

The Rule of Law in the EU: Crisis and Solutions

■ MOVING FORWARD ON ARTICLE 7 ■ MONEY TALKS! THE EFFECTIVENESS
OF FINANCIAL TOOLS TO FOSTER COMPLIANCE WITH THE RULE OF LAW
■ THE EXTERNAL DIMENSION ■ LOOKING FORWARD: RESTORING THE RULE
OF LAW IN EU MEMBER STATES ■ DEFENDING THE EU'S VALUES BEYOND
THE RULE OF LAW ■ CHALLENGES OLD AND NEW

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Dimitry Kochenov, Ian Manners, Andreas Moberg, John Morijn, Joakim Nergelius,
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Preface

The rule of law is one of the fundamental values of the European Union. Upholding the rule of law in the EU is therefore of major concern. The institutional and political consequences of negative developments in this area are serious enough for the situation to have been widely described as a crisis.

This is why SIEPS—together with the Swedish Network for European Legal Studies, the Centre for European Research (CERGU) and the School of Business, Economics, and Law, both at the University of Gothenberg—has organised a major conference at which academics, legal practitioners and policymakers will consider the problem and possible solutions.

It is a pleasure to publish, on the occasion of the conference, this collection of work by conference speakers; prominent legal scholars, political scientists and practitioners with long and deep experience of the rule of law.

The Swedish presidency of the Council of the EU has named democratic values and the rule of law as one of its four priorities. By publishing anthologies such as this, SIEPS seeks to support, with analysis and insight, the considerations of policymakers, to enrich the scholarly debate, and to shed light on an issue of fundamental importance.

Göran von Sydow
Director, SIEPS

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Introduction

What is ‘the rule of law crisis in the EU’?

In the last decade, the governments of some EU Member States have damaged the independence and impartiality of the judiciary in their countries, reduced the independence of universities and civil society, and curtailed media freedom. They have facilitated widespread corruption, limited opposition parties’ ability to act politically, and violated human rights. These changes slowly but surely undermine the rule of law, and thereby democracy. This is what we mean by the rule of law crisis in the EU.

What is the rule of law? It is not altogether easily defined and it has different meanings in different languages and legal orders. The concept has its roots in ancient Greek philosophy, and in the modern era, differences can be observed between linguistic notions: the English ‘rule of law’, the German ‘Rechtsstaat’, the French ‘État de droit’, and the Swedish ‘rättsstaten’. Nevertheless, today there is a common, core understanding of the concept, which is uncontroversial. As Jeremy Waldron explains, it comprises several principles which speak to the way a society is governed.¹ These concern the generality, clarity, publicity, stability, and prospectivity of norms (characterized as ‘formal’ principles), as well as the processes and institutions that administer them (characterized as ‘procedural’ principles). In brief, the concept is about limiting the abuse of power and sustaining the separation of powers. But some ‘substantive’ elements also seem central to the concept: the rule of law is intrinsically related to democracy and human rights. As J.H.H. Weiler wrote:

Majority governance without the constraints of human rights and the rule of law is but a tyranny of the majority. Human rights without effective rule of law are but slogans. The rule of law outside a democracy is simply the most effective instrument of authoritarianism and worse.²

The EU is not the only part of the world where the rule of law is seriously threatened. But the rule of law is an issue by which the Union defines itself. Article 2 of the Treaty on European Union (TEU) states that ‘the Union is founded on [...] the rule of law’. Among legal scholars, this treaty article has long been thought of as merely a political statement, but the Court of Justice has recently made clear that it is more than that: it is among the values ‘which are given concrete expression in principles comprising legally binding obligations for the Member States’.³ In other words, Article 2 and its commitment to the rule of law have a legally binding quality. And the fact that it appears in the EU Treaties means that the Member States have agreed to respect it.

But why is the rule of law *at Member State level* a concern for the EU, one might ask; why is that something that the EU should care about? The answer is that when the rule of law is not observed at national level, the EU is affected. And it is affected in a serious way: its functioning, credibility, and identity are at stake.

Why should we care?

How would this threat play out; in what sense are the Union’s functioning, credibility, and identity at stake? First, if the rule of law is not respected in the Member States, the internal market (which comprises the free movement of goods, services, capital, and persons) cannot function properly: it is to a large extent based on mutual trust and, without a functioning judiciary, the enforcement of contracts cannot be guaranteed. Second, without the rule of law it is impossible to achieve the EU’s objective of establishing an area of freedom, security and justice, which is based on mutual recognition of judgments by national courts and trust in each other’s legal systems. For example, the European

¹ Jeremy Waldron, ‘The Rule of Law’, The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed) <<https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/>>.

² J.H.H. 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* (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 298, Springer 2021) 5. See also Rosas’ contribution to this volume.

³ Case C-157/21 *Poland v European Parliament and Council* EU:C:2022:98, para 264.

Arrest Warrant—the cross-border judicial surrender procedure—will not function without the rule of law. A Member State cannot surrender a person to another Member State if they cannot trust that the ensuing trial will be fair.

Third, if the rule of law is not respected in the Member States, the system of judicial cooperation between the European Court of Justice and national courts cannot be maintained. Under the preliminary rulings procedure, national courts can submit questions to the Court of Justice about how EU law is to be interpreted. The national courts are then responsible for applying EU law on the basis of the interpretation of the Court of Justice. But if the judiciary in a Member State is no longer independent, this cannot work properly. Fourth, the EU will not be a credible actor when promoting the rule of law internationally when the EU's own Member States do not respect the rule of law. These are just some examples of the severe effects this crisis could have—there are certainly others.

Whether or not the EU already is being affected in the ways listed above is an empirical question, not addressed here. But *at the level of principle*, there is no doubt that this is an existential issue for the EU: as the European Court of Justice has made clear, the rule of law is an integral part of the EU's identity.⁴

Addressing the crisis

The EU has long recognized this: it has for several years been trying to solve these problems, using various tools. However, the efforts to address these violations have come to little. In some respects, things are getting worse: the rhetoric is noticeably hardening from the Member States concerned, arguing that they need not accept the primacy of EU law, that the EU lacks competence in this area,

and that the EU must respect the national identity of the Member States.⁵ In fact, the situation has gone so far that research institutes such as V-Dem and Freedom House no longer classify Hungary as a democracy, but rather as a hybrid regime. In September 2022 the European Parliament adopted a resolution declaring the same.⁶

This anthology discusses important questions concerning the current crisis situation and the future of the rule of law in the EU: what lessons can we learn from the actions that EU institutions have already taken? Does the EU need new instruments to protect the rule of law? How can the EU best support Member States in their transition back to rule of law compliance? In sum: are there any identifiable, implementable solutions to the crisis?

A great deal has already been written about the rule of law and the EU; there exists an expansive scholarly literature on the topic. What we are trying to do is to pay attention to some novel areas; to pose and answer questions that have not been extensively discussed, previously. And, despite the disheartening developments in some EU Member States and the spread of authoritarian tendencies in the wider world, there is generally a strong sense among observers that now is a good time to draw lessons from past experiences and chart a concrete path for future action. It is on the basis of such exchanges, perhaps, that the EU will find its way out of the crisis.

The Contributions to this Volume

The anthology features 14 pieces written by prominent scholars of law and political science. It is divided into six sections (following this introduction), each devoted to a different aspect of the rule of law crisis in the EU.

⁴ Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, para 127 and C-157/21 *Poland v European Parliament and Council* EU:C:2022:98, para 264.

⁵ See, for example, Poland's and Hungary's arguments in the cases above. See also Anna Wójcik's contribution to this volume on the Polish government's response to the EU's measures.

⁶ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0324.

The anthology opens with three thought-provoking pieces on how to move forward with Article 7 TEU, the most central of the EU's political tools to protect the rule of law. It has been activated against Poland and Hungary, but, despite several hearings in the Council, the procedure can best be described as stuck. In the first contribution, **R. Daniel Kelemen** is very critical of how Article 7 is designed but argues that the procedures against Hungary and Poland should continue although there is little prospect of them moving forward. In his view, they serve a symbolic function, and fortunately, he argues, the EU has more effective tools against democratic backsliding at its disposal. In the next piece, **Dimitry Kochenov** is also critical of Article 7's design. He goes on to explain that, despite the success of the Court of Justice in addressing the rule of law issues, its judgments do not seem to lead to significant improvements in the Member States concerned. Kochenov further argues that the rule of law is being undermined when it is framed in terms of supremacy and legality. Finally, **Andreas Moberg** provides a thorough critique of the very complex construction of Article 7 and explains why, in his view, the Council will never make use of the provision.

In the second section of the anthology, three illuminating contributions discuss the EU's ability to suspend funding to Member States that are not respecting the rule of law. Perhaps the best known of these financial tools is the conditionality regulation, which was applied for the first time in 2022 against Hungary. **Kim Lane Scheppele** and **John Morijn** investigate this and other tools which apply rule of law conditionality. They show that, in total, the EU is withholding much more money from Poland and Hungary than previously thought. Next, **Anna Wójcik** provides an analysis of the financial tools that the EU has adopted against Poland and the impact they have had so far. Thereafter, **Xavier Groussot and Anna Zemskova** analyze the EU's financial tools both within the Union (the internal dimension) and in the EU's relations with non-EU actors (the external dimension).

The anthology's horizons widen in the third section, which is devoted to the external dimensions of the rule of law crisis. The crisis can affect the EU's image as a global norm promoter and, in turn, its ability to act externally and to 'advance' the rule of law in the rest of the world. The EU's external legitimacy in this area will diminish as its internal unity over the rule of law is challenged. The crisis may also affect the enlargement process, which has been revived by Russia's war against Ukraine. In his stimulating contribution, **Ian Manners** explains how the internal and external dimensions of what he calls 'the EU's autocracy' crisis are interlinked. He argues that it is necessary to understand and address its causes, not just its symptoms.

The fourth section comprises two thorough analyses of how the rule of law can be restored by a government that wishes it to be upheld once more. Is a democracy bound to follow constitutional rules set by authoritarians? Is it sufficient to remove the central perpetrators from the judiciary to re-establish a functioning judicial system? **Armin von Bogdandy** shows how the experience of transformative constitutionalism in Latin America can usefully inform contemporary strategies for restoring the rule of law in EU Member States. **András Sajó** examines the inherent weaknesses and uncertainties pertaining to the rule of law and reviews the societal context which enables illiberal actors to prevail. He explains that a militant restoration of the rule of law would run counter to its own principles.

As noted above, the rule of law is one of the EU's values listed in Article 2 TEU. But Article 2 also proclaims other values: human dignity, freedom, democracy, equality, and respect for human rights. In the fifth section three insightful essays ask whether the EU can and should defend these other values—equally under threat in some Member States—and if so how. The infringement proceedings lodged against Hungary and Poland over breaches of LGBTQ+ rights can be seen as a step in this direction. **Monica Claes** argues that the values in Article 2 TEU must be given concrete expression to specify concrete standards

and obligations for the Member States and to allow the EU institutions to implement and enforce them. **Luke Dimitrios Spieker** warns about the democratic situation in Hungary, and examines how to address threats to democracy in the Court of Justice. He demonstrates how the value ‘democracy’ in Article 2 could be ‘operationalised’. **Allan Rosas** lays out a conceptual discussion, exploring how democracy, human rights, and the rule of law can be seen as forming a trinity, and the other values subsumed under this trinity. He explores how, given these relationships, democracy and human rights in the EU can be further strengthened.

The sixth and final section of the anthology comprises two distinctive contributions, each addressing a different set of problems. **Jane Reichel** argues that the EU court-centred version of the rule of law is problematic and that more attention

should be paid to the developing system of public administration in the EU. In the last contribution, **Joakim Nergelius** points to the impact of the war in Ukraine and argues that, in an ever more turbulent world, the EU needs to protect and promote its values, in spite of the short-term costs involved.

As the authors in this anthology show, the EU is still far from resolving the crisis. There has been some success, but many issues remain. The rule of law crisis strikes at the very core of the Union; solutions are urgently needed.

Anna Södersten
Editor

Article 7's Place in the EU Rule of Law Toolkit

R. Daniel Kelemen

Article 7 TEU was not designed to be an effective tool to prevent rule of law backsliding. Fortunately, the EU has more effective tools at its disposal. The Article 7(1) procedures against Hungary and Poland should remain open because they serve a symbolic function and because closing them would signal capitulation. However, EU leaders should focus on deploying more effective tools in the EU's arsenal.

1. Introduction: Moving Forward with Article 7 or Moving On?

Is Article 7 of the Treaty on European Union (TEU) better understood as a nuclear option or a damp squib?¹ Is it a tool of potentially enormous power for defending the rule of law in the European Union, or little more than a dead letter? Should European leaders be assessing how to move forward with the Article 7 procedure, or rather be focused on moving on from it? This brief contribution seeks to shed light on these questions by analysing the place of the Article 7 TEU procedure within the EU's broader rule of law toolkit. I explore how Article 7 relates to other tools the EU has established to defend rule of law norms—in terms of the issues it is designed to address, the measures it empowers the EU to take, and, most importantly, the practical likelihood that it might be effectively deployed.

My analysis suggests that while the EU has many powerful tools at its disposal with which to protect rule of law values, Article 7 is not one of these. The design of Article 7 means that it is only likely to be effectively deployed in instances where a Member State government descends into a brutal, fully fledged dictatorship or is suddenly

toppled in a revolution or military coup. But most backsliding on democracy and the rule of law today occurs much more subtly and incrementally, as democratically elected governments use autocratic legalism and other non-violent tools to gradually dismantle liberal democracy and cement hybrid electoral autocracies.² Article 7 has been, and is likely to remain, useless against such methods.

The EU currently finds itself in a position where Article 7's preventive mechanism (Article 7(1)) has been opened against both Hungary and Poland, but where there is almost zero prospect that Article 7's sanctioning mechanism will be invoked or that any actual sanctions will be applied against either state (under Articles 7(2) and 7(3)). What should be done in this context? The best route forward is to leave Article 7(1) open, hanging like a sword of Damocles over those in power in Budapest and Warsaw. The Council should continue to hold Article 7(1) hearings—and it should finally address recommendations to these rogue governments, but it should avoid taking any steps that could lead to the closure of these open procedures. Were the Article 7(1) procedures against either of these two regimes to be dropped while they continue their assault on the EU's democratic values, that would

¹ Laurent Pech, 'From Nuclear Option to Damp Squib? – A Critical Assessment of the Four Article 7(1) Hearings to date' (2019) Reconnect Working Paper <<https://reconnect-europe.eu/blog/blog-fourart71teuhearings-pech/>>.

² Javier Corrales, 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' (2015) 26(2) *Journal of Democracy* 37; Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85(2) *The University of Chicago Law Review* 545.

signal a capitulation by the EU to autocracy. Such a surrender would encourage other aspiring autocrats in the Union to attack the pillars of democracy in their states and in the EU itself.

The remainder of this article is divided into three sections. First, I discuss the place of Article 7 in the EU's rule of law toolbox, emphasizing how EU leaders have engaged in a needless cycle of creating new tools in order to distract attention from their failure to use existing tools effectively. Next, I summarize the current state of play with regard to Article 7 and I recommend a path forward. I conclude by emphasizing that the EU should rely on alternative tools to defend democracy and the rule of law that are far more effective than Article 7.

2. The EU's Rule of Law Rube Goldberg Machine

As Professor Laurent Pech has explained, for years EU leaders have engaged in a 'rule of law instrument creation cycle'—repeatedly reacting to new episodes of democratic backsliding by procrastinating and wasting time creating new tools instead of using the EU's existing tools.³ The result of this cycle has been the erection of what I have labeled a Rule of Law Rube Goldberg Machine; an overly complicated assemblage of redundant, often needless tools to perform a task that could have been achieved more efficiently with simpler tools the EU already possessed.⁴ The EU has put

in place a host of rule of law tools including a Justice Scoreboard, a Rule of Law Framework, an Annual Rule of Law Dialogue, 'country specific recommendations' on the rule of law as part of the European Semester process, an annual Rule of Law Cycle culminating in a Rule of Law Report, and finally a Rule of Law Conditionality Regulation.⁵ What is the place of Article 7 TEU in this overflowing, superfluous toolbox?

Article 7 is often characterized as the most powerful tool in the EU's rule of law arsenal.⁶ This is deeply misleading. Article 7's prominent reputation stems firstly from the fact that it is the only mechanism in the Treaties specifically designed for the protection of Article 2 values and secondly from the fact that Article 7(3) specifically mentions that, in sanctioning a Member State for serious and persistent breaches of Article 2 values, the Council may suspend the state's voting rights in the Council. While the sanctions envisaged under Article 7(3) sound potent, the procedures required to impose them render the whole of Article 7 impotent. Indeed, as Professor Wojciech Sadurski has demonstrated, the impotence of Article 7 was by design.⁷

Article 7 in fact involves two separate procedures, which do not need to be applied sequentially.⁸ Article 7(1) is supposed to serve as a preventive mechanism. It enables the Council, acting by a four-fifths majority, to determine that there is 'a

³ Laurent Pech, 'The Rule of Law' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (3rd edn, Oxford University Press 2021).

⁴ R. Daniel Kelemen 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools' (2023) 45(2) *Journal of European Integration* 223. Named for a 20th century cartoonist, Rube Goldberg Machines are contraptions intentionally designed to perform a task in an overly complicated way, through a chain reaction linking many independent parts.

⁵ *ibid.* See also Pech (n 3).

⁶ The governments of Hungary and Poland even advanced the argument that Article 7 might be the only mechanism the EU could use to defend Article 2 values. Fortunately, the Court of Justice rejected this argument in its judgments in Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97; and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98.

⁷ See Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider' (2009) 16 *Columbia Journal of European Law* 385. Sadurski shows that in designing Article 7, the Member States were determined to reduce the role of the European Parliament, eliminate any role for the Court of Justice, and impose a unanimity threshold for any sanctions—all measures that served to weaken the procedure.

⁸ Laurent Pech and Jakub Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updates and New Article 7(1) TEU Recommendations' (2023) Central European University Democracy Institute Working Paper 2023/2, 8; Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021). As Pech and Jaraczewski and Kochenov point out, there is no requirement that Article 7(1) be deployed before Article 7(2) is triggered.

clear risk of a serious breach’ of Article 2 values by a Member State. Given the proliferation of other reporting mechanisms designed to identify threats to the rule of law listed above, Article 7(1) has by now become just one of many supposedly preventive mechanisms in the EU’s rule of law toolbox—none of which have succeeded in preventing significant backsliding on the rule of law and democracy.

Article 7(2) and Article 7(3) are designed as a sanctioning mechanism. Article 7(2) empowers the European Council, acting by unanimity, to determine, ‘the existence of a serious and persistent breach by a Member State of the values referred to in Article 2.’ Once such a determination is made, Article 7(3) empowers the Council, acting by qualified majority, ‘to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.’

Quite simply, the unanimity requirement required under Article 7(2) before sanctions can be imposed via Article 7(3) means that, in practice, sanctions are unlikely to ever be imposed. While one can imagine unanimity among Member States to suspend the voting rights (or other rights) of a government that has become a brutal dictatorship or of one whose democracy had been toppled by a military coup, it is nearly impossible to imagine the Member States achieving unanimity to sanction subtler, less violent forms of democratic backsliding

and authoritarian rule. But as political scientists have demonstrated, in the contemporary era, democracy is typically dismantled through gradual processes of authoritarianization rather than through sudden coups,⁹ and the most common forms of authoritarianism are hybrid electoral autocracies, not heavy-handed dictatorships.¹⁰ Article 7 was not designed to fight such processes, and—as I discuss below—it has already proven itself incapable of doing so. Moreover, with its unanimity requirement, Article 7(2) is designed particularly poorly for dealing with situations where more than one Member State is facing serious and persistent breaches of Article 2 values, since the two rogue states could simply veto sanctions against one another.¹¹

3. Article 7: State of Play and Recommended Next Steps

Article 7(1) was activated by the European Commission against Poland in December 2017¹² and by the European Parliament against Hungary in September 2018.¹³ Several years have passed since then, and by now we might say that both procedures are in a state of suspended animation. They are neither dead, nor showing signs of active life.

As of January 2023, the Council has organized ten hearings pursuant to Article 7(1) (five concerning Poland and five concerning Hungary).¹⁴ However, as the European Parliament has noted, these hearings have been ad hoc, opaque, and overall unsatisfactory.¹⁵ The Council has even refused

⁹ Nancy Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) *Journal of Democracy* 5; Andrea Kendall-Taylor, Natasha Lindstaedt, and Erica Frantz, *Democracies and Authoritarian Regimes* (Oxford University Press 2019), particularly chapter 14, ‘Changing patterns of democratic backsliding and breakdown’.

¹⁰ Steven Levitsky and Lucan A. Way, *Competitive Authoritarianism* (Cambridge University Press 2020).

¹¹ To address this conundrum, Kim Lane Scheppele has suggested that if a state is already subject to Article 7(1) proceedings, it should not be able to vote on Article 7(2) proceedings against another Member State. See Kim Lane Scheppele, ‘EU can still block Hungary’s veto on Polish Sanctions’ (*Politico Europe*, 11 January 2016) <<https://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/>>.

¹² European Commission, ‘Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland’ COM(2017) 835 final.

¹³ European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340.

¹⁴ Pech and Jaraczewski (n 8) 9.

¹⁵ European Parliament, Resolution of 5 May 2022 on ongoing hearings under Article 7(1) of the TEU regarding Poland and Hungary (2022/2647(RSP)), P9_TA(2022)0204, para 6. See also Laurent Pech and Petra Bárd, *The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values* (European Parliament Study PE 7227.551, 21 February 2022).

to allow Members of the European Parliament to participate in the hearings.¹⁶ The Council has failed to address any recommendations to Poland or Hungary under the Article 7(1) procedure and has shown no sign that it might be preparing to take a vote (on which it would need a four-fifths majority) to make a determination that there is ‘a clear risk of a serious breach’ of Article 2 values by either state.

The Council has clearly proven itself unwilling to make robust use of Article 7, and, in a broad sense, events have passed Article 7 by. A series of developments have demonstrated that there is a widespread understanding among EU institutions that Article 2 values are in fact being seriously and persistently breached in Hungary and Poland: the declaration by the European Parliament that Hungary is no longer democracy;¹⁷ the Commission triggering the Rule of Law Conditionality Regulation vis-à-vis Hungary and the Council’s decision to suspend €6.3 billion in budgetary commitments under that Regulation;¹⁸ the Commission withholding the release of €35.4 billion from Poland under the post-Covid Recovery and Resilience Facility due to its failure to address rule of law issues, and the Commission last month launching Article 2 and Article 19 related

infringement proceedings against Hungary and Poland.¹⁹ In this context, for the Council to still be tiptoeing around the question of whether there is a *risk* of a violation of Article values in Hungary and Poland and refusing to even vote on that question under Article 7(1) is, to put it mildly, ridiculous.

However, despite the fact that the ongoing Article 7(1) procedures against Hungary and Poland are inadequate and even ridiculous, they should not be abandoned. Closing either procedure could be disastrous, as the regimes in Hungary and Poland would surely promote such an outcome in their state media and international propaganda efforts as evidence that the rule of law is not under threat in their countries. Instead, the ongoing procedures should be left open, and any Member State governments holding the rotating Council Presidency that care about Article 2 values should hold hearings as provided for under Article 7(1).²⁰ They should also press the Council to address specific recommendations to the governments of Hungary and Poland under Article 7(1).²¹ The fact that Article 7(1) proceedings remain open against Hungary and Poland has symbolic value, which can be invoked by institutions, such as the European Parliament, that are committed to resisting their attacks on EU values.²² Thus,

¹⁶ Laurent Pech, ‘Article 7 TEU: From “Nuclear Option” to “Sisyphean Procedure”?’ in Uladzislau Belavusau and Aleksandra Gliszczynska-Grabias (eds), *Constitutionalism under Stress* (Oxford University Press 2020).

¹⁷ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0324, para 2. Also see Lili Bayer and Camille Gijs, ‘European Parliament brands Hungary as “no longer a democracy”’ (*Politico Europe*, 15 September 2022).

¹⁸ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L325/94.

¹⁹ European Commission, ‘The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal’ Press Release, 15 February 2023, <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842>; European Commission, Action brought on 19 December 2022, Case C-769/22 *European Commission v Hungary*, OJ C54/16.

²⁰ Moreover, given how long the proceedings have been running and given the fact that the governments of Poland and Hungary have expanded their violation of Article 2 values, the hearings should not be limited to addressing topics specifically identified when the Article 7(1) proceedings were launched, but should also address additional threats to Article 2 values that have emerged.

²¹ As Pech and Jaraczewski (n 8) have pointed out, though the Council has failed to address rule of law recommendations to these states under Article 7(1), the EU has addressed a number of rule of law recommendations to both governments under other mechanisms, such as country specific recommendations under the European Semester process, milestones required under the RRF, and recommendations made pursuant to the EU’s Annual Rule of Law Report.

²² See for instance the European Parliament’s September 2022 resolution on Hungary pursuant to Article 7(1) in which the Parliament (n 17) regretted that, ‘the lack of decisive EU action has contributed to a breakdown in democracy, the rule of law and fundamental rights in Hungary, turning the country into a hybrid regime of electoral autocracy.’

Article 7(1) proceedings should be left open to serve as an enduring mark of shame and reminder that the backsliding regimes in Budapest and Warsaw are under scrutiny.

4. Beyond Article 7

While the ongoing Article 7(1) proceedings against Hungary and Poland should be left open, EU leaders should focus most of their energies on the many more effective tools the EU has at its disposal to defend Article 2 values—above all the power of its purse, the power of its law, and the power of its collective voice. Thankfully, after a lost decade of appeasement and inaction on the rule of law crisis, EU leaders finally started making use of these tools in the latter half of 2021 and continued in 2022. They must carry on doing so moving forward.

First and foremost, the EU began using the budgetary tools at its disposal. In April 2022, the Commission finally triggered the Rule of Law Conditionality Regulation against Hungary.²³ By the end of 2022, the Council had agreed to suspend €6.3 billion of Hungary's Cohesion Funds under the Regulation. Separately, the Commission blocked the release of billions of euros of funding to both Hungary (€5.8 billion) and Poland (€35.4 billion) under the post-pandemic Next Generation EU recovery fund because of their failure to meet rule of law related 'milestones'. And, finally, the Commission blocked billions more in EU funding to both governments on rule of law grounds under its authority pursuant to the Common Provisions Regulation.²⁴ In all, more than two-thirds of EU funding allocated to Hungary and Poland—over €130 billion—is currently being

withheld due to breaches of rule of law values.²⁵

The Commission must hold the line here and resist any political pressure to cave in and release funds without significant concessions by the regimes in Warsaw and Budapest that actually restore the rule of law. In short, whether it uses the Conditionality Regulation, the Common Provisions Regulation, or the leverage provided by its ability to withhold the release of funds through the Next Generation EU recovery plan, the Commission and the EU more generally must stop funding autocracy.

The second tool the EU should focus on to defend the rule of law is the Article 258 infringement procedure, the standard legal procedure the Commission uses to enforce EU law when Member States fail to comply with their EU legal obligations. As Tommaso Pavone and I have documented, beginning in the mid-2000s, the European Commission began relaxing enforcement, dramatically reducing its use of infringement procedures.²⁶ The Commission engaged in this policy of forbearance in hopes of winning back what it perceived to be declining support from national governments for the Commission's policy agenda and for the integration project more generally. The fact that the Commission began to take a more relaxed approach to enforcement just a few years before the Orbán government began its assault on the rule of law and democracy in Hungary proved unfortunate, as it led the Commission to resist using infringements assertively in this field as well. According to the Meijers Committee (an independent group of legal experts who advocate for rule of law observance), as of 2022 only 10 infringements referred to the Court of Justice over the past decade had concerned

²³ Kim Lane Scheppele, R. Daniel Kelemen, and John Morijn, 'Freezing All EU Funds to Hungary' Study (Solicited by the Greens/EFA Group in the European Parliament, 2022) <<https://danielfreund.eu/wp-content/uploads/2022/07/100-suspension-Hungary.pdf>>

²⁴ Notably, this move by the Commission demonstrates that Professor Kim Lane Scheppele and I were correct in our 2018 diagnosis that the EU already had the authority under the Common Provisions Regulation to suspend funding on rule of law grounds. See R. Daniel Kelemen and Kim Lane Scheppele, 'How to Stop Funding Autocracy in the EU' (*Verfassungsblog*, 10 September 2018) <<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>>

²⁵ See Daniel Freund, 'Poland and Hungary: More than two thirds of EU funds frozen' (*Freund*, 31 January 2023) <<https://danielfreund.eu/poland-and-hungary-more-than-two-thirds-of-eu-funds-frozen-background/?lang=en>>; also see Kim Lane Scheppele and John Morijn, 'What Price Rule of Law?' (2023) in this volume.

²⁶ R. Daniel Kelemen and Tommaso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2022) SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918>

rule of law matters.²⁷ Moreover, the Commission has rarely requested interim measures in such cases, and it has only once brought a follow-up Article 260 case seeking penalty payments for non-compliance with prior Court of Justice rulings in this field. Fortunately, the Commission has shown a greater willingness in recent months to bring Article 2 related infringements.²⁸ This should be encouraged. To be sure, infringements are no panacea. But the timely lodging of infringement cases—backed, where appropriate, by requests for interim measures and by the filing of Article 260 cases in the event of noncompliance—can be a more powerful tool than it has appeared to be in recent years.

Finally, EU leaders must find their collective voice and use it to denounce attacks on the rule of law and other Article 2 values. Most EU leaders have failed to speak out forcefully against the attacks on the rule of law and democracy perpetrated by the regimes in Warsaw and Budapest. To its

credit, the European Parliament has spoken out clearly,²⁹ but the Commission has been much more restrained, and silence has reigned for the most part within the Council (with the exception of some moments of criticism of Orbán by Dutch Prime Minister Mark Rutte and Luxembourg Prime Minister Xavier Bettel). This restraint is the result of diplomatic norms in the EU; as leaders are hesitant when it comes to forcefully denouncing one another's actions. In addition, some EU leaders may be reluctant to point out that one or more governments sitting in the Council are not functioning democracies as admitting this could create serious problems under Article 10 TEU.³⁰ Whatever their reasons, the silence of EU leaders implies consent. Before the EU can hope to effectively arrest and reverse the ongoing destruction of the rule of law and democracy itself in Hungary and Poland, European leaders will need to find their voice and denounce these developments openly.

²⁷ Meijers Committee, 'Our Rule of Law Dashboard' (22 February 2023) <<https://euruleoflaw.eu/rule-of-law-dashboard-new/>>

²⁸ European Commission (n 19).

²⁹ European Parliament (n 17), para 2.

³⁰ John Cotter, 'To Everything There Is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2022) 47(1) *European Law Review* 69.

EU Rule of Law Today: Limiting, Excusing, or Abusing Power?

Dimitry Kochenov

The EU is no longer a club of liberal democracies only. This paper focuses on three lessons to be learnt from the ongoing fight to reverse this development: 1. that Article 7 fails us by design; 2. that the CJEU's rule of law success is disconnected from solving problems on the ground; and 3. that the continued framing of supranational rule of law as supremacy and legality is a problem. Contrary to emerging as a safeguard against the abuse of power and the destruction of rights, such 'supremacy rule of law' has the potential to undermine, rather than reinforce, adherence to Article 2 TEU.

Introduction: Three Problems

The Court of Justice of the European Union (CJEU) has emerged as the key force in ensuring that Article 2 TEU values—and especially the rule of law—are not empty promises.¹ The Court has played the critical role in this: the whole landscape of EU rule of law has changed, and values have prevailed before the Court, bringing about a veritable 'rule of law revolution':² values have been elevated into true law.³

However, the Union is no longer an organization uniting exclusively liberal democracies bound by the rule of law, and the lack of national-level success stories is glaring: PiS Poland is still PiS Poland

and Orbán's Hungary is still Orbán's Hungary.⁴ All the court victories and all the elaborate dances around the naïve panacea of Article 7 TEU notwithstanding, EU values are lost on the ground and should be recovered. A much more concerted effort is required from all the actors involved to reach this goal. In the meantime, the supranational political party groups, instead of helping, seem to have aggravated the situation and no sanctioning is in sight against the 'bad apples'.⁵

It is necessary to be clear about three points when designing future steps to ensure values are upheld: 1. Article 7 TEU fails us by design; 2. CJEU's rule of law success needs to be treated with caution

¹ Regarding Article 2 values see Jan Wouters, 'Revisiting Art. 2 TEU' (2020) 5 *European Papers* 255 and Marcus Klamert and Dimitry Kochenov, 'Article 2 TEU' in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed, Oxford University Press 2023). For the rule of law specifically see Koen Lenaerts, 'The Rule of Law and the Constitutional Identity of the European Union' (*Europejski praven pregled*, 5 March 2023); Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) 14 *Hague Journal on the Rule of Law* 107.

² Luke Dimitrios Spieker, *EU Values before the Court of Justice* (Oxford University Press 2023); Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case-Law of the Court of Justice' (Stockholm, SIEPS 2021:3).

³ Kim Lane Scheppele, Dimitry Kochenov, and Barbara Grabowska-Moroz, 'EU Values Are Law, After All' (2020) 39 *Yearbook of European Law* 3.

⁴ Laurent Pech and Kim Lane Scheppele, 'Illiberalism within' (2019) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁵ R. Daniel Kelemen, 'Europe's Other Democratic Deficit' (2017) 52 *Government and Opposition* 211; Cf Dimitry Kochenov and John Morijn, 'Augmenting the Charter's Role in the Fight for the Rule of Law in the European Union' (2021) 27 *European Public Law* 759; John Morijn, 'Responding to "Populist" Politics at EU Level' (2019) 17 *International Journal of Constitutional Law* 617.

given the disconnect from solving the problems on the ground; and 3. the emerging ‘supremacy rule of law’ tendency potentially undermines, rather than reinforcing adherence to Article 2 TEU. The upshot of these three lessons is that ‘EU lawlessness law’—which rather than constraining power actively obstructs such constraints—could be knocking on our doors in the guise of the rule of law.⁶ This could potentially be much more problematic than the national-level backsliding—especially given the peculiar nature of EU democracy and the character of the principle of supremacy.⁷

1. Article 7 is unusable in a successful EU

Article 7 TEU has puzzled commentators: *the* instrument in the Treaties to enforce the EU’s values has ultimately played no role whatsoever in the recent rule of law developments, especially compared with the reinterpretation of the scope and substance of Articles 2 and 19 TEU.⁸ Countless discussions on the activation of Article 7(1) TEU against Poland and Hungary have accompanied the ongoing backsliding, though many of them fail to pass a basic fact-check.⁹ It is clear, though, that Article 7(1) is simply the wrong legal basis. When the so-called Polish Constitutional Tribunal deems key principles of the EU and the ECHR incompatible with the national constitution,¹⁰ this is not merely a ‘threat’ to Article 2—it is an outright assault on EU values. But Article 7(1) does not cover this situation, and therefore any decision on the matter taken under Article 7(1) misses the point.

