

# SAFEGUARDING A RULE OF LAW CULTURE IN THE MEMBER STATES: ENGAGING NATIONAL ACTORS

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## INTRODUCTION

Shortly after the fall of the Berlin wall, when the process of transition to liberal democracy had only just begun, Ralph Dahrendorf famously stated that ‘It takes six months to create new political institutions, to write a constitution and electoral laws. It may take six years to create a half-way viable economy. It will probably take sixty years to create a civil society. Autonomous institutions are the hardest thing to bring about.’<sup>1</sup> Today, it would be tempting to take his words as a hopeful promise: We are ‘only’ thirty years into the process, and the current developments in the so-called ‘backsliding countries’, mainly Hungary and Poland, may be ‘only’ a temporary setback in a process that was bound to take much longer in the first place.

It is clear that the developments in Hungary (since 2010) and Poland (since 2015) in many ways defy the values and principles of liberal democracy.<sup>2</sup> Since Fidesz won the elections in 2010, Hungary has seen democratic decay, the breakdown of countervailing powers including media, the constitutional court, the judiciary and other independent bodies and institutions, wide-spread corruption, an on-going attack on the rights and freedoms of migrants, the LGBTIQ+ community, minorities and political opponents, the shrinking of civic space impoverishing the

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<sup>1</sup> RALPH DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE (1990).

<sup>2</sup> I use the concept, rather loosely, to refer to the values of liberal democracies governed under the rule of law. They coincide, roughly, with the values mentioned in Article 2 TEU.

democratic debate.<sup>3</sup> In 2015, Poland became a second instance of ‘backsliding’ in the European Union, with the PiS government setting out to break down the institutions of liberal democracy, mainly the constitutional court and the judiciary.<sup>4</sup> Other Member States have come close to following a similar path, but never to the same extent. Nevertheless, institutions of democracy and rule of law have been under siege also in other countries.

The European Union has been called upon to stand up against so-called backsliding and defend the principles of liberal democracy. It took some time for the European institutions to start acting, but over the past decade, the EU has gradually stepped up its efforts: Article 7(1) TEU has been set in motion against both Poland (initiated by the Commission) and Hungary (by the European Parliament), though no progress has been made since, given the strict procedural requirements of the mechanism.<sup>5</sup> The Commission has opened a series of enforcement actions under Article 258 TFEU directly addressing violation of the independence of the judiciary (based on Article 19 TEU),<sup>6</sup> and the Charter combined with other provisions of EU law,<sup>7</sup> rather than taking the indirect route aimed only at infringements of secondary legislation or internal market rules as it did in the early days.<sup>8</sup> The so-called ‘toolbox’ to protect the rule of law has been steadily expanded and is today filled with a whole range of legal, political and financial instruments, including Rule of Law Reports, the European Semester, NextGenerationEU, and budgetary conditionalities, increasing the leverage of the Union against the Member States. Most of these instruments have been put in motion.

Nevertheless, a considerable part of public commentators and academia remains particularly critical, and many activists, officials and academics have become disappointed with what they perceive as a lack of support of the Union for the rule of law in the Member States.<sup>9</sup> Union action to safeguard the rule of law is often

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<sup>3</sup> Gábor Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 243 (Mark Graber et al. eds., 2018).

<sup>4</sup> WOJCIECH SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN (2019).

<sup>5</sup> *European Commission Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (Dec. 20, 2017); *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)), 2019 O.J. (C 433) 66 (Sept. 12, 2018).

<sup>6</sup> *Comm’n. v. Poland (Indépendance de la Cour Supreme)*, Case C-619/18, EU:C:2019:531; *Comm’n. v. Poland (Indépendance des Juridictions de Droit Commun)*, Case C-192/18, EU:C:2019:924; *Comm’n v. Poland (Régime Disciplinaire des Juges)*, Case C-791/19 R, EU:C:2021:596.

<sup>7</sup> *See, e.g., Comm’n v. Poland (Lex CEU)*, Case C-66/18, EU:C:2020:792; *Comm’n v. Hungary (Transparency of Associations)* Case C-78/18, EU: C:2020:476.

<sup>8</sup> On these infringement actions, *see e.g., Matteo Bonelli, Infringement Actions 2.0: How to Protect EU Values Before the Court of Justice*, 18 EUR. CONST. L. REV. 30 (2022) [hereinafter *Infringement Actions 2.0*].

<sup>9</sup> *See, e.g., Roger Daniel Kelemen, Appeasement, ad infinitum*, 29 MAASTRICHT J. OF

EUR. AND COMPAR. L. 177 (2022); Petry Bárd and Dimitry Kochenov, *War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening*, 27 EUR. L. J. 39, 43-44 (2022); Laurent Pech et al., *Poland’s Rule of Law Breakdown: A Five-Year Assessment of EU’s (In)action*, 13 HAGUE J. ON THE RULE OF LAW 1 (2021); Petra Bárd, *In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law*, 27 EUR. L. J. 185 (2022); Dimitry Kochenov and Laurent Pech, *Better Late Than Never? On the European Commission’s Rule of Law*

described as ‘too little, too late’. The Council is accused of playing political games, the Commission has been refuted for buying time, and being too timid and overly legalistic. Its credibility as guardian of the European rule of law has been questioned. The European Parliament has opened legal proceedings against the Commission for failure to act on the Conditionality Regulation.<sup>10</sup> And while the Court of Justice has been described somewhat dramatically as the last soldier standing,<sup>11</sup> it too has been accused of being too timid in the face of backsliding.<sup>12</sup> Overall, the effectiveness of EU action is questioned, and the EU is presented as weak at best.

