have direct effect in the national legal order. How then, did the rule of law take shape in the EU?

3.2.2 *The Rule of Law's Origins in the EU Legal Order*

Though the European Union came into being about seventy years ago, the concept of the rule of law only started to explicitly appear in its legal order halfway its existence.[82] The Union's origins lay in a willingness of Member States to cooperate on economic matters (from common policies for the coal and steel sector, to the establishment of a customs union and a common market), leaving matters like democracy, human rights and the rule of law at the national level, and at the

[79] The Charter of Fundamental Rights of the European Union (CFREU) also states that insofar as it contains rights that correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same – without preventing Union law to provide more extensive protection (see Article 52(3) of the CFREU).

[80] It can also be noted that The Court of Justice of the European Union frequently cites the case law of the European Court of Human Rights (ECtHR) in its own judgments.

[81] See, e.g., Polakiewicz and Kirchmayr (n 72) 366.

[82] Admittedly, then-head of the European Economic Community Walter Hallstein coined the notion of 'a community based on law' in the 1960s, yet this concerned the governance of the Union itself, and was meant to indicate that the Union could only rely on law, not on any means of coercion, to enforce its rules. See Werner Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening', in his *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 5.

intergovernmental level of the Council of Europe.[83] Gradually, Member States embraced further integration, transforming the Union from a market-oriented project to a self-standing legal order in which human rights, democracy and the rule of law have come to play a central role,[84] greatly aided in this endeavour by the CJEU's case law.[85]

The seminal case in which the rule of law was first mentioned in the EU legal order is *Les Verts*, concerned with party political funding.[86] In this 1986 judgment, the CJEU formally stated that "*the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.*"[87] According to the Court, the Treaties established a "*complete system of legal remedies and procedures*" designed to review the legality of measures adopted in the Union, and to protect natural and legal persons against the application to them of general measures implemented either by EU institutions or by national authorities.[88] While *Les Verts* was concerned with the rule of law *horizontally*, dealing with the relationship between EU institutions rather than within EU Member States, it did hint at the fact that also the actions of Member States can be reviewed based on their conformity with EU law. In subsequent case law, the CJEU reiterated and firmly entrenched the Union's rule of law-basis.[89]

A few years later, in 1993, the rule of law was included as part of the so-called Copenhagen criteria which set out the conditions that aspiring EU Member States

[83] Magen and Pech note that the concept of the rule of law "*first entered treaty language in the context of Member State's efforts to speak in greater unison to the rest of the world, not as part of any intra-community constitutional discourse*" and that it was for a long time primarily seen as part of the Union's external action rather than a focal point of its internal policy. See Magen and Pech (n 3) 236.

[84] See also Case 6/64, *Costa v E.N.E.L.*, 15 July 1964, ECLI:EU:C:1964:66.

[85] Koen Lenaerts, Piet Van Nuffel and Tim Corthaut, *EU Constitutional Law* (Oxford University Press 2021) 16.

[86] *Parti écologiste 'Les Verts' v European Parliament* [1986] European Court of Justice C-294/83, EU:C:1986:166.

[87] ibid §23.

[88] ibid §23. See in this regard also the Court's seminal judgments in *Van Gend & Loos* and *Costa ENEL*, respectively establishing the principle of direct effect (meaning that natural and legal persons can directly invoke before a national court legal rights granted to them by EU law), and the principle of the primacy of EU law over the law of its Member States. See *Van Gend & Loos* [1963] European Court of Justice Case 26-62, EU:C:1963:1; *Flaminio Costa v ENEL* [1964] European Court of Justice Case 6-64, EU:C:1964:66.

[89] See, e.g., the Courts judgments in *Commission and Others v Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, EU:C:2013:518, §66; *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, §91; and *Telefónica v Commission*, C-274/12 P, EU:C:2013:852, §56 *Maximillian Schrems v Data Protection Commissioner* [2015] European Court of Justice (Grand Chamber) C-362/14 §60.

should fulfil to be eligible for membership.[90] Yet it was not until the Treaty of Amsterdam, signed in 1997, that the rule of law was incorporated into primary EU law as one of the Union's founding 'principles' that are 'common to the Member States', alongside liberty, democracy, respect for human rights and fundamental freedoms – without, however, providing any definition of the concept.[91] When the Treaty of Lisbon was signed ten years later, the rule of law and the other founding principles became 'values' instead[92] yet obtained a more prominent place in the Treaty on European Union (TEU), right at the start in Article 2. The Lisbon Treaty likewise omitted the concept's definition, yet reiterated that it is considered a value common to all Member States. Pursuant to Article 21 TEU, the rule of law is also a 'principle' that the Union seeks to 'advance in the wider world', hence constituting a part of the EU's identity and objectives both internally and externally.[93] Whether called a value or principle, it is clear from both terms that the rule of law is considered an overarching guiding norm that requires concretisation through court interpretation or legislation in order to distil concrete obligations therefrom.[94]

3.2.3 *Vertical and Horizontal Dimensions*

When discussing the rule of law in the European Union, a distinction needs to be made between the various dimensions in which the rule of law plays a role. First, the rule of law can be examined at the level of EU Member States, dealing with the relationship between national institutions (legislative, executive and judicial) and national citizens (*vertically*).[95] Member States are required to comply with the rule of – both national and European – law.[96] However, since the EU constitutes an autonomous legal order,[97] one can also examine the rule of law at the level of the EU, dealing with the relationship between EU institutions (legislative, executive

[90] "*Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union*". See 'Presidency Conclusions – Copenhagen European Council' (European Council 1993) <www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf>.

[91] See also Roila Mavrouli, 'The Dark Relationship between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation' (2022) 7 European Papers 275, 276.

[92] For a discussion on the significance of this change in vocabulary, see Werner Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States*, vol 298 (Springer Berlin Heidelberg 2021) 110.

[93] Schroeder (n 82) 13.

[94] ibid 12.

[95] Note that this is also the level that the Council of Europe is focusing on.

[96] See Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 Common Market Law Review 59, 64.

[97] See Case 6-64, *Flaminio Costa v ENEL*, 15 July 1964, EU:C:1964:66.

and judicial) and EU citizens (*horizontally*).[98] Both of these layers are *internal* to the EU. These dimensions can further be distinguished from the rule of law's *external* dimension, which concerns the relationship between the EU and third countries, and between the institutions of those countries and their citizens. This dimension is primarily relevant for the EU's external action, such as rule of law-promotion activities in third countries pursuant to Article 21 TEU.

In this book, I will *not* be looking at the external dimension of the rule of law, nor will I consider the *horizontal* dimension of the rule of law in the EU.[99] At this point, it may therefore be useful to explain why, if my focus only lays on what happens at Member State level, I am nevertheless analysing the role of EU law. Surely there are national conceptions of the rule of law in all EU Member States, and national mechanisms to protect and enforce it in accordance with those conceptions. So why am I grounding my analysis in the EU legal order? Put differently: what does it matter from the perspective of EU law whether Member States, within their national jurisdictions, uphold the rule of law? I briefly answered this question in the Introduction, but this point merits some further clarification here.

It is true that the EU was not granted any 'general' competence regarding the 'rule of law'. This is not surprising, as the rule of law is expressed as a relatively abstract value. As is well known, pursuant to the principle of conferral enshrined in Article 5 TEU, the Union "*shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*" Moreover, Article 4 TEU also states the Union's obligation to respect Member States' national identities, "*inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.*" Accordingly, it can be assumed that Member States, though declaring the rule of law to be a value that is common to their traditions, did not wish to create a harmonised conceptualisation of the rule of law or to bestow the EU with competences to control the compatibility of their actions therewith *in general*. Arguably, the Council of Europe – through the jurisdiction of the ECtHR, based on the ECHR – already has a mandate to govern and clarify rule of law-related matters.

[98] See Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Bloomsbury 2017) 5.

[99] In the EU, several entities can be said to constitute the Union's executive power – most prominently the European Commission – and the legality of their actions are reviewable by the CJEU. Insofar as they implement algorithmic systems in their decision-making processes, tensions can likewise arise with their obligation to adhere to the rule of law. This subject, however, merits a separate research project – one that can potentially build on the insights of the current one.

At the same time, the EU does have some more specific or indirect competences related to the rule of law (which I will come back to in Chapter 5), and it cannot be denied that respect for the rule of law, also at Member State level, is crucial for the success of the Union's project. There are several reasons for this. First, a large part of Union law has direct effect in Member States. EU law is hence integrated in national legal orders, enabling citizens to derive rights therefrom that are enforceable before national courts. The national level is hence not easily distinguishable from the European level, given the prevalence of EU law. Accordingly, "*deficient rule of domestic law automatically translates in deficient rule of EU law*".[100] Second, the European Union hinges on *mutual trust* between Member States – including trust in the fact that their public authorities act in accordance with human rights, democracy, the rule of law and other EU values.[101] This trust has highly practical consequences, as it, for instance, enables a Member State's court to extradite a citizen to another Member State pursuant to a European arrest warrant, or to engage in legal cooperation in asylum cases.[102] In other words, there are significant negative externalities involved for other Member States and the EU legal order as a whole if the rule of law is not observed.[103] Third, all citizens of Member States also have EU citizenship, which *inter alia* accords them with rights that they invoke when they move to another Member State, making it important for the sake of the enforcement of those rights that the host Member State respects the rule of law too. A weakening of the rule of law in one Member State hence not only affects the nationals of that state but also other EU citizens that moved there. In addition, more indirectly, it affects all those who reside in the EU by virtue of that state's "*participation in the EU's decision-making processes and in the adoption of norms that bind all in the EU*".[104] This is why, fourth, adherence to the rule of law is also a prerequisite to become an EU Member State.[105] It is thus reasonable to require Member States to keep respecting the rule of law also after they joined the EU.

In sum, regardless of whether there exists a common conception of the rule of law in all Member States, and regardless of whether there exists an autonomous 'EU' notion of the rule of law, adherence to this value by all Member States is part of their *common interest* – and it thus makes sense for EU law to play a role in ensuring this adherence. This is also why several mechanisms exist in the EU legal order to protect the rule of law at Member State level. The (in)existence of a commonly accepted notion of the rule of law in the EU hence does not affect my arguments, as

[100] von Bogdandy and Ioannidis (n 96) 64.
[101] Konstadinides (n 98) 17.
[102] Schroeder (n 82) 17.
[103] von Bogdandy and Ioannidis (n 96) 74.
[104] Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 8.
[105] See 'Presidency Conclusions – Copenhagen European Council' (n 90). See also Petra Bárd and others, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' (2016) CEPS Paper in Liberty and Security in Europe, 247.

they do not rely on the specific 'EU' nature of the rule of law, but on the underlying value it represents, which is expressed not only at supranational, but also at national and international level. My focus on the EU legal framework primarily stems from a desire to analyse not only how algorithmic regulation can affect the rule of law, but also to examine, within a concrete legal system, which safeguards exist to protect it. Yet as noted in the Introduction, the theory of harm that I will conceptualise has relevance far beyond the EU and can provide insights for all jurisdictions where the rule of law – along with democracy and human rights – is deemed important. To make my research inquiry tractable, I will hence presume there is an 'EU' conceptualisation of the rule of law, drawing on EU legal sources, while stressing that, even if no such distinct notion were to exist, this leaves my analysis intact, as my normative framework is generalisable beyond the European Union.

3.2.4 *The EU Conceptualisation of the Rule of Law*

As noted above, Article 2 TEU lists the rule of law as a foundational Union value, without a definition. Since this article distinguishes the rule of law from other values, such as respect for human rights and democracy, some have noted that this may indicate a 'thin' understanding of the rule of law in the European Union.[106] It would, however, seem short-sighted to claim that the EU adheres to a formal conceptualisation of the rule of law based on the mere fact that 'human rights' is listed alongside the rule of law rather than as part of it. In fact, a closer look at EU legal sources reveals a rather thick conception of the rule of law instead.

