THE EU AS A GUARDIAN OF THE RULE OF LAW WITHIN ITS MEMBER STATES

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INTRODUCTION

This Special Issue celebrates, although with a delay due to COVID related restrictions, the 30th anniversary of the Institute for European Law, which Koen Lenaerts founded as professor of European Law at KU Leuven in 1990. The connections between the Institute and the *Columbia Journal of European Law* go back to the foundation of the Journal by Professor George Bermann in 1994,[1] which Lenaerts actively supported. As noted in the Foreword of the first issue, '[w]hile perhaps increasingly a "bloc" for some purposes, Europe also has preserved its national and sub-national particularities and thus represents something like the "laboratories" for "experimentation"'.[2]

The laboratory for experimentation that is the focus of the present issue relates to one of the greatest internal challenges currently facing the European Union ('EU'): Can the EU protect the rule of law in its Member States, and if so how? The rule of law is both a value on which the EU is founded, and a value that is common to the Member States.[3] Yet, the rule of law is under assault in several Member States, as illustrated in recent months by standoffs between the European Commission and the Hungarian government on the adoption of measures for the protection of the Union budget against breaches of the principle of the rule of law,[4] or between the Court of Justice of the EU ('Court of Justice') and the Polish Constitutional Tribunal and the Romanian Constitutional Court, on the primacy of Union law and the binding effect of rulings of the Court of Justice regarding judicial independence.[5]

Back in 1990, Lenaerts noted that American constitutionalism shows that oversight by a supreme judicial body 'must and can', 'under the rule of law which governs the common legal order' keep 'the appropriate balance between the autonomy of the component entities […] and the effectiveness of the central government, favoring the values of […] supranational cohesion and decision-making at the level of the common legal order'. And he added: 'The European Community […] will not fail to meet the challenge'.[6] In recent years, Lenaerts has been part of the formation of the Court deciding on numerous key judgements paving the way for contemporary developments on the rule of law in the case law of the Court of Justice. He for instance presided the grand chamber and the full court, respectively,

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[1] G. Bermann, Foreword, Columbia Journal of European Law, 1 (1994-1995), p. 2.

[2] Ibid. p. 1.

[3] Art. 2 TEU.

[4] Eg. 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 L 325, 20.12.2022, p. 94.

[5] Eg. RS, C-430/21, EU:C:2022:99 (Romania); European Commission, 'Reasoned opinion Art. 258 TFEU: Violation of EU law, in particular Art 19(1), second subparagraph, TEU and the general principles of EU law, by the Constitutional Tribunal' (INFR(2021)2261, 15.7.2022) (Poland).

[6] Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 AM. J. COMP. L. 205 (1990), at p. 263. See also: Eg. 'the Court is ready to bear its full responsibility for upholding the rule of law within the EU. That responsibility lies at the very heart of its function of ensuring that 'in the interpretation and application of the Treaties the law is observed'.' (Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue' (2019) Yearbook of European Law pp.1-15 at p.15).

in such key judgments as *Associação Sindical dos Juízes Portugueses* (‘*ASJP’*, 2018)[7] and *Conditionality Judgements* (2022)[8]. This personal engagement, as well as the current interest of our Institute in the protection of the rule of law and fundamental rights,[9] explain our decision in this Anniversary Issue, to explore the evolving constitutional and institutional framework for the protection of the rule of law in Europe, with an ever-growing emphasis on the EU as a key player.

THE RULE OF LAW IN EU LAW

Today, the fundamental importance of the rule of law for the EU is clear from a first glance at its constitutional texts. In addition to the preambles of both the Treaty on European Union (‘EU Treaty’ or ‘TEU’) and the Charter of Fundamental Rights of the European Union (‘Charter’), which refer explicitly to the concept of the rule of law, Article 2 TEU provides that the rule of law is one of the values on which the Union is founded, and the first paragraph of Article 21 TEU provides that the Union’s action on the international scene is to be guided by the principles which have inspired its own creation, development and enlargement, including, in particular, the rule of law. In other words, the EU Treaty provides both that the Union is founded on the rule of law and that this principle should guide its action on the international scene.