This paper seeks to take stock of EU involvement in the so-called rule of law backsliding in the past twelve years, and to evaluate some of the criticism waged against the EU institutions. It does so by revisiting the diagnosis: what problem is the EU facing exactly, and what is the aim that must be achieved? It will be submitted that the problem is both broader and deeper than is usually presented. What is at stake, ultimately, is a rule of law *culture* and the commitment of all national actors including citizens to the values of liberal democracy. The second section critically assesses the judicial mechanisms to uphold the rule of law and asks whether too much is expected of the European Court of Justice and of EU law more generally. The paper then proposes to invest more in additional strategies to foster a rule of law *culture* in the long run. The paper ends with a sobering conclusion: at the end of the day, a robust rule of law requires a rule of law *culture*, that can only flourish when political and legal actors as well as civil society and the public at large support it, and thus, that these national actors understand why it is, as far as we know, the best system to prevent arbitrariness and abuse of power and ultimately, to achieve the good life for the many. While the European Union has an important role in fostering such culture, there are limits to what the Union and Union law can achieve.

#### THE DIAGNOSIS: WHAT CHALLENGE IS THE EU FACING?

In the legal academic discourse and among policy circles in Brussels, the focus of attention has mostly been on the element of ‘rule of law’ backsliding, with special attention to judicial independence.<sup>13</sup> Yet, the challenge facing the EU is much deeper

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*Framework and Its First Activation*, 54 J. OF COMMON MKT. STUD. 1062 (2017); see also Gráinne de Búrca, *Poland and Hungary’s EU Membership: On Not Confronting Authoritarian Governments*, 20 INT. J. OF CONST. LAW 13 (2022) [hereinafter *Not Confronting Authoritarian Governments*].

<sup>10</sup> Eur. Parliament v. Comm’n, Case C-657/21. A few months later, the Parliament notified the Court of its wish to discontinue the action. The case was removed from the Register by Order of the President of the Court of 8 June 2022.

<sup>11</sup> Dimitry Kochenov and Petra Bárd, *The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, in EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 2019 243 (Jurgen de Poorter et al. eds., 2019).

<sup>12</sup> See, e.g., Sébastien Platon, *Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: Miasto Lowicz*, 57 COMMON MKT. L. REV. 1843 (2020).

<sup>13</sup> It is not clear why the phenomenon has been labelled a ‘rule of law’ issue. Gora and de Wilde have suggested that it may have to do with the fact that the EU Treaties are drawn up by lawyers, who are trained to focus on the rule of law, see Anna Gora and Pieter de Wilde, *The Essence of Democratic Backsliding in the European Union: Deliberation of Rule of Law*, 29 J. EUR. PUB. POL’Y 342 (2020). Yet, the debate was not instigated by lawyers alone, and the first commentators were not just EU lawyers. Of course, many legal scholars do use the wider lens and look beyond the ‘rule of law.’ See e.g., WOJCIECH

and broader than the notion of ‘rule of law backsliding’ with its traditional focus on courts suggests. The problem of a declining commitment to the founding principles of the constitutional democratic state governed under the rule of law also concerns other elements of the ‘trinity of constitutionalism’: democracy and the protection of fundamental rights, as well as other values mentioned in Article 2 TEU. It is also not limited to two countries. To name but a few elements of the phenomenon: Discontent with democracy as such is steadily increasing, and conceptions of democracy are changing everywhere, with the focus often on the rule of the majority of the day, while the protection of minorities and the marginal is no longer considered an essential aspect of democracy.<sup>14</sup> Consensus building is often considered a failure for the majority, which sees its responsibility to its partisan base only, disregarding other societal interests. Traditional political parties are declining. Trust in public organisations and in independent institutions (media, science, and universities) and courts is dwindling. Public discourse is deteriorating, and competing elites are polarised, no longer acknowledging their opponents’ legitimacy, and they seek to destroy rather than defeat them in the democratic arena. Civic space is shrinking.<sup>15</sup> Populism is on the rise, with politicians and groups claiming to represent ‘the real people’ coming (closer) to power. There is an increasing attention for clashing societal preferences and value choices, with such choices often portrayed as pertaining to national traditions and national identity, and requiring protection against external and internal forces (often ‘elites’). Human rights are increasingly considered unwarranted leftist policy choices that unduly benefit the marginal and unpopular. ‘Common European values’ are presented as ‘Western values’ and international organisations and institutions, including the Commission (‘Brussels’) and the European Courts as oppressive ‘external’ actors.<sup>16</sup>