To understand why Article 7 is unusable, it is crucial to consider the underlying mechanics of this provision. The creation of the internal market goes hand in hand with deep economic interpenetration, aimed at making hostilities between the Member States impossible: economic interdependence was the tool purposefully chosen as to achieve the goal of peace. This has shaped the day-to-day reality of European integration, leaving no room for Article 7 TEU with its deeply politicized and confrontational logic which runs counter to the rationale and objectives of the internal market. One important factor making it unlikely to be used effectively is that rich Member States potentially stand to suffer significant losses as a result of taking a principled, value-laden position. At the same time, it is not guaranteed that there will be a positive outcome in terms of a lasting restoration of values in the backsliding Member States. This is why it would be naïve to expect too much of Article 7 TEU; such expectations would not be informed by the legal-historical vision of EU integration.¹¹

The bitter lesson learnt here is that the values Article 7 TEU aims to defend are by no means indispensable for the successful functioning of the internal market. This is why the Polish economy can keep growing, generating significant returns, despite the fact that the Polish government fails to respect the values of the Union: the *acquis* of the Union is not necessarily about the values,¹² and Article 7 TEU will likely never be used as a political tool to attack successful economic integration.¹³

⁶ For a definition of lawlessness law see Dimitry Kochenov and Sarah Ganty, ‘EU Lawlessness Law’ (2022) Jean Monnet Working Paper 2/2022. ‘Tempering power as an ideal’ is used by Martin Krygier in ‘Tempering Power’ in Maurice Adams and others (eds), *Bridging Idealism and Realism in Constitutionalism and Rule of Law* (Cambridge University Press 2016).

⁷ J.H.H. Weiler, ‘Epilogue: Living in a Glass House’ in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight* (Cambridge University Press 2016); Andrew Williams, *The Ethos of Europe* (Cambridge University Press 2010); Dimitry Kochenov, Gráinne de Búrca and Andrew Williams (eds), *Europe’s Justice Deficit?* (Hart Publishing 2015).

⁸ Pech and Kochenov (n 2).

⁹ Cf Laurent Pech and Jakub Jaraczewski, ‘Systemic Threat to the Rule of Law in Poland’ (2023) CEU Democracy Institute Working Paper 2023/2.

¹⁰ Adam Ploszka, ‘It Never Rains but It Pours, The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional’ (2022) *Hague Journal on the Rule of Law* (online first).

¹¹ Could this question the potential deployment of Article 259 TFEU, which allows for direct inter-state infringement actions, too? Dániel Hegedüs, ‘Exploring the Potential and Political Feasibility of “Biting Intergovernmentalism” in the EU’ (2023) re:constitution Working Paper 15/2023.

¹² Dimitry Kochenov, ‘The *Acquis* and Its Principles’ in András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford University Press 2017).

¹³ Dimitry Kochenov, ‘Article 7 TEU’, in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

There are such precedents, however, when it comes to political-legal moves with negative economic consequences: a recent CJEU ruling effectively outlawed intra-EU bilateral investment treaties. This is a disastrous blow to the rule of law as Western investors in backsliding Member States are now obliged to face hijacked local courts, where effective protection of rights is hardly possible, even if the ruling has so far been largely inconsequential outside of the EU legal order.¹⁴

2. The rule of law cannot be just another supremacy tool

In the absence of Article 7 TEU as a relevant tool, the CJEU has done a lot to reinforce the rule of law claims of the EU legal order beyond the self-referentialism of *Les Verts*,¹⁵ albeit with limited success on the ground in the Member States concerned.¹⁶ In the hands of the Court, the rule of law has emerged as a crucial tool to reinforce the supremacy of EU law—a triumph of procedure over substance; power over justification.¹⁷ Such functional aspects of the rule of law in the EU, when pushed to the extreme, provide the basis for the effective instrumentalization of the principle going against its *raison d'être*. This entails the deployment of the rule of law to delegitimize normative claims not originating from the EU's supranational legal order, thus weakening the rule of law in the EU as a key tool to temper power and prevent its abuse.¹⁸

It is quite evident that 'supremacy' has nothing to do with the rule of law. Worse still, claims to the contrary are potentially dangerous, especially in the complex context of multi-level governance, where the scope of national and supranational power is not set in stone. The Court's explicit mentioning of supremacy as an argument for rule of law engagements has rightly attracted criticism,¹⁹ because the concept of 'supremacy rule of law' is quite different—if not the opposite—to the meaning of the rule of law that Article 2 TEU seems to demand. Such 'rule of law' could also be read—and is indeed read by the Court—as a requirement to step aside when the *Herren der Verträge*, our 'Masters of the Treaties' are guilty of abusing the law, thus forgetting about the law altogether under the pretext of legality, no less. We witnessed their interference with the Court's own composition in violation of the Treaties, the Statute of the Court and the key principles enforced by the same Court at the national level in the *Sharpston* cases, which will forever remain a blemish on the Court's rule of law track-record.²⁰ A similar example is the placement outwith the law of the outsourcing of human rights abuses, as happened in the *EU-Turkey Deal*.²¹ The infamous reference to EU's legal exceptionalism to justify a failure to subscribe to ECHR rights in *Opinion 2/13* is another case in point.²² This list is growing fast, giving rise to worries about the nature of the rule of law as embraced and promoted by the EU.

¹⁴ Wojciech Sadowski, 'Protection of the Rule of Law in the European Union through Investment Treaty Arbitration' (2018) 55 *Common Market Law Review* 1025; Dimitry Kochenov and Nikos Lavranos, 'Achmea versus the Rule of Law' (2022) 14 *Hague Journal on the Rule of Law* 195.

¹⁵ In Case 294/83 *Parti écologiste 'Les Verts' v Parliament* EU:C:1986:166, para 23, the Court stated that the EU is a 'community based on the rule of law' because it is bound by law.

¹⁶ Dimitry Kochenov, 'De Facto Power Grab in Context' (2021) XL *Polish Yearbook of International Law* 197.

¹⁷ *ibid.*; Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 74.

¹⁸ See Krygier (n 6).

¹⁹ Loïc Azoulay, 'Editorial Comments: EU Law between Common Values and Collective Feelings' (2018) 55 *Common Market Law Review* 1329, 1332.

²⁰ Order of 16 June 2021, Case C-684/20 P *Sharpston v Council* EU:C:2021:486; and Order of 16 June 2021, Case C-685/20 P *Sharpston v Council* EU:C:2021:485. Dimitry Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member State Power after the Sharpston Affair' (2021) 28 *European Law Journal* 262.

²¹ Thomas Spijkerboer, 'Bifurcation of People, Bifurcation of Law' (2017) 31(2) *Journal of Refugee Studies* 232; Bas Schotel, 'The EU-Turkey Statement and the Structure of Legal Accountability' in Eva Kassoti and Narin Idriz (eds), *The Informalisation of the EU's External Action in the Field of Migration and Asylum* (Springer 2022).

²² *Opinion 2/13 Accession of the EU to the ECHR* EU:C:2014:2454. Cf Kochenov n 17 (and the literature cited therein).

The recurrent reference to the ‘rule of law’ in this way not only discredits other voices, including substantive accounts of rights, it also justifies non-intervention in the face of potential abuse of power. This is precisely the opposite of what the rule of law as an ‘institutional ideal’ is intended to achieve.²³ We might call this understanding of the rule of law ‘Supremacy rule of law’. It is, in essence, a move away from the necessary dialogical understanding of the essential elements of the European legal space—a step towards ‘autocratic legalism’.²⁴ It is also a move away from the protection of fundamental rights and values the EU was created to establish, reinforce, and uphold. Worse still, the inability of the CJEU to make up its mind on the vital issue of what it means to be an ‘independent court established by law’ in the EU legal context (such ambiguity is necessary to leave the CJEU enough ground to play with ‘supremacy rule of law’ after the loss of face of the *Sharpston* cases) has led to a proliferation of ‘standards’ of judicial independence, all of which are deficient. These ‘standards’ are not only internally and mutually contradictory, but they also apply differently to the different levels of European judiciary, and thus fall short of the minimum requirements outlined by the European Court of Human Rights (ECtHR).²⁵

The CJEU should think twice before further deploying this supremacy rule of law rhetoric, as it risks further undermining the rule of law in the

Union, thereby hurting its own legitimacy and fueling the populists.²⁶ One example of where it could be argued that the Court undermines the rule of law is the *LM* case-law and its progeny: the Court values the idea of ‘mutual trust’ above the protection of fundamental rights and adherence to the rule of law.²⁷ Further, the presumption of the CJEU, entertained in the *Sharpston* cases and justified by arguments invoking the rule of law, that the action of the sovereign should *not* be reviewable constitutes a denial of what the principle of the rule of law is about. It signifies, in essence, that not even the lowest standards of lawful composition and independence apply to the CJEU itself, undermining the very idea of Article 19 TEU minimal requirements, let alone respect of ECHR law.

The self-serving cacophony is amplified with the Court departing from basic ECtHR standards, as seen in the case *Getin Noble Bank*.²⁸ In that judgment the CJEU refuses to give the ‘court or tribunal of a Member State’ an EU law meaning. It simply presumes that national courts have been ‘established by law’, however, this contradicts final decisions of national courts,²⁹ its own case-law,³⁰ and Article 6(1) ECHR as interpreted by ECtHR³¹ (especially in the case of *Advance Pharma*,³² rendered *before* the *Noble Bank* decision).³³ This case-law can only be explained by the desire to whitewash the shame of the *Sharpston* cases, which

²³ Gianluigi Palombella, ‘The Rule of Law as an Institutional Ideal’ in Leonardo Morlino and Gianluigi Palombella (eds), *Rule of Law and Democracy* (Brill 2010).

²⁴ See Dimitry Kochenov and Matthijs van Wolferen, ‘The Dialogical Rule of Law and the Breakdown of Dialogue in the EU’ (2018) EUI Working Paper LAW 2018/01. For autocratic legalism see Kim Lane Scheppele, ‘Autocratic Legalism’ (2018) 83 *The University of Chicago Law Review* 545.

²⁵ Dimitry Kochenov and Petra Bárd, ‘Kirchberg Salami Lost in Bosphorus’ (2022) 60 *Journal of Common Market Studies* 150.

²⁶ Dariusz Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *Common Market Law Review* 623; Paul Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15 *European Constitutional Law Review* 519.

²⁷ Case C-216/18 PPU *Minister for Justice and Equality v LM* EU:C:2018:586.

²⁸ Case C-132/20 *Getin Noble Bank* EU:C:2022:235; Barbara Grabowska-Moroz, ‘Annotation of *Getin Noble Bank*’ *Common Market Law Review* (forthcoming).

²⁹ Polish Supreme Court, Resolution of 23 January 2020 (implementing the *AK* judgment of the CJEU), para 1.

³⁰ Joined Cases C542/18 RX-II and C543/18 RX-II *Simpson and HG* EU:C:2020:232.

³¹ Laurent Pech and Sébastien Platon, ‘How Not to Deal with Poland’s Fake Judges’ Requests for a Preliminary Ruling’ (*Verfassungsblog*, 28 July 2021) <<https://verfassungsblog.de/how-not-to-deal-with-polands-fake-judges-requests-for-a-preliminary-ruling/>>. The Court’s statement in Case C-132/20 *Getin Noble Bank* para 73 that the Court ‘was not aware’ of the unlawfulness of the appointment of the sole judge making the reference in the case could not be further from the truth.

³² ECtHR, *Advance Pharma v. Poland*. No. 1469/20, judgment of 3 February 2022.

³³ Paweł Filipek, ‘Drifting Case-Law on Judicial Independence’ (*Verfassungsblog*, 13 May 2022) <<https://verfassungsblog.de/drifting-case-law-on-judicial-independence/>>.

hinted that the CJEU itself could fall short of meeting the basic standards of ‘established by law’ under Article 6 ECHR. The strong belief of the CJEU in what I have branded ‘supremacy rule of law’, is nothing but an abuse of the principle, which the CJEU is entrusted to protect. Thus, recent CJEU case-law can be said not only to be entirely ineffective at the national level where the problems which it intended to address rest, but may also be creating more EU-level problems, in the long run, than it has solved.

3. ‘Lawlessness law’ via the triumph of the rule of law?

In a supranational system immune to traditional democratic control,³⁴ deploying the rule of law to silence dialogue about the *substance* of the law, and to limit Socratic contestation all while diminishing the level of human rights protection, would be to make an ‘agreement with Hell’³⁵—a variation on Evil Law.³⁶ Professor Sajó is right: restoring rule of law is very difficult.³⁷ Restoring supranational rule of law from a legalistic affirmation of supremacy benevolent to the wishes of the *Herren der Verträge* to a bulwark against the abuse of power could be much harder still.

The problem is illustrated by the persistent mass deaths in the Mediterranean, which is very much of EU’s making, and is also seemingly ‘legal’. We witness legal marginalisation of racialised non-citizens, which results in the physical annihilation of thousands in the liminal spaces by the concerted efforts of the EU and its Member States, as well

as EU-funded foreign proxies. The sea has been transformed into a mass grave of humongous proportions. Many of those who do not die are enslaved, tortured, and held ransoms in EU-funded prisons where there is no law.³⁸ The main tool here is what Sarah Ganty and I have termed ‘EU lawlessness law’.³⁹ This lawlessness law is a steadily evolving system of legal arrangements purposefully aimed at removing any accountability. It is also aimed at making it impossible to lodge enforceable rights claims from anywhere in the boundary context, at least when the claimant is a racialised ‘other’ attempting to reach European soil from the formerly colonized parts of ‘Eurafrica’ and beyond.⁴⁰

EU lawlessness law is a collection of legal rules and practices that make the taming of those who abuse power extremely difficult, while honoring the law’s supremacy remains a must—a sub-type of ‘supremacy rule of law’. Like Orbán’s constitution, it is 100% legal, yet its purpose is in direct conflict with the values of Article 2 TEU. Among the tools is the fetishisation of the limits of the Court’s power to *not* stop the abuse by the sovereign, as in the *Sharpston* cases. It moves agreements with principled human rights implications outside the scope of EU law. It sets up enormous, intrusive and unaccountable funding schemes to establish, preserve, and sponsor the export of rights violations outside the EU’s borders.⁴¹ Its border agency, Frontex, has covered up crimes and shared vital intelligence with EU-sponsored thugs hunting the racialized passport-poor on the Union’s behalf.⁴² Torture, pushbacks, and killing of

³⁴ Weiler (n 7).

³⁵ Jack M. Balkin, ‘Agreements with Hell and Other Objects of Our Faith’ (1997) 65 *Fordham Law Review* 1703.

³⁶ Anna Lukina, ‘The Paradox of Evil Law’ in Mark Tushnet and Dimitry Kochenov (eds), *Research Handbook on the Politics of Constitutional Law* (Elgar 2023).

³⁷ András Sajó, ‘On the Difficulties of Rule of Law Restoration’ (2023) CEU Democracy Institute Working Paper 2023/08.

³⁸ Ian Urbina, ‘The Secretive Prisons that Keep Migrants out of Europe’ *New Yorker* (28 November 2021).

³⁹ Kochenov and Ganty (n 6).

⁴⁰ On the EU’s beginnings as a colonial project, see, Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold Story of European Integration and Colonialism* (Bloomsbury 2014).

⁴¹ Clare Castillejo, ‘The European Union Trust Fund for Africa’ (2017) German Development Institute Briefing Paper 5/2017; Caterina Molinari, ‘Digging a Moat around Fortress Europe: EU Funding as an Instrument of Exclusion’ in Tesseltje de Lange, Willem Maas and Annette Schrauwen (eds), *Money Matters in Migration* (Cambridge University Press 2021).

⁴² See Urbina (n 38); Melanie Fink, *FRONTEX and Human Rights* (Oxford University Press 2019); Roberta Mugianu, *FRONTEX and Non-Refoulement* (Cambridge University Press 2016); OLAF final report on Frontex, Case No OC/2021/0451/A1 <<https://fragdenstaat.de/dokumente/233972-olaf-final-report-on-frontex/>>.

thousands of innocent people—either directly or via proxies—happen in an atmosphere of near-total unaccountability, and seemingly beyond the reach of the law of the Union, signifying absence of the rule of law. The EU acts in concert with its Member States, rather than alone,⁴³ creating a system too complex for there to be meaningful accountability, while horrible mass crimes are committed by public authorities and their agents.⁴⁴

No serious discussion of the rule of law crisis in the EU can take place without a complete multi-level and cross-field appraisal of the rule of law situation, the practical permutations of Union competences and powers, as well as the understanding of the principle as it is applied at the different levels

of the law. The triumphant Court combines a steep increase in the scope of the supranational involvement with the rule of law via the fresh interpretation of Articles 2 and 19 TEU, but this cannot do away with the main meaning of the rule of law, which consists in tempering power. The emerging ‘supremacy rule of law’ is deeply problematic, as it points in the direction of a steady desire to *excuse* the misbehaving sovereign even when core principles are violated, judiciaries are interfered with, and innocent lives are on the line. To view the rule of law as a ground *not* to speak truth to power is a betrayal of the essential rationale underpinning the principle. This approach must be reconsidered.

⁴³ Cf Grażyna Baranowska, ‘Pushbacks in Poland’ (2021) XLI *Polish Yearbook of International Law* 193.

⁴⁴ In the absence of usable European procedures, the EU and its officials have been brought in front of the International Criminal Court for these crimes: Omer Schatz, Juan Branco and others, ‘EU Migration Policies in the Central Mediterranean and Libya (2014–2019)’ (2019) Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute <<https://www.statewatch.org/media/documents/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf>>.

Article 7 TEU: Difficult by Design

Andreas Moberg

This contribution examines two aspects of Article 7 TEU and one aspect of its legal context: the article's complex construction and the fact that there is practically no regulation of the consequences of a Council decision under that article, and the teleological nature of international law. It argues that these three factors help explain why the Council has not, and probably never will make use of the article.

1. Uncertainty and Legitimate Inaction

One often repeated reflection on why the Council has not acted under Article 7 of the Treaty on European Union (TEU) concerns an alleged 'lack of political will'. What is meant by this locution is basically that though a convincing argument could be made that the criteria for a decision to apply the article are met, no such decision is taken. It follows that a 'lack of political will' to apply the article is the same thing as 'sufficient political will' not to apply the article.

In this sense, the rule in Article 7 TEU seems to be working as intended (although the intention behind the specific formulation of the rule may not be to everyone's liking). This causes a lot of frustration, much like the frustration surrounding the veto-right in the United Nations Security Council.

Sometimes the frustration leads scholars to conclude that it is not possible to make a legal assessment of Article 7 TEU, or Article 2(4) of the Charter of the United Nations (UNC), only a non-legal (often referred to as 'political') assessment. I strongly disagree.

The assessment is legal, but it follows the theoretical-normative—as opposed to an empirical—logic of public international law. This is different from the logics of supra-national and national law primarily because its normative power is derived from expression of consent rather than assertion of force. There are numerous

consequences of this difference. One is that it is legitimate to base a decision on teleology rather than on the deontological application of law on facts; in other words, that it is legitimate to take all potential consequences of a decision—related to the matter at hand or not—into account before making the decision. This means that if a state does not want to accept that the criteria for applying Article 7 TEU are met, it is not legally bound to do so. The state's reasons for not taking a decision do not matter much in the case at hand (although they do matter for the normative power of the legal system in the long term). Therefore, the assessment made is a legal assessment.

This reflection does not help when it comes to finding ways of using Article 7 TEU to ameliorate the rule of law backsliding we are witnessing in the European Union today. However, it directs our attention towards an analysis of the construction of Article 7 TEU. Is there something in the way it has been designed that makes it less effective in remedying violations of the rule of law? In this paper I argue that there is. The argument relies on the assumption that public international law requires the expression of consent. This does not mean that the lack of consent always means a negative decision. In fact, it can often mean a non-decision. A wide margin of interpretation regarding legal criteria and the lack of foreseeability regarding the consequences of a decision act as catalysts that facilitate legitimate foot-dragging when it comes to making a decision.

I argue that the abundance of criteria to be met, in combination with the lack of procedural rules specifying the *consequences* of the various decisions under Article 7 TEU must be considered when analysing the reasons why the Council has not acted under Article 7(1) TEU, and why no one has submitted a proposal to the European Council under Article 7(2) TEU.¹ The gist of the argument is that the formulation of Article 7 TEU makes it (too?) easy for the Member States to *not* take a decision.

In the next section I will demonstrate how the large number of wide-margined criteria in Article 7 TEU makes it easier than it otherwise would be for Member States to legitimately avoid making decisions on a clear risk of a serious breach. In the subsequent section I show that there are very few consequences foreseen in the legislative framework of Article 7 TEU, which also cools down the process. Finally, I conclude by reiterating that the lack of foreseeability regarding the consequences of a decision under 7 TEU, seen from the perspective of each of the 27 government representatives or heads of state or government—in combination with the relatively high number of legal criteria in the article which exponentially increases the number of potential disagreements on interpretation—will only increase the probability of a non-decision on any proposal tabled. This is a consequence of the fact that Article 7 TEU is governed by the logic of public international law, which accepts teleological approaches to a much higher degree than the corresponding logics of supranational or national law.

2. The Legal Requirements for a Decision under Article 7 TEU

Article 7 TEU provides a rather complex instrument which could be used both as a preventive tool (Article 7(1) TEU) and as a

sanctioning tool (Articles 7(2)–7(4) TEU). There are several criteria, both material and procedural in nature, to be evaluated by the Council or the European Council respectively before adopting decisions. The material criteria are not specified in the article, which makes the application even more difficult, and there are no preparatory acts and no previous cases to draw inspiration from.

Following the submission of a *reasoned proposal* the Council, acting under Article 7(1) TEU, *may* determine that there is a *clear* risk of a *serious* breach of *the values* referred to in Article 2 TEU. A literal interpretation of the text yields that there is no obligation on the Council to make such a determination, that the risk of a breach has to be *clear*, that the breach in question has to be *serious* and that the breach must be a breach of *the values* (NB the plural form and definite article) referred to in Article 2 TEU. Most striking, however, is that the paragraph does not explain what a *breach* is, nor what materials to consult to gather information on what actually constitutes a breach.

Furthermore, the procedural requirements are that the European Parliament must give its consent (by two thirds of the votes cast representing a majority of its component Members),² before the Council acts by a majority of four fifths (i.e., 22 of 27 votes), having first *heard* the Member State in question.

Article 7 TEU also stipulates that the European Council may, acting under Article 7(2) TEU, determine that a Member State is violating the values referred to in Article 2 TEU. Such a decision requires that the breach is *serious and persistent*. The procedural requirements for such a decision, which requires unanimity, are that the European Council is prompted to act by a *proposal* and that the consent of the European Parliament has been obtained.³

¹ Using a similar approach, I have in previous work on Article 7 TEU pointed out that the article's hybrid nature (being a composite of two different legal logics: the intergovernmental and supranational) makes it unnecessarily complicated to apply. Andreas Moberg, 'Who will be in charge of upholding the Rule of Law in the EU? An assessment of proposed changes to the EU's Rule of Law Toolbox' (2020) 2019–20 (3) *Juridisk Tidskrift* 576; Andreas Moberg, 'Can We Expect Compliance with the Rule of Law Without the Rule of Law?' in Antonina Bakardjieva Engelbrekt, Andreas Moberg, and Joakim Nergelius (eds), *Rule of Law in the EU 30 Years After the Fall of the Berlin Wall* (Hart Publishing 2021).

² Article 354 Treaty on the Functioning of the European Union (TFEU).

³ It is interesting to note that Article 7(2) TEU does not seem to require a *reasoned* proposal as does Article 7(1) TEU, although in this author's view it is unlikely that this difference would have any impact on a tabled proposal.

Once a determination by the European Council has been made, Article 7(3) TEU grants the Council the option to decide to suspend *certain* of that Member States' rights (those granted under the Treaties). The voting rights in the Council are specifically mentioned as included amongst those rights, but these rights are the only example given. The decision to suspend rights is taken by qualified majority.⁴

Finally, under Article 7(4) TEU, the Council *may* decide to vary or revoke any measures imposed. This means that the Council is not obliged to revisit a decision taken under Article 7(3) TEU, which seems unsatisfactory at least from the perspective of the state subjected to the sanctions. Decisions under Article 7(4) TEU are taken by the same procedure as under Article 7(3) TEU.

Returning to the question of establishing the correct interpretation of the material criteria, let us, for the sake of argument, imagine that the task of applying Article 7(1) TEU had been laid before the Court, instead of the Council. Then, it is quite likely that the exact meaning of legal terms such as *clear* and *serious* would have been argued by the parties. There would possibly be arguments regarding the meaning of 'the values', since different language versions convey different meanings.⁵ There could also be arguments regarding the meaning of the requirement to 'hear the Member State in question'. As regards Article 7(2) TEU, the term *serious* would most likely be interpreted in the same way as in Article 7(1) TEU, but bear in mind that nothing in Article 7(2) suggests that a prior determination under Article 7(1) TEU is required for its application. There would most likely also be arguments put forward regarding the correct interpretation of *persistent*.

On top of these examples, the terminology in Article 7(3) TEU would likely prove even more challenging. As mentioned above, several interpretations of the text are possible. A good example is how the word 'certain' is used in the first sentence of Article 7(3) TEU:

Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council.

One possible interpretation is that 'certain of the rights' means that not all rights stemming from the Treaties may be suspended but rather at most a selection of them. Another possible interpretation is that 'certain of the rights' means that a number of the rights (NB more than one) would be suspended should the Council make such a decision. If the former interpretation is correct, the question of which these rights are is not specified in the Treaties (apart from the fact that voting rights in the Council are included in the selection). If the latter interpretation is correct, there seem to be no limitation as to which rights under the Treaties may be suspended. This issue would definitely be litigated before a court, and to this author it seems likely that the former interpretation would prevail. That would leave the court with the difficult task to determine which rights to include amongst the *certain* rights.

All in all, Article 7 TEU is indeed a complex instrument, which to an extent could explain why the Council is taking so long to come to a decision.⁶

⁴ In this case, the majority required is at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these states (Articles 354 and 238(3)(b) TFEU).

⁵ The Swedish version for example, does not state values in the definite article plural form (*the values*), but instead uses the indefinite plural form (*värden*) which in Swedish means that violation of one of the values would be enough. In the English version, this is perhaps not as clear.

⁶ This analysis excludes the procedure followed when preparing the reasoned proposal itself. There is disagreement amongst the EU institutions as to whether that procedure forms part of the overall Article 7 TEU procedure, or not. The Council is adamant that the Commission lacks the competence required to even adopt such a procedural framework, see Council Legal Service Opinion on Commission's Communication on a new EU Framework to strengthen the Rule of Law—compatibility with the Treaties (doc. 10296/14). The Commission could, of course, argue that it must be able to adopt an internal procedure on how to practice the right to submit a reasoned proposal.

3. The Legal Consequences of a Decision under Article 7 TEU

For obvious reasons there is no empirical data on the legal consequences of decisions under Article 7 TEU. Therefore, the following discussion is mainly based on documentation produced by the Commission and the Council.

Article 7 TEU has been described as a preventative mechanism, and one can assume that the mechanism of prevention is a wish to avoid the consequences. However, Article 7(1) TEU does not specify any consequences following from the Council's determination of a clear risk of a serious breach of the values referred to in Article 2 TEU. The situation is similar regarding Article 7(2) TEU: a determination by the European Council indeed has consequences, but as mentioned above, the Treaties do not specify what these are in any clear manner.

The Commission has always prioritized work on prevention of violations of the rule of law rather than on the sanctioning, which may serve as an explanation to why there is very little to be found from the Commission regarding the shape and form of sanctions. On 15 October 2003, the Commission issued a communication on the revised Article 7 TEU⁷ which specifically avoided addressing the consequences of the activation of the procedure laid down in Article 7 TEU.⁸ The

Commission's 2014 Rule of Law Framework is completely devoted to the question of prevention.⁹ The reasoned proposal submitted to the Council in 2017 is almost exclusively, as would be expected, concerned with the prevention of further violations of the rule of law.¹⁰ Finally, in the Commission's 2019 communication presenting a 'Blueprint for Action' it appears as if the Commission to some extent has resigned and decided to rely on other means than Article 7 TEU when it comes to sanctions:¹¹ it focuses on the infringement procedure and the (then forthcoming) budget conditionality mechanism.

The Council is the only institution which has had a chance to actually produce a legal consequence from Article 7 TEU. However, the only outcome so far is the 'Standard modalities for hearings referred to in Article 7(1)' (adopted by the Council 18 July 2019) which lay down a procedure for the hearings held by the Council under Article 7(1), and it is (also) silent on the potential consequences of a decision under Article 7 TEU.¹² So far, the Council has held five hearings regarding alleged breaches by Poland since February 2018, and five hearings regarding alleged breaches by Hungary since September 2019.¹³

Thus, we must conclude that it is not yet clear what a decision under 7(1) would entail, nor is it clear what rights may be suspended under 7(3). What

⁷ Following the entry into force of the Nice Treaty (2003), Article 7 TEU was amended to let the Council act preventively when a situation amounting to a clear risk of a serious breach of the values common to all the Member States occurred. Previously, the treaty-based mechanism in Article 7 TEU was remedial only and could therefore only be used *post facto*.

⁸ The Commission explained: 'However, it [the Commission] does not address questions concerning the penalties that should be ordered by the Council against a Member State that is in default in accordance with Article 7(3) of the Union Treaty and Article 309 of the EC Treaty. The Commission considers that it would be well advised not to speculate on these questions. It prefers to approach Article 7 of the Union Treaty in a spirit of prevention of the situations to which it applies and in a concern to promote common values.' Commission, on 'Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based' (Communication) COM(2003) 606 final, p. 4.

⁹ Commission, 'A New EU Framework to strengthen the Rule of Law' (Communication) COM(2014) 158 final.

¹⁰ Commission, 'Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland' COM(2017) 835 final.

¹¹ Commission, 'Strengthening the rule of law within the Union: a blueprint for action' Communication COM(2019) 343 final. The impression of resignation from Article 7 TEU is equally strong in Commission, 'Further strengthening the Rule of Law within the Union: State of play and possible next steps' (Communication) COM(2019) 163 final, p. 3.

¹² Council, 'Standard modalities for hearings referred to in Article 7(1)', Doc. 10641/2/19, 9 July 2019.

¹³ While not qualifying as hearings, the Article 7-procedure against Poland has been discussed at nine General Affairs Council meetings since February 2018, while the Hungary case has been similarly discussed at four other meetings since November 2018.

is clear is that voting rights in the Council may be suspended, and since that clarification is made it is reasonable to assume that not all rights are able to be suspended, since a clarification would be redundant if that were the case.

4. Conclusion: Article 7 Is Not Designed to Be Used

The argument presented in this contribution is that the open-ended terminology chosen for the numerous legal criteria in Article 7 TEU, in

combination with the fact that the consequences of a decision under Article 7 TEU are not agreed upon in advance, creates unsurmountable obstacles for decision-making in the Council, especially given that the logic governing the decision-making is that of public international law.

The way Article 7 TEU is constructed means that there will never be a decision made unless all possible lines of argumentation that a criterion is *not* met are closed. For better or for worse, it is simply not constructed to be applied.

What Price Rule of Law?

Kim Lane Scheppele and John Morijn

In 2022, the European Commission and the Council of the EU jointly acted to freeze EU funds totaling more than €28.7 billion for Hungary and more than €110 billion for Poland, citing rule-of-law violations. The decisions were taken not just, or even primarily, using the new Conditionality Regulation designed for that purpose but were authorized using a variety of other legal tools to which rule-of-law conditionality was attached.

1. Introduction: Suspending EU Funds to Encourage Rule-of-Law Compliance

Over the last decade, Hungary and Poland have routinely topped global lists registering the farthest, fastest falls from robust democracy and rule of law. Many have been alarmed that this could happen inside the EU, which was supposed to be a club of democracies with high standards for the rule of law. The inability (or unwillingness) of EU institutions to effectively intercept this slide has shaken faith in the EU as a democratic model in the world and as a rule-of-law regime at home.

Autocratic attacks on constitutional institutions in Hungary (since 2010) and Poland (since 2015) were initially met by a European Commission that frequently expressed concern but only rarely used its enforcement powers to challenge these developments. Instead, the Commission kept inventing new tools that delayed the day of reckoning more than they solved the problem.¹ The Council of the EU (Council) had an even worse track record, failing to act decisively, even with regard to the two Article 7(1) referrals that could have sent serious warning signals to the rogue states.² The European Parliament has kept up a steady stream of pressure but has not had the power to act alone.

Suddenly, in 2022, the Commission and Council launched the most consequential action that they had yet taken against these rogue Member States

by freezing substantial swaths of EU funding and making the unfreezing of those funds conditional on substantial rule-of-law reforms. The decisiveness with which the institutions acted and the scale of funds involved have come as welcome surprises. That said, it is still not clear, at the time of writing (March 2023), precisely which funds and what proportion of those funds have been suspended, nor how those suspensions have been legally justified. This short policy brief describes what we know, at this point, about the complex set of funding suspensions that have been invoked to make EU Member States pay for their rule-of-law violations.

2. The Long Road to the Conditionality Regulation

The idea first arose in a letter written on 6 March 2013 by four EU Member State foreign ministers, expressing great concern over the state of the rule of law in the EU.³ After suggesting that ‘the Commission as the Guardian of the Treaties should have a stronger role’ in safeguarding the rule of law, the letter proposed ‘[a]s a last resort, the suspension of EU funding should be possible.’