Starting with the CJEU's case law, one can note that judgments relating to the rule of law have been focusing primarily on two angles. The first concerns compliance with the rule of law at EU level – horizontally – where the availability of a complete system of remedies to ensure judicial protection of EU citizens against EU legal acts stands central. For instance, in the UPA case, the Court stated that "*the European Community is* [...] *a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights*".[107] This statement clearly indicates a thick conceptualisation of the rule of law, incorporating human rights-compliance.

The second angle of the Court's case law concerns compliance with the rule of law at Member State level or vertically. Member State authorities are not only obliged to respect the rule of *national* law, but also the rule of *EU* law, covering both primary and secondary EU legislation. Thus far, Member States' adherence to the principle of judicial impartiality and independence has received most

[106] See von Bogdandy and Ioannidis (n 96) 63.
[107] See Case C-50/00 P, *Unión de Pequeños Agricultores v Council of the European Union*, [2002] ECR I-6677, §38.

attention.[108] As this principle is concretised through the second paragraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the EU (the Charter or the CFREU),[109] the Court was able to flesh out its requirements in more details. This focus is not surprising. Not only are some Member States deliberately and rather overtly attempting to undermine this principle[110] (which lead to several Court challenges) but the independence of the national judiciary is also of particular importance in the EU legal order, given the role of national courts as 'first Union courts'.[111] One can also consider the principle of judicial independence as an overarching safeguard that can act as a last barrier against breaches of other rule of law principles. If a public authority arbitrarily uses its power, or if it breaches the principle of legal certainty and legality, the national court is the natural avenue to address this. As long as the functioning of the court hence occurs in an independent and impartial manner, other rule of law breaches can in theory be challenged (though, as I will discuss below, ex post protection mechanisms are insufficient safeguards in the context of algorithmic regulation, which requires ex ante safeguards instead).

The CJEU also clarified other principles of the rule of law, such as the principle of legality and legal certainty, and the obligation for the Commission – as part of the EU executive power – to state reasons for a decision.[112] While these cases dealt with the actions of EU institutions rather than Member States, they nevertheless show how the Court conceptualises the rule of law, and have been drawn upon by EU institutions when conceptualising the rule of law.[113]

[108] Rafał Mańko, 'ECJ Case Law on Judicial Independence' (European Parliamentary Research Service 2021) 2, <www.europarl.europa.eu/RegData/etudes/BRIE/2023/753955/EPRS_BRI(2023)753955_EN.pdf>.

[109] These two articles, respectively, establish that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, and that everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.

[110] Barbara Grabowska-Moroz, 'The Systemic Implications of the Vertical Layering of the Legal Orders in the EU for the Practice of the Rule of Law' (Reconnect – Reconciling Europe with its Citizens through Democracy and Rule of Law 2020) 6. Also in Strasbourg, the principle of the independence of the judiciary has been fleshed out by the Court in several cases. See, for instance, the judgment concluding that the Civil Chamber of the Polish Supreme Court consisting of newly appointed judges is not an "independent and impartial tribunal established by law", in *Advance Pharma sp. z o.o v Poland* [2022] Application no. 1469/20.

[111] National courts have the competence (and obligation) to enforce EU law at national level and can for instance also initiate preliminary reference procedures. See also Lenaerts, Van Nuffel and Corthaut (n 85) 513.

[112] For an overview, see also Konstadinides (n 98) 105 and following.

[113] Reference can also be made to relevant case law of the ECtHR dealing with various rule of law principles and their implementation at national level. This case law has been an important source not only for the Venice Commission but also for the CJEU in its own case law. See, for instance, *Golder v The United Kingdom* [1975] European Court of Human Rights Application no. 4451/70; *Engel and Others v The Netherlands* [1976] European Court of Human Rights

Yet courts are not the only actors who helped conceptualise the rule of law in the EU. The European Commission offered the most comprehensive definition of the rule of law at EU level thus far when it launched the rule of law framework.[114] The framework acts as a complementary component to existing protection mechanisms (further discussed in Chapter 5) and forms the Commission's response to a set of authoritarian and illiberal practices undertaken by several EU Member States, thus clearly focusing on the rule of law's vertical dimension. According to the Commission, even though "*the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system*", nevertheless, case law of the CJEU and of the ECtHR, "*as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU*".[115]

These principles are virtually identical to the ones identified by the Council of Europe and 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*; *effective judicial review including respect for fundamental rights*; and *equality before the law*. In its 2019 Communication on 'Further strengthening the Rule of Law within the Union', the Commission added the principle of '*separation of powers*' to this list,[116] which also formed part of the rule of law's definition in its 2020 and 2021 rule of law reports setting out the status of adherence to this value in each Member State.[117] With that addition, it brought its own definition entirely in line with the definition proposed by the Venice Commission. A number of those principles – such as the

Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72; *Amuur v France* [1996] European Court of Human Rights Application no. 19776/92.

[114] European Commission, 'A New EU Framework to Strengthen the Rule of Law' (2014) Communication from the Commission to the European Parliament and the Council COM/2014/0158 final 6.

[115] ibid 4.

[116] European Commission, 'Communication from the Commission to the European Parliament, the European Council and the Council: Further Strengthening the Rule of Law within the Union – State of Play and Possible Next Steps' (European Commission 2019) Brussels, 3 April 2019, COM/2019/163 final,).

[117] European Commission, '2020 Rule of Law Report: The Rule of Law Situation in the European Union' (European Commission 2020), Brussels, Brussels, 30 September 2020 COM(2020) 580 final; European Commission, 'The Rule of Law Situation in the European Union. 2021 Rule of Law Report' (European Commission 2021) Brussels, 20 July 2021, COM(2021) 700 final. Note that from 2022 onwards, the Rule of Law Reports no longer included a definition of the rule of law, likely pursuant to the adoption of the Conditionality Regulation, which is discussed further below.

principles of legal certainty, equality before the law, and respect for human rights – have also been recognised as general principles of EU law.[118]

In December 2020, the European Parliament and Council adopted the Conditionality Regulation.[119] This Regulation, which aims to protect the Union budget against adverse effects caused by breaches of the rule of law,[120] constitutes the first piece of EU legislation in which the rule of law is explicitly defined. I will discuss it more extensively in Chapter 5, but let me already emphasise here that the Regulation embraces a thick notion of the rule of law. Recital 3 states that,

> while there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.[121]

In Article 2 of the Conditionality Regulation, the European Parliament and Council[122] have defined the rule of law precisely as the European Commission did in its rule of law reports, conceptualising it as "*including the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.*"[123]

[118] Takis Tridimas, 'The General Principles of EU Law and the Europeanisation of National Laws' (2020) 13 Review of European Administrative Law 5.

[119] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a General Regime of Conditionality for the Protection of the Union Budget.

[120] Note that it is not aimed at directly penalising those rule of law breaches as such, for which other mechanisms exist. This was also stressed by the CJEU in a judgment that followed an action for annulment of the Conditionality Regulation by Hungary and Poland. See *Hungary v Parliament and Council* [2022] European Court of Justice (Full Court) C-156/21, EU:C:2022:97; *Poland v Parliament and Council* [2022] European Court of Justice (Full Court) C-157/21, EU:C:2022:98.

[121] Interestingly, Article 3 of the Conditionality Regulation also sets out actions that can be 'indicative' of breaches of the principles of the rule of law. These actions concern: (1) endangering the independence of the judiciary; (2) failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest; and (3) limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules and lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law. I will come back to this in Chapter 5, when I analyse the extent to which this Regulation provides protection against the adverse impact of algorithmic regulation on the rule of law.

[122] At least those Member States who did not seek to annul the Conditionality Regulation.

[123] Article 2(a) of the Conditionality Regulation.

In light of the above, I can conclude that these six principles collectively constitute the EU conceptualisation of the rule of law, which clearly encompasses not only formal but also substantive elements and is fully aligned with its conception at the Council of Europe. The rule of law is seen as a sine qua non for human rights and democracy, and as a value that merits being protected by EU law, also – or especially – when it risks being infringed at the level of Member States. Though conceptualisable as a list of principles, these should not be approached as a mere checklist, but as part of the rule of law's broader spirit, acknowledging its protective power and its ability to uphold the normative infrastructure of liberal democracy.

3.2.5 *The Rule of Law's Fragility: A Tale of Caution*

The existence of an EU definition of the rule of law does not mean that this definition is also universally respected by EU Member States. The fact that two Member States challenged the validity of the Conditionality Regulation provides an indication that the picture is not all rosy.[124] I have already alluded several times to the rise in authoritarian tendencies globally, and to the fact that the EU has been undergoing what commentators have called a 'rule of law crisis'.[125] In this section, I will elaborate on this crisis and discuss the main points of friction that lead to this grave denomination.

At the outset, let me reiterate that the rule of law is an ideal, or a value that should continuously be striven towards rather than one that can be perfectly achieved. No EU Member State can be said to meet its principles entirely – if only because, as I shall discuss in the next section, when examining these principles more closely, they are imbued with internal and external tensions that renders their achievement challenging.[126] Bearing this in mind, what now does this EU 'rule of law crisis' consist of? It frequently happens that Member States do not fulfil their obligations under EU law in a negligent or sporadic manner, for instance because they did not implement a directive within the set deadline, or because the national measures they adopted to implement an EU legal act were (inadvertently or deliberately) misinterpreted and hence concern an incorrect implementation. Such occasional infringements or minor non-alignments with European Union law are, however, not what legal scholars are currently apprehensive about. Instead, concerns are centred around more structural challenges to the rule of law, which are twofold in nature.

First, in several Member States, the primacy of EU law, and hence the alignment of national acts with the rule of *EU* law, is being challenged. Such challenges can be explicit or more implicit, and were, for instance, instigated by the

[124] See Case C-156/21, *Hungary v Parliament and Council (Full Court)*, 16 February 2022, EU:C:2022:98 and Case C-157/21, *Poland v Parliament and Council (Full Court)*, 16 February 2022, EU:C:2022:97.

[125] Schroeder (n 82); Pech and Scheppele (n 104); Grogan and others (n 76).

[126] See, in particular, Sections 3.3 and 3.4 of this book.

German and Polish Constitutional Courts,[127] the French Council of State,[128] as well as political parties.[129] To the extent that only one Member State institution is behind such challenge, this has in and of itself not (yet) caused major disturbances in the EU legal order.[130] The situation is, however, different in countries where the challenge of EU law's primacy is more structural in nature and shared by various institutions, or where it complements a wider challenge to the values of liberal democracy more generally, which is the second and, arguably, more worrisome type of concern.

Several Member States have indeed taken legislative initiatives that deliberately pursue illiberal or authoritarian practices and undermine the protective power of the law.[131] In such states, *"no longer are rule of law issues temporary and isolated deviations from a norm of compliance, which had been presumed. Instead, noncompliance with European values has become a principled ideological choice."*[132] Huq

[127] See, e.g., 'Brussels Closes Case against Germany in EU Law Supremacy Dispute' (*POLITICO*, 2 December 2021) <www.politico.eu/article/brussels-closes-case-against-germany-in-eu-law-supremacy-dispute/> 2; 'Explained: What Bombshell Polish Court Ruling Means for EU' (*POLITICO*, 8 October 2021) <www.politico.eu/article/explained-poland-court-ruling-european-union-eu/>. See also Pieter Cleppe, 'An Overview of National Top Courts Challenging the Supremacy of EU Law, Brussels Report' (*Brussels Report*, 12 October 2021) <www.brusselsreport.eu/2021/10/12/an-overview-of-national-top-courts-challenging-the-supremacy-of-eu-law/>.