The problem facing the European Union, thus, is much broader and deeper than the notion of ‘rule of law backsliding’ suggests and threatens the very structure of constitutional democracies governed under the rule of law and the fabric of open societies in Europe (and beyond). As Ivan Krastev and Stephen Holmes have put it, the West is losing the fight for democracy.<sup>17</sup> This decline of the ‘liberal script’ in the Member States also threatens the European Union itself.<sup>18</sup>

These developments take place across the European Union, but in most countries, they have not (yet) led to a complete breakdown of the institutions, and

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SADURSKI, POLAND’S CONSTITUTIONAL BREAKDOWN (2019); MATTEO BONELLI, A UNION OF VALUES: SAFEGUARDING DEMOCRACY, THE RULE OF LAW AND HUMAN RIGHTS IN THE EU MEMBER STATES (2019).

<sup>14</sup> Many organizations have documented global declines in the health of democracy, including Freedom House, the Economist Intelligence Unit, V-Dem, the Pew Centre.

<sup>15</sup> See e.g., EUR. UNION AGENCY FOR FUNDAMENTAL RTS., PROTECTING CIVIC SPACE IN THE EU (2021).

<sup>16</sup> See, e.g., Mark Dawson, *How Can EU Law Respond to Populism?*, 40 OXFORD J. OF LEG. STUD. 183 (2020) [hereinafter *Respond to Populism*].

<sup>17</sup> IVAN KRASTEV AND STEPHEN HOLMES, THE LIGHT THAT FAILED: WHY THE WEST IS LOSING THE FIGHT FOR DEMOCRACY (2019).

<sup>18</sup> SCRIPTS, the Berlin-based Cluster of Excellence, represents the challenge as unprecedented ‘contestations of the liberal script’, defined as a set of ideas and institutional prescriptions about how society is organised based on the core principle of individual self-determination. See *Contestations of the Liberal Script*, SCRIPTS, [www.scripts-berlin.eu](http://www.scripts-berlin.eu) (last visited Mar. 6, 2023).

the system has usually proven to be sufficiently resilient. Not so, however, in Poland and Hungary, where PiS and Fidesz have hijacked the institutions and are dismantling liberal democracy. Many factors, economic, societal, cultural, political and institutional, have been brought to the table to explain why ‘democracy has failed’ in Poland and Hungary: resentment at the post-1989 imperative to become Westernized; disgruntlement with globalisation, neo-liberalism and international economic competition; the sense of economic insecurity; loss of social cohesion; growing inequality; cultural and religious resentment coupled with distrust of political correctness and multi-cultural tolerance; concerns about identity in the face of migration; disenchantment with political elites and the establishment (sometimes including the judiciary); impatience with constraints on government viewed as institutional obstacles to ‘getting things done’. Yet, we do not yet fully understand why some States resist populism and others do not, and why liberal democracy, constitutionalism and the rule of law fail in some States and not in others.<sup>19</sup>

What may be most worrying is that these are not (yet) autocratic regimes that have acquired or maintained power by force: these governments have been elected and re-elected. Fidesz won the elections for the fourth consecutive time in 2022, achieving a two-thirds majority in Parliament. We do not yet know exactly why these parties continue to win elections. Of course, their victories can in (large) part be explained by factors that are highly problematic in terms of the principles of liberal democracy: there is no longer a pluralistic media landscape, the opposition does not have the same opportunity to bring its message across and the electoral system has been amended to the advantage of the ruling party.<sup>20</sup> Yet, this does not fully account for consecutive election victories, and does not explain the fairly limited domestic resistance against democratic erosion.<sup>21</sup> Large portions of voters consciously elect and re-elect parties and leaders who have proven not to comply with liberal democracy per se, and sometimes even openly propagate against it.<sup>22</sup>

The real question therefore is: why do people vote for parties and leaders who openly reject the values of liberal democracy?<sup>23</sup> Why do they not punish politicians who trample the principles of constitutionalism and vote them out of office? Why do they not resist the breakdown of the liberal project they supposedly embraced so passionately only a few decades ago? ‘Rule of law backsliding’ thus becomes a challenge accompanying a much more profound problem: that people accept to be

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<sup>19</sup> See Wolfgang Merkel and Anna Lührmann, *Resilience of Democracies: Responses to Illiberal and Authoritarian Challenges*, 28 *DEMOCRATIZATION* 869 (2021); SHERI BERMAN, *DEMOCRACY AND DICTATORSHIP IN EUROPE FROM THE ANCIEN RÉGIME TO THE PRESENT DAY* (2019); STEVEN LEVITSKY AND DANIEL ZIBLATT, *HOW DEMOCRACIES DIE: WHAT HISTORY REVEALS ABOUT OUR FUTURE* (2019) [hereinafter *HOW DEMOCRACIES DIE*].

<sup>20</sup> On the 2022 Hungarian elections, see, e.g., Kim Lane Scheppelle, *How Viktor Orbán Wins*, 33 *J. OF DEMOCRACY* 45 (2022).