At first, few had any idea how this might be done. The primary mechanism for dealing with challenges to fundamental values seemed to be Article 7 TEU, which had such high hurdles for activation that it was functionally a dead letter. The existing Regulations that the Commission

¹ Kim Lane Scheppele, ‘Treaties without a Guardian: The European Commission and the Rule of Law’ (2023) *Columbia Journal of European Law* (forthcoming).

² See R. Daniel Kelemen’s contribution to this volume.

³ Letter to José Manuel Barroso from Dr. Guido Westerwelle (Germany), Frans Timmermans (Netherlands), Villy Søvndal (Denmark), and Erkki Tuomioja (Finland), 6 March 2013.

could use to cut funds to a Member State, the Common Provisions Regulation (CPR)⁴ and the Financial Regulation,⁵ had been interpreted by the Commission to preclude sweeping *ex ante* suspensions. Instead, the Commission used them on a project-by-project, receipt-by-receipt basis in which specific projects and line items would be flagged for what were euphemistically called ‘corrections,’ at which point either the invoices submitted by the Member States for work done on those projects would not be paid by the Commission or money paid out in error to the Member State in question would be clawed back. The CPR did contain broad language⁶ that might allow for pre-emptive suspension of a broader swath of funds⁷ where rule-of-law violations threatened the proper spending of these funds. But the Commission did not accept the invitation to interpret its existing legal mandates broadly at that time.

Instead, the Commission opted to seek an explicit legal ground for suspending funds to rule-of-law-threatening Member States. The flagship Conditionality Regulation was tabled by the Juncker Commission near the end of its term in 2018, when the rule-of-law portfolio was still wielded actively by Frans Timmermans, one of the

four foreign ministers who originally penned the letter to the second Barroso Commission.

As it passed through the legislative process, the Conditionality Regulation was battered, narrowed and weakened, so that what began as an attempt to sanction rule-of-law violations by withholding EU funds became a law designed to protect the EU budget by withholding potentially corruptible funds until rule-of-law deficiencies could be corrected. The Regulation passed at the end of 2020⁸ in a contentious process that included a highly irregular intervention by the European Council⁹ and that was followed by an unsuccessful challenge to the Regulation by Hungary and Poland before the Court of Justice (ECJ).¹⁰ Because the European Council (with the Commission President as one of its members under Article 15(2) TEU) had intervened and promised Hungary and Poland that the Regulation would not be used until the Court of Justice had signed off on the Regulation’s legality, the first and so far only action against a Member State was not begun by the Commission until two months after the ECJ had given the Regulation a green light, more than four years after the Regulation was first proposed and more than a year after the Regulation came into effect.¹¹

⁴ Regulation (EU) 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions laying down common provisions [2013] OJ L347/320. This has since been superseded by Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions [2021] OJ L231/159. Note that a new CPR is negotiated for each new EU budget.

⁵ Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union [2012] OJ L298/1. This has since been superseded by Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union [2018] OJ L193/1.

⁶ Regulation (EU) No 1303/2013 (n 4), Article 142(1)(a), allowed for funds to be withheld if ‘there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution [...]’

⁷ Israel Butler, ‘Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework’ (Civil Liberties Union for Europe, March 2018) <<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3ldqCT-eB5iM9/view>>; R. Daniel Kelemen and Kim Lane Scheppele, ‘How to Stop Funding Autocracy in the EU,’ (*Verfassungsblog*, 10 September 2018) <<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>>.

⁸ Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433/1.

⁹ Kim Lane Scheppele, Laurent Pech, and Sébastien Platon, ‘Compromising the Rule of Law while Compromising On the Rule of Law’ (*Verfassungsblog*, 13 December 2020) <<https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/>>

¹⁰ Case C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98.

¹¹ Kim Lane Scheppele, R. Daniel Kelemen, and John Morijn, ‘The EU Commission has to Cut Funding to Hungary: The Legal Case’ Study (Solicited by the Greens/EFA Group in the European Parliament, 7 July 2021) <bit.ly/3xofAtT>

The Commission eventually triggered the Conditionality Regulation against Hungary in April 2022, proposing that money be suspended for only three programmes under the Cohesion Funds. The recommendation was not even that all of the funds in those three programmes be frozen, but only 65% of the funding allocated, or €7.5 billion.¹² Out of the many rule-of-law violations that the Commission could have attempted to correct with this powerful new tool, the Commission highlighted only the risk of corruption and required that the Hungarian government put in place a system to ensure that corruption would be detected and prosecuted. The Hungarian government scrambled to enact a series of anti-corruption laws in fall 2022 to avoid the funding suspensions, but the Commission—correctly in our view—determined that the Hungarian government’s actions were not sufficient to address the problem.¹³ When the Council reviewed the Commission’s recommendations in December 2022, it agreed by a qualified majority vote to back the Commission, though suspending even less funding—only 55% of these three programmes—in recognition of the fact that Hungary had taken at least some action in the right direction.¹⁴

All of that effort to enact, defend and deploy the Conditionality Regulation resulted, in the end, in the suspension of only €6.3 billion of funding and only to Hungary, despite the huge effect that rule-of-law deficiencies are having across the European Union. The Conditionality Regulation had accomplished something, but in substance not as much, so far, as its advocates hoped. Yet, a qualified majority in the Council had backed an unprecedented step linking the issuance of funds to rule-of-law reforms and that seemed to embolden the Commission to do more.

3. Beyond the Conditionality Regulation: Other Conditionality, Other Regulations

While most eyes were focused on the public drama around the Conditionality Regulation, other conditionality mechanisms were being quietly embedded throughout EU law, sometimes written explicitly into other Regulations and sometimes emerging in new interpretations of existing EU law by the Commission. New conditionality clauses making the flow of funds to Member States conditional on complying with European values were inserted into the Recovery and Resilience Regulation and into the new Common Provisions Regulation, both passed as part of the general package of laws enacted with the new EU budget. These may have attracted less attention, but they have been more powerful in the way that the Commission has deployed them to date. Thus far, more than €20 billion in additional EU funds allocated to Hungary have been frozen, above and beyond what the Conditionality Regulation suspended, and at least €110 billion have been withheld from Poland without the Conditionality Regulation ever being invoked.¹⁵ The Conditionality Regulation may have attracted the most attention, but it has not been, in the end, how the greatest budgetary pressure has been brought to bear on the two rogue governments.

The Conditionality Regulation passed through the legislative process at the same time as the Regulation on the Recovery and Resilience Fund (the centrepiece of the Next Generation EU Package).¹⁶ Rather than containing direct rule-of-law language, the Recovery Regulation was enacted with a logic of economic conditionality, in which issuance of recovery monies was to be linked to fulfilment of country-specific recommendations

¹² The decision to move forward in a formal procedure was notified to Hungary in September 2022. Commission, ‘Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary’ COM(2022) 485 final.

¹³ Scheppele described and assessed these reforms in detail in a series of blogposts with various coauthors published on the *Verfassungsblog* between October and December 2022 <<https://verfassungsblog.de/author/kim-lane-scheppele/>>.

¹⁴ Council Implementing Decision 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94.

¹⁵ The large difference in withholdings between the two countries does not measure the relative seriousness of the violations but instead reflects the relative size of the funding authorizations and therefore how much money was available to suspend. Poland has the largest absolute amount of EU funds allocated to it, while Hungary has the largest per capita amount so both sets of cuts are significant in the national budgets.

¹⁶ Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

under the European Semester. Initially, almost nobody noted¹⁷ that for some Member States these country-specific recommendations, long issued by the Council without any real consequences, actually contained strong rule-of-law-related language. As a result, for some Member States economic conditionality was linked to rule-of-law conditionality. The Recovery Regulation thus created a new path for approving (and withholding) funds. Each Member State was required to submit a National Recovery and Resilience Plan to be approved by the Commission and Council, and the Commission was empowered to refuse the plan or refuse the distribution of funds for carrying out the plan if country-specific recommendations were not addressed. When the Commission assessed Poland's and Hungary's proposed plans, it recommended to the Council approval of both, but with rule-of-law strings attached deriving from the country-specific recommendations for both Member States. The strings meant that none of the Recovery Funds would be distributed to either country until they met 'milestones' that restored judicial independence (for both Member States) and that fought corruption more effectively (in Hungary).

The Polish milestones, published in June 2022,¹⁸ were widely criticized—including by five Commissioners who made their dissenting views known¹⁹—because the milestones did not require

that Poland comply with all judicial independence decisions of the ECJ. Four European umbrella organisations of judges have even taken the Council and the Commission to the ECJ over this decision in order to have the approval of the Polish plans annulled.²⁰ Chastened, the Commission appeared to tighten up conditions, rejecting various attempts by Poland in summer and fall 2022 to pass reforms in order to unlock the money, reforms that in the view of nearly all observers did not adequately respond to the criticisms.²¹ So far, Poland has been denied access to all €35.4 billion authorized under the Recovery Fund.

Hungary's Recovery Plan was finally approved in December 2022, but with more exacting and detailed conditions, perhaps in response to the criticism that had erupted over the approval of the Polish plan. The Commission added to the prior conditions laid down in the Conditionality Regulation procedure requiring establishment of an anti-corruption programme a new and detailed list of changes that the Commission expected Hungary to enact in order to restore judicial independence, following up on country-specific recommendations.²² Until Hungary meets these conditions, it is blocked from accessing its entire €5.8 billion in Recovery Funds. That is why the Commission said its conditional approval contained 'super milestones.'

¹⁷ One of us did. John Morijn, 'The July 2020 Special European Council, the EU budget(s) and the Rule of Law: Reading the European Council Conclusions in their Legal and Policy Context' (*EU Law Live*, 23 July 2020) <<https://eulawlive.com/op-ed-the-july-2020-special-european-council-the-eu-budgets-and-the-rule-of-law-reading-the-european-council-conclusions-in-their-legal-and-policy-context-by-john-morijn/#>>

¹⁸ Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland [2022], Interinstitutional File: 2022/0181 (NLE), <<https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf>> and ANNEX <<https://data.consilium.europa.eu/doc/document/ST-9728-2022-ADD-1/en/pdf>>.

¹⁹ Jorge Liboreiro, 'Fair Deal or Cave in? Brussels' Green Light of Poland's Recovery Plan Reveals Loopholes' (*Euronews*, 3 June 2022) <<https://www.euronews.com/my-europe/2022/06/03/fair-deal-or-cave-in-brussels-green-light-of-poland-s-recovery-plan-reveals-loopholes>>; see also Laurent Pech, 'Covering up and Rewarding the Destruction of the Rule of Law, One Milestone at a Time' (*Verfassungsblog*, 21 June 2022) <<https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/>>.

²⁰ See 'The Good Lobby Profs Action in support of the unprecedented lawsuit against the Council of the EU's decision to approve Poland's Recovery and Resilience Plan' (*The Good Lobby*, 29 August 2022) <<https://www.thegoodlobby.eu/2022/08/29/tglprofaction/>>. A later case was filed against the Commission on similar grounds. The cases are now pending as T-530/22, T-531/22, T-532/22 and T-533/22 *European association of judges v Council* and T-116/23 *MEDEL and others v Commission*.

²¹ Notes from Poland, 'Poland closes judicial disciplinary chamber at heart of dispute with EU' (*Notes from Poland*, 15 July 2022) <<https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/>>.

²² Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary [2022], Interinstitutional File: 2022/0414 (NLE), <<https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf>> and ANNEX <<https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf>>.

But the biggest hits to rogue Member States' bottom lines came from an even more surprising source. The Commission has invoked additional conditionalities through the Partnership Agreements that the Commission negotiates with each Member State at the start of each EU budget cycle, specifying how funds from the EU budget should be spent. The new Common Provisions Regulation, enacted in 2021, now includes in Article 9(1) (read in conjunction with Article 15(1), second sentence and Annex III, fourth heading) a 'horizontal principle' (or 'enabling clause') requiring Member States to comply with the Charter of Fundamental Rights (CFR) in the implementation of the wide array of funds covered by the CPR.²³ In both the Hungarian and Polish Partnership Agreements, the Commission, using the qualified majority in the Council around the Conditionality Regulation as political cover, seems to have weaponized this additional conditionality tool to authorize freezing *all* CPR-covered funds allocated to both Hungary and Poland until the Member State in question has restored an independent judiciary as required by Article 47 CFR.

The EU-Hungarian Partnership Agreement was published on 22 December 2022²⁴ and the Commission has also issued a summary.²⁵ The Agreement covers €22 billion and includes 11 national programmes. While the Conditionality Regulation procedure against Hungary withheld €6.3 billion from three of the Cohesion Fund programmes (and it seems plausible that those programmes are among those allocated the €22 billion, though it is hard to tell), the Partnership Agreement seems to authorize withholding

all the funds covered by the Agreement. As a result, Hungary is facing the suspension of at least an additional €16.2 under the Partnership Agreement, more than the total withholdings under the Conditionality Regulation and Recovery Regulation combined, until it strengthens judicial independence. In addition, the Commission has withheld monies under some of these funding streams pending a) a repeal of the 'child protection law' that infringes LGBT+ equality rights, b) the restoration of academic freedom by changing the politicized boards of trustees of the newly privatized universities, and c) compliance with the right to asylum which the ECJ has repeatedly found that Hungary violates.

Taking into account money withheld under the Recovery Regulation, Conditionality Regulation and Partnership Agreement, then, it appears that Hungary is facing the suspension of at least €28.7 billion. And those are just the suspended funds that we know about so far.²⁶ Once the implementing decisions are published for the other programmes through which Hungary receives funds, we may find that even more funds are being withheld. For example, we know that Hungary has been cut off from both the Horizon Europe and Erasmus+ programmes,²⁷ a consequence of the Council Implementing Decision on the Conditionality Regulation that additionally bars any EU funds from flowing to the newly and controversially privatized universities. Since the funds that would flow to these blacklisted universities would primarily result from competitive proposals that have yet to be assessed, we cannot attribute a euro amount to this particular decision.²⁸

²³ Regulation (EU) 2021/1060 (n 4). The Regulation covers the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, the European Maritime, Fisheries and Aquaculture Fund, the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy.

²⁴ Commission Implementing Decision of 22.12.2022 approving the partnership Agreement with Hungary, C(2022) 10002 final <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)10002&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10002&lang=en)>.

²⁵ EU Cohesion Policy 2021–2027: Investing in a fair climate and digital transition while strengthening Hungary's administrative capacity, transparency and prevention of corruption (2022) <<https://commission.europa.eu/system/files/2023-01/partnership-agreement-hungary-2021-2027.pdf>>.

²⁶ A list of the implementing decisions explaining what, if any, conditionality is attached to each of the specific funds can be found here: <https://tinyurl.com/96yemd9r>. However, the list is incomplete.

²⁷ 'European Commission Suspends Erasmus+ and Horizon Europe Funding for Some Hungarian Institutions' (DZS, 23 January 2023) <<https://www.dzs.cz/en/article/european-commission-suspends-erasmus-and-horizon-europe-funding-some-hungarian-institutions>>.

²⁸ The University of Debrecen, one of the affected universities, has filed an action for annulment in the General Court challenging its inclusion on this blacklist. Case T-115/23 *Debreceni Egyetem v Council* (pending).

With regard to Poland, the suspensions, their amounts and their rationales are even murkier. Poland signed a—not yet released in English²⁹—Partnership Agreement with the EU on 30 June 2022,³⁰ in which the CFR conditionalities were limited to concerns about gender equality and the rights of persons with disabilities, with no mention of judicial independence under Article 47 CFR. Press reports in October, however, suggested that the Commission was withholding all of the funds subject to the Partnership Agreement after Poland had failed to carry out promised judicial reforms.³¹ Though those press reports do not mention the legal basis for this action, one might extrapolate from the Hungarian Partnership Agreement and accompanying implementing decisions on various EU funds and guess that the Commission invoked Article 47 CFR as a horizontal condition on the funds covered by that agreement. So far, however, no published documents from the Commission indicate the legal basis for withholding what seems to be about €75 billion in Cohesion Funds.³² And again, there may be even more funds withheld under other funding streams that are not visible because the implementing decisions for Poland—although many are listed in the register of Commission documents and dated 8, 12 and 19 December 2022—have not so far been released.³³

Poland has taken an additional hit to its EU funds because the Commission has been deducting from Poland's EU funding streams €1.5 million per

day in fines for Poland's continuing violation of decisions of the Court of Justice.³⁴ The amount owed is now approaching €500 million.

Between the Recovery Fund and Partnership Agreement suspensions, plus the docked fines, Poland is facing suspension of at least €110 billion. And all without any invocation of the Conditionality Regulation.

4. Can Freezing Funds Leverage Rule-of-law Reform?

Unlike anything else that the Commission has tried over the last ten years, suspending large amounts of money allocated to rogue Member States has generated action. Both Poland and Hungary have already enacted new laws to remedy the problems that stand between them and the money they expected to receive.

The Commission should remember that both the Polish and Hungarian governments are run by lawyers who have jointly created a comparative law institute to ransack other EU Member States' legal pantries for ideas that they can use to appear to comply with EU law even while undermining it.³⁵ With 'legalistic autocrats'³⁶ running the show in both countries, the Commission needs to ensure that it is not fooled by the appearance without the reality of compliance.

²⁹ The Commission register of documents does, however, mention the document 'Commission implementing decision approving the partnership agreement with the republic of Poland', C(2022)4640, 30 June 2022 <[https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)4640&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)4640&lang=en)>.

³⁰ EU Cohesion Policy: Commission Adopts €76.5 billion Partnership Agreement with Poland for 2021–2027 (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223> (with link to full Partnership Agreement in Polish only).

³¹ Wojciech Kosci, 'European Commission Reportedly to Withhold Most of Poland's Cohesion Funds for Rule of Law Failures' (*bne Intellinews*, 17 October 2022) <<https://intellinews.com/european-commission-reportedly-to-withhold-most-of-poland-s-cohesion-funds-for-rule-of-law-failures-259574/>>.

³² Zoltan Simon, 'How EU is Withholding Funding to Try to Rein In Hungary, Poland' *Washington Post* (2 January 2023) <https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html>.

³³ Evidence of the existence of this batch of documents can be found here: <https://tinyurl.com/yv6ans23>

³⁴ Jennifer Rankin, 'EU to Withhold Funds from Poland over Unpaid Fine' *Guardian* (8 February 2022) <<https://www.theguardian.com/world/2022/feb/08/eu-to-withhold-funds-from-poland-over-unpaid-fine-coal-mine>>.

³⁵ Edit Inotai, Claudia Ciobanu, and Miroslav German Sirotnikova, 'Jury's Out on V4 Comparative Law Institute' (*Reporting Democracy*, 26 November 2020) <<https://balkaninsight.com/2020/11/26/jurys-out-on-v4-comparative-law-institute/>>.

³⁶ Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545.

So far, the Commission has recognized fake compliance for what it is. Poland replaced the politicized judicial Disciplinary Chamber that the Court of Justice had condemned with a new one that nonetheless featured many of the same judges. The Commission refused to accept the new arrangement. Now Poland has run into domestic problems enacting more substantial reforms. The Polish government faces a divided Parliament in which some of its own supporters refuse to back down in the face of EU threats while others are eager to compromise and release the money. The new judicial reform programme has now landed on the docket of the Constitutional Tribunal, which itself is facing a new infringement action from the Commission for violating EU law.³⁷ So the restoration of the rule of law in Poland is not imminent.

In Hungary, Prime Minister Viktor Orbán has an impregnable parliamentary majority that will follow his orders. He also is particularly adept at

faking compliance with rule-of-law norms while undermining them. The Hungarian government already rushed through a set of laws establishing an anti-corruption programme in fall 2022 and the Commission rightly rejected the effort as insufficient. Now, the Hungarian government has put forward a plan to reform the judiciary which the Commission has deemed reasonable in theory, but that leading Hungarian human rights NGOs have already demonstrated to be more cosmetic than real.³⁸

Now that the Commission, using the qualified majority in the Council for the Conditionality Regulation as cover, has seized the power to leverage great change, it will need the strength to reject Potemkin reforms and the patience to distinguish paper promises from reality. Having surprised us all with massive suspensions of EU funds to the rogue states, the Commission now needs to hold the line and not pay the money until the rule of law is restored.

³⁷ Wojciech Kosc, 'Poland's EU Billions Now Depend on a Tainted Top Court Embroiled in a Civil War' (*Politico.EU*, 4 March 2023) <<https://www.politico.eu/article/poland-eu-billions-tainted-constitutional-court-civil-war-recovery-funds-julia-przylebska-jaroslaw-kaczynski-andrzej-duda-ngo-civic-platform/>>.

³⁸ Amnesty International, Eötvös Károly Institute and Hungarian Helsinki Committee, *Assessment of the Government's Draft Proposal on the amendment of certain laws on justice related to the Hungarian Recovery and Resilience Plan* (3 February 2023) <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf>.

Using Financial Tools to Protect the Rule of Law: the Case of Poland

Anna Wójcik

The contribution discusses the European Union's financial sanction mechanisms intended to foster rule of law compliance in Poland and the Polish government's response. Sanctions include the Court of Justice of the EU's periodic penalties, delaying approval of the Recovery and Resilience Plan funding, making the disbursement of funds conditional upon rule of law milestones, and linking European funds to observance of the Charter of Fundamental Rights of the EU. It finds that the effectiveness of these sanctions is hindered by political factors in Poland, despite the government's openness to cosmetic changes.

1. Introduction: Curtailment of Judicial Independence in Poland and the EU's Response

The rule of law crisis in Poland has been deepening for eight years and the European Union has diligently monitored the deteriorating situation, for example through the European Commission's flagship annual Rule of Law Reports. Beyond monitoring it, the EU has also sought to actively address the deterioration. Current tools for doing so include: ongoing political dialogue (between the EU and Poland and the EU and Hungary) on Article 7 of the Treaty on European Union (TEU) (the intensity of this dialogue varies over time); five infringement procedures initiated by the European Commission, and rulings from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) which have clarified standards on judicial independence in a number of cases arising from Poland and other EU Member States. Poland's politically captured Constitutional Tribunal has challenged some of

those rulings in a series of judgments passed since 2021.¹ The cases have been brought by, among others, the Prime Minister and the Prosecutor General (who is also the Justice Minister).

A significant dimension of the rule of law crisis in Poland is the curtailment of judicial independence.² As of early 2023, problems with judicial independence include:

- The composition and functioning of the Constitutional Tribunal, which is subject to a pending CJEU case brought by the European Commission (infringement procedure)
- The selection procedure for the National Council of the Judiciary which was changed in 2017
- Nomination and promotion of judges in a process which involves the National Council of the Judiciary. According to case law established by the CJEU and the ECtHR, this results in the

¹ Constitutional Tribunal, judgment of 14 July 2021, case P 7/20; and Constitutional Tribunal, judgment of 7 October 2021, case K 3/21.

² According to the Commission's annual rule of law reports, other dimensions include institutional issues related to checks and balances, media freedom and pluralism, and anti-corruption framework.

Polish courts lacking independence under EU law and the European Convention on Human Rights (ECHR)

- The harassment of judges who have criticized changes to the justice system through measures such as
 - A disciplinary system, which in 2018–2022 included the now-defunct Disciplinary Chamber in the Supreme Court, and still includes a so-called muzzle law (in force since February 2020) which is the subject of a pending CJEU case brought by the European Commission.³
 - The suspension of judges by the Justice Minister and by court presidents nominated by the Justice Minister.⁴
 - Various forms of repression by court presidents, including forced transfer of judges to other court departments.
 - The National Public Prosecutor's Office's special internal department prosecuting judges.
 - Smear campaigns against judges and disinformation in government-controlled public media and private media supporting the government, and in social media
- The politicization of the prosecution service and the harassment of prosecutors who criticize changes in the justice system, including forced transfers.

The EU institutions appear to have realized that this crisis cannot be resolved by political negotiations with Poland's government, which is led by the right-wing Law and Justice (*Prawo i Sprawiedliwość*, hereafter PiS) party, nor by legal arguments. In recent years they have therefore, in addition, tested various types of economic sanction against Poland. Economic sanctions are tools used to pressure a target country to comply with specific demands

or punish it for violating international norms or laws, and their effectiveness can be measured by the extent to which they achieve their intended goals.

The EU has used various types of such sanctions to attempt to foster compliance with the rule of law: CJEU-ordered periodical penalties for not complying with CJEU rulings relating to the rule of law; delaying the approval of Poland's Recovery and Resilience Plan, and making the disbursement of the relevant funds conditional on meeting rule of law 'milestones'; and linking the 2021–2027 Multi-annual Financial Framework (the EU's budget) to the Charter of Fundamental Rights of the EU, which entails that disbursement of funds from the budget may be halted over judicial independence concerns.

The remainder of this contribution examines three of these mechanisms and the response of the Polish authorities: the first mechanism is the imposition of penalties for non-compliance with the CJEU judgments (section 2). The second pertains to the acceptance of the Recovery and Resilience Plan, which is intended to provide financial support to Member States as they recover from the economic impact of the COVID-19 pandemic (section 3). The third mechanism involves the withholding of EU funds to Poland under the Multiannual Financial Framework (2021–2027) (section 4). It goes on to consider the impact of the broader political and economic landscape on compliance (section 5) and draws some conclusions regarding the factors which influence the effectiveness of such sanctions (section 6).

2. Fines Imposed by the CJEU

In 2021 the CJEU ordered record-high, daily recurring financial penalties in two cases against Poland, and the fines will continue to accrue until the Member State takes action to comply with the rulings. These were a €0.5 million daily fine in a case concerning the Czech Republic's dispute with Poland over the Turów coal mine and a €1 million daily fine in a pending case concerning the disciplinary system for judges.⁵

³ Case C-204/21 *Commission v Poland (Indépendance et vie privée des juges)*, pending.

⁴ On the 28th of March 2023, the Professional Liability Chamber in the Supreme Court reinstated the last suspended judge, Maciej Ferek, to the Regional Court in Kraków.

⁵ Order of the Vice-President of the Court of 21 May 2021. Case C-121/21 R *Czech Republic v Republic of Poland (Mine de Turów)* EU:C:2021:420; Order of the Vice-President of the Court of 14 July 2021, Case C-204/21 R *Commission v Poland* EU:C:2021:593.

The Czech Republic withdrew the complaint in the coal mine case in February 2022 after Poland agreed to pay €45 million to close the dispute. The Polish government contests the obligation to pay €68.5 million accrued fines to the EU. However, in practice the fines are being paid, albeit indirectly: the EU has deducted the amount from funds allocated to Poland's from the EU budget. At the time of writing, the fine accrued concerning the disciplinary system for judges exceeds €500 million. In 2021, the Polish Prosecutor General filed a motion to the Constitutional Tribunal regarding the conformity of the CJEU Vice-President's orders to impose such fines with the Polish constitution. The case is pending.⁶

3. The Recovery and Resilience Facility Fund and the Milestones

The Recovery and Resilience Facility (RFF) is a part of the 'Next Generation EU' instrument of investment and reforms intended to meet the economic and social challenges posed and exposed by the pandemic. In May 2021, the Polish government submitted the €35.4 billion recovery and resilience plan (RPP) to the European Commission. If approved, it would unlock €23.9 billion in grants and €11.5 billion in loans.

However, the Commission withheld its approval of the plan as a way of applying pressure on Poland to comply with the rule of law. It also set some conditions for the payment of RPP funds. In June 2022 the European Commission endorsed the Polish plan—five EU Commissioners voted against this—but it was decided that in order for funds to be released Poland would have to meet rule of law 'milestones'. Following the European Commission's endorsement, the Council of the EU (also in June 2022) adopted its implementing decision on the approval of Poland's plan and which set out the details.⁷ The milestones require:

- All disciplinary cases against judges to be adjudicated by a court, distinct from the current Disciplinary Chamber, that complies with EU law requirements derived from the case law of the Court of Justice and is thus independent, impartial, and established by law;
- That judges are not subject to disciplinary liability for submitting a request for a preliminary ruling to the Court of Justice, for the content of their judicial decisions, or for verifying whether another court is independent, impartial, and established by law;
- Procedural rights of parties in disciplinary proceedings to be strengthened;
- That all judges affected by the past Disciplinary Chamber rulings have the right to have these rulings reviewed, without delay, by a court that complies with EU requirements and is thus independent, impartial, and established by law.⁸

The reaction by legal practitioners in other Member States was swift and indignant: four European judicial associations referred the Council to the CJEU over this decision. According to their arguments in these cases, the Council's decision fell short of what is required to ensure effective protection of the independence of judges.⁹

Poland had already taken some measures to rectify the situation as a response to a judgment by the CJEU.¹⁰ In June 2020, the Polish authorities had amended the Supreme Court Act to dissolve the contested Disciplinary Chamber and replaced it with a new Chamber of Professional Liability.¹¹ But in July 2022, the European Commission found this solution insufficient to meet the milestones: the ECHR and EU law standards on judicial independence were still not met.¹² In response

⁶ Constitutional Tribunal of the Republic of Poland, Case K 8/21 (pending).

⁷ Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland [2022], Interinstitutional File: 2022/0181 (NLE) <<https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf>> and ANNEX <<https://data.consilium.europa.eu/doc/document/ST-9728-2022-ADD-1/en/pdf>>.

⁸ European Commission, NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375>.

⁹ Case T-530/22 *Medel* (pending).

¹⁰ Case C-791/19 *Commission v Poland* EU:C:2021:596.

¹¹ Law of 9 June 2022 on amendments to the Supreme Court Act and certain other laws, Journal of Laws, 2022, item 1259.

¹² *ibid.*

to the setting of the milestones, Poland repealed some provisions of the 'Muzzle Act' (in force since February 2020) which provided that disciplinary proceedings could be launched against judges for their rulings, for requesting preliminary rulings from the CJEU, and for examining the independence of judges. However, the European Commission President has criticized the fact that judges could still be punished for questioning judicial appointments.¹³

The Polish government stepped up its anti-EU rhetoric, but simultaneously, more concessions had to be made to meet the milestones. Importantly, some well-known judges who had been suspended from their roles for defending the rule of law were allowed to return to the bench. As of mid-March 2023, only one judge, Maciej Ferek, is still suspended. However, authorities continue to harass judges by other means.¹⁴

In December 2022, the Poland's new minister for EU affairs announced that constructive talks were held in Brussels and the government tabled another amendment to the Supreme Court Act,¹⁵ aimed at defusing the conflict with the EU. The Polish parliament adopted the amendment on 13 January 2023. But on 9 February 2023, in a surprise move, President Andrzej Duda decided not to sign the bill into law and referred it to the Constitutional Tribunal.¹⁶

The Constitutional Tribunal is itself considered to be a body which in its present state breaches the rule of law: on 15 February 2023, the European Commission referred Poland to the CJEU over precisely this issue.¹⁷ All judges and persons illegally occupying judicial posts on the Tribunal were appointed by the PiS party. At least six out of 15 judges argue that the Tribunal's President

presides over the court illegally.¹⁸ To make a ruling on the President's motion, a panel of 11 judges is required and it is uncertain whether this number can be gathered due to the internal dispute in the tribunal.

Suppose the Constitutional Tribunal finds that the amendment to the Supreme Court Act conforms to the Polish constitution and President Duda signs it into law. The Commission may still find that the milestones have not been met: the amendment does not address the disciplinary punishment of judges for questioning the legitimacy of judicial appointments and questioning the legitimacy of constitutional bodies. Moreover, the milestones demand that the disciplinary cases of judges are heard in a chamber in the Supreme Court that meets the EU and ECHR standards of independence. However, the new bill entails that such cases are heard in another court: the Supreme Administrative Court, which is contrary to the milestone's formulation.

Despite these problems, the Polish government seems confident that the funds under the plan will be eventually paid out: the government has opened competitions for grants from the RFP and is going to pre-finance the projects from domestic funds.

4. Withholding Funds from the Multi-annual Financial Framework

The third economic sanction mechanism is the possibility of freezing €76.5 billion of cohesion funds and money from seven other funds in the 2021–2027 Multi-annual Financial Framework (the EU's budget) to Poland.

Under the Common Provisions Regulation, the EU budget is linked to the Charter of Fundamental

¹³ 'Poland warns of repercussions if Brussels keeps blocking funds' (Reuters, 9 August 2022) <<https://www.reuters.com/world/europe/poland-warns-repercussions-if-brussels-keeps-blocking-funds-2022-08-09/>>.

¹⁴ The most comprehensive analysis of this harassment is only available in Polish: Mariusz Jąłoszewski, 'Jak w Polsce PiS i Ziobro prześladowa się niezależnych sędziów. Analiza Archiwum Osiatyńskiego [How independent judges are being persecuted in PiS and Ziobro's Poland: Analysis of The Wiktor Osiatyński Archive]' (OKO.press, 14 March 2023) <<https://oko.press/system-represji-wobec-sedziow-w-polsce-analiza-archiwum-osiatynskiego>>.

¹⁵ Draft No. 2870. Parliamentary bill of 13 December 2022 on amending the law on the Supreme Court and some other laws.

¹⁶ Constitutional Tribunal, case Kp 1/23.

¹⁷ Cf ECtHR, *Xero Flor w Polsce sp. z o.o. v Poland*, Appl. No. 4907/18, judgment of 7 May 2021.

¹⁸ The law specifying a six-year presidential term came into effect after Ms Julia Przyłębska was appointed the President of the Constitutional Tribunal.

Rights (Article 9 of the Regulation).¹⁹ As there is such a link, the Commission can argue that Poland has breached Article 47 of the Charter (right to an effective remedy and right to a fair trial) to justify withholding funding. Even if the Commission accepts that Poland fulfils the milestones set out in Poland's RFF plan, the Commission could still claim the breach of Article 47 of the Charter. This is because the milestones do not require Poland to remedy *all* rule-of-law breaches (for example, some of the problems around the composition of the National Council of Judiciary).

Some EU funding to Poland is also subject to partnership agreements between Polish national and regional authorities and the European Commission. These agreements stipulate that the beneficiaries of cohesion funds must respect the horizontal anti-discrimination law provisions in the Common Provisions Regulation. And these agreements could be used to justify withholding cohesion funding to municipalities which have adopted declaratory resolutions discriminating against lesbian, gay, bisexual, and transgender persons.²⁰ There is domestic opposition to such resolutions: the Polish Supreme Administrative Court has invalidated several of them following a motion from the Commissioner for Human Rights, and some local municipalities have also revoked them over the threat of losing EU funding.