[128] See, e.g., Theodore Christakis, 'French Council of State Discovers the "Philosopher's Stone" of Data Retention' (*about:intel*, 23 April 2021) <https://aboutintel.eu/france-council-of-state-ruling/>; Sharifullah Dorani, 'The Primacy of EU Law over French Law: EU Law Takes Precedence over National Law?' (CESRAN 23 November 2021) <https://cesran.org/the-primacy-of-eu-law-over-french-law-eu-law-takes-precedence-over-national-law.html>.

[129] See, e.g., Reuters, 'Poland's Kaczynski Says Primacy of EU Law Undermines Sovereignty' *Reuters* (18 September 2021) <www.reuters.com/world/europe/polands-kaczynski-says-primacy-eu-law-undermines-sovereignty-2021-09-18/>.

[130] Though they have been eagerly commented on by legal scholars. See, for instance, Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice' (2011) 48 Common Market Law Review 9; Dana Burchardt, 'Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review' (2020) 21 German Law Journal 1; Panos Koutrakos, 'Longing for Less Interesting Times? The German Federal Constitutional Court and the Supremacy of EU Law' (2020) 45 European Law Review 293.

[131] See also Pech and Scheppele (n 104); Zsolt Körtvélyesi, 'The Illiberal Challenge in the EU: Exploring the Parallel with Illiberal Minorities and the Example of Hungary' (2020) 16 European Constitutional Law Review 567; Marcin Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States*, vol 298 (Springer Berlin Heidelberg 2021); Maurits Meijers and Harmen van der Veer, 'MEP Responses to Democratic Backsliding in Hungary and Poland. An Analysis of Agenda-Setting and Voting Behaviour' (2019) 57 Journal of Common Market Studies 838.

[132] Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, After All: Enforcing EU Values Through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3, 8.

and Ginsburg note that "*in both Hungary and Poland, for example, elected governments have recently hastened to enact a suite of legal and institutional changes that simultaneously squeeze out electoral competition, undermine liberal rights of democratic participation, and emasculate legal stability and predictability*".[133] The Polish reform of the judiciary which the Law and Justice Party initiated in 2015 after it gained majority control is a case in point. The government inter alia set up a disciplinary chamber to control Polish judges, undermined their ability to refer preliminary questions to the CJEU and lowered the retirement age of judges in an arbitrary way – thereby undermining their independence.[134] Hungary's reforms of both the Constitution and of the Constitutional Court are likewise frequently mentioned examples, and also in Romania challenges to the independence of the judiciary have raised concerns.[135] Yet also beyond the sphere of the judiciary, Member States have relied on the law to advance illiberal and authoritarian aims. Consider, for instance, the introduction of legislative proposals that curtail the rights of LGBTQ+ individuals in Hungary,[136] Poland[137] and Romania[138] that curb the

[133] Aziz Huq and Tom Ginsburg, 'How to Lose a Constitutional Democracy' (2018) 65 UCLA Law Review 78, 94. It should, however, be noted that in the Polish elections of October 2023, the opposition parties (consisting of the Civic Coalition, Third Way and The Left) managed to achieve a combined total vote of 54 per cent. Their ambition is to steer the country back towards a more liberal democratic course.

[134] See in this regard Case C-619/18, *Commission v Poland*, 15 November 2018, ECLI:EU:C:2018:910; C-791/19 R, *Commission v Poland*, 15 July 2021, ECLI:EU:C:2021:596; Case C-204/21 R, *Commission v Poland*, 27 October 2021, ECLI:EU:C:2021:878; Case C-204/2, *Commission v Poland*, 5 June 2023, ECLI:EU:C:2023:442. See also Gabriel N Toggenburg and Jonas Grimheden, 'Managing the Rule of Law in a Heterogeneous Context: A Fundamental Rights Perspective on Ways Forward' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe – From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 225.

[135] See, e.g., Zoltán Fleck, Nóra Chronowski and Petra Bárd, 'The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary (Paper I)' (2022) 4 MTA Law Working Papers 1; 'Systemic Backsliding of the Rule of Law in Hungary: State Control' (*Netherlands Helsinki Committee*, 19 April 2022) <www.nhc.nl/systemic-backsliding-of-the-rule-of-law-in-hungary-state-control/>. See in this regard also Case C-107/23 PPU, Lin, 24 July 2023, ECLI:EU:C:2023:606.

[136] Reuters, 'Hungary Restricts Sales of LGBT-Themed Children's Books' *Reuters* (6 August 2021) <www.reuters.com/world/europe/hungary-orders-shops-cover-up-lgbt-themed-childrens-books-2021-08-06/>.

[137] Piotr Maciej Kaczynski, 'Poland, a LGBT-Free Zone?' *www.euractiv.com* (21 October 2021) <www.euractiv.com/section/politics/short_news/poland-a-lgbt-free-zone/>.

[138] As of early 2024, the law – inspired by the Hungarian law cited above – has been accepted by the Senate and lower House, but still needs to be formally approved, and hence has not yet entered into force. See also Reuters, 'Romania Must Reject Hungary-Style Anti-LGBT Bill, Rights Groups Say' *Reuters* (29 April 2022) <www.reuters.com/world/europe/romania-must-reject-hungary-style-anti-lgbt-bill-rights-groups-say-2022-04-29/>. In May 2023, Romania has also been condemned by the ECtHR for violating the rights of same-sex couples. See *Buhuceanu and others v Romania*, Applications nos. 20081/19 and 20 others, 23 May 2023.

activities of non-governmental organisations who scrutinise the government's actions,[139] or that undermine the plurality and freedom of media.[140]

In sum, the rule of law, and in particular its role to secure constitutional checks and balances and to protect other core values such as human rights and democracy, is being undermined not in an isolated but in a systemic manner. Furthermore, the Member States in question are using the law as a tool to do so, thus legitimising actions that infringe the values in Article 2 TEU while upholding a semblance of legality at national level. This can only be conceptualised as rule *by* law.

These developments should be considered against the background of a broader global crisis of liberal democracy, including the rise of nationalism, populism and the increased support for authoritarian modes of governance which are believed to be more 'efficient'.[141] For instance, in Belgium, a survey taken in September 2021 revealed that 37.4 per cent of the participants consider that 'our society would be better governed if the power were concentrated in the hands of a single leader'.[142] Amongst people aged twenty-five to thirty-four, this number even rose to 46.9 per cent.[143]

Overall, these developments demonstrate that the rule of law and the values of liberal democracy more generally are fragile. They can be eroded incrementally, almost invisibly, unless the isolated actions of Member States are looked at cumulatively.[144] Arguably, such gradual degradation is of even greater concern, as a sudden collapse may at least have the advantage of triggering a response from a sufficiently large group of people who refuse to have their rights and liberties stripped away. In contrast, an incremental attack on EU values – encased by a shell of legality through the perversion of the rule of law into rule by law – renders a large-scale mobilisation against such practices more difficult. Furthermore, as noted by Huq

[139] 'Hungarian Civil Society Raises Alarm over NGO Law Change' (*Euractiv*, 22 April 2021) <www.euractiv.com/section/justice-home-affairs/news/hungarian-civil-society-raises-alarm-over-ngo-law-change/>.

[140] See, e.g., Eva Połońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Springer International Publishing 2019).

[141] Bojan Bugarič, 'The Rise of Nationalist-Authoritarian Populism and the Crisis of Liberal Democracy in Central and Eastern Europe' in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020). This longing for a more centralised mode of governance is not new as such, and also marked the political sentiment at the beginning of the twentieth Century in several EU countries. See in this regard Scarcello (n 60).

[142] The survey, commissioned by the RTBF (the public service broadcaster of Belgium's French-speaking Community) was taken between 20 and 27 September 2021 by KANTAR, with an indicated maximum margin of error of 3.01 per cent. The results of the survey can be accessed through this link: https://ds.static.rtbf.be/article/attachment/10852475/9/3/3/2a279d7bcb6b412677b112d29b4cf053.pdf. For a discussion of these results, see also Aubry Touriel and Thomas Gadisseux, 'Sondage RTBF : un quart des Belges veulent la fin de notre démocratie parlementaire' *RTBF* (4 October 2021) <www.rtbf.be/article/sondage-rtbf-un-quart-des-belges-veulent-la-fin-de-notre-democratie-parlementaire-10852475>.

[143] ibid.

[144] Indeed, "*a constitutional liberal democracy can degrade without collapsing*". See Huq and Ginsburg (n 133) 94.

and Ginsburg, "*there will be cases where disputes arise as to whether a sufficient aggregate amount of backsliding has occurred*",[145] and this dispute can aptly be exploited by those who use the guise of the law to legitimise their problematic practices.

To counter these developments, the European Union has been exploring routes to not only mitigate but also prevent some of these concerns, and over the last decade it has enlarged its toolbox with several rule of law-monitoring mechanisms that can play a more proactive role.[146] In Chapter 5, I will discuss the rule of law-protection afforded by EU law in more detail when I examine the robustness of these mechanisms against the risks of algorithmic regulation. For now, suffice it to conclude that a cautionary approach is warranted, since observance of the rule of law, even in the EU, where a layered normative infrastructure exists to uphold this value, cannot be taken for granted.

3.3 THE RULE OF LAW AS NORMATIVE FRAMEWORK

Now that I analysed how the rule of law has been conceptualised in legal theory (Section 3.1) and in the EU legal order (Section 3.2), two conclusions can be drawn. First, the rule of law is an overarching concept, alternatingly denoted as a principle, idea, value or interest. It encompasses a range of principles that can be grouped in different ways and at different levels of generality. In the context of the public sector, these principles serve a common purpose, namely constraining public power and thereby also enabling such power by delineating its legal contours. Second, despite some conceptual differences, several principles seem to resurge in virtually all EU accounts of the rule of law and can hence be proposed as constituting its 'core content' in the context of the European Union's legal order. These are the principles of *legality*; *legal certainty*; *the prohibition of arbitrariness of the executive powers*; *equality before the law*; *effective judicial protection, with access to justice and review of government action by independent and impartial courts, also as regards human rights*; and *the separation of powers*.[147] The question is now: how can these still rather broad and general principles serve as the normative framework of my research? To recap, my aim in this chapter is to assess how public authorities should exercise power in a way that complies with the rule of law when they rely on algorithmic regulation. Only then can I assess how their use of algorithmic regulation risks undermining such compliance.

In this section, I will take these six rule of law principles as my starting point and examine the concrete requirements that public authorities must respect to align

[145] ibid 98.
[146] See European Commission, 'A New EU Framework to Strengthen the Rule of Law' (n 114). See also Toggenburg and Grimheden (n 134) 225.
[147] See *supra*, Section 3.2.5.

therewith. To do so, I draw on relevant legal sources from the European Union and the Council of Europe that concretise these principles and clarify what they imply for the executive branch of power.[148] Through their concretisation, these six principles will serve as this book's normative analytical framework. In Chapter 4, I will use this framework to analyse how public authorities' reliance on algorithmic regulation can affect each of these principles and put forward an overarching theory of harm to conceptualise this threat.

As part of this concretisation exercise, it is important to consider the challenges that public authorities *already* face when seeking to fulfil these six principles, regardless of any reliance on algorithmic regulation. Just as the rule of law is an ideal that is never entirely achievable, so are its principles, which contain some intrinsic tensions that impede their full realisation.[149] Therefore, in this section, for each principle – namely legality (Section 3.3.1); legal certainty (Section 3.3.2); the prohibition of arbitrariness (Section 3.3.3); equality before the law (Section 3.3.4); judicial review of government action and access to justice (Section 3.3.5); and the separation of powers (Section 3.3.6) – I will not only assess their relevant requirements for public authorities, but also the challenges that are an inherent part thereof.