<sup>21</sup> On the role of resistance, see Luca Tomini et al., *Standing Up Against Autocratization Across Political Regimes: A Comparative Analysis of Resistance Actors and Strategies*, 30 *DEMOCRATIZATION* 119 (2023).

<sup>22</sup> Andrew Arato relates the loss of the election to the opposition’s ‘incoherent combination of the promise of the restoration of the rule of law at the price of illegality’: the opposition advertised the change it propagated as *rendszer váltás* (regime change), the term used for the cataclysmic changes of 1989-1990 rather than replacement of a not very popular government. See Andrew Arato, *Why We Lost*, *VERFASSUNGSBLOG* (Apr. 4, 2022), <https://verfassungsblog.de/why-we-lost/>

<sup>23</sup> See, e.g., *HOW DEMOCRACIES DIE*, *supra* note 19.

governed by politicians who openly defy liberal democracy, and do not seem to mind so much that countervailing powers are defused, and that courts and institutions are captured, to the (often personal and financial) benefit of those in power. Liberal democracy itself has lost its appeal. It is important to keep this in mind, as it should inform the strategy the EU should follow to address the challenge.

Let us now return to the rule of law and judicial independence, as only one aspect of the broader problem.

#### RULE OF LAW AND RULE OF LAW CULTURE

The concept of the rule of law is notoriously difficult to define, and it is commonplace to say that there are many versions of the Rule of Law, *Rechtsstaat* or *État de droit*. Indeed, there are many ways to shape and operate a system in accordance with the principles of the rule of law. Yet, despite this diversity, there is quite a bit of agreement about what the Rule of Law essentially is and even more so, what it aims to achieve.<sup>24</sup> At its core, the Rule of Law aims to protect citizens from arbitrariness and abuse of power by those who govern. It intends to limit the exercise of power, to ensure that power is exercised in a just and fair manner, and to the benefit of the many, and that all governed under the law are guaranteed equal treatment. It demands that all public power is subject to the law: the legislature is subordinate to higher law -usually the Constitution and/or principles of law, and often (certain) international law-; the executive is subordinate to the legislature; and the courts review that the other branches -the executive and the legislature- comply with higher law. Principles of the Rule of Law are usually laid down and shaped in rules of law: in the Constitution (e.g., rules on the independence of courts, provisions relating to separation of powers or the hierarchy of norms such as the rule that lower law must comply with higher law, or fundamental rights aimed to protect individuals against the state) and in legislation (e.g., laws governing judicial organisation). These principles of the Rule of Law are further defined and fleshed out in constitutional conventions and in the case law of the courts.

Yet, the Rule of Law does not rest just on some abstract constitutional statement or fetishisation of courts or indeed, on the rules of the law.<sup>25</sup> The principle of the Rule of Law and the constitutional and legal principles, rules, mechanisms and procedures that shape it will not deliver what they promise without a *robust political and legal culture* supporting them. The Rule of Law is not only about rules and institutions, but about political and judicial *mentality*. Its realisation depends on a

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<sup>24</sup> For official documents, see e.g., Venice Comm'n Rule of Law Checklist, Stud. 711/2013 (Mar. 18, 2016), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e); *Communication from the Commission on Strengthening the Rule of Law Within the Union. A Blueprint for Action*, COM (2019) 343 final, at 1 (July 17, 2019) [hereinafter *A Blueprint for Action*]; Eur. Parliament and Council Regulation 2020/2092, A General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433) I/1. The CJEU has recently confirmed that there is a common understanding of the concept that all Member States share and have undertaken to respect. See *Hungary v. Parliament and Council* (Conditionality Regulation), Case C-156/21, EU:C:2022:97, at 232-35; *Poland v. Parliament and Council* (Conditionality Regulation), Case C-157/21, EU:C:2022:98. See also Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 14 HAGUE J. ON THE RULE OF LAW 107 (2022).

<sup>25</sup> Stefan Voigt, *Mind the Gap: Analyzing the Divergence Between Constitutional Text and Constitutional Reality*, 19 INT. J. OF CONST. LAW 1778 (2021).

shared commitment to the Rule of Law of all actors involved - political and judicial institutions, executive and administrative bodies, civil servants, civil society organisations and the citizenry at large - who each within their own role take responsibility to give effect to it. Put differently, the Rule of Law is a living *culture*, a habit, a state of mind that should be innate in every official, civil servant, judge, politician and ultimately in civil society and citizens.<sup>26</sup> Legal rules alone cannot guarantee that the Rule of Law is complied with.