5. Political and Economic Factors Determining Compliance

The rule of law crisis in Poland is inherently *political*: it results from and is dependent on the political decisions made by the fragile United Right coalition (led by PiS) that has been in power in Poland since 2015, by President Andrzej Duda and by the institutions PiS has subordinated, notably the Constitutional Tribunal, the National Council of the Judiciary, and parts of the Supreme Court. The crisis has an important economic dimension in

the sense that the government's attitudes towards the EU's rule-of-law compliance demands are linked to Poland's economic performance, which in turn influences the ruling coalition's approval ratings and electoral prospects, and their propensity to pick fights over the rule of law.

In 2019, PiS won a second term with 43% of the vote at a time of geopolitical stability in Poland's neighbourhood, rising living standards and annual GDP growth of 4.7%. These factors emboldened the government to pursue increasingly confrontational policies toward Brussels, which included stepping up repression of judges and prosecutors who sought to defend the rule of law, ostentatiously failing to implement the CJEU's rulings, and undermining them through the Constitutional Tribunal's abusive judicial review.

Russia's full-scale invasion of Ukraine in February 2022 changed Poland's security and economic outlook considerably, and for the worse. 2022 was marked by the highest inflation in a quarter of a century (14.1% on average) and in the fourth quarter Poland's GDP was shrinking—with the exception of the period of the COVID-19 pandemic, Poland has had continuous annual GDP growth since 1991.²¹

Poland will hold general elections in the autumn of 2023.²² The rule of law is not a prominent topic in the polarizing and vicious campaign, which has so far centred on cultural and economic issues. PiS leads the polls with 34%, followed by Platforma Obywatelska (PO, Civic platform) with 28%. But though it remains in the lead, PiS's ratings are much lower than before; they collapsed in the autumn of 2020 after the Constitutional Tribunal controversially restricted access to abortion in Poland, sparking the biggest nationwide protests in 30 years, and since then have not returned to 2019 levels.

¹⁹ Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions [2021] OJ L231/159.

²⁰ See Adam Ploszka, 'From human rights to human wrongs. How local government can negatively influence the situation of an individual? The case of Polish LGBT ideology-free zones' (2023) 27 (2) *The International Journal of Human Rights* 359.

²¹ For inflation figures see Announcement of the President of the Central Statistical Office of 13 January 2023 on the average annual index of prices for total consumer goods and services in 2022. For GDP, see Eurostat, GDP and employment flash estimates for the fourth quarter of 2022.

²² The exact date of the elections has not been announced yet, but 15 October 2023 is a possible date.

Polls in early 2023 show that Poles consider improving relations with the EU a priority after fighting inflation and improving health care. PiS politicians address this desire for improved relations by seeking to shift responsibility over the RFF deadlock and other conflicts to President Duda, the Constitutional Tribunal, and 'Brussels' (often identified with 'Berlin'). Nevertheless, when it comes to the financial aspects of the conflict—the frozen EU funds in particular—these may matter most to voters who are unlikely to vote for PiS. Socio-demographic characteristics of PiS core voters (older, less educated, outside of large cities) mean that the issue of EU money may not be crucial to them, since the EU-supported investments tend to support jobs, education, and long-term investments in economy, green and digital transformation, and mobility.

Another relevant political context is that, even if the conflict over the rule of law does matter to some voters, the playing field on which the election will be contested has been greatly tilted. For example, PiS changed the law regulating elections, increasing the number of polling stations in rural areas, and thereby making it easier to vote in these regions, relatively speaking. It also has a powerful propaganda machine of public and private media, and it can thus effectively mobilize its voters. Another factor is that, as an ageing society, Poland also has a much smaller percentage of the youngest voters who do not vote for PiS.

In 2023, it appears that PiS may, despite internal quarrels, implement some changes which increase compliance with the rule of law to please the European Commission. However, these are likely to be rather superficial, and will not touch those areas where the main problems lie: the National Council of the Judiciary and the Constitutional Tribunal.

But if PiS wins the elections in the autumn, we can expect their anti-EU rhetoric to intensify again and for this rhetoric to be accompanied by concrete actions. The government would likely announce further changes to the judiciary, which it accuses of sticking with left-liberal elites over the interests of ordinary people. However, it is not clear that these changes would necessarily go on to be implemented

by the future Justice Minister/Prosecutor General: the incumbent, Zbigniew Ziobro, has delayed and varied implementation. And PiS's attitudes may be softened by geopolitical and security considerations, not least in the context of cooperation with allies in NATO and the EU.

In the event of pro-EU opposition parties winning the election and forming a government, a key objective for such a government may be to restore the rule of law within Poland. The efficacy of such an undertaking is, however, contingent upon a number of factors. Notably, the President, Andrzej Duda, possesses the power to veto bills proposed by an opposition-led government. Furthermore, PiS MPs party may issue motions to the Constitutional Tribunal with the aim of invalidating newly introduced laws. These obstacles have the potential to limit the ability of a pro-EU opposition government to fully restore the rule of law in Poland.

6. Conclusions

To sum up, the financial mechanisms by means of which the EU is seeking to foster the rule of law compliance have had limited success in reversing the changes in judiciary that contribute to the rule of law backsliding; the changes introduced in response have so far mostly been cosmetic and core issues have not been addressed. Importantly, the Union has not used all financial mechanisms for protecting the rule of law against Poland including, in contrast with Hungary, the so-called conditionality mechanism.²³

Ultimately, the most critical factor affecting Poland's compliance with the rule of law is which party is in power. At present, despite the government's efforts to make changes that satisfy the European Commission and allow the RFF and other EU funds to be unlocked for 2021–2027, the ruling camp's internal conflicts are slowing the implementation of changes. And while these EU funds are essential to many Poles, they are less so to PiS's core voters.

Despite this limited effectiveness and the importance of factors which are outside the EU's

²³ Regulation (EU, Euratom) 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 [2020] OJ L433I/1.

control, as a matter of principle and to send a message to other Member States, the EU should continue to demand full alignment of the situation in the judiciary with the CJEU and ECtHR rulings and respect for the primacy of EU law. It should not be satisfied with changes that *'underenforce'*

these rulings. In particular, the EU should address the issue with the National Council of the Judiciary. Alongside the financial mechanisms examined here, it should use all available tools, both political (Article 7) and legal (infringement proceedings).

Using Financial Tools to Protect the Rule of Law: Internal and External Challenges

Xavier Groussot and Anna Zemskova

This contribution aims to elucidate some problematic aspects of the financial tools (such as the Conditionality Regulation, Recovery and Resilience Facility and other measures), used by the EU to ensure compliance with the rule of law. It draws attention to certain legal conundrums which challenge the functional effectiveness of these tools both within the Union (the internal dimension) and in the Union's relations with non-EU actors (the external dimension).

1. Introduction

Attempting to strengthen alignment with EU legal obligations by underpinning them with financial deterrents against failing to meet such obligations is not a new idea. And it is no accident that the EU's approach to ensuring legal protection and compliance with the rule of law as enshrined in Article 2 TEU has undergone a recent transformation in this direction. The EU appears to have left behind instruments such as Article 7 TEU, the Rule of Law Framework, and the Rule of Law Mechanism, and turned its gaze instead to more practical tools: financial incentives. These financial tools are commonly considered to *a priori* increase the chances of compliance with Union values but there are certain inherent uncertainties which may limit their effectiveness.

In this contribution we intend to elucidate the legal conundrums affecting the operational functionality of such instruments in pursuing policy objectives both within the Union; the internal dimension (section 2), and in the Union's relations with non-EU actors; the external dimension (section 3). We then make some concluding remarks (section 4).

2. The Internal Dimension: Enforceability of Conditionality Mechanisms

The primary challenge when it comes to the internal aspect of the financial tools so far deployed by the EU to secure adherence to the rule of law is their practical enforceability. The effectiveness of such tools can only be guaranteed if financial deterrents are imposed and enforced in a timely, proportionate, and non-arbitrary manner. A merely partial application of the deterrents not only undermines the functionality of such mechanisms, but also contributes to the process of disruption of the rule of law on the national and European level.

This dangerous tendency can be observed in the context of the recently introduced conditionality-based tools under the Conditionality Regulation and the Recovery and Resilience Facility (RRF), a constituent element of Next Generation EU (NGEU).¹

Back in February 2022 we wrote about the long-awaited judgments of the Court of Justice in *Hungary v Parliament and Council* and *Poland v*

¹ Regulation (EU, Euratom) 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 [2020] OJ L433/1; and Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 Establishing the Recovery and Resilience Facility [2021] OJ L57/17.

Parliament and Council,² and greeted them with moderate excitement.³ The Court dismissed the actions for annulment of the Conditionality Regulation brought by Hungary and Poland, and elevated the constitutional status of the EU values in Article 2 TEU by acknowledging their legally binding nature.⁴ However the effectiveness of the mechanism established in the Conditionality Regulation remained unclear. The role which the Regulation—already weakened by its limited scope—will play in ensuring respect of the rule of law by the Member States will be determined (among other things) by the proportionality of the measures under the Regulation. The principle of proportionality requires that the measures be proportionate with regard to the ‘nature, duration, gravity and scope of the breaches of the principles of the rule of law’.⁵ So far, even though the invocation of the conditionality mechanism against Hungary is a considerable step forward,⁶ commitments to pay out allocated funding have been only partially suspended.⁷ Such partial

suspension, in the case of a Member State with such well documented ‘underlying’ problems might not be considered as living up to the requirements of the principle of proportionality under EU law. Here, we agree with the position expressed by prominent scholars on multiple occasions:⁸ access to EU funds can only be provided when systematic deficiencies in a Member State have been completely rectified—a compromise in the form of partial corrections, on the contrary, does not represent a feasible solution to the problem safeguarding adherence to the rule of law in the EU, but is rather a defeat.

The evaluation of whether the remedial measures proposed by a Member State subject to the conditionality mechanism are sufficient also needs to be substantive in nature. The application of a formalistic approach here might result in an illusory façade of compliance that satisfies the conditions of rule *by* law but not those of the rule *of* law.⁹ This challenge was demonstrated by the

² Case C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* [2022] EU:C:2022:98.

³ Anna Zemskova, ‘Rule of Law Conditionality: A Long-Desired Victory or a Modest Step Forward?: Hungary v Parliament and Council (C-156/21) and Poland v Parliament and Council (C-157/21)’ (*EU Law Live*, 18 February 2022) <<https://eulawlive.com/analysis-rule-of-law-conditionality-a-long-desired-victory-or-a-modest-step-forward-hungary-v-parliament-and-council-c-156-21-and-poland-v-parliament-and-council-c-157-21-by/>>.

⁴ *Hungary v Parliament* (n 2) para 232; Xavier Groussot, Anna Zemskova, and Katarina Bungerfeldt, ‘Foundational Principles and the Rule of Law in the European Union: How to Adjudicate in a Rule-of-Law Crisis, and Why Solidarity Is Essential’ (2022) 5 *Nordic Journal of European Law* 1; Xavier Groussot and Anna Zemskova, ‘The Manifestations of the EU Rule of Law and its Contestability: Historical and Constitutional Foundations’ (2022) 44 (2) *Giornale di Storia Costituzionale* 98.

⁵ Regulation 2020/2092 (n 1), Article 5(3).

⁶ Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94.

⁷ *ibid*, Article 2 (1) reads: ‘55 % of the budgetary commitments under the following operational programmes in Cohesion Policy, once approved, shall be suspended [...]’

⁸ John Morijn, R. Daniel Kelemen, and Kim Lane Scheppele, ‘The EU Commission has to Cut Funding to Hungary: The Legal Case’ Study (Solicited by the Greens/EFA Group in the European Parliament, 7 July 2021) <https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf>; John Morijn, R. Daniel Kelemen, and Kim Lane Scheppele, ‘Freezing all EU funds to Hungary’ Study (Solicited by the Greens/EFA Group in the European Parliament, 20 May 2022) <<https://danielfreund.eu/wp-content/uploads/2022/07/100-suspension-Hungary.pdf>>; John Morijn, R. Daniel Kelemen and Kim Lane Scheppele, Op-Ed: ‘Stop Feeding the Autocrats’ (*EU Law Live*, 6 July 2022) <<https://eulawlive.com/op-ed-stop-feeding-the-autocrats-why-cutting-100-of-the-funds-to-hungary-is-required-by-the-conditionality-regulation-by-john-morijn-r-daniel-kelemen-and-kim-lane-scheppele/>>.

⁹ For a detailed discussion on the essence of the rule by law, see Xavier Groussot, ‘Illiberal Democracy and Rule by Law from an EU Perspective’ (forthcoming) in Allan Rosas, Juha Raitio and Pekka Pohjankoski (eds), *The Rule of Law’s Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023).

Council's approval of the Poland's recovery and resilience plan in the context of the NGEU.¹⁰ The Council's decision is the subject of actions for annulment brought by several European judicial organisations.¹¹ Even though the disbursement of the funds is conditional on achieving the milestones, achieving them in their current form will not in itself eradicate the deficiencies in the adherence to the rule of law as established in the case law of the Court of Justice.¹²

3. The External Dimension: Sanctions and the Rule of Law in EU Common Foreign and Security Policy

The second challenge when it comes to financial tools deployed by the EU is external and concerns sanctions in the field of Common Foreign and Security Policy (CFSP). Since the start of the 'war on terror' waged in the wake of 9/11, external sanctions against states and individuals have become an integral part of the EU legal landscape. In the past, the EU's sanctions were often based on UN Security Council resolutions, but they are becoming increasingly autonomous. This is exemplified by the unparalleled rounds of sanctions adopted against Russian persons and entities following the invasion of Ukraine on 24 February 2022.¹³ Notably, these CFSP sanctions constitute, when they take the form of travel bans and asset freezes, a manifestation of 'restrictive measures'

adopted against individuals that infringe the rule of law (Article 2 TEU) as well as EU fundamental rights (Article 6 TEU).¹⁴ The CFSP, in light of Article 2(4) TFEU,¹⁵ is undoubtedly an example of a 'special competence' of the EU that cannot be assimilated to other types of competences enshrined in Article 2 TFEU such as 'shared competences'. But does the very existence of this 'special competence' make all the affiliated legal and constitutional questions immune from judicial review?¹⁶

If not, what is the protective and judicial scope of EU rule of law with regard to external CFSP sanctions?¹⁷ This is not a clear-cut issue. The CFSP policy is not subject to the full jurisdiction of the CJEU. Indeed, Article 275 TFEU creates a 'claw-back' clause allowing a derogation from the full jurisdiction of the CJEU under Article 19 TEU.¹⁸ In this section, two inter-connected issues will be examined. First, we will look at the application of the rule of law in relation to the jurisdiction of the CJEU. Second, we will focus on the application of the rule of law as a matter of EU fundamental rights when it comes to CFSP measures adopted by the EU institutions and national measures adopted by the Member States in implementing CFSP policy at domestic level. The latter case is particularly delicate since there is, today, no case law of the CJEU that recognizes the possibility of a national court making a preliminary reference

¹⁰ Council Implementing Decision of 14 June 2022 on the Approval of the Assessment of the Recovery and Resilience Plan for Poland [2022], Interinstitutional File: 2022/0181 (NLE) <<https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf>>.

¹¹ Pending Cases T-530/22 *Medel v Council*; T-531/22 *International Association of Judges v Council*; T-532/22 *Association of European Administrative Judges v Council*, and T-533/22 *Rechtlers voor Rechtlers v Council*.

¹² Pekka Pohjankoski, Op-Ed: 'The Rule of Law Takes the Back Seat: EU Commission Greenlights "Next Generation EU" Funds to Poland' (*EU Law Live*, 9 June 2022) <<https://eulawlive.com/op-ed-the-rule-of-law-takes-the-back-seat-eu-commission-greenlights-next-generation-eu-funds-to-poland-by-pekka-pohjankoski/>>.

¹³ As of 1 March 2023, there have been ten rounds of sanctions.

¹⁴ See in that respect Article 6(1) and (3) TEU that makes reference to EU fundamental rights as an integral part of the EU Charter and the doctrine of general principles of EU law.

¹⁵ See Article 2(4) TFEU.

¹⁶ See AG Bobek, Case C-14/19 P *Satcen* EU:C:2020:220, n 40. See Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) that considered CFSP as an integral part of the 'security constitution' which marks by a tension between security considerations and fundamental rights protection that implies a dual perception of the individual as both a security threat and as an individual endowed with fundamental rights (at 272).

¹⁷ Christina Eckes, 'The Law and Practice of EU Sanctions' in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Edward Elgar Publishing 2018); Panos Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2017) 67 *International and Comparative Law Quarterly* 13.

¹⁸ See Article 275 TFEU.

on interpretation based on Article 267 TFEU in the CFSP context. The CJEU, in other words, will have to adopt a new judicial doctrine that explicitly recognizes such a possibility.

As a preliminary point, it is worth referring to the CJEU ruling in *Kadi I* decided by the Court before the entry into force of the Lisbon Treaty. It set a very high constitutional tone in EU law by relying on the rhetoric of the Charter of Fundamental Rights of the European Union (Charter) when it comes to assessing the legality of economic sanctions in the CFSP field in light of EU fundamental rights.¹⁹

The CJEU also observed that if the freezing measures imposed by the Council regulation are unilaterally imposed by every Member State, then there is a risk that the multiplication of those national measures may affect the operation of the internal market, especially by impeding the free movement of establishment and capital.²⁰ This last point shows the tension between the adoption of individual sanctions and the respect of the economic rule of law within the EU by its Member States.

After *Kadi II*, it is clear that the CJEU applies a uniform standard of judicial review of sanctions, be it autonomous or not.²¹ The Lisbon Treaty also clarified the use of the Treaty provisions necessary

to adopt a Council Regulation implementing a CFSP policy and imposing sanctions on individuals.²² The case law of the CJEU post Lisbon Treaty contains crucial developments both as to the scope of jurisdiction in CFSP matters and as to the scope of application of EU fundamental rights in relation to EU acts (but not acts of the Member States implementing a CFSP policy).

Concerning the scope of jurisdiction of the CJEU in CFSP matters, the *Rosneft* case, which relies on strong rule of law rhetoric, has extended the scope of jurisdiction of the CJEU beyond the wording of Article 275 TFEU and Article 24(1) TEU that restrict its full jurisdiction based on Article 19 TEU as explained before.²³ The CJEU considered that the preliminary ruling on validity, which constitutes an essential characteristic of the EU system for judicial protection, extends to the review of the legality of decisions that prescribe the adoption of restrictive measures against natural or legal persons within the framework of the CFSP.²⁴ The reasoning is founded on the existence of a complete system of legal remedies and the rule of law.²⁵ Here, the rule of law is considered to be a founding value of the EU. This is apparent not only from provisions of the TEU,²⁶ but also Article 47 of the Charter on effective judicial protection, which is ‘of the essence of the rule of law’.²⁷ This implies that the limitations enshrined in Article 275 TFEU must

¹⁹ See also Joined Cases C-402/05 and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)* [2008] EU:C:2008:461, paras 230 and 326. See Peter van Elsuwege, ‘The Adoption of “Targeted Sanctions” and the Potential for Inter-institutional Litigation after Lisbon’ (2011) 7 (4) *Journal of Contemporary European Research* 488, 493.

²⁰ *ibid*, *Kadi I* para 230.

²¹ Joined Cases C-584/10 P, C-584/10 P, C-593/10 P and C-595/10 P *Commission and Others v Kadi (Kadi II)* EU:C:2013:518, and Case C-417/11 P *Council v Bamba* EU:C:2012:718. See eg Armin Cuyvers, ‘“Give me one good reason”: The unified standard of review for sanctions after *Kadi II*’ (2014) 51 *Common Market Law Review* 1768; Michael Wimmer, ‘Individual Sanctions and fundamental rights standards: *Bamba*’ (2013) 50 *Common Market Law Review* 1126; Christina Eckes, ‘EU restrictive measures against natural and legal persons: From counterterrorist to third country sanctions’ (2014) 51 *Common Market Law Review* 892.

²² See *Kadi I* (n 19), para 212. In that respect, the CJEU made clear that such a type of restrictive measure should be based either on Article 75 TFEU or Article 215 TFEU (see Case C-130/10 *Parliament v Council* EU:C:2012:472. Article 215 TFEU is now defined as creating a bridge between TEU objectives and TFEU, see Case C-72/15 *Rosneft* EU:C:2017:236, para 88.

²³ See in particular para 81 in *Rosneft* (n 22) on the acceptance of the preliminary ruling of validity in specific situations such as the use of Article 40 TEU—the so-called non-affectation clause.

²⁴ *Rosneft* (n 22), para 75.

²⁵ *ibid*, paras 67–75.

²⁶ *ibid*, para 72.

²⁷ *ibid*, para 73.

be interpreted strictly.²⁸ Finally, the CJEU observed that it would be contrary to the objectives of Article 19(1) TEU and to the principle of effective judicial protection to adopt a limited interpretation of its jurisdiction.²⁹ A similar ‘rule of law’ logic is used in *Bank Refah*.³⁰

This case law clearly shows that the CJEU’s jurisdiction extends into CFSP areas. But, so far, the CJEU has not ruled whether it can render a preliminary ruling on interpretation when it comes to national measures implementing a CFSP policy. In principle, EU regulations imposing freezing measures (which constitute the so-called restrictive measures or sanctions) are directly applicable in national law. However, the Member States may be required to adopt legislation providing enforcement penalties in the context of the restrictive measures established by the EU legislation. According to the Council’s best practices on implementation of restrictive measures, the Member States may adopt additional legislation to freeze funds, financial assets, and economic resources at a national level.³¹ It is under these circumstances that the CJEU can be asked by a national court to rule on the interpretation of the national measures in light of EU law.³² In *Neves 77*, a case that is still pending, the CJEU will have to rule on its jurisdiction in preliminary rulings on interpretation. It has been asked by a national court to assess the proportionality of a national measure authorizing the confiscation of the entire profit of a transaction.³³ If it extends its jurisdiction and decides to limit the scope of Article 275 TFEU—a provision that is beginning to resemble Honoré

de Balzac’s ‘*peau de chagrin*’³⁴—it will probably do so by referring to the rule of law logic relied on in *Rosneft* and *Bank Refah*.

Concerning the scope of application of EU fundamental rights, the CJEU jurisprudence after the entry into force of the Lisbon Treaty has consistently confirmed the *Kadi I* requirement that EU measures in the field of CFSP respect EU fundamental rights and the Charter.³⁵ However it also worth remarking that the CJEU always underlines the Council’s broad margin of discretion when making choices of a political nature; a recent example is its decision in *RT France* concerning restrictive measures adopted against Russia.³⁶ Indeed, from a general perspective, the EU institutions enjoy a broad margin of discretion, particularly when they are required to make choices of a political nature and to undertake complex assessments. In these circumstances, judicial review of the assessments that underpin the exercise of that discretion must consist in determining the absence of manifest errors.³⁷ This broad margin of discretion influences, in turn, the evaluation of the breach of EU fundamental rights, which thus becomes more difficult to establish in practice.

Does this broad discretion in CFSP matters also apply to Member States when implementing restrictive measures that may infringe EU fundamental rights? The post-Lisbon CJEU jurisprudence has not yet decided on this specific matter and the Court has, in addition, yet to rule on whether EU fundamental rights and the Charter are applicable when a Member State

²⁸ *ibid*, para 74. See also Peter Van Elsuwege, ‘Upholding the Rule of Law in the Common Foreign and Security Policy: H v. Council’ (2017) 54 *Common Market Law Review* 841.

²⁹ *Rosneft* (n 22), para 75.

³⁰ Case C-134/19 P *Bank Refah* EU:C:2020:793, paras 35–36.

³¹ See Council of the European Union, ‘EU Best Practices for the effective implementation of restrictive measures’, 10572/22, Brussels, 27 June 2022, para 25 <<https://data.consilium.europa.eu/doc/document/ST-10572-2022-INIT/en/pdf>>.

³² In his Opinion in *Rosneft*, Advocate General Wathelet pointed out that if the Court has jurisdiction to rule on a question of validity of a CFSP decision on restrictive measures, it should also have jurisdiction to rule on the question of interpretation (AG Wathelet, Case C-72/15 *Rosneft* EU:C:2016:381).

³³ See Case C-351/22 *Neves 77*, *nyd*.

³⁴ See Honoré de Balzac, *Wild Ass’s Skin* (1831). In this novel the magical ‘Skin of Shagreen’ grants wishes but shrinks every time it does so. Each time the CJEU extends its jurisdiction through case law, it reduces the scope of Article 275 TFEU. That is the reason why one can view this provision as a ‘Skin of Shagreen’.

³⁵ Case C-530/17 P *Azarov v Council* EU:C:2018:1031, para 38.

³⁶ See Case T-125/22 *RT France v Council* EU:T:2022:483, para 56.

³⁷ Case C-418/18 P *Puppinck and others v Commission* EU:C:2019:1113, paras 95 and 96. See also Joined Cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* EU:C:2017:631, paras 123 and 124.

implements CFSP policy. Considering pre-Lisbon adjudication, and particularly at the ruling in *Segi*,³⁸ which concerned a Common Position based on both police and judicial cooperation in criminal matters and CFSP, it would not seem to be a giant leap for the CJEU to recognize the application of EU fundamental rights when it comes to national measures implementing a CFSP policy.³⁹ It remains to be seen whether the CJEU will confirm its pre-Lisbon line of case law and also to what extent the CJEU will be ready to grant discretion to the Member States in this field, where the freezing measures that affect right to property and the freedom to pursue a trade or business according to the Court in *Kadi I* cannot be imposed unilaterally.

There are other questions, though, which are harder to answer. How far can a Member State diverge from a Council Regulation imposing restrictive measures? Can the ‘peace/security’ objectives in Article 3(5) TEU be relied on by the CJEU to assess the scope of discretion? Is the Commission prepared to start infringement proceedings when a Member State does not follow the EU legislation and imposes stricter sanctions that encroach on fundamental rights in a more intrusive way than the Council Regulation? Is this a breach of the principle of EU loyalty (under Article 4(3) TEU and/or Article 24(3) TEU)? These questions concern not

only CFSP-related matters under Article 2(4) TFEU, which constitute without doubt matters of ‘special competence’, but also touch upon the very core of national security. And, ultimately, they concern choices of an inherently political nature that may be (partially or fully)⁴⁰ immune from judicial review in certain specific circumstances.⁴¹

4. Concluding Remarks

This contribution demonstrates that while constituting a solid policy option for ensuring adherence to the principle of the rule of law, the use of financial tools, internally and externally, is fraught with unresolved challenges that need to be taken into consideration in the future. The primary challenge we have identified with regard to the internal dimension is insufficient enforceability of conditionality mechanisms, and with regard to the external dimension the unclear protective and judicial scope of the EU rule of law in regard to the application of the CFSP sanctions. Addressing the legal conundrums outlined in this contribution will considerably strengthen the practical functionality of financial deterrents, operating in highly sensitive policy areas, and provide the Union with a stable legal framework with an unconditional respect for the principle of the rule of law at its apex.

³⁸ Case C-355/04 P *Segi* EU:C:2007:116, para 51.

³⁹ In our view, the CJEU ought to consider this by analogy to *Segi* (ibid), para 51.

⁴⁰ On partial immunity, see Case C-94/95 *Bosphorus* EU:C:1996:312, paras 22–27.

⁴¹ See AG Bobek, *Satcen* (n 16), paras 79–80.

The External Dimensions of the European Union's Autocracy Crisis

Ian Manners

This contribution analyses the external dimensions of the EU's autocracy crisis. It argues that the internal and external dimensions of the crisis, and those relating to accession, are interlinked, and that more genuine social democracy, human rights, and rule of law would help address the crisis. It concludes that a paradigm shift to a holistic approach is needed to understand and address the causes, not just the symptoms, of the EU's autocracy crisis.

1. Introduction: Autocracy Crisis

The European Union has an autocracy crisis.¹ Some of its Member States have regimes in which 'politics is increasingly exclusive and monopolistic, and political power ever more repressive and arbitrary'.² Internally the autocracy crisis means that one EU Member State is 'no longer a democracy' while another 'arguably no longer' has 'an independent judicial branch'.³ But the autocracy crisis is not just about the rule of law in the EU, as the 2022 report from the *Varieties of Democracy* project makes clear: 'the level of democracy enjoyed by the average global citizen in 2021 is down to 1989 levels—the last 30 years of democratic advances are now eradicated'.⁴ Other annual reports on political freedoms and democracy reinforce this assertion, with Freedom House stating that 'the present threat

to democracy is the product of 16 years of decline in global freedom' while the *Democracy Index 2022* published by *The Economist* argues that there continues to be a 'stagnation in the state of global democracy' with 'darker developments' in Russia and China.⁵ The World Justice Project (WJP) *Rule of Law Index 2022* confirms these dire reports reinforcing that 'for the fifth year in a row, the rule of law has declined in most countries'.⁶

Within the EU Hungary has descended to an 'electoral autocracy' or 'hybrid regime', while Poland has followed a similar path but remaining an 'electoral democracy' or partially 'flawed democracy'.⁷ Certain candidate countries are also defined as 'electoral autocracies' or 'hybrid regime[s]' (Turkey), 'flawed democracy' (Serbia).

¹ R. Daniel Kelemen, 'The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools' (2023) 45(2) *Journal of European Integration* 223.

² Seda Gürkan and Luca Tomini, 'The Limits of the Europeanization Research Agenda: Decoding the reverse process in and around the EU' in Nathalie Brack and Seda Gürkan (eds), *Theorising the Crises of the European Union* (Routledge 2020) 183–203.

³ Barbara Grabowska-Moroz, Joelle Grogan, Dimitry Kochenov, and Laurent Pech, 'Reconciling Theory and Practice of the Rule of Law in the European Union' (2022) 14 *Hague Journal on the Rule of Law* 101.

⁴ V-Dem Institute, *Varieties of Democracy Report 2022: Autocratization Changing Nature?* (Gothenburg, V-Dem Institute, University of Gothenburg 2022).

⁵ 'Freedom in the World 2022: The Global Expansion of Authoritarian Rule' *Freedom House* (Washington DC, 2022); 'Democracy Index 2022: Frontline Democracy and the Battle for Ukraine' *The Economist* (London, 2023).

⁶ World Justice Project, *Rule of Law Index 2022* (Washington DC, 2023).

⁷ Freedom House and The Economist (n 5).

Within Europe, Belarus and Russia have been defined as ‘electoral autocracies’ or ‘authoritarian regimes’. According to the WJP the ‘four universal principles of the rule of law’—accountability, just law, open government, accessible and impartial law—have declined in Hungary, Poland, Serbia, Turkey, Belarus, and Russia over the past five years. Thus, there is an autocracy crisis among the EU’s members, applicants, and neighbours; but this crisis is shared across the planet.

2. Genuine Democracy, Human Rights, and Rule of Law

The EU’s autocracy crisis is not just about the decline of the rule of law. As the 1949 Statute of the Council of Europe (CoE) made clear, genuine democracy is based on the principles of individual freedom, political liberty and the rule of law, which the 1993 ‘Copenhagen Criteria’ for EU membership embody with their emphasis on democracy, human rights, and the rule of law. The CoE’s 1996 declaration clarifies this understanding: ‘a genuine democracy must be a social democracy. Democracy cannot be genuine unless it has a social dimension. The lack of respect for fundamental social rights threatens legal and political equality, the foundation of any democracy’.⁸ The more recent 2022 CoE Parliamentary Assembly resolution on ‘Safeguarding and Promoting Genuine Democracy in Europe’ clarifies the central principle of genuine social democracy as ‘promoting equality and providing protection against discrimination and hatred’, similar to the Copenhagen criteria of ‘respect for and protection of minorities’.⁹

These ‘three complementary and indivisible principles’¹⁰ of democracy, human rights, and rule of law are being constitutionalised within the EU through the Charter of Fundamental Rights (Article 6 TEU); the Union’s values (Article 2 TEU); the conditions for membership (Article

49 TEU); the legal basis for its external action (Article 21 TEU), and its commitment to accede to the European Convention on Human Rights (Article 6 TEU). It is absolutely crystal clear that solutions to the rule of law crisis in the EU cannot be found without understanding and addressing the complementary and indivisible principles of democracy, human rights, and rule of law together. But an undue emphasis on free and fair elections, freedom from fear, and/or legal impartiality and impunity in an abstract sense overlooks the deep origins of the autocracy crisis. Thus there is a need to tackle the autocracy crisis through genuine social democracy addressing democratic decay, human rights abuse, and unfair rule of law through the promotion of equality.

3. Internal, Accession, and External Dimensions

It is a mistake to see the internal, accession, and external dimensions of the EU’s autocracy crisis as separable. The V-Dem focus on the way in which ‘anti-pluralist parties are driving autocratization in at least six of the top autocratizers’, including Hungary, Poland, Serbia, and Turkey is important for understanding the domestic drivers of the crisis in EU Member States and candidate countries.¹¹ The V-Dem report also identifies democratic decay in Slovenia, Croatia, Greece and Czechia over the past decade, but it is the role of far-right anti-pluralist parties in the UK, Netherlands, France, Italy, Sweden, Austria, and Germany that need greater focus. As the European Parliament’s 2022 resolution on ‘foreign interference in all democratic processes in the EU’ makes explicit, close links between Russia and many parties in the EU Member States—Austria’s Freedom Party, France’s National Rally, Italy’s Northern League, Germany’s AfD, Hungary’s Fidesz and Jobbik, and UKIP/Brexit Party in the UK—have driven the crisis within the EU.¹² Studies of these parties’

⁸ Council of Europe, ‘Draft Declaration on Genuine Democracy’, Final Activity Report of Project Group on Human Rights and Genuine Democracy, Committee of Ministers, Strasbourg, 19 January 1996; Conference of INGOs of the Council of Europe, ‘Declaration on Genuine Democracy’, CONF/PLE(2013)9DEC1, adopted 24 January 2013.

⁹ Parliamentary Assembly of the Council of Europe, ‘Safeguarding and Promoting Genuine Democracy in Europe’, doc. 15486, 25 March 2022.

¹⁰ Council of Europe 1996 (n 8) 5.

¹¹ V-Dem (n 4) 23.