3.3.1 *Legality*

3.3.1.a The Principle's Requirements

The principle of legality – sometimes also referred to as the principle of lawfulness – requires that public authorities recognise the 'supremacy of the law' and act in conformity therewith. While its focus often lays on conformity with the constitution[150] (which typically delineates the competences of different authorities), the principle of legality requires conformity with legislation more generally, be it at national, international or supranational level.[151] This also implies that Member States must act in conformity with European law, in light of their legal obligations under the EU Treaties. While the rule of law also requires that public authorities

[148] Some of these sources are non-binding – such as the previously mentioned Venice Commission's rule of law checklist, the European Commission's rule of law reports, or the Recommendations from the Council of Europe's Committee of Ministers – yet my reliance thereon is justified by the fact that they draw on or develop binding legal instruments and pertinent case law. It should be noted that my analysis aims at the development of a *normative* framework, without claiming that all the identified requirements are also *legally enforceable* before national or Union courts. I will discuss the legal framework – and the legal obligations of Member States at the level of the EU – in more detail *infra*, in Section 5.2.

[149] See also Tamanaha (n 26).

[150] Venice Commission (n 74), §44.

[151] See also Case C-496/99 P, *Commission v CAS Succhi di Frutta*, 29 April 2004, § 63: "*in a community governed by the rule of law, adherence to legality must be properly ensured*".

fulfil their duties in ensuring that private parties respect the law,[152] my analysis focuses on the duties of public authorities themselves.

The legality principle is first and foremost a formal principle, and hence does not dictate the substance of the law that must be complied with *as such*. However, both the European Union and the Council of Europe have stressed that, since their Member States have committed themselves to human rights legislation (including the EU Charter of Fundamental Rights and the European Convention on Human Rights), the legality principle de facto also encompasses the requirement to comply with human rights,[153] and that judicial review of the legality of government action also entails a review of its alignment with human rights. Accordingly, while 'respect for human rights' is listed as a separate value under Article 2 TEU, the legality principle does bring the need to comply with human rights under the wings of the rule of law.[154]

Importantly, public authorities must not merely 'comply' with the law; their actions must also be 'authorised' by law, thus implying the need to identify a legal basis to justify their acts.[155] Indeed, the powers of public authorities should be "*defined by law*", and this "*delineation of powers between different authorities*" should be "*clear*".[156] As implied by the Venice Commission's rule of law checklist, cases in which public authorities are allowed to operate without an explicit legal basis should be a rarity and duly justified, making it the exception.[157] Moreover, whenever legislative power is delegated to the executive, "*the objectives, contents, and scope of the delegation of power*" should be "*explicitly defined in a legislative act*".[158] Importantly, the principle of legality also applies when public authorities delegate

[152] For instance, the executive's duty to implement the law also means it should foresee sanctions against the law's non-compliance by private parties and prevent impunity. See also Venice Commission (n 74), §53–55.

[153] ibid. See, e.g., the checklist question: "*Do public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights?*" at 18.

[154] As also argued by Paul Dermine, *The New Economic Governance of the Eurozone: A Rule of Law Analysis* (Cambridge University Press 2022).

[155] "State action must be in accordance with *and authorised by* the law." (emphasis added) in Venice Commission (n 74), §44. This is particularly important when the actions of public authorities limit individuals' human rights. Consider in this regard also the ECtHR's statement that

> the expression 'in accordance with the law' not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. For domestic law to meet these requirements, it must afford adequate legal protection against arbitrariness and accordingly indicate with sufficient clarity the scope and discretion conferred on the competent authorities and the manner of its exercise,

in the Judgment in *Catt v The United Kingdom*, Application no. 43514/15, 24 January 2019, §94. See also *M.M. v the United Kingdom*, Application no. 24029/07, 13 November 2012, §193.

[156] Venice Commission (n 74) 18.

[157] ibid.

[158] ibid 20.

their tasks to private actors. In that case, equivalent guarantees of legality should be established by law.[159]

Beyond compliance *with* and *action authorised by* the law, the principle of legality also requires public authorities to safeguard the legal and practical conditions for the law's correct implementation.[160] When public authorities implement laws and adopt administrative acts, they need to do so commensurably with the law's text and with respect to the principle of proportionality, as highlighted by the Recommendation of the Council of Europe's Committee of Ministers to Member States on good administration.[161] Concretely, this means that public authorities "*shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued*".[162] Moreover, "*when exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive*".[163]

Finally, both the EU and the Council of Europe emphasise that the principle of legality also requires public participation and transparency[164] to ensure public authorities' accountability. Indeed, the Conditionality Regulation, for instance, states that the principle of legality implies "*a transparent, accountable, democratic and pluralistic law-making process*".[165] While it can be recalled that those adhering to a thin rule of law conception would consider these requirements as separate from the rule of law, it is clear that under its EU conceptualisation, the strong affinity with democracy is underscored, and a narrow conception of legality without democratic legitimacy is excluded. The Venice Commission's checklist also provides that the public ought to "*have access to draft legislation, at least when it is submitted to Parliament*", as well as "*a meaningful opportunity to provide input*".[166] It also

[159] ibid.

[160] Council of Europe (n 42), §45. See also the ECtHR Judgment in *Broniowski v Poland*, Application no. 31443/96, 22 June 2004, §184: "*The rule of law underlying the Convention and the principle of lawfulness in Article 1 of Protocol No. 1 require States not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation.*"

[161] See Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration'.

[162] ibid 8.

[163] ibid.

[164] Compare the precise wording of the legality principle in Article 2 of the EU's Conditionality Regulation ("*legality implying a transparent, accountable, democratic and pluralistic law-making process*") with the formulation in §18 of the Venice Commission's Rule of Law Checklist ("*legality, including a transparent, accountable and democratic process for enacting law*").

[165] Article 2(a) of the Conditionality Regulation.

[166] Venice Commission (n 74) 13.

requires that, where appropriate, "*impact assessments [are] made before adopting legislation (e.g. on the human rights and budgetary impact of laws)*".[167]

Transparency and public participation[168] must, moreover, not only be ensured in the legislative phase, but also in the executive or implementation phase when public authorities adopt administrative acts.[169] Over the last decades, the idea of democratic participation in administrative processes has increasingly come to the forefront. As noted by Galligan, "*this regeneration of democratic practices within administration can have strong elements of discussion, negotiation, and compromise*", drawing on the model of deliberative democracy to bring together a plurality of interests and views in modern societies.[170] Since normative administrative acts through which public authorities concretise legislation can indeed affect a multitude of interests, methods of deliberative democracy can contribute to an understanding of how those interests could be balanced. Moreover, by ensuring that they act transparently and in a participatory manner, public authorities can enhance their accountability as well as elevate the quality of their acts, for instance through the solicitation of feedback on whether the act reaches its aims and does not cause unintended negative externalities.

3.3.1.b Challenges to the Principle of Legality

Bearing in mind these requirements, what are the tension points that can arise when public authorities seek to abide by the principle of legality? The first challenge can be found in the need to ensure a sufficiently clear and delineated legal basis for public authorities to act on. Rules of general application tend to be over- and under-inclusive, since they typically set out broad instructions in advance that will subsequently be applied to an indeterminate number of individual cases.[171] As also admitted by Scalia, "*all generalizations (including, I know, the present one) are to*

[167] ibid. In this regard, the checklist also refers to ECtHR *Hatton v the United Kingdom*, Application no. 36022/97, 8 July 2003, §128, stating that "*A governmental decisionmaking process concerning complex issues of environmental and economic policy such as in the present case must necessarily involve appropriate investigations and studies in order to allow them to strike a fair balance between the various conflicting interests at stake*." See also *Evans v the United Kingdom*, Application no. 6339/05, 10 April 2007, § 64.

[168] Especially when it comes to ensuring public participation in decision-making that pertains to technological and scientific matters, the influential work of Sheila Jasanoff should be pointed out. See, e.g., Sheila Jasanoff, 'Technologies of Humility: Citizen Participation in Governing Science' (2003) 41 Minerva 223.

[169] See Committee of Ministers of the Council of Europe, 'Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities'; 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration' (n 161).

[170] Galligan, 'Public Administration and the Tendency to Authoritarianism' (n 55) 197.

[171] See also Denis James Galligan, 'Fair Procedures in Discretionary Decisions', in his book *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press 1990).

some degree invalid, and hence every rule of law has a few corners that do not quite fit".[172] Situations will hence inevitably arise that were not foreseen and that do not entirely conform to the normative assumptions behind the rule. Tamanaha therefore concludes that "*legality, which requires making decisions in accordance with rules, will in this manner occasionally produce non-optimal or undesirable results*."[173] While this may not be ideal, it is a price societies are willing to pay to avoid a situation of lawless or arbitrary decision-making. Moreover, as we saw in Section 2.3, when implementing legislation, public authorities can often rely on discretionary powers to ensure that the application of a general rule to a specific case remains proportionate and justified.

Second, as simple as the phrase 'acting in conformity with the law' may sound, its execution is not always straightforward. The broadness of legal rules often also leads them to be 'vague' and 'ambiguous'.[174] Moreover, the law is language based, which means it is inherently open for various interpretations.[175] Accordingly, one can argue that the determination of *how* public authorities must act in conformity with the law can be up for discussion, and depends on the way in which the law is interpreted – and by whom. This is where, yet again, the executive's discretion comes in. Rarely is a law so detailed and precise that no interpretative scope exists, hence necessarily implying a level of choice for public authorities to determine the law's meaning when implementing it. Despite such discretion, public authorities cannot interpret the law arbitrarily. They need to do so in a way that conforms to the normative aims of the law. Moreover, the textual openness and ambiguity of the law can also be considered its very strength, as this feature allows it to be applied to different individual cases, thus precluding the need to foresee detailed rules for every individual situation in advance (which may raise tensions with the principle of equality) and preventing the need to continuously update the law to match changed realities (which may raise tensions with the principle of legal certainty).[176]

[172] Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 The University of Chicago Law Review 1175, 1177.

[173] Tamanaha (n 26) 241.

[174] See in this regard also Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 California Law Review 509; Paul Craig, 'Legality: Six Views of the Cathedral' in Peter Cane and others (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020).

[175] Mireille Hildebrandt, 'The Adaptive Nature of Text-Driven Law' (2021) 1 Journal of Cross-disciplinary Research in Computational Law 1, 8 <https://journalcrcl.org/crcl/article/view/2>. See also Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (1st ed., Cambridge University Press 2007) 152.

[176] Hildebrandt (n 175). This is also the reason why critiques that "the law is always running behind the technology" are often incorrect, since the fact that a law does not mention a specific technology by name does not prevent it from regulating it. The generality of laws, and particularly their open textuality, is often precisely what enables their applicability to novel technologies. Consider for instance that the liability regime which is in place in many European countries today, is still strikingly similar to the one established by the Romans in

As regards the third challenge, I would like to recall the above discussion about the rule *of* law versus the rule *by* law. When legality is considered a goal in itself, namely a self-standing principle outside of the rule of law's overarching spirit, it embodies a formalistic conceptualisation of the law that considers its substance irrelevant, even if it may undermine important values like human rights and democracy. Legality then risks being reduced to legalism, which, as explained by Diver, in its strongest form can be seen as "*an ideology, according to which not only should rules be followed, but they should not be questioned or even interpreted beyond their apparent meaning*".[177] In the past, a rigid interpretation of the legality principle has been relied on to legitimise atrocious rules that were unmistakeably incompatible with the spirit of the rule of law.[178] As discussed above, this risk also exists today. Indeed, legal rules can be used as a means not to delineate public power but to expand it and to enhance public control over natural and legal persons.[179] It is therefore crucial that the implementation of the legality principle is not seen separately from the purpose of the rule of law, and from the values that are essential in liberal democracies, lest it be abused for authoritarian and illiberal ends.