Turning to judicial independence as an element of the Rule of Law, James Melton and Tom Ginsburg have found that in established democracies, there does not seem to be a significant relationship between *de jure* and *de facto* judicial independence: some of the oldest and most robust democracies have the weakest legal guarantees of judicial independence, and very high levels of *de facto* judicial independence. Experiences from these countries suggest that judicial independence, observance of the rule of law and separation of powers may be *more* a matter of tradition and political culture than of legal and constitutional guarantees.<sup>27</sup> Specifically with respect to the European Union, Jerg Gutmann and Stefan Voigt have shown that formal legislation passed to enhance judicial independence is even negatively correlated with *de facto* judicial independence.<sup>28</sup> More legislation to regulate judicial independence does not lead to more judicial independence in practice. They suggest that culture plays a crucial role for the quality of institutions and point to two elements specifically: the generalised trust in society and individualism. They explain that in societies with high levels of individualism and trust, politicians expect to be held accountable for their behaviour and thus have few incentives to intervene in court decisions. They do point out that the negative association between *de jure* and *de facto* judicial independence does not imply that legal rules are *necessarily* ineffective or even counterproductive. Yet, they warn that their relevance seems to be substantially smaller than that of deeply rooted cultural traits.

These findings have important policy implications. They suggest that it is hard to fundamentally reform a State's *de facto* compliance with the Rule of Law relating to judicial independence by simply changing the laws on the books regarding their organisation, especially in countries where the *de jure-de facto* constitutional gap is wide, and constitutions underperform.<sup>29</sup>

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<sup>26</sup> As the Venice Commission has put it: "The Rule of Law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture." Venice Comm'n Rule of Law Checklist, *supra* note 24, at 43. See also Michal Bobek, *The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries*, 14 EUR. PUB. LAW 99 (2008).

<sup>27</sup> James Melton and Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Re-Evaluation of Explanations for Judicial Independence*, 2 J. OF LAW AND COURTS 187 (2014). Melton and Ginsburg do argue that *de facto* judicial independence might be improved if countries adopt both selection and removal procedures that insulate judges from the other branches of government. *Id.* at 209.

<sup>28</sup> Jerg Gutmann and Stefan Voigt, *Judicial Independence in the EU: A Puzzle*, 49 EUR. J. OF LAW AND ECON. 83 (2020).

<sup>29</sup> With respect to the protection of rights, see, e.g., Katarzyna Metelska-Szaniawska and Jacek Lewkowicz, *Post-Socialist "Illiberal Democracies": Do De Jure Constitutional Rights Matter?*, 32 CONST. POL. ECON. 233 (2021).

So, how has European Union law responded to Rule of Law backsliding in the past decade?

#### THE LIMITS OF WHAT EU LAW AND THE EUROPEAN COURT OF JUSTICE CAN ACHIEVE

Let us now return to the European Union's response to the Rule of Law crisis starting in 2010. There are several plausible explanations for the slow reaction of the European Union to the developments in Hungary.<sup>30</sup> For one, the Commission and the Court did not seem to see it as their role to enforce the values of Article 2 TEU, in light of the traditional indifference of EU law toward national constitutional arrangements, a rather restrictive conception of the scope of EU law and of the competences of the Union and its institutions. It took time for the Commission to turn to legal means and target challenges to the rule of law or violations of fundamental rights directly, rather than indirectly addressing infringements of EU secondary legislation and internal market law.<sup>31</sup> The Court of Justice too played only a marginal role in the first years of the crisis, and it did not seize the opportunity of the indirect cases brought before it to openly address the broader issue of the values of Article 2 TEU. The Court did not, for instance, mention judicial independence in the decision on the early retirement of Hungarian judges.

Then, in the *Portuguese Judges* case, the Court invited cases directly, by frontally addressing judicial independence with its bold and creative interpretation of Article 19(1) TEU in connection with Article 2 TEU and Article 47 of the Charter, and in the light of Article 6 and 13 ECHR and the constitutional traditions of the Member States.<sup>32</sup> The case law on Article 19(1) TEU is now well-established, and the Court of Justice has been flooded with references from courts questioning the independence of other national courts in their own country,<sup>33</sup> the appointment of judges of the Supreme Court,<sup>34</sup> the independence of the disciplinary chamber of the Supreme Court,<sup>35</sup> and from national courts questioning the independence of courts of

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<sup>30</sup> *Not Confronting Authoritarian Governments*, *supra* note 9.

<sup>31</sup> The Commission did start several enforcement actions, over the independence of its central bank and data protection authorities and the retirement age of judges and it did mention independence of the judiciary in the latter case. See Eur. Comm'n Press Release IP/12/24, European Commission Launches Accelerated Infringement Proceedings Against Hungary over the Independence of its Central Bank and Data Protection Authorities as well as Over Measures Affecting the Judiciary (Jan. 17, 2012), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_12\\_24](https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24). The first two cases were solved in the administrative phase and not brought to Court.

<sup>32</sup> *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, Case C-64/16, EU:C:2018:117, ¶ 35; see (on this case and the creativity of the Court) Matteo Bonelli and Monica Claes, *Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary*, 14 EUR. CONST. L. REV. 622 (2018).