¹² European Parliament, ‘Resolution of 9 March 2022 on Foreign interference in all democratic processes in the European Union’(2020/2268(INI)), P9_TA(2022)0064.

voting patterns in the European Parliament (EP) have demonstrated their tendency to vote in Russia's interest and against closer EU relations with Ukraine, Moldova, and Georgia.¹³

Similarly, while the V-Dem report draws attention to 'electoral autocracy' in EU accession countries Turkey, Serbia, Ukraine, Bosnia and Herzegovina, Montenegro, Macedonia, and Albania, the EP's 'foreign interference' resolution sets out how the Western Balkans (Serbia, Montenegro, and Republika Srpska in Bosnia and Herzegovina) are particularly vulnerable to 'foreign interference and disinformation campaigns stemming from Russia, China and Turkey'.¹⁴ The role of Hungary and Turkey in blocking Sweden's membership of NATO provides an example of an EU member and an accession state seeking to undermine both the EU and NATO to Russia's advantage.¹⁵

Externally, the EU is part of a planet increasingly populated by autocracies. The V-Dem report demonstrates how the peak of democratic countries by population occurred between 2000–2010, with only 30% of the world's population now living in liberal or electoral democracies. Freedom House measures the decline in people living in free countries from 46% of the world's population in 2005 to 20% in 2021. The Economist's Democracy Index peaked in 2008 and 2014–2015, with 45% of the world's population now living in full or flawed democracies. Regardless of the exact measures, it is clear that the EU now acts externally in an environment overwhelmingly defined by autocracy, 'not free countries', hybrid and authoritarian regimes. The six votes held in the UN General Assembly on Russia's invasion(s) of Ukraine between 2014 and 2023 provide evidence of the international consequences of this planetary

autocratisation for multilateral cooperation. They demonstrate five dimensions of the EU's autocracy crisis: first, that only about 141 states are willing to consistently vote in favour of maintaining the UN principles of international peace and security; second, that about six autocracies (led by Russia) are willing to consistently vote against the first group; third, that a third group of about 32–35 states (led by China) consistently abstain; fourth, that only about 93–100 states are willing to vote in favour of UN principles of territorial integrity and human rights; and finally, that the EU and its European neighbours (43 states) consistently make up about 30–45% of the UN-supporting countries in the world.

Thus the internal, accession, and external dimensions of the EU's autocracy crisis are inseparable—there is external support for autocracy within the EU; there are autocracies seeking membership of the EU, and the EU faces opposition from groups of autocracies opposed to international cooperation in the EU and the UN.

4. A Holistic Approach to the Causes and Symptoms of the Crisis

The temptation to analyse the autocracy crisis in terms of the decline of the liberal international order is also a mistake. The autocracy crisis is a symptom of a wider, planetary organic crisis (POC) of economic inequality, social injustice, ecological unsustainability, conflict insecurity, and political irresilience.¹⁶ In order to understand the causes of the autocracy crisis, a first step is to appreciate that these five mutually interdependent roots of the POC feed the rise of ethnonationalism around the world. This combination of far-right reactionism with neo-liberal libertarianism has been termed 'reactionary

¹³ Anton Shekhovtsov, 'The "National-Bolshevik" alliance is again at work in the European Parliament' (*Anton Shekhovtsov's blog*, 17 September 2014); Patrik Oksanen, 'SD:s rysslandsröster i Europaparlamentet sticker ut' (*Säkerhetsrådet, Frivärld*, 7 september 2022); Anton Wiebke, '"Russia" in the European Parliament: Voting patterns, discourse-coalitions and self-other representations' (DPhil thesis, Ludwig-Maximilians-University 2022).

¹⁴ European Parliament 2022, *op cit*.

¹⁵ Karin Thurffjell, 'Kris för Nato om vi inte är medlemmar om ett år' (*Svenska Dagbladet*, 8 januari 2023); 'Hungary signals fresh delay in Finland, Sweden NATO approval' (*Reuters*, 25 February 2023).

¹⁶ Ian Manners, 'European Communion and Planetary Organic Crisis' in Nathalie Brack and Seda Gürkan (eds) *Theorising the Crises of the European Union* (Routledge 2020); Ian Manners, 'Achieving European Communion in the Planetary Organic Crisis: How Dominance and Differentiation affects the sharing of Genuine Democracy' (2023) EU3D: Differentiation, Dominance, Democracy (Oslo, ARENA); Stephen Gill and Solomon Benatar, 'Reflections on the Political Economy of Planetary Health' (2020) 27(1) *Review of International Political Economy* 167.

libertarianism’ and has firmly established itself inside and outside the EU since the global financial crisis.¹⁷ An extensive analysis of this collaboration in the cases of the USA (Trump), Britain (Brexit), Hungary (Orbán), Israel (Netanyahu) argues that neoliberal oligarchies needed to disguise their failures by supporting ‘populist oligarchy’ across the planet in need to protect the wealthy elite.¹⁸ For example, Putin’s Russian nationalism relies on oligarchs, Modi’s Hindu nationalism relies on industrialists, and Trump’s American nationalism relies on billionaires.¹⁹

With this context in mind it becomes easier to see how resolving the EU’s autocracy crisis is not so much a matter of treating the symptoms of the lack of rule of law, but rather first requires us to understand the causes of the planetary organic crisis; not so much a case of EU democracy vs. non-EU autocracy, as one of reactionary libertarians, inside and outside the EU, using ethnonationalist agendas to disguise the practices of kleptocratic ruling elites.

Taking this more holistic approach to the problem of the EU’s autocracy crisis involves two ways of understanding its causes: a) taking a normative power approach, and b) considering the role of external political actors in EU politics. Doing so suggests two ways of addressing the crisis: c) the enlargement of the EU as reinvigorating its *raison d’être*, and d) external actions in concert with others prepared to act for the planetary good. The next four paragraphs set this out and lead to the conclusion of the necessity of a holistic analysis of the EU’s autocracy crisis.

a) The normative power approach within critical social theory questions notions of normativity and power. It studies international, regional, and transnational actors and how their actions can, in concert, reshape conceptions of ‘normal’ for the planetary good.²⁰ Studies of the EU’s normative power have demonstrated how ‘through the promotion of the rule of law as well as other values enshrined in Article 2 TEU, the EU has significantly built its normative power, and the European Commission, with the support of the Member States, has steadily increased its leverage notably in promoting the rule of law towards the former candidate countries from Central and Eastern Europe’.²¹ Thus, the EU is not just subject to global trends, such as autocratization and increasing irresilience, but can shape those trends.

b) As well as considering the normative role of the EU beyond its borders, it is vital to understand the role of external political actors in the politics of EU Member States. Achieving genuine democracy, human rights, and rule of law through social democratic equality involves identifying the networks of economic and political influence that flow through reactionary libertarian power structures in ‘dark money’ think tanks, ‘whitecoat’ policy experts, ‘astroturf’ activist groups, and far-right political parties into autocratic governments.²² More specifically, exposing Russian interference in the democracy and rule of law of Member States, together with the role of US Christian right networks (eg European Center for Law and Justice), and the Atlas and Epicenter network of neoliberal ‘think tanks’ would constitute an important step towards breaking the material and ideological support for autocrats in the EU.

¹⁷ Dieter Plehwe, Quinn Slobodian, and Philip Mirowski (eds), *Nine Lives of Neoliberalism* (Verso Books 2020); Owen Worth, *Morbid Symptoms: The Global Rise of the Far-Right* (Bloomsbury Publishing 2019).

¹⁸ Shelly Gottfried, *Contemporary Oligarchies in Developed Democracies* (Springer 2019).

¹⁹ Timothy Snyder, *The Road to Unfreedom: Russia, Europe, America* (Tim Duggan Books 2018). Arundhati Roy, ‘Modi’s model is at last revealed for what it is: violent Hindu nationalism underwritten by big business’ (*The Guardian*, 18 February 2023); Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right’s Stealth Plan for America* (Viking Press, 2017).

²⁰ Ian Manners, ‘Arrival of Normative Power in Planetary Politics’ (2023) 61 *JCMS: Journal of Common Market Studies* (forthcoming).

²¹ Ivan Damjanovski, Christophe Hillion, and Denis Preshova, ‘Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Aquis in the Pre- and Post-accession Context’ (EUIDEA Research Paper No. 4, 31 May 2020).

²² ‘Dark money’ is spending and funding from groups that do not disclose their donors in order to influence public and policy debates, elections, and referenda. The World Health Organisation defines ‘whitecoat’ as the ‘use of science or pseudoscience to defeat legitimate scientific enquiry’ (WHO, Tobacco Industry Interference with Tobacco Control (Geneva: WHO, 2009) 11. ‘Astroturfing’ is the practice of masking the sponsors of political campaigns to give the appearance of grassroots support.

c) Such considerations reveal opportunities: the enlargement to include new Eastern and South Eastern European Member States is a chance to reinvigorate the *raison d'être* of the EU—'to better achieve together what cannot be achieved apart'—peace, prosperity, and progress. The 2022 elections in Slovenia and the ongoing anti-corruption reforms in Ukraine are examples of how new accession and Member States can serve as examples of 'precisely what rule of law elements are needed to achieve what specific aims'.²³ Recent analysis of external democracy promotion in its neighbourhood demonstrates that there is 'little evidence of deterioration in the EU's image as a democracy promotor and human rights defender, as seen from the countries in the European neighbourhood (both east and south)'.²⁴ The EU's long-term response to Ukraine's application for membership provides an opportunity to use its normative power to strengthen genuine democracy, human rights, and rule of law through enlargement to its new social democracies—Ukraine, Moldova, Georgia, Macedonia, Montenegro, Serbia, Albania, Bosnia and Herzegovina, and Kosovo.²⁵

d) This global approach suggests global solutions: in order to address the autocracy crisis, the EU's normative power must be used through enacting external actions in concert for the planetary good. In practice this means moving the 'foreign policy' paradigm away from the geopolitics of 'principled pragmatism' where the EU institutionally isomorphises itself into a 'Global Europe', imitating the USA, China, India, or Russia. Instead, the

EU, its Member States, and its transnational actors (such as civil society, activist movements, and NGOs) must take empowering actions in concert with other equally concerned groups and actors to reshape conceptions of normal for the planetary good.²⁶ This paradigm shift begins with the realisation that at its heart the autocracy crisis is fuelled by the denial of the fact that with a 3–5 degree Celsius global mean temperature rise by 2100, human civilisation as we know it is in its last century.²⁷

5. Conclusion: Holistic Analysis of the EU's Autocracy Crisis

It is only through a holistic analysis of the EU's autocracy crisis, including the way in which reactionary libertarian autocratic groups promote increasing economic inequality, strengthen the spread of social injustice, deny the breakdown of ecological sustainability, simultaneously promote and claim to answer conflict insecurity, and represent irrisilient political regimes, that we can understand the roots of the POC. Addressing the external dimensions of the EU's autocracy crisis begins with appreciating the depth and breadth of the crisis; it means advocating genuine democracy, human rights, and rule of law that bring greater equality to ordinary people; it involves realising that the internal, accession, and external dimensions of the autocracy crisis are deeply interlinked; and it demands a paradigm shift through normative power to a holistic approach to the causes and symptoms of the autocracy crisis.

²³ Lisa Louwerse, *The EU's conceptualisation of the rule of law in its external relations: case studies on development cooperation and enlargement* (DPhil thesis, Leiden University 2019).

²⁴ Olga Burluk, Assem Dandashly, and Gergana Noutcheva, 'External democracy promotion in times of internal rule-of-law crisis: the EU and its neighbourhood' (2023) *Journal of European Public Policy* 1.

²⁵ Marta Králiková, 'Power Structures and Normative Environment: Limits to the Rule of Law and the EU's Normative Power in Ukraine' (2017) UPTAKE Working Paper No. 3/2017; Gergana Noutcheva and Kateryna Zarembo, 'Normative Power at Its Unlikeliest: EU Norms, Soviet Legacy and Security Sector Reform in Ukraine' (2023) 58 *Cooperation and Conflict* (forthcoming).

²⁶ Ian Manners, 'Normative Power Approach to European Union External Action', in Sieglinde Gstöhl and Simon Schunz (eds), *The External Action of the European Union: Concepts, Approaches, Theories* (Macmillan 2021).

²⁷ Manners (n 20).

Transformative Constitutionalism as a Prism and a Guide

Armin von Bogdandy

This text argues that the experience of transformative constitutionalism in Latin America can usefully inform contemporary strategies for restoring the rule of law in EU Member States. It begins by sketching Latin American transformative constitutionalism. It then reflects on European constitutionalism and what has gone wrong, in Europe, in terms of the observance of the rule of law. Finally, it discusses three challenges faced by courts in Europe, and considers what Europe can learn from how those same challenges have been addressed in Latin America.

1. Transformative Constitutionalism and Latin American Innovations

Before attempting to draw lessons for how the rule of law situation in the EU might be improved from the tradition of transformative constitutionalism, let us consider what it is. Transformative constitutionalism is, in essence, a legal practice that embeds the law in society. The concept was forged by scholars to describe the role of the law in the democratization processes in South Africa and certain Latin American countries in the 1990s. It was initially defined as ‘a long-term project of constitutional enactment, interpretation, and enforcement committed [...] to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.’¹ It is not a philosophy of history, nor does it represent a theory of modernization. It is a legal concept to interpret

and apply constitutional rules with the objective of contributing to social transformation. We can distinguish two understandings. The first, which is less demanding, finds transformative constitutionalism in any constitutional jurisprudence that promotes democratic transformations.² The second combines the first with the attempt to address systemic deficiencies, although these deficits need not have the magnitude of South African apartheid, or the Colombian state’s collapse. Because it is more instructive, I use the more demanding—i.e. narrower—understanding.

My reflections focus on Latin American constitutional innovations (synthesized as transformative constitutionalism) in dealing with systemic deficiencies. In doing so, I hope to illuminate how the Court of Justice of the

¹ Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights* 146, 150. For other applications and interpretations of the concept, see Theunis Roux, ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without a Difference?’ (2009) 20 *Stellenbosch Law Review* 258; Theunis Roux, ‘A Brief Response to Professor Baxi’ in Oscar Vilhena Vieira, Upendra Baxi, and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press 2013) 48, and Michaela Hailbronner, ‘Transformative Constitutionalism: Not Only in the Global South’ (2017) 65 *American Journal of Comparative Law* 527.

² Hailbronner (n 1) 527.

European Union (CJEU) and the European Court of Human Rights (ECtHR), the EU Commission and the Venice Commission, activists and legal scholars, and national courts and ombudspersons can counteract systemic deficiencies in European society, such as those under the PiS-led government in Poland.

The Latin American experience is instructive because it, too, uses common law and common institutions to address systemic deficiencies. Latin American transformative constitutionalism operates at two levels, the state and the regional level. Two institutions stand out at the regional level: the Inter-American Commission and the Inter-American Court of Human Rights (IACtHR).³ Furthermore, there is a horizontal network of transformative domestic institutions—particularly courts, ombudspersons, public prosecutors' offices, and dedicated bureaucracies—as well as grassroots and non-governmental organizations. These generate much of the system's dynamics and turn transformative constitutionalism into a social practice far beyond the black letter of legal sources.

The court's legal basis is the American Convention on Human Rights, which came into force in 1978, and it found its role in interpreting the Convention in such a way as to support the process of democratization in the region which began in the early 1980s. Before this point, many people in the region believed that the law primarily served to consolidate the elite's power and prevent social change.⁴ By contrast, after this, many started to recognize its potential for *supporting* social transformation, that is, for effectively guaranteeing rights in daily life and strengthening democratic participation. This implied a new professional self-understanding, new doctrines, and new techniques of legal reasoning.⁵ Traditional legal formalism was considered a major obstacle.

This transformative thrust became a regional phenomenon, for the new or reformed Latin American constitutions opted to incorporate human rights. The ensuing doctrine of the constitutional bloc ('*bloque de constitucionalidad*') links national constitutions with the American Convention on Human Rights. On this basis, domestic constitutions give a mandate to the Inter-American System of Human Rights to participate in the transformation towards a democratic society.⁶

Latin American transformative constitutionalism is the joint product of national constitutional law and international human rights. This multilevel constitutionalism formalizes a key experience gleaned from repressive times: as Keck and Sikkink observed, many Latin American actors strongly relied on international and foreign institutions to counter oppression.⁷ The constitutional incorporation of human rights validated this strategy.

This process is one of juridification of social issues. Some claim that juridification entails depoliticization, which would hinder successfully addressing entrenched social problems. But the Latin American experience demonstrates the opposite. Juridification helps create a new language and new fora for publicly identifying structural deficiencies and for articulating possible solutions. These are features of politicization rather than depoliticization. Moreover, the IACtHR, like other courts, does not only adjudicate concrete disputes. It explicitly tackles deficient structures and provides transformative impulses for society as a whole, thereby *generating* political processes. In other words, there can be a constructive link between juridification and politicization.

³ Rodrigo Uprimny, 'Las transformaciones constitucionales recientes en América Latina: Tendencias y desafíos', in César Rodríguez-Garavito (eds), *El derecho en América Latina: un mapa para el pensamiento jurídico del siglo XXI* (Siglo Veintiuno XXI Editores 2011) 109, 114.

⁴ Eduardo Novoa Monreal, *El derecho como obstáculo al cambio social* (México, Siglo xxi 1975).

⁵ Carlos Santiago Nino, *Fundamentos de derecho constitucional. Análisis filosófico, jurídico y politológico de la práctica constitucional* (Editorial Astrea De A. y R. Depalma 1992).

⁶ Manuel Eduardo Góngora-Mera, *Inter-American Judicial Constitutionalism on the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (IIDH, Inter-American Institute of Human Rights 2011).

⁷ Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press 1998) 79 ff.

2. European Transformative Constitutionalism

The EU Treaties have tremendous transformational impetus. In 1957, in the Preamble to the European Economic Community Treaty (now the Treaty on the Functioning of the European Union), the signatories declare they are ‘determined to lay the foundations of an ever closer union among the peoples of Europe’. In 1992 the Treaty on European Union (TEU) elevated ‘ever closer union’ to the status of a legal objective in the operative part of the Treaties. And, amidst the turmoil of the European debt crisis (c. 2009–2015), the CJEU stressed this, stating that ‘the implementation of the process of integration [...] is the *raison d’être* of the EU itself.’⁸

Despite the decades of transformative integration, transformative *constitutionalism* in the EU can only truly be said to have begun in the 1990s, when Central and Eastern European societies decided to overcome their authoritarian structures by transforming themselves in the light of the values now established by Article 2 TEU. These societies ascribed an important role in this transformation to their constitutions, but also Union law and the law of the Council of Europe. This constitutionalism yielded true successes, but democratic structures remain frail in some countries. One of the major questions of our time is whether the strengthening of authoritarian forces heralds a new (and much darker) threshold phase or whether a renewed transformative constitutionalism can consolidate the European democratic society.

At the beginning of this period, in the early 1990s, much seemed self-evident. Most actors and observers were confident that the Central and Eastern European societies to the West of the former Soviet Union would become liberal democracies. Francis Fukuyama’s ‘end of history’ or Jürgen Habermas’ dictum of the ‘catch-up

revolution’ expressed this zeitgeist.⁹ In 1993, the united Western European governments agreed on European *governance*, which would reorganize Europe by joining the resources of the various European organizations. One manifestation of this agreement was the European Council’s decision that promised the transforming states accession under the so-called Copenhagen criteria, that is, standards that would later be incorporated into Article 2 TEU.¹⁰ In the same vein, the Council of Europe issued its like-minded Vienna Declaration.¹¹ These texts laid the political foundation for the path towards transformation.

On this basis, the European Union, the Council of Europe, and the CSCE (which became the Organization for Security and Co-operation in Europe (OSCE) in 1994) developed a policy of transformative constitutionalism, albeit without articulating it as such. Despite there being some tensions between them, these organizations cooperatively formulated and implemented the Western European principles of democratic rule of law vis-à-vis those states. This policy gained traction because it promised accession to the European Union, which many Central and Eastern European citizens eagerly desired.

According to some scholars, this transformation ended in failure.¹² This strikes me as a misjudgment; the post-socialist states did in fact abandon many of their authoritarian structures. At the same time, regressions are all too visible, particularly in Hungary and Poland. Most observers agree that these regressions are not solely due to Viktor Orbán and Jarosław Kaczyński’s political skills but must also be due to insufficient transformation.¹³ Some argue that the transformation was driven by a narrow elite and that wider legal culture could not keep up with it.¹⁴ Others maintain that the transformation disappointed many by resulting in

⁸ Opinion 2/13 *ECHR Accession II* EU:C:2014:2454, para 172.

⁹ Francis Fukuyama (1989), ‘The End of History?’, 16 *The National Interest* in Robert J Lieber (eds), *Foreign Policy* (Routledge 2008) 3; Jürgen Habermas, *Die nachholende Revolution* (Suhrkamp 1990).

¹⁰ European Council of 21/22 June 1993, Presidency Conclusion (SN 180/1/93 REV 1), at 13. In detail, see Christophe Hillion, ‘The Copenhagen Criteria and their Progeny’ in Christophe Hillion (eds), *EU Enlargement. A Legal Approach* (Hart Publishing 2004) 1.

¹¹ Council of Europe, Vienna Declaration of 9 October 1993.

¹² Ivan Krastev and Stephen Holmes, *The Light that Failed: A Reckoning* (Pegasus Books 2019).

¹³ Dariusz Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *Common Market Law Review* 623.

¹⁴ András Jakab, ‘Institutional Alcoholism in Post-socialist Countries and the Cultural Elements of the Rule of Law: The Example of Hungary’ in Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe: Political and Legal Integration Beyond Brexit* (Bloomsbury Publishing 2019) 209.

economic hardship rather than prosperity.¹⁵ The subsidies with which the European Union supports Orbán's and Kaczyński's governments, Germany's significant industrial investments in those countries, and the European People's Party's tolerance of antidemocratic tendencies on the part of its members are also worth mentioning.¹⁶

Whatever the root causes, in light of these regressions we must today consider the legal feasibility of some innovations that might facilitate a second democratic transition.

3. New Responses to Old Challenges

In the remainder of the essay I discuss three challenges faced by courts in Europe, and consider what Europe can learn from how those same challenges have been addressed in Latin America.

Coping with politicization

Political resistance against courts in general—and transformative decisions in particular—has been a major issue in recent years.¹⁷ It often leads to political actors questioning the legality and legitimacy of a decision, a line of jurisprudence, or even of a court as such. This endangers a court's authoritativeness and thus perhaps its most important resource. But it also presents an opportunity.

The letter of the law alone does not make a court authoritative. Authoritativeness is also taken, conquered, often in a situation of conflict.

Therefore, political resistance offers a court the chance to build or strengthen its authority. Of course, it takes acumen, courage, and political skill to make good use of any such opportunity. Scholarly analysis can determine when courts have been successful. Latin American experiences illustrate this point.

In 2017, the IACtHR issued an opinion, at the request of the Costa Rican government, that Convention States must treat same-sex couples equally to heterosexual couples.¹⁸ Implementing the opinion became a central issue in the subsequent election campaign.¹⁹ Indeed, the entire election turned out to be something like a referendum on the authority of the IACtHR in Costa Rica. In response the presidents of Argentina, Brazil, Chile, Colombia, and Paraguay sent a public letter to the IACtHR on Human Rights in April 2019.²⁰ The letter demanded that its institutions show greater respect for the principle of subsidiarity, apply restrictive methods of interpretation, and work with 'due knowledge and consideration of the political, economic and social realities of the States'. These requests called into question the transformative constitutionalism of the Inter-American human rights system.

As a result, more than two hundred NGOs mobilized against the letter.²¹ They portrayed it as an attack on the very system that symbolizes and safeguards the restoration of democracy in Latin America.²² Their mobilization proved successful and

¹⁵ Pál Sonnevend, 'Preserving the *Acquis* of Transformative Constitutionalism in Times of Constitutional Crisis. Lessons from the Hungarian Case' in Armin von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017) 123.

¹⁶ Csaba Györy, 'Ein Freund, ein guter Freund', (*Verfassungsblog*, 22 December 2020).

¹⁷ Ximena Soley and Silvia Steininger, 'Parting ways or lashing back? Withdrawals, backlash and the Inter-American Court of Human Rights' (2018) 14 *International Journal of Law in Context* 237.

¹⁸ IACHR, *Opinión Consultiva OC-24/17: Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo Sexo* (2017); Rene Urueña, 'Reclaiming the Keys to the Kingdom (of the World): Evangelicals and Human Rights in Latin America' in Janne E. Nijman and Wouter G. Werner (eds), *Netherlands Yearbook of International Law 2018: Populism and International Law* (Springer 2019) 175.

¹⁹ Kirk Semple, 'Costa Rica Election Hands Presidency to Governing Party Stalwart' *The New York Times* (1 April 2018) <<https://www.nytimes.com/2018/04/01/world/americas/costa-rica-election-alvarado-quesada.html>>.

²⁰ La República Argentina, la República Federativa del Brasil, la República de Chile, la República de Colombia y la República del Paraguay, *Declaración Sobre el Sistema Interamericano de Derechos Humanos* (2019) <<https://repositorio.uca.edu.ar/handle/123456789/8628>>.

²¹ See ASILEGAL, Embates al Sistema Interamericano de Derechos Humanos vulneran la protección regional de los DD.HH. of 2 May 2019 <<https://asilegal.org.mx/comunicados/embates-al-sistema-interamericano-ddhh/>>.

²² On this role, see Carlos Santiago Nino, *Radical Evil on Trial* (Yale University Press 1996) 68 f.

the coalition of the five presidents fell apart. Thus, there was no concerted attempt to undermine the system, for example, by agreeing on a particular staffing policy for Commissioners or Judges.²³

We can compare the letter of the five presidents with the Interlaken process of the ECtHR.²⁴ For a long time, voices that were critical of the ECtHR dominated this process. Ultimately, however, the far more numerous actors who view the ECtHR's case law as lawful and legitimate mobilized. Thus, the much-feared politicization confirmed, and indeed promoted, the Court's legitimacy.

Something similar is occurring in Poland. There, the government is mobilizing against the European Courts that support Polish judges fighting for their independence. But the government's politicization appears to be backfiring because it soon became apparent that vast parts of Polish society support the European courts.²⁵

Creating a supportive social field

The second challenge concerns the need for a supportive social field.²⁶ Transformative constitutionalism is not solely a judicial activity. It requires numerous other actors who identify suitable facts, prepare them as legal cases, take them to court, litigate them, accompany the process of implementation, and then use the decisions as precedents in later controversies.²⁷ Court decisions

are only the tip of an iceberg of social practice; the court and these other actors depend on each other.

In Latin America, many civil society organizations have only developed thanks to the opportunities provided by the Inter-American System. This serves to democratize the region.²⁸ The same is true in Central and Eastern Europe. The Hungarian government's actions against civil society organizations such as the *Open Society Foundation* and the *Central European University* confirm that they are relevant societal forces.²⁹

For the CJEU, the ECtHR, and the IACtHR, this suggests attending to actors who support their case law and help it enter social reality. Judicial cooperation constitutes one important building block, the larger field of societal actors another one. That civil society organizations play a minor role before the CJEU and the ECtHR, compared to the IACtHR, suggests a potential for development.³⁰

Tackling the problem of non-compliance

A challenge also presents itself when a state does not comply with a decision that strives for transformation.³¹ The ruling might then be devoid of meaning if it cannot engender effects within society.

Moreover, the compliance rate is particularly low in these cases. A high rate of compliance often seems

²³ Mariclaire Acosta and others., 'Informe del Panel Independiente de Expertos y Expertas para la evaluación de candidatos y candidatas a la Comisión Interamericana de Derechos Humanos, 5 June 2019' <<https://www.wcl.american.edu/impact/initiatives-programs/center/documents/2019-informe-del-panel-independiente-de-expertos/>>.

²⁴ A series of high-level conferences aiming to safeguard the effectiveness of the ECHR system.

²⁵ Maria Pankowska, 'Majority of Poles take EU Court of Justice side in fighting PiS attack on courts' (*Rule of Law in Poland*, 19 November 2019) <<https://ruleoflaw.pl/majority-of-poles-take-eu-court-of-justice-side-in-fighting-pis-attack-on-courts/>>.

²⁶ Antoine Vauchez, 'Introduction. Euro-lawyering, Transnational Social Fields and European Polity-Building' in Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Bloomsbury Publishing 2013) 1.

²⁷ Antoine Vauchez, 'Communities of International Litigators' in Cesare PR Romano, Karen J. Alter, and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) 655, 656 f.

²⁸ Par Engstrom (ed), *The Inter-American Human Rights System: Impact Beyond Compliance* (Palgrave Macmillan Cham 2019).

²⁹ The CJEU has declared both laws to be contrary to Union law. Case C-78/18 *Commission v Hungary (Transparency of Associations)* EU:C:2020:476; and Case C66/18 *Commission v Hungary (Enseignement supérieur)* EU:C:2020:792.

³⁰ Elif Erken, 'The Participation of Non-Governmental Organisations and National Human Rights Institutions in the Execution of Judgments of the Strasbourg Court: Exploring Rule 9 Communications at the Committee of Ministers' (2020) *European Convention on Human Rights Law Review* 248.

³¹ Alexandra Huneus, 'Compliance with Judgments and Decisions' in Romano and others (n 27) 438.

to indicate that a court triggers transformative effects and is authoritative.³² The ECtHR faces considerable difficulties in this regard.³³ But the CJEU also confronts challenges. The importance of compliance could suggest that courts should not address structural problems so as not to jeopardize their authority. Studying the opposite course, which was chosen by the IACtHR, is hence instructive for Europe.

The IACtHR suffers from an especially low compliance rate.³⁴ But we overlook many transformative effects if we focus on nothing else. Thus, the very process of promoting compliance can be useful, too. Thus: the Court insists on duties of disclosure, conducts site visits, and organizes hearings at which state authorities, victims, and stakeholders—who often have never met—exchange opinions and discuss strategies.³⁵

To further compliance, international decisions are often vague; only during the implementation process and in dialogue with the states involved do they take on more precise contours.³⁶ What is more, the context of implementation is rarely static, and the IACtHR often tries to influence it. Frequently, one objective of its rulings is to allow other actors to use the decision to promote a supportive context: how can *this* international decision help the national judiciary promote compliance with its own decisions? How can an international decision help civil society mobilize for the issue at hand? This is how compliance partnerships emerge.³⁷

Moreover, a court exerts its influence not only through the eye of the needle by ensuring full compliance with its rulings.³⁸ Again, Latin America helps us understand this more clearly. Until the 1980s, human rights hardly played a role in most Latin American states. Today, by contrast, inter-American provisions, decisions, and institutions are present in the entire region, even though the compliance rate is low. They are interwoven with national provisions to form a shared law of human rights, creating a new social field of possibilities for structural transformation. Transformative constitutionalism means that intractable social problems that once appeared to be manageable only in political or even revolutionary terms are now also articulated as legal issues and dealt with in the forms of law. This can have far-reaching effects. Of course, human rights continue to be violated systematically in many countries, but it should not be overlooked that decisions by the IACtHR help address many deficiencies.

The Latin American experience suggests focusing on the bigger picture in addressing systemic deficiencies. There is legal value in judgments that identify deficient situations as such, publicly state what needs to be done, and strengthen social forces committed to remedying the deficiency. If domestic institutions—namely, the government, its parliamentary majority, or a captured court—do not comply with a judgment issued by the ECtHR or the CJEU, Europeans should consider this the problem of the deviant domestic institution and not of the ECtHR or the CJEU.

³² Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press 2018) 24.

³³ See, eg, Council of Europe (Committee of Ministers), Annual Report 2018, Supervision of the execution of judgments and decisions of the European Court of Human Rights, at 71 ff.

³⁴ Damian Gonzalez-Salzberg, 'Do States Comply with the Compulsory Judgments of the Inter-American Court of Human Rights? An Empirical Study of the Compliance with 330 Measures of Reparation' (2014) 13 *Revista do Instituto Brasileiro de Direitos Humanos* 93.

³⁵ In detail, Armin von Bogdandy and René Uruña, 'International Transformative Constitutionalism in Latin America' (2020) 114 *American Journal of International Law* 403, 425 ff.

³⁶ On the CJEU, Tanja A. Börzel and others, 'Obstinate and Inefficient: Why Member States Do Not Comply With European Law' (2010) 43 *Comparative Political Studies* 1363.

³⁷ Alexandra Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority' (2016) 79 *Law and Contemporary Problems* 179; Lisa J. Conant, *Justice Contained: law and politics in the European Union* (Cornell University Press 2002), at 214 ff.

³⁸ Oscar Parra Verra, 'The Impact of Inter-American Judgments by Institutional Empowerment' in Armin von Bogdandy and others (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017) 357.

On the Difficulties of Rule of Law Restoration

András Sajó

The democratic backsliding in some EU Member States is commonly understood as a problem of the rule of law. This identification is misplaced, but the inherent weaknesses and uncertainties pertaining to the rule of law do contribute to these difficulties. This contribution examines the internal deficiencies, and reviews the external context, which enables illiberal actors to prevail. Finally, it considers the possibility of a militant restoration of the rule of law which would, however, run counter to its own principles.

1. Introduction

Despotism banishes all forms of liberty; usurpation needs these forms in order to justify the overturning of what it replaces; but in appropriating them it profanes them.

Benjamin Constant¹

At the heart of the rule of law crisis lies an illiberal-plebiscitarian-leader version of democracy. The leaders of these illiberal regimes, or electoral autocracies, can be considered usurpers in Constant's terms. In this contribution I examine how the rule of law is used, by them, to undermine itself, and ponder how societies might recover from this profanation.

This is worth considering because the current fight against the breakdown in the rule of law is not likely to be effective. The 'conditionality' action plans that the European Union is now using or considering using seem to evidence a belief that corruption is at the heart of the problem. And while corruption is an important factor—embezzlement and cheating in the service of perpetuated illiberal imperium building are key techniques of the rule of law usurpation—it is not the *sine qua non*. This is because, to build a domestic empire (a perpetual fiefdom based on usurpation) it is not crucial to openly, illegally

bribe someone. The appropriation of public assets can be fully legalized, and laws can be written and interpreted in ways that legalize the redistribution of those illicit assets. The rules of public procurement can be written in a way that puts public procurement contracts in the hands of government favourites, administered by loyal servants. The tailor-made-for-embezzlement law creates economic power that enables the perpetuation of political power in the seemingly democratic electoral process. None of this is strictly illegal within the system, and we must therefore reconsider the problem of the weakening of the rule of law.