3.3.2 *Legal Certainty*

3.3.2.a The Principle's Requirements

The principle of legal certainty is closely affined with and complementary to the principle of legality. Beyond the fact that the law should be respected and should authorise public actions, this principle focuses on the *qualities* that the law should have. Those qualities concern the law's accessibility, intelligibility, transparency and publicity, as well as its foreseeability.[180] As pointed out by Tamanaha, this "*enhances liberty of action or individual autonomy because people are advised of their permissible range of free action*", also pointing to a positive correlation between economic development on the one hand, and the predictability of the law and its application on the other.[181] This doctrine hence applies not only to legislation but also to

antiquity, despite the undeniable change and technological evolutions that the world has undergone since then.

[177] Laurence Diver, 'Interpreting the Rule(s) of Code: Performance, Performativity, and Production' [2021] MIT Computational Law Report 2 <https://law.mit.edu/pub/interpretingtherulesofcode/release/1> 3.

[178] See also Bingham (n 6) 67.

[179] See *supra* Section 3.2.5.

[180] See, e.g., the references to the Case *Sunday Times v United Kingdom* (no. 1), Application no. 6538/74, 26 April 1979, § 49 and *Malone v United Kingdom*, Application no. 8691/79, 2 August 1984, § 68, in Council of Europe (n 42), §46. These characteristics also appear, for instance, in Lon Fuller's influential account of the rule of law, as discussed *supra* in Section 3.1.1.

[181] Tamanaha (n 26) 240.

administrative acts taken by public authorities, both as regards general and individual acts.[182]

Legal certainty requires public authorities to ensure stability when implementing the law, and to carry out their tasks in line with people's legitimate expectations, in a manner that is compatible with other legislation.[183] To achieve this, applicable laws and their implementation guidelines must be foreseeable as to their effects, through a sufficiently clear and precise formulation that enables natural and legal persons to organise their lives accordingly. A link can also be made to the principle of the non-arbitrary exercise of public power and the discussion of the executive's discretion, since "*a law which confers discretion to a state authority must indicate the scope of that discretion*" as well as "*the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness*".[184] Finally, the law must also be applied in a consistent way, and when rules are changed, for instance because they are adapted to a changing reality, this needs to happen with a fair warning.[185]

3.3.2.b Challenges to the Principle of Legal Certainty

The implementation of the legal certainty principle is not devoid of challenges. First, as noted above, a fine line exists between a legal text that is so precise that it loses its general and broad applicability, and a text that is so imprecise that it ceases being conducive to legal certainty and lends itself to arbitrariness. Where and how this line must be drawn depends on the context and substance of the legal provisions. As regards the regulation of technology-related risks, for instance, the need for technical expertise typically drives legislators to opt for broad legal provisions, which can then be further specified by (specialised) public authorities through administrative acts. It is, however, important that those administrative acts still comply with the principle of legal certainty, by remaining relatively foreseeable and in any case consistent with the normative aims of the law they are based on. This issue is specifically addressed in the Venice Commission's checklist, which states that

> precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.[186]

[182] Venice Commission (n 74) 27.
[183] To return to Hayek's quote, the rule of law enables us "*to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge*". See Hayek (n 17) 112.
[184] Council of Europe (n 42), §46.
[185] Venice Commission (n 74) 26.
[186] ibid.

Second, the consistent application of the law by public authorities can also be a challenge, especially when authorities are decentralised and when the law's broadness leaves much scope for discretion. At a very practical level, the same law will often be applied to different individual cases by many different public officials, who might each have a different way of interpreting and implementing its provisions. In many situations, however, the risk of inconsistency is reduced by the adoption of implementation guidelines which public officials ought to follow, and by the hierarchical control that is typical of bureaucracy. Yet, there again, too much specification may shift the balance towards over-precision. Indeed, in certain situations, stability and consistency may lead to undesirable outcomes in the face of new or unforeseen circumstances that require flexibility. The Venice Commission therefore recalls that "*stability is not an end in itself: law must also be capable of adaptation to changing circumstances. Law can be changed, but with public debate and notice, and without adversely affecting legitimate expectations*".[187]

Consequently, just like the principle of legality, the principle of legal certainty comprises some inherent tensions, requiring a balance between consistency and adaptability. There is no uniform way of achieving this balance, as it depends on the particular context. Nevertheless, guidance must not be sought in the essentialisation or idealisation of either consistency or adaptability. Instead, it should be found in the overarching aim of this principle as part of the rule of law: ensuring that those subjected to the law can reasonably foresee the law's effects and plan their lives accordingly. This is the goal that public authorities should strive towards when implementing laws and adopting administrative acts.

3.3.3 *Non-arbitrariness of the Executive Powers*

3.3.3.a The Principle's Requirements

The prohibition of arbitrariness is arguably the clearest expression of the rule of law's aim to constrain public power and ensure it is exercised in line with the law. Concretely, it provides that public authorities cannot act arbitrarily or based on whims. Instead, they must act rationally and unbiasedly, in the public interest, and make sure that "*public officials carry out their duties in an impartial manner, irrespective of their personal beliefs and interests*".[188]

The EU Charter of Fundamental Rights expresses this principle, as part of the right to good administration, as follows: "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*"[189] As part of this provision, persons also

[187] ibid.
[188] See also the principle of 'impartiality' as part of 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration' (n 161), Article 4.
[189] Article 41(1) Charter of Fundamental Rights of the European Union.

have the right to be heard before a measure is taken that adversely affects them, and the right to have access to their file (while respecting the legitimate interests of confidentiality and of professional and business secrecy).[190] While the Charter's provision only applies to public authorities at EU level, it expresses requirements that can be found in the administrative rules of all EU Member States as regards the relationship between public authorities and natural and legal persons.

An important requirement derived from the principle of non-arbitrariness is that public officials should provide reasons or justifications for their decisions in a clear and understandable manner.[191] This allows those affected by their decisions to appraise the non-arbitrary nature thereof. The obligation to give reasons for public decisions – also enshrined as a right in Article 41(2)(c) of the EU Charter – is particularly important when they affect the rights or interests of individuals.[192] Conversely, an explicit obligation to express the reasons behind the adoption of an administrative act does not always exist for normative acts, or those that have a general rather than an individual application. In Belgium, for instance, no formal motivation requirement exists in such case.[193] Nevertheless, the absence of a formal motivation duty for general acts does not extinguish the need for such acts to be based on factually and legally acceptable motives, which need to be clear either from the act itself or at least from the administrative file.[194]

The prohibition of arbitrariness is especially important when public authorities have a (wide) margin of discretion. On the one hand, "*the complexity of modern society means that discretionary power must be granted to public officials.*"[195] On the other hand, this power ought to be exercised in a non-arbitrary manner, implying that measures taken by public authorities should be reasonable and proportionate.[196] Indeed, "*an exercise of power that leads to substantively unfair, unreasonable, irrational or oppressive decisions violates the rule of law*".[197] Accordingly,

[190] ibid Article 41(2).

[191] Venice Commission (n 74), §68.

[192] Also in this regard, the Council of Europe's Committee of Ministers issued further recommendations for member states' public authorities. See, e.g., Committee of Ministers of the Council of Europe, 'Resolution 77(31) on the Protection of the Individual in Relation to the Acts of Administrative Authorities'; 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration' (n 161).

[193] Steven Van Garsse (ed), *Handboek Bestuursrecht* (Politeia 2016) 36.

[194] This file consists of the entirety of the documents that pertain to the decision, including drafts of the decision, preliminary advices, minutes that were taken at meetings, email exchanges, reports or other relevant materials. See also ibid 36 and 84.

[195] Venice Commission (n 74) 29.

[196] See, for instance, Case C-389/05, *Commission v France*, 17 July 2008, ECLI:EU:C:2008:411, §94; Case C-169/07, *Hartlauer v Wiener Landesregierung*, 10 March 2009, ECLI:EU:C:2009:141,§64; and Case C-203/08, *Sporting Exchange Ltd v Minister van Justitie*, 3 June 2010, ECLI:EU:C:2010:307, §50.

[197] Venice Commission (n 74), §64. Note also the ample case law in this regard cited in the Checklist, e.g. *Husayn (Abu Zubaydah) v Poland*, Application no. 7511/13, 24 July 2014, §521; *Hassan v the United Kingdom*, Application no. 29750/09, 16 September 2014, §106; *Georgia v*

discretionary power requires clear legal restrictions, "*in particular when exercised by the executive in administrative action*".[198]

Already in 1980, the Council of Europe's Committee of Ministers adopted a Recommendation dealing with the exercise of discretionary power.[199] The Recommendation sets out six principles public authorities must respect whenever they exercise such power: they should not pursue a purpose other than that for which the power has been conferred; they must observe objectivity and impartiality, taking into account only the factors relevant to the particular case; they must observe the principle of equality before the law by avoiding unfair discrimination (which will be further discussed below); they should maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues; they must take their decision within a time which is reasonable having regard to the matter at stake; and they must apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

Finally, public authorities must also put in place mechanisms that can prevent, correct and sanction the arbitrary or abusive use of discretion.[200] This also includes, according to the EU rule of law report methodology, an anti-corruption framework, covering measures to ensure whistle-blower protection and to encourage the reporting of corruption, as well as the criminalisation of corruption as such.[201] Moreover, as regards public authorities' use of electronic databanks, "*precautions should be taken against any abuse or misuse of information*", making everyone concerned with the operation of electronic data processing in the public sector "*bound by rules of conduct aimed at preventing the misuse of data and in particular by a duty to observe secrecy*".[202]

3.3.3.b Challenges to the Principle of Non-arbitrariness

As regards the tensions that arise in the implementation of this principle, two aspects are particularly worth highlighting: first, tensions around the (overzealous faith) in

Russia (I), Application no. 13255/07, 3 July 2014, §182; *Ivinović v Croatia*, Application no. 13006/13, 18 September 2014, §40. For the CJEU, see, e.g., Case 46/87 and 227/88, *Hoechst v Commission*, 21 September 1989, ECLI:EU:C:1989:337, §19; and T-402/13, *Orange v European Commission*, 25 November 2014, ECLI:EU:T:2014:99, §89.

[198] Venice Commission (n 74) 29.

[199] Committee of Ministers of the Council of Europe, 'Recommendation No. R (80) 2 of the Committee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities', Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies, 1980.

[200] Venice Commission (n 74) 29.

[201] European Commission, 'European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report' (2020) 2.

[202] Committee of Ministers of the Council of Europe, 'Resolution (74) 29 on the Protection of the Privacy of Individuals Vis-a-Vis Electronic Data Banks in the Public Sector'.

rationality and efficiency and, second, tensions around the exercise of (excessive or insufficient) discretion. Let me discuss each in turn.

First, it can be recalled that the rise of the welfare state in the nineteenth century significantly expanded the competences of public administrations, which started organising themselves as hierarchical bureaucracies with the purpose of taking rational and objective decisions. There is, however, no such thing as 'objectivity' in public decision-making. As pointed out by Barth and Arnold, "*the issue in the public sphere is not to remove values from decisions. We know that in public policy, there is no such thing as an apolitical or valueless decision; all but the most narrowly technical decisions reflect value choices or biases by what is done and by what is not done*."[203] Public authorities and officials are hence always coloured by the political processes that govern them in a direct way, and by the values and interests of the societal groups they are part of in a more indirect way. More generally, political values and policies lay at the basis of public decision-making, and thus also determine how decision-making processes take place and which goals they aspire to achieve. As noted above,[204] an overemphasis on procedural rationality, objectivity and efficiency hence risks obfuscating the fact that *all* public policy is grounded in normative values – whether those values are rendered explicit or not.