<sup>33</sup> *Repubblika v. Il-Prim Ministru*, Case C-896/19, EU:C:2021:311; *Miasto Lowicz v. Skarb Państwa*, Joined Cases C-558/18 and C-563/18, EU:C:2020:234; *BN and Others v. Getin Noble Bank*, Case C-132/20, EU:C:2021:557; *A.B. and Others v. Krajowa Rada Sądownictwa and Others* (Appointment of Judges to the Supreme Court – Actions), C-824/18, EU:C:2021:153.

<sup>34</sup> *A.B and Others v. KRS* (Appointment of Judges at the Supreme Court), Case C-824/18, EU:C:2021:153.

<sup>35</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

other Member States.<sup>36</sup> Infringement actions have been brought against Poland for the lowering of the retirement age of Supreme Court judges,<sup>37</sup> for the lowering of the retirement age of ordinary judges and public prosecutors;<sup>38</sup> and for the disciplinary regime applicable to judges,<sup>39</sup> while penalty payments have been imposed for the “Muzzle Law”.<sup>40</sup> This case law has led the Court of Justice to confront domestic political conflict and become involved in very fundamental disagreements about the very fabric of the State.<sup>41</sup>

Yet, there are limits to what the Court of Justice, and more generally, what EU law can achieve. To be sure, there have been a few clear successes. But overall, the legal and judicial mechanisms that the EU has at its disposal have not proven to be very effective in achieving compliance with the values of Article 2 TEU. The main reason is beyond the control of the Court and of the law: the further a State backslides from the foundational values, the less it will be inclined to comply with the law and with decisions of the Court of Justice. This is the very problem of backsliding: that governments no longer feel bound by the law and the independent institutions requiring them to do so. Several governments and (captured) national courts have bluntly rejected the authority of the Court of Justice or of the European Union more generally, under reference to a lack of competence of the Union, sovereignty, national identity, essential state functions, the supremacy of their Constitution. In other instances, the relevant governments do (pretend to) implement Court decisions, but on closer inspection, they only make cosmetic changes, without *actually* complying.<sup>42</sup> One should therefore not exaggerate the scope for the EU to bring unwilling backsliding Member States in line through law and judicial decisions.<sup>43</sup> At the end of the day, like any other court, the Court of Justice can only rely on its normative force to ensure compliance.

The judicial mechanisms have not always been deployed to make the best use of them. Especially the early infringement actions took too long, and the decision declaring that the Member State had violated obligations under EU law came too late for the violation to be corrected.<sup>44</sup> In this respect, the Commission and the Court are learning by doing, and now make use of available mechanisms to speed up the process and avoid that the harm is irreparable before a decision is handed.

But other challenges are inherent in the specific procedures to bring cases before the Court of Justice, and in EU law itself. Especially in the context of preliminary reference proceedings, the Court of Justice is not always very well placed to act as the guardian of judicial independence and other aspects of the Rule of Law, let alone

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<sup>36</sup> *Openbaar Ministerie v. X and Y* (Tribunal Établi par la Loi dans l’État Membre d’Émission), Joined Cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100.

<sup>37</sup> *Comm’n v. Poland* (Independence of the Supreme Court), Case C-619/18, EU:C:2019:531;

<sup>38</sup> *Comm’n v. Poland* (Independence of Ordinary Courts), Case C-192/18, EU:C:2019:924.

<sup>39</sup> *Poland*, EU:C:2021:596.

<sup>40</sup> *Comm’n v. Poland* (Application for Interim Measures), Case C-204/21 R, EU:C:2021:878.

<sup>41</sup> *Respond to Populism*, *supra* note 16.

<sup>42</sup> The strategy is not restricted to ‘backsliding countries’, see Agnes Batory, *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, 94 PUB. ADMIN. 685 (2016).

<sup>43</sup> See Ulrich Sedelmeier, *Political Safeguards Against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure*, 24 J. EUR. PUB. POL’Y 337 (2017).

<sup>44</sup> See, e.g., *Lex CEU*, EU:C:2020:792.

of other values contained in Article 2 TEU. References for preliminary reference are inadmissible if the dispute before the national court in the main proceedings is not substantively connected to EU law, that is, if there is no connecting factor between the provision of EU law to which the questions relate and the dispute in the main proceedings.<sup>45</sup> Moreover, the preliminary reference procedure is meant to give the Court of Justice the opportunity to interpret *EU law* (or assess its validity). It is not the role of the Court of Justice to decide on the compliance of national law with EU law, and even less so, to decide whether a particular factual situation complies with EU law. The final assessment of the facts falls to the referring court.<sup>46</sup> The Court of Justice is not well equipped to carry out an in-depth assessment of the independence and impartiality of individual judges, or of the possible flaws in the appointment procedure of specific judges.<sup>47</sup>

The Court has more room in the context of infringement actions to delve into the national system and rule on the compliance of national situations with EU law. But even infringement proceedings are ‘more suitable to tackle the more concrete consequences, rather than the root causes, of constitutional backsliding, or in other words to fight the symptoms, rather than the disease itself’.<sup>48</sup>

Finally, in both types of procedures, the Court and the Commission, are confronted with the fact that not too many specific legal obligations can be derived from the values expressed in Article 2 TEU, from Article 19 TEU, the Charter, the ECHR and the general principles of EU law. The Court of Justice has developed an impressive body of case law shaping the principle of judicial independence, but there is not much more that it can do to formulate detailed rules on judicial appointment and other aspects of judicial independence. This is even more so with respect to other aspects of the Rule of law and other values mentioned in Article 2 TEU.