It is further worth considering because it is a puzzle: as an ideal and a set of instruments to defend the public against arbitrary power, the rule of law would seem to be a simple, unequivocal human good. But what might be an unqualified human good in the abstract becomes a conflicted matter in the social and legal practices carried out in the very name of that good. The veneration of the rule of law by lawyers and the frequent lip service paid to it by politicians may be necessary, but this praise cannot obscure the fact that, like all human institutions, it has imperfections, inherent contradictions, and a dark side. To a great extent, the ongoing breakdown is simply a systematic display of these inherent problems.

¹ *Political Writings* (Biancamaria Fontana tr, Cambridge University Press 2007)

2. Inherent Flaws

I begin by identifying two internal deficiencies in the concept and practice of the rule of law that have contributed to the current problems. I go on to examine two external factors which contribute to the rule of law's self-liquidation.

First, the rule of law sustains all kinds of status quo, *including the unjust or unfair*. It can be oppressive or at least heartless. This undermines its legitimacy. If a society has inherited a legally protected status quo that is based on past injustice, or where enclaves of injustice are common, the rule of law will tend to protect such arrangements. Undeniably, the statute of limitations, *nullum crimen*, and their progeny are bastions of foreseeability and legal certainty. They are the ultimate defences against arbitrariness, but they are also typical bulwarks of status quo injustice. Rules of legal certainty will certainly protect ill-gained property and grant impunity to criminals of all sorts. Improperly appointed judges or other authorities will maintain their position in the name of irremovability, and so on. The impunity of wrongdoers or the impossibility of returning ill-acquired property generates social discontent because law is seen as the refuge of scoundrels. As we shall see, this inertial property means that when it comes to its restoration the rule of law operates as if it were its best enemy.

Second, as applied in law-making and law enforcement, the rule of law is uncertain and to some extent contradictory. There can be a fundamental agreement at the highest level regarding the value and principles of the rule of law. It is easy to agree that limiting arbitrariness is a good thing, although even at this level there can be some disagreement, for example when it comes to the distinction between necessary discretionary power and unacceptable arbitrariness. The agreement can be sustained even at the level of foundational and structural components: legality, judicial independence, procedural fairness, etc., all imply a firm belief in a specific principle (or bundle of principles) regarding the structure of law and its institutional pillars. In the hoped-for scenario the shared belief becomes an effective action plan, and it enables the principle to have normative power. But what happens, and not only in the demise scenario, if the agreement breaks down and there is *uncertainty* in the operationalization of principles? Does the rule of law require judicial review of all administrative decisions? And what is the exact

meaning of *vacatio legis* (i.e., the time period between the adoption of a legal act and its coming into force) if it is supposed to be an essential part of the rule of law? What constitutes a sufficient time period? Decent and reasonable judges can consider various relevant factors to evaluate the adequacy of the time period. But this is not a guarantee in the sense of rule of law certainty, although the judicial practice may crystallize points of reference for such matters.

There are further such internal deficiencies; inherent aspects which may undermine the very essence and efficacy of the rule of law and the legal system, but these two suffice to show that the rule of law is not sufficiently protected against its own demise, a demise by its own means.

The two non-legal, external elements which merit particular attention in the study of the (self-) liquidation of the rule of law are as follows. First, like constitutionalism in general, the existence and observance of the rule of law is to a great extent a matter of mentality, tradition, and culture. There is the 'spirit of the law'; so too is there the spirit of the rule of law, and it must be shared by the relevant legal actors, and to some extent wider society, for the rule of law to be meaningful and efficient. Without a shared commitment to legal decency judges become mere technicians accepting a mechanical, politically imposed meaning of the law, partly because of existential conformism, partly because of professional dumbness. Here, even decent people become tired, and a mood of resignation prevails. The rule of law ends where belief in it dies.

Second, where authoritarian predispositions prevail in society—by authoritarian disposition I mean a veneration of the authority of a person or a collective identity with an intensity bordering religious fanaticism—power can be wielded in unconstrained fashion, especially where public opinion is manipulated by government monopoly. For the authoritarian mind a constrained power is no power at all, and the very lack of constraints has a form of popular legitimacy where such a disposition exists.

The regimes of usurpation in the EU claim that they respect the rule of law. This claim is 'corroborated' by showing that whatever they do is present in countries which are considered model

states of the rule of law. Equally important is how the regime of usurpation uses internationally recognized exceptions to general rules creating a regime of normalized exceptionalism and expediency. A key example of this is the disregard of competitive bids in public procurement in the interest of national economy (expediency), a matter that is recognized in EU law. It is for the sovereign national authorities with local knowledge to determine where national economic interests are at stake, and this is a matter of national sovereignty. Local knowledge here means knowing who the cronies are. As to the remedy: a clear definition of what constitutes national economic interest is helpful but an EU advocated milestone that would limit single party calls to ten per cent of the total is a good to start at best, and most likely only the beginning of a new cycle in the game of workarounds. Tom's message to 'EU Jerry' is clear: 'Catch me if you can!' Or consider the debate raging about the composition of judicial councils, judicial appointment and irremovability. In the (changing) endorsement of one or another single model the imperative language cannot conceal the conflicting evidence.

3. The Rule of Law Is Its Own Best Enemy

So what is to be done? The transition to democracy from dictatorial regimes and the restoration or reconstruction of a pre-existing constitutional order have been extensively studied: they are the subject of whole academic fields, i.e. transitional justice and transformative constitutionalism theory. Restoration of the rule of law in regimes where the usurpation has *not* reached the level of dictatorship and naked arbitrariness, and where at least a veneer of the rule of law is maintained, is a less studied phenomenon. We can start by observing that for several reasons—many of them inherent to the rule of law—such a restoration looks likely to prove quite difficult.

One maxim of the transition to democracy is that 'there can be no rule of law created by its own violation' because it will only start an endless cycle of illegality. In certain restoration situations this maxim results in stalemate and paralysis, friendly to the status quo. The uncertainties and contradictions become extremely challenging where the rule of

law and restorative social justice cannot be achieved without the violation of formal legality. This is the problem where the Midas touch of legality has served the interests of the usurper: most of the acts which have undermined democracy and keep people in intellectual serfdom and material dependence were fully legalized (though in Poland or Bulgaria, partly for lack of constituent majority but primarily because of impatience, legalization is less successful than in Hungary).

The status-quo-protecting nature of the rule of law is central in matters of judicial irremovability. Removing judges in case of systemic improper judicial appointments seems to be a natural response in attempts of restorative justice, but it is a real challenge, as the post-war legal history of Germany demonstrates. The European Court of Human Rights (ECtHR), after many years of trepidation, recognized in *Guðmundur Andri Ástráðsson v Iceland* that exceptional circumstances may justify judicial removal, and the ECJ too has accepted that certain judicial formations are contrary to the rule of law, and that some appointments and dismissals are therefore void. However there has been no restoration to judicial managerial positions in the Hungarian cases,² and thus far none of the unconstitutional appointments of the Polish Constitutional Tribunal have been invalidated. The fruits of the poisonous tree hang too high: the longer the despotic regime rules, the more legalized the appointments will be and the rule of law, contrary to quasi-revolutionary regime changes, does not offer a solution where the problem with the administration of justice is that the judges and in particular those who have managerial positions were appointed for partisan reasons (assumed political loyalty or lack of spine), but within the legal forms that apply in rule of law countries.

Given the centrality of the judiciary for the rule of law, scholarly, professional and political interest usually focuses on the administration of justice. However, the sources of the illiberal usurpation lie in economic and cultural quasi monopolies, created by law and entrenched by the rule of law. The positions of domination were created by the tailor-made law and were not, at the time of their creation,

² ECtHR, *Guðmundur Andri Ástráðsson v Iceland* [GC], Appl. No. 26374/18, judgment of 1 December 2020.

deemed violations by the EU. How to change—without breaching the rule of law—the decisive ownership structures which mean the press is owned by the cronies of the usurper? Nationalization in the name of public interest with full compensation would be the rule of law-compliant answer. But what to do with the management of the public television or national bank and many other public institutions which are also protected by rules of irremovability, even at the level of EU law and quite often constitutionally entrenched?

Criminal law is also bound by legality. How is one to prosecute past crimes which are beyond the statute of limitations and, if they are not, who will prosecute where the prosecutorial office is populated by accomplices of the past regime? Recall the Italian ‘solution’ after the collapse of fascism. The principal drafter of the race law became the second president of the Constitutional Court. Fascists continued to work for democracy. It is for the historian to determine the extent to which the rule of law can be said to have obtained in the post-war, cold war system established by Italian Christian Democracy, but one can note the significant degree of corruption which eventually erupted into violence and political crisis.

In summary, when it comes to national tools for restoration, the power of the usurper will endure because the material basis of that power—former public assets now in the hand of regime loyalists—is protected by the constitution and the rule of law. The only hope is that there are enough corrective mechanisms in the rule of law which allow at least a modest correction. Many of the biased contracts can be voided for being *contra bonus mores* (unconscionable) and rescinded if the judiciary is ready to accept a radical but reasonable interpretation of classic private law concepts. After all, as the Hungarian Civil Code states: ‘Contracts violating the law or concluded by circumventing the law shall be null and void’ (6:95). But are these concepts applicable to an administrative decision allocating government subsidies (after all, the Civil Code would not normally apply to sovereign government action that is formally lawful)?

What about the European tools? Some of the more recent victims of laws written to the benefit of government cronies can be compensated if the laws of usurpation are contrary to European law. Let’s assume that the domesticated judiciary will be ready to review its earlier positions. Even so, it will be hard—perhaps even impossible—to frame most of the abuse in terms of EU law infringement, and the successful infringement process will not reach the wrongdoers who act in accordance with the national law that they had written for themselves.

Assume, for example, that, as part of the restoration of the rule of law, the rules of public procurement are rewritten, and the new legislation is not struck down by a Constitutional Court filled with appointees of the usurper. Imagine that the new rules contain clear and transparent (objective) tender conditions. Assume also that past overpricing, exclusion of competitors (on formal grounds or informally), and exclusion of better offers is documented. The evidence indicates improper advantage, even systemic corruption, in the previous regime of public procurement, but no smoking gun of bribery or illegality (as the system is legally rigged by sovereign decision). Would excluding the beneficiaries of past procurement calls from new public procurement conform with the rule of law, if the excluded company had not at that point been found to be involved in price fixing, or other breaches; if the managers were never convicted, not even charged? It is easy to exclude on grounds of past behaviour companies like Odebrecht with a clear judicial record of illegality, but not in our case where the qualified bidder has never been charged.³ Of course, it is possible that legal responsibility can be established, but this takes many years in a rule of law-based system, because due process is time-consuming. The domesticated national administration of justice will obstruct the restoration of the rule of law in the very name of the rule of law.

As for the EU bodies and civil servants, these have not been able so far to respond with sufficient flexibility or speed. And there are deficiencies in Brussels, where Qatargate is the consequence of

³ The judicial findings are dubious in the eyes of left-wing commentators as in the Ecuadorian case related to the Odebrecht bribery, where the convictions allegedly aimed to facilitate the barring of ex-President Correa to stand at elections and were in violation of the rule of law. Denis Rogatyuk, ‘Ecuador’s Neoliberal Government is Trying to Ban Rafael Correa from the 2021 Elections’, *Jacobin* (8 March 2020) <<https://jacobin.com/2020/08/ecuador-moreno-correa-elections>>.

insufficient transparency and conflict of interest rules. It is telling that, as part of the conditionality milestones, the Hungarian parliamentary asset declaration rules had to be changed, because the Hungarian Parliament applied the European Parliament rules.

There are many instances which demonstrate the paralysing constraints of EU rule of law. Consider, for example, the Fifth Anti-Money Laundering Directive.⁴ The Directive includes an exemption, meaning that beneficial owner information does not have to be disclosed where there is a disproportionate risk of harm, for example fraud. This is a reasonable exception if national authorities act properly and transparently. But it becomes a shield for knaves where the authorities are programmed to see such disproportionate risk every time when the information would expose government cronies.

The ECJ reviewed the situation in *Luxembourg Business Registers*.⁵ Seeking to strike a proportionate balance between human rights and the public interest, it did not remedy the deficiency, but rather exacerbated it, voiding the unconditional access of the public to information on beneficial owners. Apparently, the earlier, pre-2018 rule is restored and ‘legitimate interest’ is to be shown. This is, again, within the rule of law, except that another gap is created in the service of the usurper: it will be easy for the authorities to *not* find legitimate interest as there is no presumption in favour of the press and specific civil society organizations. The usurper will maintain the façade of legality, for example by arguing that the press has no legitimate interest in the specific case. Or by asserting that the requesting journalist did not explain convincingly that the person concerned is involved in money laundering. Of course, the information will be granted to the friendly press it comes to ‘enemies’, in the spirit of ‘to my friends everything, to my enemies the law’.

The recent EU measures are doomed because they continue with the assumptions of the rule of law and human rights. This reflects the assumption

that the rule of law will operate as in decent democracies. But the ordinary considerations regarding the rule of law and human rights backfire in usurpation. Where the form of state is kleptocracy, the rule of law assumptions are naïve at best. However in illiberal democracies of the EU, at least for the time being, the abuse of the rule of law is a shield of the knaves, and not the sword of the usurper, i.e., in most cases law is not used to silence or prosecute those unwilling to become accomplices, and in individual litigation a veneer of decency is still present.

The legalistic limits of EU law, and the EU’s non-confrontational, muddling through tactics contribute to the systemic, substantive violation of the rule of law in a growing number of Member States. The careless EU subsidies regime empowered the beneficiaries of the usurpation in their regime-building. Of course to the EU it seemed that there were more important matters on the agenda than issues affecting less than one per cent of the budget and only in peripheral countries. When it comes to the Member States, they seemed to have focused on the nationalism of these regimes, and asked themselves whether it was so bad, given that they were also nationalists, albeit (in their view) of a ‘superior’ and ‘civilized’ kind?

Acquiescence is the name of the game. Social peace and efficiency are decisive considerations influencing the rule of law (and practical human reasoning). Legal certainty and its institutional entrenchment hamper the correction of past injustice even if that irregularity continues to pester the democratic future. This is the essence of the statute of limitations, and time neutralizes even the most egregious injustices, at least in law. The ECtHR ruled that, even where a judicial appointment was inappropriate, ‘the passage of time, the preservation of legal certainty will carry increasing weight in relation to the individual litigant’s right to a “tribunal established by law” in the balancing exercise that must be carried out.’⁶

⁴ Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

⁵ Joined Cases C-37/20 and C-601/20 *Luxembourg Business Registers* EU:C:2022:912.

⁶ ECtHR, *Guðmundur Andri Ástráðsson v Iceland* (n 2), para 252.

4. The Mentality of Immorality

There are a few, limited possibilities for rule of law restoration, and these rely on the rather limited or neglected capacity of rule of law self-correction. The rule of law does not contain a mechanism of self-defense, a kind of militant rule of law, apt to prevent and combat systemic abuse, and it does not provide a system for its self-restoration that would not endanger, perhaps severely, its own normal functioning. But it is, perhaps, possible to envision a restorative, militant rule of law, even if, given the social realities of adjudication and compromise-based interest politics, the chances of an effective restoration in this vein are not good.

The principal problem of restoration is not just insufficient self-correction. It is a problem of public and professional mentality. The rule of law is not just a principle, or a set of principles, generating standards and ultimately rules. It is also about the spirit, the morality that motivated and generated the principle, anchored in shared social experience. Those who suffered injustice at the hands of torturers, or communities experiencing lack of equality before the law on a daily basis will understand what arbitrariness means. They will have an intuitive understanding and respect for the rule of law and what derives from it, as well as a motive to undo arbitrariness. This spirit (or consciousness, culture, *habitus*, etc.); this shared social experience was to a great extent socialized as a set of general social expectations and institutionally in the construction of the *Rechtsstaat*. In this culture, the other party must be listened to as a matter of respect and as a precondition for rational deliberation. Decency-as-truth-telling is the basic assumption of everyday life. These expectations operate as social norms: collective expectations that are socially and institutionally sanctioned. These social assumptions were also built into the professional ethics of lawyers, scholars, journalists and even partisan politicians. It is in the spirit of legal decency and integrity that legal interpretation must follow established canons, and it should be reasonable.

This system of implied beliefs fails if ordinary social decency and fairness cease to be valid expectations

because, for example, a higher cause like restoring the nation's imaginary greatness dictates otherwise. Expectations of fairness then fade away thanks to conformism, or simple personal survival needs: maintaining them becomes unrealistic and counterproductive as a life strategy. He who continues to expect decent behaviour in social relations outside family is fatally mistaken and will be punished where unprincipled action rules and integrity is not rewarded.

Judges are socialized to follow a professional ethics of decency. In their case decency means professional rationality. They are not socialized to be moral heroes on the bench (though some Polish judges have shown heroism). Once decency and integrity are gone there is no moral obstacle to one or another absurd interpretation of the law (especially if this is the precedent coming from higher instances).

The citizen of a democracy expects respect from the authorities that can be provided by adherence to the rule of law. However, the same citizen is often ready to endorse a sentiment that is fundamentally contrary to the rule of law. After all, to quote Sandy Levinson, 'the "rule of law", defined as adherence to procedural norms, works in systematic ways to frustrate democratic wishes and goals.'⁷ The belief that the will of the nation represented in a majority is sovereign appears to be increasingly prevalent. According to this belief, the majority represents the genuine (true) nation or people, and rules are merely unnecessary obstacles. To quote the President of the Hungarian Supreme Court: 'an application of the principle of the rule of law can start wearing marks indicating tyranny, and, in extreme cases, marks of totalitarianism'.⁸

Alexandre Koyré—and later Hannah Arendt—observed that 'the totalitarian regime is founded on the primacy of the lie.'⁹ The contemporary regimes of usurpation are founded on the toleration of known lies. How is that possible, we might ask? *Mundus vult decipi, ergo decipiatur*. If the world will be gulled, let it be gulled.

⁷ Sanford V. Levinson, 'The Iron Cage of Veneration' (*Verfassungsblog*, 27 December 2021) <<https://verfassungsblog.de/the-iron-cage-of-veneration/>>.

⁸ András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Dialóg Campus 2019) 10.

⁹ Alexandre Koyré, 'The Political Function of the Modern Lie' (1945) 8.3 *Contemporary Jewish Record* 291.

Safeguarding the European Union's Values Beyond the Rule of Law

Monica Claes

The values proclaimed in Article 2 TEU must be given concrete expression in other rules of the Treaties or of secondary law to bring them within reach of EU law, to specify concrete standards and obligations for the Member States, and to allow the Union's institutions to implement and enforce them. Paradoxically, to safeguard the values proclaimed in Article 2 TEU, Article 2 TEU may not even be key.

1. Introduction

Article 2 of the Treaty on European Union (TEU), which affirms the 'values' of the Union, was initially perceived as being mainly of symbolic and political importance.¹ It was seen as an affirmation of the nature (today, one would say the 'identity') of the Union, as well as, via Articles 7 and 49 TEU, of its Member States. But the provision seemed to be too vague to impose concrete obligations on Member States, especially when acting outside the scope of EU law.

How different is the outlook today. Article 2 TEU today features in the preambles of many legislative proposals, it is increasingly mentioned in the case law of the Court of Justice of the European Union, and the values in it have been central to the current

Commission's priorities and in the joint priorities of the EU institutions in recent years. 'Values' talk is pervasive. The Court of Justice has confirmed that Article 2 TEU is 'not merely a statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the European Union as a common legal order'.² Article 2 TEU *is* binding on the Member States and the Union is no longer indifferent to the Member States' constitutional infrastructure.

In both the public debate and in academic writing, the main focus of attention in recent years, when it comes to these values, has been the rule of law. Of course, aspects of the other values of Article 2 TEU are included in 'rule of law' which is very broadly construed, for example in the European

¹ The 'values' are also reflected in the preambles of the EU Treaties and the Charter, in many other provisions of the EU Treaties, such as the horizontal or mainstreaming clauses of Chapter II of Title I of the TFEU, as well as in EU legislation and the case law of the European Court of Justice (most clearly in the general principles of EU law). In fact, they permeate EU law. Yet, in line with the current debate, the focus here will be on Article 2 TEU. On the special importance of Article 2 TEU, see eg Lucia Serena Rossi, 'La valeur juridique des valeurs. L'article 2 TUE: relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) *Revue Trimestrielle De Droit Européen* 639; Luke Dimitrios Spieker, 'Defending Union values in judicial proceedings. On how to turn Article 2 TEU into a judicially applicable provision' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021) 237.

² Case C-156/21 *Hungary v Parliament and Council (conditionality regulation)* EU:C:2022:97, para 232.

Commission's Rule of Law Reports and in the Conditionality Regulation.³ But this is not the case for all other values. So, to what extent can and should the EU act to safeguard and promote the other values of Article 2 TEU, beyond the rule of law? What lessons can be learned from the experience with the rule of law?

This contribution is structured as follows: section 2 sets out some lessons from the rule of law crisis. Section 3 then examines whether, and if so to what extent, the same approach can be taken to safeguard the other values of the Union. It discusses in turn the protection of fundamental rights, democracy, and the societal values mentioned in the second sentence of Article 2 TEU. Section 4 draws the lines together and concludes that the values must be given concrete expression in other rules of the Treaties or of secondary EU law to be enforceable. As a result, some values are more easily enforced than others.

2. Lessons from the EU response to the rule of law crisis

When the rule of law crisis hit, the EU institutions faced three main challenges: the (perceived) lack of competence of the EU and its institutions to safeguard the rule of law, especially when Member States act outside the scope of EU law; the alleged indeterminacy of the concept of 'the rule of law' and the ensuing lack of concrete obligations for the Member States, and the inadequacy of the mechanisms available to enforce and safeguard the rule of law.

Competences and reach

When, over ten years ago, the Orbán government began its attack on liberal constitutional democracy—targeting courts, the media and other independent agencies—the Commission, the European Parliament and several leading European politicians called on the Hungarian Government to comply with 'the values of the European Union'. Yet, the constitutional and legislative changes in Hungary were generally considered to be out of the reach of EU law and the European institutions. The Commission did open infringement actions relating to issues that came clearly within the scope of EU law: the independence of the data protection supervisory authority, the independence of the Central Bank, and the retirement age of judges. The Commission thus focused on technical issues, rather than on what was really at stake, namely judicial independence, the rule of law, and separation of powers.⁴

It was the Court of Justice that convinced the Commission to take a broader view of the reach of EU law, bringing judicial organisation almost entirely into the purview of the Court in the *Portuguese Judges* case.⁵ The Court read the obligation of the Member States under Article 19(1), second sentence, to provide remedies sufficient to ensure effective legal protection 'in the fields covered by Union law' as including a duty to ensure that all courts and tribunals which *may* act as European courts meet the requirements of effective judicial protection, and accordingly, that they are independent.

The Court further explained that Article 19(1), second sentence, gives concrete expression to the value of the rule of law in Article 2 TEU. The

³ The Commission Rule of Law Reports focus on 'four key areas for the rule of law': national justice systems, anti-corruption frameworks, media pluralism and freedom, and other institutional questions linked to checks and balances, see eg Commission, '2022 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2022) 500 final. Article 2 of the Conditionality Regulation defines 'the rule of law' 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. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU' (Regulation (EU, Euratom) 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 [2020] OJ L433I/1). This connection between the values of Article 2 TEU has rightly been recognised by the Court in *Hungary v Parliament and Council* (n 2), para 229.

⁴ See eg Matteo Bonelli, 'Infringement Actions 2.0: How to protect EU values before the Court of Justice' (2022) 18(1) *European Constitutional Law Review* 30.

⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses (ASJP)* EU:C:2018:117.

mention of Article 2 TEU does not seem decisive for the case, but it does demonstrate the gravity of the issue. The enforcement actions against Poland in the aftermath of the *Portuguese Judges* case confirm that attacks on judicial independence are considered infringements of the obligation under Article 19(1) TEU, rather than Article 2 TEU *per se*. Article 19 TEU is essential to bring judicial organisation in situations which are not otherwise in the scope of EU law, in that scope, and hence in the purview of the Court. Article 2 TEU alone is not sufficient to do so.⁶

From values to legal obligations

So then, what concrete obligations can be derived from ‘the rule of law’ in Article 2 TEU? Article 2 TEU is indeterminate, while the EU has no competence to organise national judiciaries. Yet there are other sources to draw on. In the rich case law starting from the *Portuguese Judges* case, the Court of Justice has given meaning to the principle of judicial independence as one of the elements of ‘the rule of law’ by drawing on the general principles of EU law; Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter); Article 6 of the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights; on its own case law on judicial independence (in the context of Article 267 of the Treaty on the Functioning of the European Union, TFEU), and its case law on the general principle of effective judicial protection. As a result of the case law from the Court of Justice, there is now a rather clear conception of judicial independence in EU law, but Article 2 TEU plays a limited role in formulating the concrete obligations of the Member States.

Extending the rule of law toolbox

Originally, infringement actions proceedings were considered unsuitable to enforce ‘the rule of law’ against the Member States. Over the years, the Commission has developed what has been referred to as infringement proceedings 2.0, protecting judicial independence directly on the basis of Article 19(1) TEU, rather than taking the ‘indirect route’ of challenging other infringements of substantive EU law.⁷

In addition, the European Union has introduced new mechanisms to safeguard ‘the rule of law’ including the Commission’s Rule of Law Framework, which is mainly built on political dialogue, and its Rule of Law Mechanism, including the annual Rule of Law Reports. In addition, elements of the rule of law are monitored, and can be the subject of country-specific recommendations in the context of the European Semester and the Recovery and Resilience Facility. Most importantly perhaps, what has come to be known as the Conditionality Regulation makes it possible to protect the EU budget where it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU in a sufficiently direct way. Here too, Article 2 TEU mainly serves to mark the significance and urgency of the instruments.

Final remarks

By bringing the rule of law—or some aspects thereof, especially judicial independence—within the reach of the European institutions, clarifying the obligations involved, and developing new instruments, the EU has become a key actor in the fight to protect the rule of law in the Member States. This has fundamentally changed the nature of the Union, and the relationship between the Union and the Member States: more than ever before, the Union is concerned with the judicial organisation of the Member States, even when they are not strictly speaking implementing EU law, and it no longer simply presumes that the Member States comply.

3. Promoting the EU's values beyond the rule of law

Let us now turn to the other values mentioned in Article 2 TEU and examine whether, and if so to what extent, the Union can act, drawing, where possible, from the experiences with the rule of law.

Article 2 TEU enumerates twelve values in a rather haphazard and unstructured manner. It is broken up in two sentences. The first sentence seems to

⁶ Of course, Article 2 TEU is sufficient to bring the issue in the reach of the institutions when the thresholds of Article 7 TEU are met. The procedure of Article 7 TEU must then be followed.

⁷ See Bonelli (n 4).

contain more institutional or structural values on which the *EU and the Member States* are founded: respect for human dignity, freedom, democracy, respect for human rights, including the rights of persons belonging to minorities. The second sentence in Article 2 describes the type of *society* the Treaty envisages, reflecting pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men. In the following sub-sections, these values will be organized in three ‘baskets’: fundamental rights, democracy, and ‘societal values’.

Fundamental rights

The values listed in Article 2 TEU are reflected in other provisions of the EU Treaties (the TEU and the TFEU), the Charter and often also in secondary EU law. This is most evident for fundamental rights,⁸ which are ‘given concrete expression’ in Article 6 TEU, in the Charter, and in other provisions of the Treaties.⁹ They are further shaped in EU legislation. The promotion of fundamental rights is high on the political agenda of the Union institutions, and the legal bases available in the Treaties are used to develop strategies, actions, and legislation with a view to promoting these rights, for example in the context of ‘A Union of Equality’. In addition to the legal bases geared towards the promotion of fundamental rights (e.g. Articles 18–19 TFEU), recourse is also made to general legal bases, such as Article 114 TFEU, as the Union is under a general obligation to respect and promote Charter rights in all its actions.

Turning then to the enforcement of the Charter against Member States, the Commission has increasingly started to bring actions for violation of Charter rights. For this to be possible the Charter must apply, which is to say that the relevant Member State is implementing EU law, that is, is acting in the scope of EU law.

But can the EU act to safeguard Charter rights against Member States when they are not acting in the scope of EU law? Thus far, the Commission has always brought infringement actions for breach of Charter rights in combination with other provisions of the EU Treaties and/or EU legislation. The recent action against Hungary on its anti-LGBTIQ+ legislation is based on the infringement of several pieces of EU legislation, Treaty provisions, and Charter rights. Interestingly, the Commission also claims, as a separate plea, that by adopting the relevant law Hungary has infringed Article 2 TEU.¹⁰ It does not, however, specify which value Hungary allegedly infringes, nor how it relates to the first, more elaborate plea. Again, it seems that Article 2 TEU is not decisive for the case, but mostly serves to mark the severity of the breach. Infringements of fundamental rights outside the scope of EU law solely based on Article 2 TEU still seem to be beyond the reach of enforcement actions.

Democracy and pluralism

Democracy is given concrete expression in Articles 10, 11 and 12 of the TEU.¹¹ Yet it is not at all evident that these provisions can serve the function of operationalising the Article 2 value of democracy, as Article 19 TEU does for the rule of law and judicial independence. Even if they were to be interpreted as bringing ‘national democracy’, e.g. national elections, under the purview of the Court of Justice, it would require a lot of imagination to derive from these provisions clear standards and concrete obligations for the Member States. There is much less in EU law, ECHR law, and common traditions of the Member States to draw on than in the context of judicial independence.

That does not mean that ‘national democracy’ is entirely out of the reach of the Union. In fact, in recent years, the Union has become more concerned with democracy in the EU. ‘Nurturing, protecting and strengthening our democracy’ is one of the

⁸ Respect for human dignity, equality, respect for human rights, including the rights of persons belonging to minorities, non-discrimination, equality between women and men. Most of the other values can also be viewed through the lens of fundamental rights or contain aspects which can be framed as fundamental rights, such as democracy (Articles 10, 11 and 12 Charter, and Title V Charter), rule of law (Articles 47, 48 and 49 Charter), pluralism (Articles 10, 11 and 13 Charter), freedom (Title II Charter), justice (Title VI Charter) and solidarity (Title IV Charter), while ‘tolerance’ may refer to equality.

⁹ See also *Hungary v Parliament and Council* (n 2), paras 157 and 158.

¹⁰ Commission, Action brought on 19 December 2022, Case C-769/22 *Commission v Hungary*, OJ C54/16.

¹¹ As confirmed in Case C-418/18 P *Puppinck and others* EU:C:2019:1113, and Case C-502/19 *Oriol Junqueras Vies* EU:C:2019:1115 (both relating democracy at the EU level).

six priorities of the current Commission, which has developed several new policy initiatives to promote democracy in the European Union.¹² Most notably, the Commission launched the European Democracy Action Plan to empower citizens and build more resilient democracies, promote free and fair elections, and uphold electoral rights of EU citizens¹³ and issued a proposal to regulate political advertising and targeting, using mainly Article 114 TFEU as its legal basis.¹⁴ The proposal for a Media Freedom Act—another initiative under this priority—which aims to protect media freedom, media pluralism, and independence, is equally based on Article 114 TFEU.¹⁵ The Annual Rule of Law Reports also examine media freedom, and the Union also invests in protecting civic space and civil society organisations.

So, while the Union does not have competence to regulate ‘national democracies’, that is, the electoral system, the institutional structure, and the design of the political system, it can significantly influence the conditions in which these structures operate, such as the media climate, and it seeks to strengthen what we might call the fabric of democracy, at the national level.¹⁶ Through these activities, expression is given to Article 2 TEU and elements of national democracy may come within the reach of EU law, while the standards may be further shaped, giving rise to further EU actions.

Tolerance, justice and solidarity

The second sentence of Article 2 TEU refers to ‘a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. It is evocative of a societal contract and suggests that the Union is not merely an internal market and an area of freedom, justice

and security, but stands for open societies based on the values mentioned. It is not clear whether these ‘societal’ values are legally of a different nature than those of the first sentence. Non-discrimination and equality between women and men seem to overlap with some of the values mentioned in the first sentence. Perhaps they are repeated here to imply that not only the EU and the Member States, but also individuals must not discriminate among themselves.

Be that as it may, the values of ‘tolerance’, ‘justice’, and ‘solidarity’ are even more difficult to define and to safeguard in the Member States. What concrete obligations do ‘tolerance’, ‘justice’, and ‘solidarity’ impose on the Member States, in addition to the concrete obligations EU law imposes on them? ‘Solidarity’ features in the EU Treaties as an objective of the Union more generally (Article 21 TEU), as solidarity between generations,¹⁷ solidarity among Member States,¹⁸ and as solidarity among peoples in the wider world.¹⁹ But it can also be taken to refer to the solidarity towards and between individuals, as reflected in Title IV of the Charter (‘Solidarity’). It would then refer to a more social Europe. It is unclear whether ‘justice’ refers more to social justice and fairness in society or to the distribution of justice as under Title VI of the Charter, Article 19 TEU, and Articles 81–86 TFEU. ‘Tolerance’ is even more difficult to concretise. It can, again, be viewed through the lens of fundamental rights, urging the Union, the Member States (and individuals in society?) to respect fundamental rights, e.g. equality. But it may also be concerned with democratic societies and open public debate. What solidarity, tolerance, and justice require in concrete cases will have to be implemented in legislation and policies to be safeguarded.

¹² Commission, ‘A new push for European democracy: Nurturing, protecting and strengthening our democracy’ Priorities 2019–2024.

¹³ Commission, ‘On the European democracy action plan’ (Communication) COM(2020) 790 final.

¹⁴ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising’ COM(2021) 731 final.

¹⁵ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU’ COM(2022) 457 final.

¹⁶ The functioning of the democratic debate and pluralist societies can also be protected through the lens of fundamental rights, eg freedom of expression protected in Article 11 of the Charter, which the Court of Justice has qualified as ‘an essential foundation of a pluralist, democratic society reflecting the values on which the Union, in accordance with Article 2 TEU, is based’, see Case C-163/10 *Patriciello* EU:C:2011:543 and Case C-507/18 *Associazione Avvocatura per i diritti LGBTI* EU:C:2020:289.