History has also shown that an overemphasis on rational procedures and efficiency, without critical attention to the substantive aims those procedures should attain, can lead to outcomes that are diametrically opposed to the spirit of the rule of law as cornerstone of liberal democratic societies.[205] Public authorities must hence make sure that their zeal for rational and efficient decision-making does not trump the social policies and values they are meant to achieve. While the requirement for rational and impartial decision-making should not be dismissed as unattainable, it is important to understand the normative assumptions that underlie the decision-making process and – in Weberian terms – to balance procedural rationality against substantive rationality. In this regard, the role of empathy[206] has been pointed out as a potential counterbalance against uncritical formal rationality in public decision-making. Yet the ability to let decisions be guided by empathy in addition to rationality also requires a certain level of discretion, which is imbued with similar tensions.

Indeed, the second challenge to the implementation of the prohibition of arbitrariness concerns the level of discretion that public officials ought to have when

[203] Thomas J Barth and Eddy Arnold, 'Artificial Intelligence and Administrative Discretion: Implications for Public Administration' (1999) 29 The American Review of Public Administration 332, 337.

[204] See *supra* Section 3.2.

[205] Recall in this regard the connection made by Bauman between excessive bureaucracy without normative underpinnings on the one hand, and the Holocaust on the other hand, in Zygmunt Bauman, *Modernity and the Holocaust* (Polity Press 1989).

[206] Sofia Ranchordas, 'Empathy in the Digital Administrative State' (2022) 71 Duke Law Journal 1341.

making decisions – a recurring dilemma in public governance theory, and one that I already touched upon in Section 2.3.3. As noted by HLA Hart, since "*we are men, not gods*", we should "*not cherish the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives.*"[207] It can also be recalled that the flexibility afforded by discretion can be used to keep the excesses of procedural rationality in check, and to ensure more meaningful policy outcomes.[208] At the same time, it is equally clear that discretion needs to be delimited to avoid that public authorities can subvert legislative authority by interpreting and applying general rules in an arbitrary or abusive manner.[209] Being at the mercy of public officials who can singlehandedly decide whether a right is accorded or denied, was precisely the bureaucratic nightmare scenario depicted by Hayek in his *Road to Serfdom*.[210]

Over time, public authorities have sought to decrease discretion at the level of public officials by routinising public decision-making processes through the adoption of detailed guidelines that public officials should follow. While this routinisation can contribute to the consistency of decision-making, decrease corruption and counter arbitrary actions, it also reduces the possibility for justified deviations, for instance when this would be beneficial to ensure substantive rationality, or to correct (unintended) adverse effects caused by the law's general nature.[211] In other words, there is a fine line between an *excess* and a *shortage* of discretion at the level of individual public officials, which requires careful balancing rather than overly strict formalisation in one way or the other, while keeping in mind that discretion ought to be used in the public interest.[212]

Finally, a third challenge arises when seeking to identify what exactly the 'public interest' is that public authorities should aim to achieve when performing their tasks and exercising discretion. While it is quite ingrained that the "*proper ends of government*" are "*promoting the common good and human well-being*",[213] it is far

[207] Hart (n 30) 128.

[208] See in this regard Lars Tummers and Victor Bekkers, 'Policy Implementation, Street-Level Bureaucracy, and the Importance of Discretion' (2014) 16 Public Management Review 527.

[209] Barth and Arnold (n 203) 332.

[210] Indeed, "*one of the major dilemmas with public administrators exercising discretion is that the public must rely on the 'public interestedness' of the administrator when we know that people and agencies can be motivated by self-interest.*" See Hayek (n 17). See also Michael C Munger, 'Self-Interest and Public Interest: The Motivations of Political Actors' (2011) 23 Critical Review 339.

[211] It has therefore been argued that, despite the arbitrariness risks attached thereto, "*front-line discretion is necessary to respond to the unexpected and to ensure that services are responsive to individual need*". See Tony Evans, 'Professionals and Discretion in Street-Level Bureaucracy' in Peter Hupe, Michael Hill and Aurélien Buffat (eds), *Understanding Street-Level Bureaucracy* (Bristol University Press 2015) 281.

[212] Van Garsse (n 193) 41.

[213] Cass R Sunstein and Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Harvard University Press 2020) 5.

from self-evident how concepts like the public interest or the common good should be defined or interpreted.[214] It would take me too far to discuss here the vast scholarship that either criticises these concepts as empty vessels which can be abused by any ideology[215] or claims that they should be placed more prominently on policy agendas.[216] Suffice it to say that – in a modern heterogenous society where various people, groups and organisations have competing interests – identifying whether a measure is 'in the public interest or not' is not a straightforward exercise.

3.3.4 *Equality before the Law*

3.3.4.a The Principle's Requirements

The principle of equality before the law, often mentioned together with the principle of non-discrimination, is strongly affined with the prohibition of arbitrariness. While in Article 2 TEU the value of *equality* is listed in addition to, rather than as part of, the value of the rule of law, in the Conditionality Regulation it is nevertheless mentioned as one of the sub-principles of the rule of law's definition.[217] Equality is also a general principle of EU law recognised by the CJEU, enshrined in Title III of the EU Charter, and further concretised in secondary EU legislation.[218] Accordingly, compliance therewith can also be argued to fall under the rule of law's principle of legality, which requires Member States' actions to align with primary and secondary EU law. One could hence argue that thin and thick rule of law theorists alike must concede that in the EU, the principle of equality ought to be respected by public authorities.

Pursuant to this principle, public authorities must treat all individuals in an equal manner, and effectively protect them against discrimination. A number of discrimination grounds are explicitly prohibited by the EU Charter of Fundamental Rights[219]

[214] See, e.g., Anthony Downs, 'The Public Interest: It's Meaning in a Democracy' (1962) 29 Social Research 1.

[215] Note how Sorauf conceptualises it as a 'political *je ne sais quoi*', in Frank J Sorauf, 'The Public Interest Reconsidered' (1957) 19 The Journal of Politics 616.

[216] See, e.g., Barry Bozeman, *Public Values and Public Interest: Counterbalancing Economic Individualism* (Georgetown University Press 2007).

[217] Although Article 2 of the Conditionality Regulation considers this principle to be part of the rule of law, those adhering to a thin conception of the rule of law would not necessarily agree with this, particularly if it concerns a substantive understanding of equality.

[218] See in this regard also Elise Muir, *EU Equality Law: The First Fundamental Rights Policy of the EU* (Oxford University Press 2018).

[219] See Article 21 of the EU Charter: (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. (2) Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

and by the European Convention on Human Rights.[220] In essence, the principle requires that persons in similar situations are treated equally and that different situations are treated differently. When public authorities violate this requirement, an effective remedy needs to be ensured so that this can be challenged in court.[221]

In the European Union, besides being a formal requirement, the principle of equality is also considered to be a substantive one, requiring the *substantively* equal treatment of persons.[222] This implies that in certain situations, the principle's application dictates that public authorities *must* make differentiations, namely when legal subjects are substantively finding themselves in unequal situations. However, whenever a differential treatment is applied, this should be objectively justified on the basis of a reasonable aim, and in conformity with the principle of proportionality.[223]

3.3.4.b Challenges to the Principle of Equality

One can immediately notice the challenge that is contained in that last sentence. When is a distinction objectively justified and when do people find themselves in a differing situation that warrants differential treatment, and when not? A link can be made here also to the more general problem of over- and under-inclusivity that is inherent to any general rule of law. Solving these questions typically requires a case-by-case analysis and balancing exercise. Evidently, such a balance needs to take place not only at the level of the legislature, when adopting legislation, but also at the level of the executive, when implementing legislation and adopting administrative acts. Public authorities hence need to express an objective and reasonable justification for any differential treatment, which ought to pursue a legitimate aim and showcase a reasonable relationship of proportionality between the means employed and the aim one seeks to realise.[224] The situation of the differently treated people must hence be *relevantly* differentiated.[225] When such differentiations are challenged in court, the assessment of the justifiability of differentiation often reflects "*local political, social and legal dimensions of the case as well as arguments made by claimants and alleged offenders*", revealing that there are "*very few clear-cut*

[220] See Article 14 ECHR: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[221] See European Union Agency for Fundamental Rights (ed), *Handbook on European Non-Discrimination Law* (Publications Office of the European Union 2018).

[222] Venice Commission (n 74) 19.

[223] ibid 32.

[224] ibid.

[225] Moreover, Strasbourg case law provides that "*contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference*". See in this regard *Burden v the United Kingdom* GC, Application no. 13378/05, 29 April 2008, §60; *Hämäläinen v Finland*, Application no. 37359/09, 26 July 2014, §108.

examples of static rules, requirements, or thresholds for defining the key concepts and groups underlying discrimination as a legal standard".[226]

In addition, it may also be challenging for persons who are affected by a public authority's unreasonable differentiation to remedy this situation, as it is not always evident that such differentiation is taking place. While laws and regulations of general application are in principle rendered public (given the transparency required by the principle of legal certainty and legality), individual acts taken by public authorities when they apply these laws to specific cases are typically not public.[227] Instead, they are often only communicated to the natural or legal person to which the act pertains, which means that it is not always easy for persons to ascertain that they are treated differently than others who are in a similar situation. Accordingly, the fulfilment of the requirement that an effective remedy must exist against discriminatory or unequal applications of the law depends on more than the mere existence of a ground of legal standing. It also necessitates a certain level of transparency by public authorities on how they interpret a general rule, and how they intend to apply it.

3.3.5 *Judicial Review*

3.3.5.a The Principle's Requirements

Like other principles, the principle of effective judicial review can be broken down into various sub-principles, which are sometimes presented separately, sometimes together. The Conditionality Regulation speaks of "*effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights*",[228] while the Venice Commission frames it as "*access to justice before independent and impartial courts, including judicial review of administrative*

[226] Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Why Fairness Cannot Be Automated: Bridging the Gap between EU Non-Discrimination Law and AI' (2021) 41 Computer Law & Security Review 105567, 8. See also their subsequent paper, Sandra Wachter, Brent Mittelstadt and Chris Russell, 'Bias Preservation in Machine Learning: The Legality of Fairness Metrics under EU Non-Discrimination Law' (2021) 123 West Virginia Law Review 735, in which they argue that "*the fundamental aim of the law is not only to prevent ongoing discrimination, but also to change society, policies, and practices to 'level the playing field' and achieve substantive rather than merely formal equality*". They also stress that tackling bias in algorithmic systems should go beyond fairness metrics that 'preserve' the status quo, but must aim at transforming existing societal biases so as to foster substantive equality.

[227] Under Belgian administrative law, for instance, administrative acts with a general application (regulations or normative acts) need to be rendered public by law, whereas individual acts only need to be communicated to the legal subjects to which the act pertains. See, e.g., Van Garsse (n 193) 38.

[228] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (n 119), Article 2.

acts" and lists *respect for human rights* as a separate principle.[229] As my focus lays on distilling from these principles more specific requirements for the executive branch of power, I will set aside the sub-principles on "*access to justice*" and "*independent and impartial courts*",[230] and limit my attention here to the requirement of ensuring judicial review of administrative acts.

In essence, judicial review comprises a legality check that encompasses, but is not limited to, compliance of those acts with human rights law.[231] In the context of the European Union, this also implies the review of national authorities' compliance with primary and secondary EU law. More generally, judicial review also enables the verification of public authorities' compliance with the other rule of law principles listed above, including respect for legal certainty, the prohibition of arbitrary decision-making, and respect for the principle of equality. Given this overarching role in protecting the rule of law's principles, the importance of an effective judicial review mechanism can thus not be overstated. The ability to "*prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities*" can indeed be seen as a sine qua non to protect the rule of law.[232] Without this ability, the rule of law would ultimately remain a dead letter. Importantly, judicial review must also be enabled for acts that are carried out by private actors on behalf of public actors.[233] Public authorities can thus not escape a review of the legality of their actions – or of their responsibility – by outsourcing their tasks to companies or other private organisations.