There are, thus, limits to what the Court of Justice can do to restore the Rule of Law in the Member States. While the decisions of the Court are needed to avoid a sense of impunity, at the end of the day, it is for national actors to establish and respect the Rule of Law more generally, and judicial independence specifically. The Court cannot do that in their place. Yet, one may wonder to what extent the enforcement actions brought by the Commission and the decisions of the Court of Justice have contributed to *fostering a culture of the rule of law*.

#### FOSTERING A RULE OF LAW CULTURE INVOLVING NATIONAL ACTORS

In the current debate, the focus is usually on punitive measures, rather than on positive incentives to foster respect for the Rule of Law or to increase public support for it. Legal rules and judicial safeguards are necessary and must be employed to formulate a *response* to problems of backsliding. But more effort could be invested in *promoting* a rule of law *culture* and *preventing* backsliding.<sup>49</sup> Three dimensions of

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<sup>45</sup> *Miasto Łowicz*, EU:C:2020:234; Order of the Court, S.A.D. Maler und Anstreicher, Case C-256/19, EU:C:2020:523.

<sup>46</sup> See, e.g., *KRS*, EU:C:2021:153, ¶ 96; *W.Z. (and des Affaires Publiques de la Cour Suprême – Nomination)*, Case C-487/19, EU:C:2021:798, ¶¶ 78-79.

<sup>47</sup> *W.Z.*, EU:C:2021:798, ¶¶ 78-79.

<sup>48</sup> *Infringement Actions 2.0*, *supra* note 8, at 52.

<sup>49</sup> See also *A Blueprint for Action*, *supra* note 24.

such a strategy are mentioned here to develop a robust Rule of Law culture: fostering civil society, strengthening transnational networks and investing in training and education.

A vibrant civil society is essential to establish and maintain robust liberal democracies governed under the Rule of law.<sup>50</sup> But today, we are witnessing rather the shrinking of civic space and a clampdown on journalists, watchdogs, activists, and civil society organisations ('CSOs').<sup>51</sup> The European institutions have acknowledged the vital role of civil society organisations and other civil society actors to achieve respect for the values of Article 2 TEU.<sup>52</sup> Several policies and strategies intend to protect civic space in the Member States. The European Democracy Action Plan, adopted in December 2020 to contribute to building more resilient democracies in the Union, announced a series of initiatives to support and safeguard media freedom and pluralism.<sup>53</sup> In this context, the Commission presented a Recommendation to Member States on the safety of journalists.<sup>54</sup> In April 2022, the Commission, mobilised by civil society organisations, proposed a directive intended to protect journalists and civil society organisations against abusive litigation, the so-called anti-SLAPP directive, which aims to provide courts and targets of SLAPPs with the tools to fight back against manifestly unfounded or abusive court proceedings.<sup>55</sup> The Commission also adopted a Recommendation complementing the Directive and encouraging Member States to ensure that national legal frameworks provide the necessary safeguards, similar to those at EU level, to address domestic cases of SLAPPs; to provide training for legal professionals and potential SLAPP targets to improve their knowledge and skills to effectively deal with these court proceedings; to organise awareness raising and information campaigns and to ensure that targets of SLAPP have access to individual and independent support, such as from law firms that defend SLAPP targets pro bono.<sup>56</sup>

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<sup>50</sup> Łukasz Bojarski, *Civil Society Organizations for and with the Courts and Judges—Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020*, 22 GER. L. J. 1344 (2021).

<sup>51</sup> See, e.g., Barbara Grabowska-Moroz and Olga Śniadach, *The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland*, 17 UTRECHT L. REV. 56 (2021); FUNDAMENTAL RIGHTS AGENCY, PROTECTING CIVIC SPACE IN THE EU (2021); see also *European Commission Rule of Law Report 2022*, COM (2022) 500 final (July 13, 2022) [hereinafter *Rule of Law Report 2022*]; *European Commission Rule of Law Report 2020*, COM (2020) 580 final (Sept. 30, 2020) [hereinafter *Rule of Law Report 2020*].

<sup>52</sup> See *Rule of Law Report 2020 and Rule of Law Report 2022*, supra note 51; *Communication from the Commission on the European Democracy Action Plan*, COM (2020) 790 final (Dec. 3, 2020) [hereinafter *European Democracy Action Plan*]; *European Parliament Resolution of 8 March 2022 on the Shrinking Space for Civil Society in Europe and the Council Conclusions on Strengthening the Application of the Charter of Fundamental Rights in the European Union (2021/2013(INI))* (Mar. 8, 2022); see also *Comm'n v. Hungary (Transparency of Associations)*, Case C-78/18, EU:C:2020:476; *Comm'n v. Hungary (Criminalisation of Assistance to Asylum Seekers)*, Case C-821/19, EU:C:2021:930.