¹⁷ Article 3(3) TEU.

¹⁸ Articles 3(3), 24, 31, 32 TEU; Articles 67, 80, 122, 194 TFEU; Title VII TFEU.

¹⁹ Article 3(5) TEU.

Here, it is even more difficult to envision the EU institutions safeguarding these values outside the scope of EU law.

4. Conclusion

Today, it is fair to say that the Union has many mechanisms available to seek to safeguard the values in Article 2 TEU, but that, except in the special circumstances described in Article 7 TEU and in the accession procedure, Article 2 TEU itself is legally of limited use. The values must be given concrete expression in other rules of the Treaties or

in secondary law to bring them in the reach of EU law, to specify concrete standards and obligations for the Member States, and to allow the Union's institutions to implement and enforce them, within the limits set by the EU Treaties. Numerous provisions of the EU Treaties, the Charter, and of EU legislation grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values of Article 2 TEU.²⁰ Paradoxically, to safeguard the values contained in Article 2 TEU, Article 2 TEU may not even be key.

²⁰ *Hungary v Parliament and Council* (n 2), para 159.

Beyond the Rule of Law

How the Court of Justice can Protect Conditions for Democratic Change in the Member States

Luke Dimitrios Spieker

While the Commission and the Court have concentrated on safeguarding judicial independence in Poland, the state of Hungarian democracy has become increasingly precarious. It is high time to intervene. This raises the question of how to legally address threats to national democracy before the Court. Based on its previous case law, this contribution demonstrates how the EU value of democracy in Article 2 TEU could be operationalised through Article 10 TEU. These provisions could then serve as yardsticks to review measures undermining the conditions for democratic change in the Member States.*

1. Introduction

As far back as 2012, Commission President José Manuel Barroso warned of ‘threats to the legal and democratic fabric’ in some Member States. In his opinion, the Article 7 TEU procedure was the final, ‘nuclear option’ to counter these challenges.¹ Being triggered twice, however, has revealed this procedure to be a dead end. Instead, the Union’s strongest response to the illiberal turn in several Member States emerged elsewhere—in Luxembourg. Confronted with the overhaul of the Polish judiciary, the Court of Justice of the European Union (CJEU) developed a powerful doctrinal innovation: with the judgment in the Portuguese Judges case (*ASJP*) the Luxembourg

judges started mobilising the values in Article 2 TEU and established a forum to remedy their violations.² So far, the Court has focused especially on challenges to judicial independence and the rule of law. While the independence of the Polish judiciary is far from saved, the legal standards to address such deficiencies are firmly established today.³

Unlike the rule of law, the Court and the Commission have approached the protection of democracy much more hesitantly. However, it seems that democracy is under even greater pressure, especially in Hungary.⁴ The European Parliament speaks of ‘a breakdown in democracy

* This contribution draws on Armin von Bogdandy and Luke Dimitrios Spieker, ‘Transformative Constitutionalism in Luxembourg? How the Court can Support Democratic Transitions’ (2023) 29 *Columbia Journal of European Law* (forthcoming) and Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023).

¹ State of the Union 2012 Address, Plenary session of the European Parliament/Strasbourg (12 September 2012).

² Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117.

³ For a detailed account, see Dimitry Kochenov and Laurent Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice* (Stockholm: SIEPS, 2021:3).

⁴ Listing Hungary as ‘electoral autocracy’, see V-Dem Institute, *Varieties of Democracy Report 2022: Autocratization Changing Nature?* (Gothenburg: V-Dem Institute, University of Gothenburg 2022) 33, 45. See also Beáta Bakó, *Challenges to EU Values in Hungary* (Routledge 2023).

[...] in Hungary, turning the country into a hybrid regime of electoral autocracy'.⁵ This breakdown consists of a bundle of individual actions that curtail opposition rights, media pluralism, the space for civil society, and equal opportunities in elections. Measures in the run-up to elections are particularly dangerous.⁶ Unfair party financing and campaigning rules, gerrymandering that favours the ruling party, and the abuse of public media—all this makes it increasingly difficult to 'throw the scoundrels out' while leaving the vote itself—the government's cloak of legality—untouched.⁷

Such measures constitute a central obstacle for restoring full compliance with EU values in Hungary. Ultimately, a decision to change course cannot be externally imposed but must emerge from within Hungarian society. Yet, any democratic change requires the existence of a democratic choice. Safeguarding the conditions for democratic change must therefore become a priority for the European institutions.

This contribution suggests that the Court of Justice should play an active role in this endeavour. This raises the question of applicable standards. At first sight, measures such as gerrymandering or changing party and campaign financing rules to give one's own party an advantage seem to escape the scope of EU law—except for Article 2 TEU. After briefly recalling the current state concerning the provision's justiciability (2), the essay invites the Commission and the Court to shift their current

focus from the rule of law to democracy (3). So far, both institutions have been reluctant to address democratic deficiencies in Hungary under the banner of Article 2 TEU (4). Against this backdrop, this contribution explores how democracy as an EU value could be operationalised by recourse to more specific Treaty provisions, in particular the EU Charter of Fundamental Rights and Article 10 TEU (5).

2. Mobilising EU Values Before the Court of Justice

Leaving institutional and competence issues aside, there are two common objections to the justiciability of Article 2 TEU.⁸ First, the provision contains moral values, not legal principles. And second, even if it were to contain legal principles, these principles are too indeterminate to be justiciable. After several years of judicial activity, the first objection can be considered to have been resolved.⁹ The Court of Justice settled this issue with its judgments on the rule of law conditionality regulation. Sitting in full court, the Luxembourg judges emphasised in unequivocal terms that 'Article 2 TEU is not a mere statement of policy guidelines or intentions'.¹⁰ As such, any doubts as to the legal normativity of Article 2 TEU are difficult to maintain and are supported only by few outliers.¹¹

Yet the second objection, namely the indeterminacy of Article 2 TEU, is much more difficult to

⁵ European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)), P9_TA(2022)0204, para 2.

⁶ On these practices, see Kim Lane Scheppele, 'How Viktor Orbán Wins' (2022) 33 *Journal of Democracy* 45, 50.

⁷ On being able to 'throw the scoundrels out' as a central feature of democracy, see J.H.H. Weiler, *The Constitution of Europe* (Cambridge University Press 1999) 329.

⁸ On why these institutional and competence issues cannot prevent the justiciability of Article 2 TEU, see Luke Dimitrios Spieker, 'The conflict over the Polish disciplinary regime for judges—an acid test for judicial independence, Union values and the primacy of EU law' (2022) 59 *Common Market Law Review* 777, 803.

⁹ See for example Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford University Press 2023); Lucia S. Rossi, 'La valeur juridique des valeurs' (2020) *Revue trimestrielle de droit européen* 639; Kim Lane Scheppele, Dmitry Kochenov, and Barbara Grabowska-Moroz, 'EU Values are Law, after All' (2020) 38 *Yearbook of European Law* 3, 67.

¹⁰ Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97, para 232; Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, para 264.

¹¹ According to the captured Polish Constitutional Tribunal, Article 2 TEU does not contain legal principles but only values of 'axiological significance'; see the press release accompanying the Judgment of 7 October 2021, K 3/21, para 19.

overcome.¹² Abstractly, there are two ways to construe the justiciability of Article 2 TEU: by applying the values in Article 2 TEU as freestanding standards, or by applying those values in combination with more specific Treaty provisions.

The first option is highly controversial. Indeed, some members of the Court have rejected a freestanding application of Article 2 TEU. According to Advocate General Pikamäe, the rule of law ‘cannot be relied upon on its own.’¹³ Similarly, Advocate General Tanchev argued that Article 2 TEU does not constitute a standalone yardstick for the assessment of national law.¹⁴ Others seem more open to considering a freestanding application.¹⁵ So far, the Court has been able to avoid this question. The Commission’s infringement procedure against Hungary for violations of LGBTIQ rights presents an opportunity to clarify this issue. The Commission based its pleas explicitly on Article 2 TEU as a freestanding provision.¹⁶ This has several advantages. For one, Article 2 TEU applies irrespective of the scope of other EU law. This allows the Court to address upheavals of the Member States’ internal constitutional structures—even without any other link to EU law. Further, addressing such upheavals under Article 2 TEU corresponds to the gravity of the situation. Instead of engaging in doctrinal contortions, to invoke violations of Article 2 TEU is to call a spade a spade.

So far, however, the Court has chosen the second option, that is, to apply the values in Article 2 TEU in combination with more specific Treaty provisions. With its 2018 judgment in *ASJP*, it started to operationalise the values in Article 2 TEU

through other Treaty provisions that give ‘concrete expression’ to the value at issue. The respective value is translated into a specific legal obligation. At the same time, Article 2 TEU has an impact on the specific provision as well. Interpreting that provision in light of Article 2 TEU justifies an extensive reading of its scope. Thus, specific Treaty provisions, such as Article 19(1)(2) TEU, can be rendered applicable—beyond their initial confines—to the Member States’ internal constitutional structures. Put differently, Article 2 TEU and the specific provision mutually reinforce each other.¹⁷ This strategy hits two birds with one stone: it makes Article 2 TEU applicable without curtailing its unrestricted scope of application. The Court seems to follow this second option. In its rulings on the rule of law conditionality regulation, it provided a vast array of possible connections between Article 2 TEU and other Treaty provisions.¹⁸

3. Shifting Focus: From Protecting the Rule of Law to Enabling Democratic Change

These powerful innovations concerned, primarily, the overhaul of the Polish judiciary. While this struggle is far from over, the precarious state of Hungarian democracy requires more attention. As such, the current focus on the rule of law should be complemented with a second focus on democracy. In particular, the Court should start operationalising democracy as an Article 2 TEU value and use it as a standard to review national measures that undermine conditions for democratic decision-making. This might help keep the channels of democratic change open. However, courts

¹² Sceptically, Matteo Bonelli, ‘Infringement Actions 2.0: How to Protect EU Values before the Court of Justice’ (2022) 18 *European Constitutional Law Review* 30, 45 ff; Tom L. Boeckstein, ‘Making Do With What We Have: On the Interpretation and Enforcement of the EU’s Founding Values’ (2022) 23 *German Law Journal* 431, 437; Pekka Pohjankoski, ‘Rule of law with leverage’ (2021) 58 *Common Market Law Review* 1341, 1345 f.

¹³ Opinion of AG Pikamäe, Case C-457/18 *Slovenia v Croatia* EU:C:2019:1067, paras 132 f.

¹⁴ Opinion of AG Tanchev, Case C-824/18 *A.B. and others* EU:C:2020:1053, para 35.

¹⁵ See Rossi (n 9) 657; Marek Safjan, ‘On Symmetry: in Search of an appropriate Response to the Crisis of the Democratic State’ (2020) *Il diritto dell’Unione* 673, 696.

¹⁶ See Case C-769/22 *Commission v Hungary* (pending).

¹⁷ For further details see Luke D. Spieker, ‘Breathing Life into the Union’s Common Values’ (2019) 20 *German Law Journal* 1182, 1204; Rossi (n 9) 650.

¹⁸ Whereas Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter ‘define the scope’ of the values of human dignity, freedom, equality, and respect for human rights, Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men, see *Hungary v Parliament and Council* (n 10), paras 157 f; and *Poland v Parliament and Council* (n 10) paras 193 f.

require cases. Hence, the Commission should initiate infringement proceedings against national measures that diminish media pluralism, unfair party financing and campaigning rules, or gerrymandering.

Some might object that the Court already went too far with its efforts to safeguard judicial independence in Poland. Intervening to protect domestic democratic processes might be understood as yet another power grab by the Luxembourg court. Nevertheless, this proposal has a strong theoretical basis. Even sceptics of judicial review acknowledge that constitutional courts (including the CJEU) should play a crucial role in securing the functioning of democratic decision-making. They can guarantee the essential preconditions for democratic processes¹⁹ and correct what Niels Petersen called ‘political market failures’.²⁰ This function is evidenced by the role of constitutional courts in many fragile democracies.²¹ If the Court of Justice mobilises Article 2 TEU to keep the channels for democratic change open, it discharges a mandate assumed by many courts.

4. Current Restraint

At the moment, however, reality looks quite different. Despite the significant challenges to democracy in Hungary, the Court and the Commission have approached these issues rather hesitantly. The judgment concerning foreign-

funded NGOs illustrates this point. In 2020, the Commission brought an action against Hungary because of a new statute that imposed duties of registration, reporting, and disclosure on civil society organizations which receive funding from abroad.²² This statute specifically targeted many NGOs engaged in upholding the rule of law and democracy in Hungary. Its aim was to stigmatize these organisations and thus to generally weaken Hungarian civil society. Despite these evident risks for democratic discourse and control, the Court’s decision fell behind the already established state of jurisprudence.

Instead of addressing the Hungarian measures under Article 2 TEU, the Court construed them mainly as a violation of the free movement of capital under Article 63 TFEU. As such, the case was settled on the uncontested ground of the internal market.²³ Admittedly, the Court also relied on EU fundamental rights by stressing that ‘the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society’.²⁴ Insofar as it relied on these rights, the judgment constitutes an improvement²⁵ when compared to the first timid cases on the overhaul of the Hungarian judiciary, which were addressed as a violation of age discrimination.²⁶ Still, fundamental rights remain a rather meek accessory to the internal market. For sure, abstaining from the highly politicised value rhetoric can contribute to de-

¹⁹ See in particular John H. Ely, *Democracy and Distrust* (Harvard University Press 1980) 73, 105; Michel Troper, ‘The logic of justification of judicial review’ (2003) 1 *International Journal of Constitutional Law* 99; Christoph Möllers, *The Three Branches* (Oxford University Press 2013) 127. Comparatively, Anusheh Farahat, ‘Constitutional Jurisdiction and the Separation of Powers in the European Legal Space: A Comparative Analysis’ in Armin von Bogdandy, Peter M. Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law, Vol. IV* (Oxford University Press 2023).

²⁰ Niels Petersen, *Proportionality and Judicial Activism* (Cambridge University Press 2017) 18.

²¹ See eg Samuel Issacharoff, *Fragile democracies. Contested power in the era of constitutional courts* (Cambridge University Press 2015) 241. But see sceptically Tom G. Daly, *The Alchemists: Questioning our Faith in Courts as Democracy-Builders* (Cambridge University Press 2017) 86.

²² Case C-78/18 *Commission v Hungary (Transparency of associations)* EU:C:2020:476.

²³ Arguing for this approach, see Mark Dawson and Elise Muir, ‘Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law’ (2013) 14 *German Law Journal* 1959. A very similar strategy can be observed in the CEU case, see Case C-66/18 *Commission v Hungary (Enseignement supérieur)* EU:C:2020:792. In detail, Vasiliki Kosta and Darinka Piqani, ‘Where trade and academic freedom meet: Commission v Hungary (LEX CEU)’ (2022) 59 *Common Market Law Review* 813.

²⁴ *Transparency of associations* (n 22), para 112.

²⁵ As promising decision, see Matteo Bonelli, ‘European Commission v Hungary (Transparency of associations) (C-78/18): The “NGOs case”’ (2021) 46 *European Law Review* 258, 268; John Morijn, ‘Separate Charter invocation as a new enforcement method: The Lex NGO case’ (2022) 59 *Common Market Law Review* 1137.

²⁶ For more detail see Gábor Halmai, ‘The Case of the Retirement Age of Hungarian Judges’ in Bill Davies and Fernanda Nicola (eds), *EU Law Stories* (Cambridge University Press 2017) 471.

escalating the conflict. At the same time, the focus on the internal market conveys a 'business as usual' image and obscures the real threats. This marginalizes the erosion of European values.

5. Future Outlook

To safeguard the conditions for democratic change in Hungary, the Court and the Commission should take bolder steps towards the judicial mobilisation of Article 2 TEU. The ongoing attacks on the freedom of press and media pluralism could become a springboard for such a reinforced approach.²⁷ In June 2021 the Commission announced an infringement procedure against Hungary for rejecting an application by Klubrádió—Hungary's last outspoken opposition channel—to use the national radio spectrum.²⁸ Regrettably, the Commission only relied on the European Electronic Communications Code,²⁹ even though such an action could have equally been based—by expanding the CJEU's combined approach developed in *ASJP*—on the essence of media freedom as protected by Article 11(2) of the Charter and Article 2 TEU.

The combined approach developed in *ASJP* is not restricted to Article 19(1)(2) TEU and the rule of law but could be extended to any other provision that gives expression to a value in Article 2 TEU. In this sense, the Court has already started to establish connections between the value of democracy and specific Charter rights. In *La Quadrature du Net* and *Privacy International*, for instance, it stressed that 'freedom of expression [...] is one of the values on which, under Article 2 TEU, the Union is founded'.³⁰

In taking this Article 2-Charter nexus a step further, the Court could start reviewing violations of the essence of Charter rights, such as media freedom, *even beyond the scope of other EU law*. Certainly, the Charter applies only within the scope of EU law (Article 51(1) CFR). Charter rights need to be triggered by some kind of EU law that applies to the case at hand. How to overcome this obstacle? First, the Court could interpret Article 2 TEU as a triggering rule in the sense of Article 51(1) CFR. Whenever the violation of a Union value is at stake, the Charter's scope would be triggered. Second, one could interpret Article 51(1) CFR restrictively in light of Article 2 TEU as not barring the Charter's application if EU values are at stake.

Ultimately, this is very close to a proposal advanced by András Jakab. He suggested that Article 2 TEU could trigger the scope of EU law and thus the Charter's scope defined in Article 51(1) CFR. This could render EU fundamental rights *generally* applicable in the Member States.³¹ It should be stressed, though, that this cannot lead to an application of the *full* fundamental rights acquis beyond the confines of Article 51(1) CFR. The value of 'respect for human rights' in Article 2 TEU can only comprise a qualified part, namely the 'essence' of fundamental rights as protected also by Article 52(1) CFR. Any other reading would severely disregard the Union's federal balance and the decision for a limited application of the Charter. Beyond the Charter's scope, EU fundamental rights could thus apply only as far as their essence protected under Article 2 TEU is concerned.³²

²⁷ European Parliament, Resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), P8_TA(2018)0340, Annex, paras 27–32; Venice Commission, Opinion of Media Legislation of Hungary, No. 798/2015.

²⁸ On the status quo, see European Commission, Press Release, Media freedom: The Commission calls on Hungary to comply with EU electronic communications rules (2 December 2021).

²⁹ Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

³⁰ See Joined Cases C-511/18, 512/18, and 520/18 *La Quadrature du Net* EU:C:2020:791, para 114; Case C-623/17 *Privacy International* EU:C:2020:790, para 62.

³¹ For a recent version of this argument, see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights' (2023) *Cambridge Yearbook of European Legal Studies* 1.

³² This is explored in detail in Armin von Bogdandy and Luke D. Spieker, 'Protecting Fundamental Rights Beyond the Charter' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 525, 531.

In any case, fundamental rights cannot address all threats to democracy in Hungary. The curtailing of opposition rights, unfair electoral laws, gerrymandering, or party financing and campaigning rules largely escape the Charter's scope. Such practices, however, could be reviewed under Articles 2 and 10 TEU. Indeed, Article 10 TEU (which describes the democratic functioning of the Union) could be interpreted as operationalising the value of democracy in Article 2 TEU. In this spirit, the Court has already noted that the principle of representative democracy in Article 10(1) TEU 'gives concrete form to the value of democracy referred to in Article 2 TEU'.³³

At first sight, Article 10 TEU seems to concern primarily democracy at the EU level. Still, the latter cannot function if democratic decision-making in the Member States falters. Democracy at the EU and the national level are essentially intertwined.³⁴ Elections to the European Parliament are partially governed by national provisions and take place within each domestic public sphere.³⁵ At the same time, the Member State governments represented in the Council derive their legitimacy from the national level. Article 10(2) TEU specifies that they must be 'democratically accountable either to their national Parliaments, or to their citizens'. In consequence, the democratic legitimacy at EU level depends to a great extent on the situation in each Member State.

This logic mirrors the logic underpinning Article 19(1)(2) TEU, which integrates the national judiciaries into the EU system of judicial protection. As it is impossible to separate the 'European' and 'domestic' functions of national courts, the obligations derived from Article 19(1)

(2) TEU in combination with Article 2 TEU apply to the Member State judiciary even in cases not related to EU law. In a very similar way, national democracy is tied into the European one. It is impossible to distinguish between the 'European' and 'national' facets of democracy in the Member States. A government cannot be 'democratically accountable' at the European level if it governs autocratically at home.

Based on these insights, a combined reading of Articles 2 and 10 TEU can result in imposing essential democratic requirements on the Member States.³⁶ This would not be confined to the 'European' dimensions of democracy in the Member States (e.g. the elections to the European Parliament), but would apply to the domestic state of democracy as well.

Eventually, democratic standards could be invoked even by individuals against national measures. Article 10(3) TEU stipulates the citizen's 'right to participate in the democratic life of the Union'. Many understand this as establishing an individual right to democratic participation.³⁷ As such, Article 10(3) TEU fulfils even the most demanding conception of direct effect, which requires a provision to contain a right that can be invoked by an individual before courts.³⁸ Such a right would not only concern democratic standards at the EU but also at the national level. As previously explained, the democratic life *of the Union* presupposes a democratic life *in the Member States*. Therefore, Article 10(3) TEU could become a provision that translates the value of democracy into obligations justiciable by individuals. Since *Van Gend en Loos*, 'the vigilance of the individuals concerned to protect their rights' has been a central

³³ Case C-502/19 *Junqueras Vies* EU:C:2019:1115, para 63. See also Order of the Vice-President of the Court of 24 May 2022, Case C-629/21 P(R) *Puigdemont i Casamajó and Others v Parliament and Spain* EU:C:2022:413, para 250; Case C-207/21 P *Commission v Poland (Protocole n° 36)* EU:C:2022:560, para 81.

³⁴ See Armin von Bogdandy, *The Emergence and Democratization of European Society* (Oxford University Press 2023).

³⁵ Article 8 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L278/5. See also *Junqueras Vies* (n 33) para 69.

³⁶ See also John Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council' (2021) 46 *European Law Review* 69, 77.

³⁷ See, in particular, Matthias Ruffert, 'Art. 10 EUV' in Christian Calliess and Matthias Ruffert (eds) *EUV/AEUV* (C.H. Beck 2022) para 12.

³⁸ See eg Koen Lenaerts and Tim Corthaut, 'Of birds and hedges: the role of primacy in invoking norms of EU law' (2006) 31 *European Law Review* 287, 311.

instrument in assuring that the Member States observe EU law.³⁹ Hence, this proposal follows a well-trodden path of European integration.

Admittedly, reviewing the Member States' internal constitutional structures for their compliance with Article 2 TEU has the potential to severely disrupt the federal balance between the EU and its Member

States. Any further mobilisation of Article 2 TEU will require some reassurance that the Member States' autonomy and diversity will be safeguarded. Article 2 TEU needs to remain an extraordinary tool for extraordinary situations.⁴⁰ One thing, however, seems relatively certain: the current state of Hungarian democracy constitutes such an extraordinary situation. It is therefore high time to make use of this extraordinary tool.

³⁹ Case 26/62, *Van Gend en Loos* EU:C:1963:1. See further Damian Chalmers and Luis Barroso, 'What Van Gend en Loos stands for' (2014) 12 *International Journal of Constitutional Law* 105, 121.

⁴⁰ On judicial strategies to operate Article 2 TEU in a restrained manner, see Spieker (n 8).

Democracy and Human Rights: Some Conceptual Observations

Allan Rosas

This paper takes stock of two of the values listed in Article 2 of the Treaty on European Union, namely democracy and human rights. Examining them as concepts and in their legal context shows that they cannot be safeguarded in isolation from the rule of law, and should be seen as forming a trinity. While the discussion is mainly conceptual, some observations will also be made on possible ways and means of further strengthening democracy and human rights in the EU.

1. Introduction

The first steps of European integration have been followed by a constant widening of the integration agenda and a gradual maturing of a community of common interests towards a union of both interests and values. Today, the foundational values of the EU are expressed in Article 2 of the Treaty on European Union (TEU), according to which the Union ‘is founded on’ a set of values which ‘are common to the Member States’. Moreover, according to Article 7 TEU, a breach of the values referred to in Article 2 may lead to a suspension of membership rights, while Article 49 TEU makes accession to the EU conditional upon respect for these values and a commitment to promoting them. Article 2 lists six values:

- respect for human dignity
- freedom
- democracy
- equality
- the rule of law, and
- respect for human rights, including the rights of persons belonging to minorities.

This paper argues that these six values can be condensed into three basic ones: democracy, human rights, and the rule of law. ‘Human dignity’, ‘freedom’ and ‘equality’ can be subsumed under human rights, or to use the EU constitutional equivalent, fundamental rights.¹

The European Court of Justice (ECJ) has observed that Article 2 TEU ‘is not a mere statement of policy guidelines or intentions, but contains values which [...] are an integral part of the very identity of the [EU] as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States’.² In recent years, the ECJ has had occasion to focus especially on the relation between the basic concept of the rule of law and the right to effective judicial protection, as expressed in Article 19(1)(2) TEU and Article 47 of the EU Charter of Fundamental Rights.³

The present contribution will focus not on the value of the rule of law as such, but the values of democracy and human rights/fundamental

¹ The EU Charter of Fundamental Rights, which according to Article 6(1) TEU ‘shall have the same legal value as the Treaties’, refers to human dignity (Article 1), freedom (Title II) and equality (Title III, Article 20 in particular). In internal EU discourse, ‘fundamental rights’ is the dominant concept whereas ‘human rights’ is mainly used with regard to EU external relations, see Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn, Hart Publishing 2018) 160.

² Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98, para 264. See also Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97.

³ See, eg Case C-824/18 *AB and Others* EU:C:2021:153, paras 114–116.

rights, both at Union and Member State levels. However, as we shall see, there are close links between democracy and human rights, on the one hand, and the rule of law, on the other, therefore the rule of law cannot be entirely omitted from the equation. It is to these conceptual interrelationships between democracy, human rights/fundamental rights and the rule of law, that I shall now turn.

2. A Trinity of Values

Even a cursory look at European legal texts will reveal that the concepts of democracy, human/fundamental rights, and the rule of law often go together and that they are, in fact, interrelated. To mention but a few examples, according to the Preamble to the Statute of the Council of Europe, 'individual freedom, political liberty and the rule of law' are 'principles which form the basis of democracy'.⁴ As for the European Convention on Human Rights (ECHR), its preamble refers to 'an effective political democracy' and recalls that the signatories are 'like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law'.⁵ The case law of the European Court of Human Rights (ECtHR) likewise brings out the interdependence of democracy and the rule of law, in this case seen through the lens of human rights.⁶

In the EU, apart from Article 2 TEU, the Preamble to the EU Charter of Fundamental Rights recognises that the Union 'is based on the principles of democracy and the rule of law'. The Commission's reports on the rule of law situation in the EU refer to democracy and fundamental rights alongside the rule of law.⁷ Then there is the new Conditionality Regulation which connects the rule of law and the protection of the Union budget;⁸ its legality upheld by the ECJ in two recent judgments.⁹ The regulation contains several references not only to the rule of law but also to the links which exist between it, democracy and fundamental rights. Article 2 of the Regulation prescribes that the concept of the rule of law 'shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU'. And in a recital (6), it is observed that respect for the rule of law 'is intrinsically linked to respect for democracy and for fundamental rights'.

Given these links between the basic values, it is fitting to conceive of them as forming a trinity.¹⁰ As will be further illustrated below, there is overlap between them and, more generally, a kind of interdependence; they seem to presuppose each other. Societies which honour them in common are 'liberal' or 'constitutional' democracies.¹¹ What has been referred to as 'illiberal' democracy is not (to cite the Preamble to the Statute of the Council of Europe) a system of 'genuine democracy'.¹² To the extent that the models of illiberal democracy try to decouple democracy as majority rule from

⁴ Statute of the Council of Europe, ETS No 1 (adopted 5 May 1949, entry into force 3 Aug 1949).

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No 5 (adopted 4 Nov 1950, entry into force 3 Sept 1953).

⁶ See, eg Elisabeth Steiner, 'The Rule of Law in the Jurisprudence of the European Court of Human Rights' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe* (Hart Publishing 2016) 135, 140; Allan Rosas, 'Democracy and the Rule of Law: Odd Bedfellows or Siamese Twins?' in Allan Rosas, Juha Raitio, and Pekka Pohjankoski (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart Publishing 2023, forthcoming) 11.

⁷ See, eg, Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2020) 580 final, 30 September 2020.

⁸ Regulation (EU, Euratom) 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 [2020] OJ L433/1.

⁹ Note 2 above.

¹⁰ Rosas (n 6) 13–14.

¹¹ *ibid.* See also Sacha Garben, Inge Govaere, and Paul Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Hart Publishing 2019).

¹² See, eg, Sanja Bogojevic and Xavier Groussot, 'Illiberal Democracy and Rule by Law from an EU Perspective' in Rosas, Raitio, and Pohjanheimo (n 6) 45.

human rights and the rule of law,¹³ it is obvious that such a system is not in conformity with existing Council of Europe and EU instruments. Moreover, furthering liberal democracy means furthering peace: liberal democracies do not wage war against each other.¹⁴

That said, each of the three basic values also has its own core content and the overlap between them is not complete.¹⁵ In the following, some further observations will be made on the values of democracy and human/fundamental rights.

3. Democracy

Without attempting here to provide a comprehensive definition of democracy, it suffices to note that it essentially concerns the political participation of citizens in public decision-making, notably through elections or other manifestations of popular will, based on the principle of equal rights of all members of the adult population.¹⁶ A democratic system must allow the manifestations of popular will to bring about a change of the government in power. According to the EU Democracy Action Plan, democracy ‘allows citizens to shape laws and public policies at European, national, regional and local levels’.¹⁷ While Article 2 TEU simply refers to ‘democracy’, it is supplemented by Title II TEU, ‘Provisions on Democratic Principles’. This includes a provision on the equality of citizens (Article 9 TEU); the statement that the ‘functioning of

the Union shall be founded on representative democracy’ (Article 10(1) TEU); a reference to the direct representation of citizens in the European Parliament, and one to the indirect representation of citizens through their governments, ‘themselves democratically accountable either to their national Parliaments, or to their citizens’ (Article 9(2) TEU). There is also a clause on the right of every citizen to participate in the democratic life of the Union (Article 10(3) TEU) and provisions on political parties at European level (Article 10(4) TEU), on participatory and deliberate democracy (Article 11 TEU), and on the role of national parliaments (Article 12 TEU).¹⁸

The right to political participation is also reflected in universal human rights instruments, which furthermore contain explicit requirements regarding elections.¹⁹ Such requirements are also to be found in Article 3 of the (first) Protocol to the ECHR, which instructs contracting parties ‘to hold free elections at reasonable intervals by secret ballot, under conditions which will secure the free expression of the opinion of the people in the choice of the legislature’. The ECtHR has held that this provision, despite its wording, not only imposes an obligation on the state but also an individual right to vote and be elected.²⁰ A similar provision relating to the election of members of the European Parliament is contained in Article 39(2) of the EU Charter of Fundamental Rights. While the recognition of the right to vote and to be elected as a human right was initially accepted only

¹³ The Hungarian Prime Minister Viktor Orbán has heralded a ‘reorganisation’ of the Hungarian state, ‘in contrast to the liberal state organisation’. The reorganised state, while not rejecting completely the fundamental principles of liberalism such as freedom, ‘does not make this ideology the central element of state organisation, but instead includes a different, special, national approach’, speech of 26 July 2014 at the XXV Bálványos Free Summer University and Youth Camp, Baile Tusnad <<https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>>.

¹⁴ See, eg, Nils Petter Gleditsch ‘The Liberal Moment Fifteen Years On’ (2008) 52 *International Studies Quarterly* 691.

¹⁵ Rosas (n 6) 16–19.

¹⁶ On different models and definitions of democracy within the EU see, eg, Robert Schütze, ‘Democracy in Europe: Some Preliminary Thoughts’ (2022) 47 *European Law Review* 24.

¹⁷ Commission, ‘On the European democracy action plan’ (Communication), COM(2020) 790 final, 3 December 2020.

¹⁸ On these provisions in the TEU see Rosas and Armati (n 1) 124–140.

¹⁹ See Article 21 of the Universal Declaration of Human Rights of 1948 and Article 25 of the International Covenant on Civil and Political Rights of 1966. I explore this further in Allan Rosas, ‘Human Rights and Democracy’ in Allan Rosas and Jan Helgesen (eds), *Human Rights in an East-West Perspective* (Pinter Publishers 1990).

²⁰ See Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (5th edn Intersentia 2018) 911–913.

reluctantly,²¹ there is today a clear overlap between political rights as human rights and the principle of democracy.

So political rights are partly considered to be human rights. And even where there is no outright overlap between the two, liberal democracy in practice presupposes respect for human/fundamental rights and freedom of expression, information, assembly and association in particular. Some requirements concerning these political freedoms do follow from the requirement of free and fair elections (thus Article 3 of the ECHR Protocol and Article 39 of the EU Charter of Fundamental Rights).²² The remaining part of these freedoms, while they do not completely overlap with the requirements concerning elections, constitute necessary ingredients of a liberal democracy.²³

As to the relationship between democracy and the rule of law, while it is difficult to imagine a sustainable non-democratic system respecting fully the rule of law, I shall here focus on the inverse situation, the importance of the rule of law for democracy. Respect for both political freedoms such as freedom of expression and the organisation of free and fair elections presuppose legal controls and remedies, with a view to preventing abuse and electoral fraud. Concerning elections in particular there is extensive ECtHR case law relating to the personal scope of the right to vote and be elected; the fielding and rejection of candidates; the electoral system; political freedoms directly relating to elections; the actual organisation of elections, and systems for the counting and verification of votes. This case law demonstrates, on the one hand, that independent and impartial judicial control is possible and necessary, and on the other that the diversity in electoral systems speaks in favour of granting states a wide margin of appreciation.²⁴ The

importance of the rule of law for democracy was demonstrated after the most recent US presidential elections, where former President Trump's attempts to invalidate votes cast and overturn certain key results by initiating a string of cases before federal and state courts came to nil, as these actions were either declared inadmissible or rejected, including by judges he had appointed.²⁵

As to the quality of democracy, the EU system is founded on a combination of direct and indirect representation, coupled with some provisions on direct participation. There is, of course, much that could be improved by reforming elections and institutions. Without listing here all possible measures, one can, at Union level, envisage a strengthening of the right of initiative of the European Parliament,²⁶ and of electing the Parliament by direct universal suffrage according to a uniform procedure in all Member States.²⁷

At Member State level, there is great diversity as to the relationship between majority and minority rule and the way a majority opinion is found. The very wide margin of appreciation concerning electoral systems granted in the case law of the ECtHR could be somewhat reduced and, although a harmonisation of systems is not a realistic option, the standard of review of the ECtHR has, in fact, become somewhat more robust in recent years.²⁸ When it comes to EU oversight, an interesting question concerns the legal relevance of the wording of Article 10(2) TEU, according to which the governments of the Member States 'are democratically accountable either to their national Parliaments, or to their citizens'. Does this provision, in combination with Article 2 TEU, constitute a mere empirical statement or a normative instruction, containing some minimum requirements concerning the national democratic systems?