A legality review can be instigated by natural and legal persons in a direct way (by directly challenging the administrative act in question before a court) or in an indirect way (by invoking the illegality of the act indirectly in the context of a court proceeding to which the act is relevant).[234] Yet while they should always be entitled to seek judicial review of an act if it directly affects their rights and interest, natural

[229] Venice Commission (n 74) 11.

[230] It should, however, be noted that especially the latter was the object of much recent case law both before the Luxembourg and the Strasbourg Courts, given that judicial capture has been taking place in certain EU Member States. For an overview, see, e.g., Mańko (n 108); Dimitry V Kochenov and John Morijn, 'Strengthening the Charter's Role in the Fight for the Rule of Law in the EU: The Cases of Judicial Independence and Party Financing' (2021) 27 European Public Law 759.

[231] The Venice Commission's Checklist (at page 18) also explicitly requires, under the principle of legality, that "*public authorities comply with their positive obligations by ensuring implementation and effective protection of human rights*". It hence not only concerns a requirement not to infringe human rights, but also to abide by positive obligations to ensure their implementation and protection.

[232] As testified by the fact that the EU Conditionality Regulation also explicitly states in its Article 3 (b) that the failure of ensuring this "*may be indicative of breaches of the principles of the rule of law*" for the purpose of the Regulation.

[233] Venice Commission (n 74) 24.

[234] Moreover, when court proceedings are instigated and individuals have standing, the right to a fair trial must be respected, including the equality of arms. Ibid 45. See in this regard also Article 6 of the ECHR.

and legal persons do not always have standing to challenge an act that does not demonstrably directly and personally affects them (for instance when it concerns an administrative act of general applicability)[235] even if the act infringes one of the rule of law's principles and hence causes societal harm.[236] The absence of a so-called *actio popularis* (an action that existed in Roman law, which could be brought by a member of the public to protect 'the public interest') is therefore not incompatible with the principle of effective judicial review.[237] This despite the fact that "*leaving the possibility to ask for a review of constitutionality only to the legislative or executive branch of government may severely limit the number of cases and therefore the scope of the review*".[238]

In many jurisdictions (as is the case in Belgium, for instance[239]) judges have the obligation *not* to apply administrative acts in case they are illegitimate, yet that of course first requires a judge to assess the act's legality. Moreover, the court controlling public authorities' exercise of discretionary power should also have the "*powers of obtaining information as are necessary for the exercise of its function*".[240] Finally, if an administrative act (or act of negligence) by a public authority is found unlawful and private persons suffer damages, a remedy must be provided.[241]

3.3.5.b Challenges to the Principle of Effective Judicial Review

Vital as the principle of effective judicial review may be, the challenges accompanying its realisation are manifold. For instance, where public authorities have discretion, judicial review often takes on a more limited shape to avoid judges replacing policymakers – which would obstruct the principle of the separation of powers. Certainly, the act taken by the public authority needs to be *legal*, but as regards its

[235] Compare this with the problem of standing in EU Courts as regards the legality review of EU legal acts. See Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, Oxford University Press 2015) 312 and following.

[236] For instance, Article 22 of the Code of Good Administration recommended by the Council of Europe's Committee of Ministers foresees that "*private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests*".

[237] See in this regard also Venice Commission, 'Study on Individual Access to Constitutional Justice – Adopted by the Venice Commission at Its 85th Plenary Session' (Council of Europe 2011) CDL-AD(2010)039rev. For Belgium, see, e.g., Sabien Lust, *Rechtsbescherming Tegen de (Administratieve) Overheid. Een Inleiding* (die Keure 2014) 119.

[238] Venice Commission (n 74), §109.

[239] See Article 159 of the Belgian Constitution: "*Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law.*" (official translation).

[240] Committee of Ministers of the Council of Europe, 'Recommendation No. R (80) 2 of the Committee of Ministers Concerning the Exercise of Discretionary Powers by Administrative Authorities' (n 199).

[241] 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration' (n 161), Article 23.

choice to pursue a particular discretionary policy or decision rather than another, judges can often only intervene if that policy or decision is (manifestly) *unreasonable*.[242] Any review is then limited to a review of legality, despite the fact that, in practice, public authorities can take actions that are *legal*, yet nevertheless cause a disproportionately adverse impact that could have been avoided with alternative policies.[243] Accordingly, whenever they have discretion (which, as discussed above, is often the case) public authorities may have a relatively broad margin of appreciation to evaluate the criteria based on which they pursue certain policies. The tension point here seems to lay between ensuring a sufficient level of judicial review that enables verification of the government's compliance with the rule of law, while at the same time also ensuring that the separation of powers is upheld and that judges do not take over the task of governments.

In addition, one can raise the difficulties regarding the right to have standing in court to ensure that an administrative act is reviewed, and the accessibility of such a review. Firstly, there may be situations where an administrative act adversely affects a societal interest, which does not necessarily bear a one-on-one relationship with a demonstrable adverse effect on an individual right or interest.[244] In that case, natural and legal persons would be prevented from challenging the act, unless national law explicitly grants standing for collective or public interest groups (the standing problem). Secondly, if individual harm remains unnoticed – recall, for instance, the situation mentioned under the principle of equality, where an individual is simply not aware of the fact that the public authority erroneously or wrongly distinguishes her case from a similar case meriting equal treatment – the problematic act will not be challenged (the knowledge problem).[245] Thirdly, the harm at the level of the individual may be perceived as insignificant, or in any case as too small in proportion to the costs that may be involved in challenging it, even if the act more significantly impacts a societal interest, thus rendering it unlikely that the individual

[242] See also Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 The Modern Law Review 265.

[243] Note that under Belgian law, for instance, the fact that a public authority used its discretionary power in a manner that does not pursue the public interest, but instead aligns with a private interest, is not enough ground to annul the decision if there are other justifications for the decision. See Van Garsse (n 193) 82.

[244] For the context of algorithmic regulation, which will be elaborated in the next chapter, see, e.g., Nathalie A Smuha, 'Beyond the Individual: Governing AI's Societal Harm' (2021) 10 Internet Policy Review 3; Bart van der Sloot and Sascha van Schendel, 'Procedural Law for the Data-Driven Society' (2021) Information & Communications Technology Law 1; Karen Yeung, 'Responsibility and AI – A Study of the Implications of Advanced Digital Technologies (Including AI Systems) for the Concept of Responsibility within a Human Rights Framework' (Council of Europe 2019) <https://rm.coe.int/a-study-of-the-implications-of-advanced-digital-technologies-including/168096bdab>.

[245] In this regard, it can be highlighted that an inherent asymmetry of information exists between public authorities on the one hand, and private persons on the other hand. I will discuss this issue further in Chapter 4.

will challenge the problematic act (the threshold problem). Fourthly, an individual can also acquiesce with a problematic act and waive the opportunity to invoke her protective right to review (perhaps because the act, while infringing the rule of law, is beneficial to her), thereby undermining the opportunity to remedy any *indirect* adverse effects of the act suffered by third parties (the egocentrism problem).

Finally, in the context of the European Union's 'rule of law crisis', one must also recall the importance of ensuring an independent and impartial judiciary.[246] Since this book focuses on the executive branch of power, I will not elaborate on this requirement here. I will point out, however, that Member States have been condemned by the CJEU and by the ECtHR precisely because they did not respect this principle.[247] Evidently, judges that are partial to the government and its administration will not be able to effectively carry out a judicial review of administrative acts and grant the protection that is due in this regard. For all those reasons, securing the principle of effective judicial review of government actions – including their respect for human rights – is not devoid of challenges.[248]

3.3.6 *Separation of Powers*

3.3.6.a The Principle's Requirements

The separation of powers aims at preventing the concentration of public power with one state entity. It does so by providing for checks and balances and thereby minimising the risk of unchecked power that can curb the rights and freedoms of citizens, erode democratic representation, and undermine public accountability. Not all legal theorists would consider it as a principle that is classifiable under the concept of the rule of law, and it is, for instance, absent from the 'ingredients list' of both Lon Fuller and Lord Bingham. At the same time, there is little doubt that the rule of law and the separation of powers are entwined. The separation of powers is therefore mentioned by both the EU and the Council of Europe in their rule of law conceptualisations, on par with the other rule of law principles. While the Venice Commission did not include separate questions for this principle in its rule of law checklist (presumably in light of the fact that the five other principles collectively contribute to the separation of powers), the European Commission's rule of law framework does contain a residual pillar named "*other institutional issues linked to checks and balances*", underlining that its abstract nature

[246] See Sergio Carrera and Valsamis Mitsilegas, 'Upholding the Rule of Law by Scrutinising Judicial Independence' (CEPS 2018).

[247] See also *supra*, Section 3.2.5.

[248] For the limitations of ad hoc judicial review of administrative action as a systematic safeguard against abuse of power, see also Harry Woolf, Jeffrey Jowell and Andrew P Le Sueur, *De Smith, Woolf and Jowell's Principles of Judicial Review* (Sweet & Maxwell 1999).

does not preclude its importance in the evaluation of countries' compliance with the rule of law.[249]

Distributing different public functions across different branches of power not only decentralises public power, but also enables one branch to 'check' and to 'balance out' the other.[250] Accordingly, the separation of powers is not a strict separation,[251] because its very aim is to enable mutual control, which requires a certain level of cooperation and transparency. Such control and cooperation occurs, in first instance, through the classical constitutional checks and balances of the *trias politica* doctrine. The legislative branch of power can keep the executive in check by organising parliamentary hearings and investigations, playing a role in the government's budget approvals, as well as more generally delimiting the contours in which the executive can operate when enacting laws.[252] The judicial branch of power can carry out a judicial review of the government's actions and hold it accountable if and when it transgresses the limits of its competences.[253]

Yet, besides the two other branches of power, citizens also play a critical role in keeping the government accountable. They do so by casting their vote during popular elections (though this is primarily relevant for the 'political' as opposed to the 'administrative' executive) and by challenging problematic government actions in court.[254] By extension, enabling a healthy civil society can also be considered as an essential requirement of this principle, given the contribution of civil society organisations to the checks and balances of and between the three branches of power.[255] Together with (independent) media,[256] civil society investigates, reports on, raises awareness of, and challenges government action in the

[249] This also comprises the theme of the "*quality of the public administration, and how authorities apply the law and implement court decisions*". See European Commission, 'The Rule of Law Situation in the European Union. 2021 Rule of Law Report' (n 117) 20, section 3.4.

[250] See also Richard Bellamy (ed), *The Rule of Law and the Separation of Powers* (Ashgate/Dartmouth 2005).

[251] It also implies loyal cooperation between the different state institutions. See also Justin Fox and Mattias Polborn, 'On the Separation of Executive and Legislative Powers: Executive Independence, Liberty, and Social Welfare' (2021) 33 Journal of Theoretical Politics 430.

[252] See in this regard also Alison L Young, *Democratic Dialogue and the Constitution* (Oxford University Press 2017).

[253] Rafael La Porta and others, 'Judicial Checks and Balances' (2004) 112 Journal of Political Economy 445. See also Guobin Zhu, *Deference to the Administration in Judicial Review: Comparative Perspectives* (Springer International Publishing 2019).

[254] See also Andreas Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

[255] European Commission, '2020 Rule of Law Report: The Rule of Law Situation in the European Union' (n 117) 20.