<sup>53</sup> *European Democracy Action Plan*, supra note 52.

<sup>54</sup> *Commission Recommendation (EU) 2021/1534 of 16 September 2021 on Ensuring the Protection, Safety and Empowerment of Journalists and Other Media Professionals in the European Union*, C (2021) 6650 final (Sept. 16, 2021).

<sup>55</sup> *Commission Proposal for a Directive of the European Parliament and of the Council on Protecting Persons who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits Against Public Participation")*, COM(2022) 177 final (Apr. 27, 2022).

<sup>56</sup> *Commission Recommendation 2022/758, Protecting Journalists and Human Rights Defenders who Engage in Public Participation from Manifestly Unfounded or Abusive Court Proceedings ("Strategic Lawsuits Against Public Participation")*, 2022 O.J. (L 138) 30.

In September 2022, the Commission proposed a European Media Freedom Act, containing rules to protect media pluralism and independence in the EU.<sup>57</sup>

In addition to these legislative packages, the *funding* available to support civil society has been substantially increased in the new Multiannual Financial Framework and NextGenerationEU. Funding is used here not as a punitive measure – as is the case when funds are suspended or cut through conditionality – but to *positively* foster and protect a strong and vibrant civil society. Thus, the €1.55bn Citizens, Equality, Rights and Values programme (CERV) aims to sustain and develop open, rights-based, democratic, equal and inclusive societies based on the rule of law *in* the European Union. The programme is based on four strands: Equality, Rights and Gender Equality; Citizens' engagement and participation; Daphne (the fight violence, including gender-based violence) and Union values. Together with the Justice programme, the Citizens, Equality, Rights and Values programme forms the Justice, Rights and Values Fund.

These programmes come with important challenges, including ensuring accessibility for smaller grassroots organisations that may simply not have the capacity to deal with the administrative burden of European funding, and preventing that European funds go to CSOs that defy the values of liberal democracy and Rule of Law. Yet, this development is a step in the right direction.

A second dimension of a strategy to foster a Rule of Law culture consists in strengthening transnational cooperation and networking between national actors, and investing in lesson-drawing, building mutual trust and socialization, emphasising voluntary and domestically driven adoption of the rules and the culture of the Rule of Law, rather than 'imposing the Rule of Law from above'. Examples here include judicial networks, such as the European Judicial Training Network, the European Judicial Network, the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of European Judges (CCJE), which all serve as meeting points for national judges. They can be used as sites for exchanging views on common challenges and providing support and assistance to build a robust Rule of Law culture. Technical and financial assistance provided by EU programmes can support these networks.

The Rule of Law Reporting system, with all its flaws, equally provides opportunities for communication between national actors, and thus for exchange on the Rule of Law.<sup>58</sup> A network of national rule of law contact points was established in 2020 to help setting up the mechanism, and functions as a channel of communication with Member States for the preparation of the Report as well as to exchange best practices.

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<sup>57</sup> *Commission Proposal for a Regulation of the Parliament and 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 (Sept. 16, 2022); *Commission Recommendation (EU) 2022/1634 of 16 September 2021 on Internal Safeguards for Editorial Independence and Ownership Transparency in the Media Sector*, C (2022) 6536 final (Sept. 16, 2021).

<sup>58</sup> See, e.g., LAURENT PECH AND PETRA BARD, EUR. PARLIAMENT POL'Y DEPT. FOR CITIZENS' RIGHTS AND CONST. AFFAIRS, THE COMMISSION'S RULE OF LAW REPORT AND THE EU MONITORING AND ENFORCEMENT OF ARTICLE 2 TEU VALUES, (2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL\\_STU\(2022\)727551\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf).

Finally, training and education is essential to foster a robust rule of law culture. As Gutman and Voigt have pointed out nicely, at the end of the day, rules will be complied with only if a sizeable portion of the population cares about them being complied with. If the rule of law meets lukewarm approval or complete disregard by the population, the government could get away with defying liberal democracy, the Rule of Law, and could govern to their own advantage rather than for the public good. Promoting a Rule of Law culture, such that citizens understand and appreciate the values of liberal democracy is essential to preserve the Rule of law.

#### CONCLUSION

It takes time to create a rule of law culture in which the institutions, rules and mechanisms of liberal democracy and the rule of law can flourish. What we have learned from the European Union's response to the attacks on the principles of liberal democracy and the rule of law is that there are no silver bullets, and that imposing the rule of law top down is not very effective to promote a rule of law *culture*. The Union must react to defend the common values of Article 2 TEU to avoid impunity, but prevention of backsliding and promotion of the Rule of Law and a Rule of Law culture is at least as important to achieve the aim, that cannot consist of legal rules alone. The European Union is developing policies which are aimed at fostering such Rule of Law culture, protecting and supporting civil society, transnational networks and training civil servants, judges and citizens. In the long term, these strategies may prove more effective than the legal and judicial mechanisms that are at the centre of attention today.