²¹ Rosas (n 19).

²² See, eg van Dijk and others (n 20) 912.

²³ Rosas (n 6) 38.

²⁴ *ibid* (n 6) 20–26.

²⁵ *ibid* 25–26.

²⁶ According to Article 225 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament 'may request the Commission to submit any appropriate proposal'. As the Commission can decline the request (in which case it must inform the Parliament of the reasons), this provision does not provide for a veritable right of initiative.

²⁷ This possibility is already mentioned in Article 223 TFEU.

²⁸ Rosas (n 6) 20–26.

4. Human Rights

Since the ECJ judgment in *Stauder*, which recognised that fundamental rights are to be protected as general principles of Community law,²⁹ the promotion and protection of fundamental rights has made great strides, leading, inter alia, to the adoption and entry into force of the EU Charter of Fundamental Rights.³⁰ It suffices here to name but two possible lacunae.

First of all, the application of the Charter at national level is according to its Article 51(1) limited to situations involving the implementation of Union law, a criterion which causes problems of delimitation. The effects of this limitation is, of course, mitigated by the fact that all Member States are contracting parties to the ECHR and many other human rights treaties, and to some extent also by the fact that in some Member States the Charter has been applied, or at least taken into account, in circumstances where this would not be required in view of Article 51(1).³¹

A more obvious gap results from the fact that, although according to Article 6(2) TEU the Union ‘shall accede’ to the ECHR, accession has not so far been accomplished. An earlier draft accession agreement was in 2014 found by the ECJ to be incompatible with Union law,³² and this led to a pause in accession negotiations between the Union

and the Member States of the Council of Europe (parties to the ECHR). The negotiations, based on a revised mandate by the EU Council of October 2019, resumed in 2020 and have made sufficient progress that, despite all the difficulties, accession has again become a realistic possibility.

5. Concluding Remarks

There is one principal conclusion that can be drawn from the above discussion: democracy, human/fundamental rights, and the rule of law form a trinity, therefore the two first values cannot be safeguarded in isolation from the rule of law. The other three values listed in Article 2 TEU can be subsumed under this trinity and the value of human/fundamental rights in particular. Since they cannot be separated, it follows that there is no such thing as an ‘illiberal democracy’, and political systems which fail to respect human/fundamental rights and the rule of law are destined to become autocracies.

That said, there are a number of democratic reforms that can be envisaged, both concerning electoral systems and enhancing the role of institutions such as the European Parliament and national parliaments. With respect to human/fundamental rights, accomplishing EU accession to the ECHR should be given the highest priority.

²⁹ Case 29/69 *Stauder* EU:C:1969:57.

³⁰ See, for example, Allan Rosas, ‘The Court of Justice of the European Union: A Human Rights Institution?’ (2022) 14 *Journal of Human Rights Practice* 204.

³¹ Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing 2020).

³² Opinion 2/13 (*Accession of the EU to the ECHR*) EU:C:2014:2454.

The Rule of Law in the European Composite Administration: in Need of a New Approach?

Jane Reichel

This contribution problematises the EU court-centred version of the rule of law and the exercise of public power within the developing composite European system of public administration. Is it acceptable to continue building this innovative form of administration without a common mechanism of court control to ensure that public power is exercised in accordance with and, within the limits, of binding legal norms?*

1. Introduction

As with the concepts of ‘democracy’, ‘legal certainty’ and ‘good governance’, the rule of law is not easily defined. In Article 2 of the Treaty on European Union (TEU), it is merely pronounced that the EU is founded on respect for the rule of law, alongside other values such as human dignity, freedom, democracy, equality, and respect for human rights, including the rights of persons belonging to minorities. Two basic features may be seen as central to the rule of law: a requirement that public power is to be exercised in accordance with and within the limits of binding legal norms and a requirement that there are mechanisms to ensure an independent control of the use of public power. The rule of law thereby serves the dual purpose of enabling accountability and of providing citizens and others with guarantees against the arbitrary or improper exercise of public power.¹ Other values listed in Article 2 TEU are closely interconnected with the rule of law, not least the respect for human rights.

The rule of law concept in EU law has traditionally been focused on court control. In the seminal *Les Verts* case from 1986, the European Court of Justice (ECJ) famously held 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’.² It follows from the rest of the paragraph that the form of review the ECJ had in mind is court control, where EU and national courts are to form ‘a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.’ This function of the courts in the EU version of the rule of law connects very well to the centrality of judicial proceeding as a means for individuals to assert their EU rights at the national level, following the *van Gend en Loos* ruling from 1963.³ Accordingly, the Member States must ensure

* This chapter builds on previously published research: Jane Reichel, ‘Ensuring the Principle of Good Administration in EU Financial Markets Law’ in Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments* (Oxford University Press 2021); Jane Reichel, ‘God förvaltning som rättstatsideal: hur kan principen realiseras inom EU:s sammansatta förvaltning?’, in Karl Djurberg Malm and Richard Sannerholm, *Rättsstaten i den svenska förvaltningen – en forskningsantologi* (Statskontoret 2022).

¹ Marco Macchia, ‘The rule of law and transparency in the global space’ in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Oxford University Press 2016) 261.

² Case 294/83 *Les Verts* EU:C:1986:166, para 23.

³ Case 26/62 *van Gend en Loos* EU:C:1963:1.

access to courts within the sphere of application of EU law.⁴ In a more recent case, the *Portuguese Judges* case, the interconnection between the EU version of the rule of law and the interest of enforcement of EU law in the Member States became clear as the ECJ held that ‘the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.’⁵

The question raised in this contribution is whether this court-centred version of the rule of law is well placed to also cover the exercise of public power within the developing composite European system of public administration, commonly referred to as the European composite administration, where EU law is enforced by EU and national authorities in close cooperation. The contribution focuses especially on the EU requirements regarding the exchange of information and data. The access to official, commercial, and private data is a key asset for the European composite administration, and it is hardly possible to assess the number of provisions in regulations and directive in EU secondary law requiring EU and national authorities to transmit and share information of various kinds.⁶ The fluidity of data is further an illustrative example of the difficulties that may arise when data is used in connection to exercise of public power in a composite context.⁷ What mechanisms are there to monitor how data collected in one Member State is used in an administrative context in another? Who can ensure the right to good administration and the

right to an effective remedy when administrative actions undertaken in one Member State are based on data from another Member State?

2. The role of data in the European composite administration

Traditionally, the enforcement of EU law at the national level had been a responsibility for the Member States to carry out more or less independently of the EU.⁸ The constitutional and administrative framework for exercising public authority thus follows national law, with national versions of the principle of legality, transparency, confidentiality and good administration. Administrative cooperation has however been part and parcel of EU law from the beginning.⁹ In recent decades, the EU has to an ever-increasing extent introduced common mechanisms for the enforcement, application and supervision of EU law, for EU and national competent authorities to use in cooperation in more or less developed composite procedures.¹⁰

More recently, developments in information and communication technology (ICT) have impelled the European Commission to put forward proposals for legal frameworks and administrative infrastructures aligning the rules and principles for the use of data within the EU. An important step was taken with the General Data Protection Regulation (GDPR) enacted in 2016.¹¹ Even though the substantive principles and rules for

⁴ Article 19(2) TEU; Article 47 Charter of Fundamental Rights of the European Union.

⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses (Portuguese Judges)* EU:C:2018:117, para 36; Laurent Pech and Dimitry Kochenov, ‘Respect for the Rule of Law in the Case Law of the European Court of Justice’ (Stockholm, Sieps 2021:3), with rich references to further legal doctrine.

⁶ Eberhard Schmidt-Aßmann, ‘Introduction: European Composite Administration and the Role of European Administrative law’ in Oswald Jansen and Bettina Schöndorf-Haubold (eds) *The European Composite Administration* (Intersentia 2011) 15.

⁷ Deirdre Curtin, ‘Interstitial data secrecy in Europe’s security assemblages’ in Anna-Sara Lind, Jane Reichel, and Inger Österdahl (eds), *Transparency in the future: Swedish openness 250 years* (Ragulka 2017) 91.

⁸ Often referred to as the Member States having institutional and procedural autonomy, see for example Case C-201/02 *Wells* EU:C:2004:12 para 67.

⁹ An early example is the Administrative Commission on Social Security for Migrant Workers, established in 1958, see further, Henrik Wenander, ‘A Network of Social Security Bodies – European Administrative Cooperation under Regulation (EC) No 883/2004’ (2013) 6 *Review of European Administrative Law* 39, 47.

¹⁰ Jürgen Schwarze, *European Administrative Law* (rev. ed, Sweet and Maxwell 2006) cxiii; Herwig C. H. Hofmann and Alex Türk, ‘The Development of Integrated Administration in the EU and its Consequences’ (2007) 13 *European Law Journal* 253; Schmidt-Aßmann (n 6).

¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1.

processing person data did not differ significantly from the Data Protection Directive from 1995,¹² the innovative composite schemes for the EU authority, the European Data Protection Board (EDPB), and the national supervisory authorities to enforce data protection brought about major changes. From being an area of law struggling with shortcomings in implementation and compliance, GDPR is today a flagship of the EU regulatory policy.¹³ Extensive information sharing in enforcement of EU law is not in itself a novelty; it has a long history in policy areas as social security and tax law. With the GDPR, however, EU took administrative cooperation a step further, where the sharing of data is connected to a composite structure for decision-making in individual cases, including the possibilities of enacting administrative sanctions.¹⁴

In 2020, the Commission launched a European Data Strategy, which set the aim of creating ‘a single market for data’.¹⁵ In the wake of the strategy, a Data Governance Act was enacted in 2022, and there have been for proposals for further legislation, such as a Data Act and the creation of a European Health Data Space.¹⁶ In the area of freedom, security and justice, the protection of EU citizens against crime and terrorism has motivated the enactment of another category of acts, permitting large collections of personal data from third country nationals entering the EU.¹⁷ More often than not, the secondary law regulating

the use of data interconnects with and affects constitutional and administrative structures of the Member States.

3. Challenges to the rule of law in the European composite administration

Two overarching challenges can be identified in relation to the rule of law in the European composite administration. First, the legal basis for exercising administrative power within the composite administration is unclear, and accordingly there is no common set of binding legal norms for the administrative authorities to abide by when exercising public power. Second, there are no common mechanisms for courts to independently control the exercise of power within the composite administration.

Starting with the question of a legal basis for the administrative powers, unlike legislative and judicial power which are quite well-defined, the EU Treaties do not identify any specific institution or body exercising administrative power at the EU level. After the Lisbon Treaty, there are several articles that indirectly acknowledge that such powers exist. Article 258 TFEU states that ‘the institutions, bodies, offices and agencies of the Union shall have the support of an open, efficient and independent European administration’ and Article 263(5) TFEU acknowledges that this administration may enact binding legal acts, which are to be reviewable by

¹² Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

¹³ Anu Bradford, *The Brussels Effect: How the European Union rules the world* (Oxford University Press 2020) 7, 132.

¹⁴ Other policy areas with similar arrangements are competition law and financial market law, see Helene Andersson, *Access and Cartel Cases: Ensuring Effective Competition Law Enforcement* (Bloomsbury Publishing 2021); Jane Reichel, ‘Ensuring the Principle of Good Administration in EU Financial Markets Law’ in Carl Fredrik Bergström and Magnus Strand (eds), *Legal Accountability in EU Markets for Financial Instruments* (Oxford University Press 2021). The proposed AI Act is another illustrative example, Commission Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM(2021) 206 final.

¹⁵ Commission, ‘A European strategy for data’ (Communication) COM(2020) 66 final.

¹⁶ Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance (Data Governance Act) [2022] OJ L152/1; Commission, ‘Proposal for a regulation on harmonised rules on fair access to and use of data (Data Act)’ COM(2022) 68 final; Commission, ‘A European Health Data Space: harnessing the power of health data for people, patients and innovation’ (Communication) COM(2022) 196 final.

¹⁷ Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132; Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) [2018] OJ L236/1. ETIAS is at the time of writing still not in use.

the EU courts in accordance to the acts setting up the administrative bodies.¹⁸ Regarding the Member States, the EU does not have any independent legislative competence to regulate their internal administrative organisation or procedures.¹⁹

There is therefore no common constitutional framework for the composite administration as such and administrative culture differs within the various parts of the European composite administration.²⁰ Different parts of one and the same composite procedure is accordingly governed by different constitutional frameworks, the respective rules of the EU and the Member States involved. This patchwork of constitutions is more evident in some categories of administrative cooperation than others. In Frontex, the European Border and Coast Guard Agency, where EU personnel work side by side with personnel from national border agencies in safeguarding the external borders, the different conditions applying to different groups are apparent.²¹ In the administrative cooperation schemes used by Data Protection Authorities, Financial Supervisory Authorities or Competition Authorities, data appears to move between EU and national borders and jurisdictions almost seamlessly.

Via sector-specific EU law, some common rules on how public information is to be dealt with in different Member States have been introduced. There are many examples of these common rules on the secrecy and confidentiality of such information, and the GDPR sets out a comparatively dense set of rules for the processing of personal data within public administration.²² However, the GDPR also leaves quite some room for manoeuvre for the Member States to define the purposes for processing personal data in specific cases, and what safeguards are to be in place to fulfil the requirements of proportionality.²³

Further, EU and national rules on access to documents differ, as do rules on good administration, such as the duty of care, access to files and the right to be heard for the parties concerned in an administrative proceeding. If sensitive or discrediting information about an individual is transferred from a competent authority to another in preparation of an administrative decision, there are no common rules to allocate the responsibility of ensuring the right to be heard or other procedural safeguards for the individual.²⁴ In addition, other legal safeguards put in place to protect individuals' right to data protection may be weakened or entirely lost when data is transferred from one constitutional setting to another. In the European Health Data Space, personal health data collected for research purposes is to be transferred on request, but the proposed European Health Data Space does not contain unequivocal rules that an informed consent given by the research participant or requirements set out in an ethical approval will be respected.²⁵

Furthermore, the lack of a common legal basis for the European composite administration also has consequences for the second challenge identified above, the lack of common mechanisms to independently control the exercise of power within the composite administration. The 'complete system of legal remedies' set out in the *Les Verts* case, is premised on the ideal that all legal acts enacted under the EU Treaties are to be reviewable—directly or indirectly—by the ECJ, as the final arbiter of EU law. In the composite administration where EU and national constitutional and administrative rules are applied in an intertwined manner, it is difficult to separate which parts of an act are enacted directly under the EU Treaties, and what parts are

¹⁸ Sergio Alonso de León, *Composite Administrative Procedures of the European Union* (Universidad Carlos III de Madrid 2020) 75, 117; Matthias Ruffert, 'An Administrative Constitution for the EU?' in Giacinto Della Cananea and Martina Conticelli (eds), *Rule of Law and Administrative Due Process in Europe, Trends and Challenges* (Editoriale Scientifica 2020) 80.

¹⁹ According to Article 6 and 197 TFEU, the EU merely has competence to support, coordinate or supplement the actions of the Member States in the area of administrative cooperation.

²⁰ Good Administration in European Countries (Statskontoret 2023), 31 *et seq.*

²¹ Bernd Parusel, 'Should They Stay or Should They Go? Frontex's fundamental rights dilemma' (Stockholm, Sieps 2022:22epa).

²² Case C-496/17 *Deutsche Post* EU:C:2019:26, para 69.

²³ Case C-439/19 *Latvijas Republikas Saeima (Points de pénalité)* EU:C:2021:504, para 108, 113.

²⁴ Case C-276/12 *Sabou* EU:C:2013:678, para 44.

²⁵ Commission, COM(2022) 196 final (n 16), Articles 33.4 and 45(4)(b); Santa Slokenberga, 'Scientific Research Regime 2.0?', How the proposed EHDS Regulation may change the GDPR Research Regime' (2022) *Technology and Regulation* 135, 142.

enacted under national law, within the doctrine of procedural autonomy. It is not always apparent which court is competent to review the different parts of an administrative proceeding or the final decision.²⁶ Unavoidably, situations will occur where constitutional or administrative rules from one legal order, EU or national, will be relevant in the assessment of a case in another jurisdiction. However, the preliminary ruling system is construed to ensure the rule of law in one-directional vertical situations only, from a national court to the ECJ. In situations where the ECJ is to assess national rules, or in horizontal situations between Member States, there is no common mechanism to independently control the exercise of power within the composite administration.

4. A need for enhanced rule of law for the European composite administration?

The question raised in this contribution is whether the court-centred version of the rule of law that the ECJ has developed is well placed to cover the exercise of public power within the developing European composite administration. Are there mechanisms to ensure the right to good administration and the right to an effective remedy when European and national public power is exercised in a composite context?

The answer to the question must be no. There are no common mechanisms for court control to ensure that power exercised within the European composite administration is in accordance with and, within the limits of, binding legal norms. EU and national authorities are to an increasing extent implementing uniform sector specific rules under a common organizational and procedural setting, where data is collected as a common asset. However, authorities remain within their respective jurisdictions: Swedish courts review decisions from Swedish authorities, no matter what authorities were involved in the administrative proceedings. The mechanism of preliminary ruling can only encompass a limited section of the cooperation, in one-directional vertical situations, a national court referring questions to the ECJ. Other legal situations remain unconnected.

How public power exercised within the European composite administrative could effectively be controlled has been discussed in legal scholarship for over two decades.²⁷ Different solutions have been put forward in legal doctrine, but the question is sensitive and very little has yet been done by EU legislators.²⁸ This raises a further question: is it acceptable that the EU continues to develop a composite administrative system without ensuring that the rule of law can be upheld, not only in theory but also in practice?

²⁶ The situation will depend on the character of the contribution from one authority to another, namely if it is a binding decision from an authority that is to be included in a matter prepared by another authority, or it is non-binding information. Cases of the former type will be treated in accordance with the principles established in the *Borelli* and *TU München* cases, whereby each binding legal act is to be reviewed by each competent court; cases of the latter type by the principles established in the *Tillack* and *Berlusconi* cases, i.e. by a single judicial review by the court competent to review the final decision, Reichel 2021 (n 14) 143. There are several examples in the case law of the ECJ where individuals have sought redress from the incorrect court system: Case C-219/17 *Silvio Berlusconi v Banca d'Italia* EU:C:2018:1023; Case C-462/98 P *Mediobanca v Commission* EU:C:2000:480; Case C-119/05 *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini* EU:C:2007:434; Napoleon Xanthoulis, 'Administrative factual conduct: Legal effects and judicial control in EU law' (2019) 12 *Review of European Administrative Law* 39, 70.

²⁷ An early example is Carol Harlow, *Accountability in the European Union* (Oxford University Press 2002).

²⁸ Paul Craig, Herwig Hofmann, Jens-Peter Schneider, and Jacques Ziller (eds), *ReNEUAL Model Rules on EU Administrative Procedure* (Oxford University Press 2017); Rainer Arnold, 'The Relation between Constitution and Global Administrative Law: Some Reflections' in Maria Grahn-Farley, Jane Reichel and Mauro Zamboni (eds), *Governing with public agencies: The development of a Global Administrative Space and the creation of a new role for public agencies* (Poseidon förlag 2022) 112; Ruffert (n 18) 91.

The Rule of Law Crisis in 2023: More of the Same or Changes to Come?

Joakim Nergelius

This contribution focuses on the most recent developments in the rule of law crisis in Hungary and Poland, taking into account the latest judgments from the European Court of Justice as well as the impact of the war in Ukraine. The EU until very recently refrained from taking legal measures against Hungary or Poland. However, in recent years, arguments based on the EU's values have been invoked in a number of cases. In the long run, the EU needs to protect and promote these core values.

1. Introduction

This contribution will focus on the most recent developments in the 'rule of law crisis' in Hungary and Poland, taking into account the latest judgments from the Court of Justice of the European Union (CJEU), as well as the impact of the war in Ukraine. The situation is seen against the sinister background of Hungarian Prime Minister Viktor Orbán's 2014 advocacy for what he calls 'illiberal democracy': a system that would, in his view, respond to contemporary challenges such as migration and terrorism better than traditional, liberal and pluralist democracy.¹ A very important part of the background is of course also the deep conflict of values that has, for at least the last ten years, characterized the whole western world.

This crisis or clash of values can be said to have started in Hungary in 2010, when the Fidesz party won a huge majority in Parliament and immediately began to use it to appoint new judges and chief executives for various public bodies. Without any doubt, Orbán's ideas have inspired authoritarian, populist right-wing leaders in other parts of the world. However, following the gradual introduction

into the EU Treaties, beginning in 1993, of ideals such as human rights, democracy, and the rule of law, the EU is bound to a liberal model of democracy, based in particular on the rule of law and human rights. Thus, the tension between the two interpretations of democracy is obvious.

2. The current legal and political framework

The term 'rule of law' was inserted in the EU Treaty for the first time in 1993. At the entry into force of the Amsterdam Treaty in 1999, former Article F was changed into two new articles (6 and 7 TEU) and the rule of law was made a foundational principle of the Union. The rule of law was above all instrumental in the context of the eastward enlargement of the Union, since it was a pillar of the Copenhagen criteria, adopted in 1993 as the basic preconditions for states wanting to become EU members.

With the entry into force of the Lisbon Treaty in 2009, the foundational principles were moved from Article 6 to Article 2 TEU. Article 7 TEU contains

¹ Viktor Orbán's speech at Băile Tușnad (Tusnádfürdő) of 26 July 2014 (*The Budapest Beacon*, 29 July 2014) <<https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>>.

the procedure envisaged for the protection of those values. The two articles thus together form the EU's main mechanism for the protection of the rule of law in the Member States.

A widespread discussion on the application of Article 7 TEU (former Article 6) took place as far back as 2000, when a majority of the Member States appeared to be willing to introduce some mild and, in reality, informal sanctions against Austria, due to the fact that the right-wing populist Freedom Party of Austria (FPÖ) had joined the Austrian government. For many reasons (the most important being that Austria had in fact not violated any of the said values),² the rather bizarre measures initiated, such as refusals from other Member State governments to shake the hands of Austrian ministers or let them join common photo sessions, quickly ended.

But for some time, other Member States did refuse to cooperate with the Austrian government, since it included members of FPÖ, even though Austria had not violated any of the principles in Article 6 TEU. This lack of legal clarity was addressed in the following treaty revision in 2003 (Nice Treaty), when Article 7 TEU was changed to include the possibility of determining the existence of both *a breach* and *a clear risk of a serious breach*.

Today, a majority of EU states are critical of the authoritarian tendencies in countries such as Hungary and Poland. A crucial question for the future, then, is whether they should use the existing mechanisms of the EU Treaties to enforce more liberal values on states who seem to prefer an authoritarian model of society.³

After the landslide electoral victory in 2010 of the *Fidesz* party in Hungary, the incoming government's initial appointments of new judges and chief executives for various public bodies were followed by a new media law and a new constitution in 2011, and then a decision forcing all judges who had reached the age of 62 years into retirement. The new Constitution has a remarkably

nationalistic language and approach, and it curtails the independence of the judicial system and huge parts of the public administration. These and further assaults on the rule of law and other crucial values caused a number of reactions from the EU. Notable among these was the infringement case brought by the European Commission to the CJEU concerning the forced retirement of judges older than 62 years. The Court found in 2012 that this amounted to unlawful discrimination on grounds of age.⁴ However, it seems that the Commission deliberately chose quite a technical approach, based on an alleged violation of a Council Directive on equal treatment in employment and occupation, rather than arguing that the basic, fundamental principle of the rule of law had been violated.

In fact, until very recently the EU refrained from invoking 7 TEU, according to which a Member State which does not respect the rule of law and/or other key values of European integration (those listed in Article 2 TEU, such as democracy, human rights, human dignity, freedom, equality) may temporarily lose some of its rights as a member, including the right to vote in the Council. Such a harsh measure against a Member State, one that has to be agreed upon by all the others, would of course be controversial for a number of reasons, but may in the long run be hard to avoid, should Member States repeatedly and almost provocatively—as has been the case in recent years—show that they have no wish whatsoever to respect those basic values. And today, this looks more likely to happen for Hungary than for Poland, though the EU Commission initially seemed to prioritize action against Poland, odd as this may seem. But since the war in Ukraine started and the obvious difference in attitude towards Russia between Poland and Hungary is clear for everyone to see, the Commission is starting to put harder pressure on Hungary while perhaps loosening its grip on Poland. Thus, at least in relation to the EU institutions, Poland has benefited from its tough line against Russia and its generosity towards Ukrainian refugees.

² This was the conclusion of a report into the matter by the three 'wise men', Martti Ahtisaari, Jochen Frowein and Marcelino Oreja, in September 2000.

³ In Art. 238 TFEU, qualified majority is defined as 72% of the Member States, representing at least 65% of the Union's population or, when not all the Member States are participating, 55% of the Member States representing at least 65% of the latter.

⁴ Case C-286/12 *Commission v Hungary* EU:C:2012:687.

3. Legal obstacles for actions against failing Member States

From a legal point of view, it seems very clear that Hungary has not complied with the founding values of the European Union (cf. Article 2 TEU). In hindsight, the EU certainly took its time before reacting sharply to events in Hungary. Ever since 2011, it has been discussed when (not if) the threshold will be passed and when Article 7 must be activated if it is to have any real significance.

A decision to react against a Member State that is failing in this respect would, under Article 7 TEU, have to be carried out in two steps. First, the Council must establish, with a majority of four fifths of the Member States, that there is a clear risk, in a Member State, of a serious breach of the founding values that are stated in Article 2 TEU. Second, after that, the Council may unanimously (with the exception of the allegedly failing state) declare that the state thus identified does, in fact, in a serious and persistent manner, ignore these values.

When it comes to Poland, the EU acted more promptly. The Polish Law and Justice Party (PiS) won the 2015 elections, and the Commission initiated a dialogue with the new government as early as January 2016, applying the so-called Rule of Law Framework.⁵ The main purpose of this instrument was to make it possible for the EU Commission to start a dialogue with a Member State, based on critical observations of developments in the country in question, without immediately having to resort to the controversial and politically difficult procedure envisaged in Article 7 TEU.

It is hard to say whether the rather swift response in relation to Poland, as opposed to the quite passive attitude initially shown towards Hungary, was due to the simple fact that the Commission thought that the Polish government would be more inclined towards constructive dialogue than the Hungarian one. There may also be other reasons, such as the fact that Hungary adopted a new constitution in 2011, after which the government did not violate

its own national rules as evidently as the Polish government has done since 2016, or simply that the threat of authoritarian regimes against the rule of law was not as strongly felt in 2011 as 2016. Nevertheless, the difference in the (strength of) reactions from the EU against the two countries was striking.

As mentioned above, the EU until very recently refrained from invoking Article 7 TEU against either Hungary or Poland. The same was true for Articles 2 and 6 of TEU. Here, however, we have seen a clear change in recent years, when arguments based on those values have been invoked against these two countries in a number of cases, notably those brought by the EU Commission. In addition to case C-619/18,⁶ concerning the law on the Polish Supreme Court and the similar C-192/18,⁷ we may here also point to the judgments against Hungary, Poland, and the Czech Republic for refusing to comply with the provisional mechanism for mandatory relocation of asylum seekers in 2020.⁸

This is logical, given that Article 2 as well as Articles 6 and 7 TEU are all based on the idea of a *liberal* democracy, with a clear emphasis on the rule of law and human rights. We may thus say that the EU, or at least its leading institutions, is returning to, or rather, now that these values are under threat, it is *for the first time* trying to live up to the standards that it has set for itself and all its activities in the EU Treaties. It is also important to underline that from the perspective of human rights and the rule of law, the situation in Hungary and Poland today is far worse—and in fact totally different—than in Austria twenty years ago. From the viewpoint of Europe's authoritarian populists, what happened in Austria in 2000, when FPÖ temporarily joined the government without causing any real harm to the rule of law or human rights, was just an appetizer, a warm-up for what is now happening in Hungary and Poland (and may happen in other countries as well).

At a special meeting of the European Council in July 2020, a majority of EU Member States, including, in fact, all its economic net contributors,

⁵ Commission, 'A new EU Framework to strengthen the Rule of Law' (Communication) COM(2014) 158 final.

⁶ Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* EU:C:2019:531.

⁷ Case C-192/18 *Commission v Poland (Independence of ordinary courts)* EU:C:2019:924.

⁸ Joined Cases C-715/17, 718/17 and 719/17 *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* EU:C:2020:257.

tried to impose new conditions on notorious ‘rule of law-violators’ such as Hungary and Poland. This was followed up at the meeting of the European Council in December of that year. In the conclusions from the July meeting, a connection was made between the right to receive financial support from the EU and the obligation to respect the rule of law.⁹ The relevant paragraphs read as follows:

22. The Union’s financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU.

The European Council underlines the importance of the protection of the Union’s financial interests. The European Council underlines the importance of the respect of the rule of law.

23. Based on this background, a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority.

The Commission argued that respect for the rule of law is an essential precondition also for sound financial management and effective EU funding. It had for a long time argued for a new mechanism to protect the EU budget from financial risks linked to ‘generalised deficiencies as regards the rule of law’.¹⁰ The idea, then, is that if such deficiencies impair or threaten to impair sound financial management or the protection of the financial interests of the Union, EU funding may be stopped. Such a decision is to be proposed by the Commission and then adopted by the Council through QMV. The possible negative economic effects of rule of law violations are sometimes hard to prove. Certainly,

a relationship between rule of law and economic development does exist, as has been clearly proved by many leading economic scholars such as Coase and others,¹¹ but, given the importance of the issues at stake, the ‘conditionality criterion’ should perhaps be upheld for its own sake rather than be seen as a part of or complement to ‘the Union’s financial interest’.

The agreement finally reached in December 2020 was, unfortunately, insufficiently clear and this has led to heated discussions among EU scholars. In short, it means that payments from the EU budget to countries violating the rule of law may be suspended when the Union’s economic interests are jeopardized. This connection between rule of law and economic interests has been severely criticized,¹² even though the December agreement made the criteria for suspending funding somewhat more precise and introduced the possibility of the CJEU determining when the principle of the rule of law had really been violated.

Poland and Hungary both brought cases to the CJEU seeking to annul the Conditionality Regulation. The Court rejected these in February 2022, stressing that the requirement of conditionality and respect for ‘the sound financial management of the Union budget’ is a sign of solidarity between EU Member States.¹³ However, future decisions from the EU Commission to actually withhold money to a state violating the rule of law are also likely to be challenged before the CJEU, which shows how fragile this compromise on conditionality really is.

The CJEU judgment upholding the Conditionality Regulation came just eight days before Russia’s attack on Ukraine. Although initially all EU Member States were able to decide quickly on common sanctions against Russia and

⁹ European Council, EUCO 10/20, CO EUR 8, CONCL 4, 21 July 2020.

¹⁰ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States’ COM(2018) 324 final.

¹¹ See, eg, Ronald H. Coase, ‘The Problem of Social Cost’ (1960) *Journal of Law and Economics* 1 or Douglass C. North, *The Rise of the Western World: A New Economic History* (Cambridge University Press 1973).

¹² EUCO 22/20, CO EUR 17, CONCL 8, 11 December 2020; and Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

¹³ Case C-156/21 *Hungary v Parliament and Council* EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Council* EU:C:2022:98.

on receiving refugees from Ukraine, the difference between Poland and Hungary in relation to Russia soon became evident. Hungary receives refugees reluctantly and only through efforts by NGOs, while Poland has received three million refugees. Poland is tough in its rhetoric and sends arms to Ukraine, while Hungary is undoubtedly the most Russia-friendly EU Member State. Orbán even managed to win a parliamentary election in April 2022 in part by stressing the economic advantages of not taking sides between Russia and Ukraine.

This cynical approach, while electorally successful, has not won Hungary any new friends in Brussels or elsewhere in the EU. In contrast the ideologically clear Polish position is met with sympathy throughout Europe and seems to be granting Poland at least a temporary holiday from the rule of law conflict. This was underscored when Poland decided in July 2022 to close the disciplinary chamber of its Supreme Court, though we may note that the Commission has initiated a new infringement procedure against Poland in February 2023.¹⁴ Thus, it was a sign of the changed times that the EU Commission in April 2022 triggered the conditionality mechanism for the first time only against Hungary, and not against Poland. The outcome of this process remains to be seen.¹⁵

Problems of the conditionality requirement, and the need for the Commission to show real impact of alleged rule of law violations on the EU budget, are here clearly visible.

4. Conclusions

As long as a clear majority of the EU Member States do still believe in the values enshrined in Article 2 TEU, it is in my view, in an ever more turbulent world, a good idea for the EU to protect and promote them, in spite of the short-term costs involved. In the long run, a steady and consistent stand in those value conflicts is likely to pay off and lead not only to a greater respect worldwide, but also to the EU finding itself—its own soul, so to speak—which will then make it easier for the Union to deal with future conflicts of the same kind. And the fact that Poland is now met with more sympathy from the EU than it has been for a long time is mainly due to the fact that, at least in relation to Russia and Ukraine, it does now stand up for those values, while Hungary has chosen a totally different path. This is not surprising for those who have followed the rule of law conflict for some time and observed the obvious differences between Poland and Hungary. Now, however, these differences may for the first time have real political and legal consequences.

¹⁴ European Commission, 'The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal' (Press Release, 15 February 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842>.

¹⁵ See Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] OJ L325/94, in which the Council acknowledges that Hungary has introduced some reform measures but withholds payments until further rule of law reforms are made.