[256] For reasons of time and space I will not consider the role of media in keeping public power in check, yet it should be noted that the European Commission's Rule of Law Report mentions the important role of media regulatory authorities and bodies, as well as the need for a framework to protect journalistic and other media activity from state inference, to investigate attacks on journalists, and to ensure access to public documents and information. See also

public interest – including, where possible, through public interest litigation in judicial review procedures. As the Commission's 2021 rule of law report states: "*An enabling framework for civil society allows for debate and scrutiny of those in power; and when their space to operate shrinks, it is a sign that the rule of law is at risk.*"[257]

In this regard, the requirement for public authorities to ensure transparency is vital. This requirement was already mentioned under the principle of legality (pertaining to the rule-making process) and under the principle of legal certainty (pertaining to the implementation process of legal rules), yet it can also be considered as essential for maintaining the separation of powers, as it enables the 'checks' it entails. The Council of Europe's Code of Good Administration explicitly includes the 'principle of transparency' in this context. It requires public authorities to "*ensure that private persons are informed, by appropriate means, of their actions and decisions which may include the publication of official documents. They shall respect the rights of access to official documents according to the rules relating to personal data protection.*"[258] Furthermore, in a specific Recommendation on access to information, the Council of Europe's Committee of Ministers also stresses that "*everyone within the jurisdiction of a member state shall have the right to obtain, on request, information held by the public authorities other than legislative bodies and judicial authorities*", and that "*access to information shall not be refused on the ground that the requesting person has not a specific interest in the matter*".[259]

Finally, the principle of the separation of powers can arguably also be understood as requiring a certain level of separation between public and private power. This aspect is not rendered explicit in the Venice Commission's rule of law checklist or in the European Commission's rule of law reporting, yet it is implicit, for instance, in requirements regarding a framework against corruption and conflicts of interests.[260] Private actors are often relied upon by public authorities to exercise public

European Commission, 'European Rule of Law Mechanism: Methodology for the Preparation of the Annual Rule of Law Report' (n 201) 2–3.

[257] European Commission, 'The Rule of Law Situation in the European Union. 2021 Rule of Law Report' (n 117) 20.

[258] See Article 10 of the 'Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration' (n 161) 9.

[259] Committee of Ministers of the Council of Europe, 'Recommendation No. R (81) 19 of the Committee of Ministers to Member States on the Access to Information Held by Public Authorities' (n 169) 2. For public authorities at the level of the EU, Article 42 of the EU Charter of Fundamental Rights also enshrines a right of access to documents. Note also that Article 11(2) TEU provides that "*The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society*". Moreover, Article 11(3) TEU states that "*The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*" This underlines the importance of the principle of transparency at the level of the European Union, as well as its connection with the role of civil society.

[260] See in this regard also Paul R Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge University Press 2007).

tasks. As noted above, such outsourcing does not divest the government of its responsibilities: the same rule of law guarantees must apply, regardless of whether the public task is executed by a public or private entity.

3.3.6.b Challenges to the Principle of the Separation of Powers

The first challenge to uphold the separation of powers can be found precisely in the requirement to separate public and private powers. For an increasing number of functions, public authorities have no choice but to rely on private actors, because they may lack the know-how, skills, expertise or data to execute a task.[261] As I will discuss below, this is particularly the case in the digital realm, for instance as regards development of algorithmic systems. Such dependency not only poses the risk that public and private interests are mingled, but it can also create a power imbalance in the advantage of large technology companies who are increasingly influential in the public sphere. This influence manifests itself both directly by developing tools for the government and more indirectly by establishing the infrastructure and standards that those tools rely on, which are often not transparent – including for the officials that use those tools.[262]

A second challenge lies in the fact that the balance amongst the various branches of power already seems to be skewed in favour of the executive branch of power. This is due to various reasons. One must, for instance, acknowledge the extensiveness of the tasks delegated by the legislative to the executive, especially in an ever more complex society, where regulatory trade-offs and risk assessments require detailed analyses that legislators are unable to conduct. As noted by Ackerman, "*consider, for example, the regulatory problems posed by environmental protection. Although democratic legislation can provide guiding principles, parliaments have neither the time nor the expertise to sift the changing scientific data in search of responsible regulatory solutions*".[263] More generally, the legislative branch is dependent on the executive to implement and apply its general laws, and the judicial branch is dependent on the executive to implement and apply its judgments. Furthermore, in many countries, the last decade has witnessed a further consolidation of executive power, be it in the context of the financial crisis, the Covid-19 pandemic or for other reasons.[264] There is also an inherent asymmetry of

[261] See Antonio Cordella and Leslie Willcocks, 'Outsourcing, Bureaucracy and Public Value: Reappraising the Notion of the "Contract State"' (2010) 27 Government Information Quarterly 82; Sonia Gantman, 'IT Outsourcing in the Public Sector: A Literature Analysis' (2011) 14 Journal of Global Information Technology Management 48.

[262] See also Linnet Taylor, 'Public Actors without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector' (2021) 34 Philosophy & Technology 897.

[263] Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633, 696.

[264] See also Protect Democracy, 'The Authoritarian Playbook – How Reporters Can Contextualize and Cover Authoritarian Threats as Distinct from Politics-as-Usual' (2022) <protectdemocracy.org/project/playbook-media-primer>.

information between the different branches: the executive holds much more information than the other two branches, which can render the latter's control of the former difficult. The executive also holds and spends the state budget. Under a worst case scenario, it can deploy this budget to finance actions that fortify its position, slander political opposition and marginalise critics, restrict the scope of action of civil society organisations and gather ever more information about natural and legal persons to increase its control over them.

Evidently, the rule of law, together with secondary legislation that sets out, for instance, rules about budget spending or electoral advertisement, is specifically targeted at preventing this from happening, and limiting the executive's ability to consolidate its power at the expense of the legislative, the judiciary and civil society. However, that does not take away the fact that, once problematic actions have been undertaken, it can be difficult for the other branches of power to reverse them. Far from being hypothetical, the previous section clarified that this situation is unfolding itself in various states across the world where authoritarian practices are on the rise.

Finally, when considering the context of the European Union, it should be noted that the division of tasks between different branches of power is organised somewhat differently in each Member State, in light of diverse national constitutional traditions.[265] As there is hence not one model for the configuration of state institutions, it is not always straightforward to assess the extent to which a particular configuration may cross the line of the 'separation of powers'. This point is, unsurprisingly, also eagerly invoked by populist leaders who seek to diminish the separation of powers and to consolidate executive power under the guise of respecting the 'diversity of national traditions'.[266] Accordingly, lest such arguments be used to undermine the rule of law, it is important to maintain a balanced understanding of the separation of powers, which safeguards both the foundational values listed in Article 2 TEU, and Member States' national identities as protected by Article 4(2) TEU.[267]

[265] Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 European Law Journal 80; Luigi Corrias, 'National Identity and European Integration: The Unbearable Lightness of Legal Tradition' (2016) 2016 1 European Papers – A Journal on Law and Integration 383. This is also perceivable when comparing legal and political institutions in liberal democracies outside the EU. Consider how certain judges in the United States are politically elected, which could elsewhere be perceived as a potential attempt to politicise and undermine the independence of courts. See also Kate Malleson and Peter H Russell, *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press 2018).

[266] See also Oliver Mader, 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law' (2019) 11 Hague Journal on the Rule of Law 133.

[267] Article 4(2) TEU reads as follows: "*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security*".

3.4 CONCLUDING REMARKS

In this chapter, I conceptualised the rule of law and drew on binding and non-binding legal sources from the European Union and the Council of Europe, as well as legal theory, to concretise its core principles into requirements that public authorities must abide by. By respecting these requirements, public authorities not only fulfil their rule of law obligations, but they also enable the protective role that the rule of law plays in constitutional liberal democracies, safeguarding both human rights and democracy. My analysis of the rule of law's six principles revealed that, just like the concept of the rule of law itself, these principles represent ideals that should be striven towards. Moreover, their fulfilment involves intrinsic challenges, given the normative tensions that are inherent to a pluralistic society governed by general rules requiring concrete application.

Some of these challenges are *external* to the concept of the rule of law. For instance, the increase in the executive's competences that accompanied the welfare state lead to what some have described as an (ever stronger) asymmetry of power between the executive, and the legislative and the judiciary.[268] I also noted how judicial review can be hampered by narrow standing rules, or by the fact that affected persons suffer from a knowledge gap or an incentive gap to initiate legal proceedings.[269] The fulfilment of the rule of law's principles by public authorities also depends on whether they can incorporate them into their internal normative systems, rather than seeing them as externally imposed.[270] Legal obligations can only take one so far; what matters at least as much is the social environment in which public authorities operate.[271] This also implies that public authorities must be allocated sufficient resources – both time-wise and in terms of adequate resourcing – to achieve their tasks in a diligent manner, and in a way that fosters not only procedural but also substantive rationality.

The achievement of the rule of law is however also dependent on overcoming certain *internal* challenges, which are part of the rule of law's very concept. Rather

[268] Reijer Passchier, *Artificiële intelligentie en de rechtsstaat* (Boom 2021).

[269] Galligan also notes that, more generally, "*there is reason to doubt that [judicial review] has more than marginal impact on the way administrative bodies operate*". See Galligan, 'Public Administration and the Tendency to Authoritarianism' (n 55) 198.

[270] Galligan puts it as follows:

> The problem can be put in terms of competing norms; the norms of administrative justice [such as the rule of law] are external and compete with norms that are generated internally. The assimilation of the external norms and their replacement of incompatible internal norms is difficult to achieve, and is a process about which we have limited knowledge. And yet that process is the key to countering the authoritarian tendencies within administrative bureaucracies.
>
> (ibid)

[271] Tamanaha conceptualises this as the need for a "*shared cultural belief*" in the rule of law, in (n 26) 246.

than being clear-cut, the requirements associated with its six principles are imbued with notions that are not always reconcilable and that necessitate delicate trade-offs. For instance, the principle of legality requires a balance between the law's broadness and prescriptiveness. It is only by setting out broader rules with general applicability that the law can be tailored to specific cases that are not all foreseeable in advance. The goal that this principle serves is, after all, not to essentialise and idealise the law, but to help achieve the rule of law's overarching aims. Similarly, the fact that public authorities must apply the law in a way that ensures legal certainty – including stability, foreseeability, consistency, publicity and intelligibility – serves the purpose of ensuring that individuals can autonomously and freely plan their lives in accordance with the law, with legitimate expectations about its effects. Yet this very purpose also implies that, sometimes, changed or unforeseen circumstances require a certain level of flexibility and adaptability to continue achieving the law's normative aims despite the new situation. Moreover, while clear procedures and routinised decision-making processes can help public officials to act in a non-arbitrary and non-discriminatory manner, some level of discretion remains necessary, as it enables officials to balance competing interests in specific situations and soften the law's hard edges.

In sum, there is a fine line between too little and too much precision, too little and too much stability, and too little and too much discretion. Overcoming these tensions may be a challenge, yet this should not be seen as a weakness of the rule of law, but rather as a strength – or, as Hildebrandt puts it, "*a feature, not a bug*".[272] By navigating these tensions and balancing them in concrete situations, the law can fulfil its protective role in an ever-changing environment. Public authorities should hence not seek to undo these tensions – or worse, to disguise them – but they should aim to strike, in each context, the right balance between extremes in order to safeguard the rule of law's spirit. Put differently, a marriage must be found between rules and discretion – whereby it should be stressed that marriage is a perpetual dance, not a one-shot game,[273] and that it requires continuous work rather than quick fixes. Certainly, it may not always be the happiest of marriages, but some mutual understanding is needed, for their divorce would either result in a rule *by* law (if the focus shifts entirely to the 'rules') or in no rules at all (if the focus shifts entirely to 'discretion'). The rule *of* law is thus the middle way that public authorities should strive for, by embracing rather than erasing the tensions inherent thereto.

[272] See Mireille Hildebrandt, 'Understanding Law and the Rule of Law: A Plea to Augment CS Curricula' (2021) 64 Communications of the ACM 28.

[273] This draws on a metaphor proposed by Karen Yeung.