Although the rule of law has been explicitly incorporated into the EU Treaty only since the Maastricht Treaty, the Court of Justice had already confirmed in its 1986 judgment in *Les Verts* – with as reporting judge René Joliet, for whom Lenaerts clerked as a legal secretary – that the then European Economic Community was ‘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.’[10] Since that landmark judgment, the Court has defined the EU as ‘a union based on the rule of law in which individuals have the right to challenge before the courts the legality

[7] ‘Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals’ and the Court went on to add ‘The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law’ (Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, ¶¶ 32 and 36). Koen Lenaerts was President of the Court of Justice and presided over the Grand Chamber that delivered the ruling.

[8] E.g. ‘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, values which are given concrete expression in principles containing legally binding obligations for the Member States.’ (Hungary v European Parliament and Council of the European Union (Conditionality Regulation), C-156/21, EU:C:2022:97, ¶ 232). Koen Lenaerts was President of the Court of Justice and presided over the Full Court that delivered the ruling.

[9] Our Institute currently hosts the RESHUFFLE project supported by the European Research Council (European Union’s Horizon 2020 research and innovation programme, grant agreement No 851621). The project reflects on the changing constitutional landscape for the protection of fundamental rights in Europe, investigating the implications of the increasingly strong driving role of the European Union in the field.

[10] Les Verts v Parliament, Case 294/83, EU:C:1986:166, ¶ 23.

of any decision or other national measure concerning the application to them of an EU act'. [11]

The Court has also more recently emphasized that Article 19 TEU, which gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights of individuals under that law not just to the Court of Justice, but also and in the first place to national courts and tribunals.[12] To that end, the Treaty on the Functioning of the EU ('TFEU') established what the Court of Justice has consistently characterized as a complete system of legal remedies and procedures, designed to permit the Court to review the legality of acts of the EU institutions. Individuals are therefore entitled to effective judicial protection of the rights they derive from the EU legal order. [13]

Hence, for the Court of Justice, the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. The Court has made it clear that, as provided for in the second subparagraph of Article 19(1) TEU, it is for the Member States to establish a system of legal remedies and procedures ensuring for individuals compliance with their right to effective judicial protection in the fields covered by EU law. Indeed, the principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 ECHR and is now reaffirmed in Article 47 of the Charter. [14]

Besides effective judicial protection by independent and impartial courts and effective judicial review, including respect for fundamental rights, EU institutions have also identified other principles which give shape to the rule of law. The European Commission in particular pointed at the importance of a transparent, accountable, democratic and pluralistic process for enacting laws; legality and legal certainty; the separation of powers and the prohibition of arbitrary exercise of executive power; and equality before the law.[15] This working definition of "the rule of law" has been taken over by the EU legislator in the General Conditionality

[11] See e.g. Associação Sindical dos Juízes Portugueses, C-64/16, EU:C:2018:117, ¶ 31 and the case-law cited.

[12] See e.g. Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, ¶ 47.

[13] See e.g. ECB and Others v Trasta Komercbanka and Others, C-663/17 P, C-665 /17 P and C-669/17 P, EU:C:2019:923, ¶ 54.

[14] See e.g. Asociaţia 'Forumul Judecătorilor din România' and Others, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, ¶ ¶ 189 and 190 and the case-law cited, Euro Box Promotion and Others, C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, ¶ 219.

[15] Eg. European Commission, Communication of 3 April 2019 "Further strengthening the rule of law in the Union: state of play and possible next steps" COM(2019) 163, at 1.

Regulation,[16] which further indicates that the rule of law must be understood 'having regard to the other Union values and principles enshrined in Article 2 TEU'.[17]

ACTIVATING EU ORGANS TO RESPOND TO AN EXISTENTIAL THREAT

Because the rule of law is both a foundation of the EU legal system and a value common to the Member States, challenges to the rule of law deeply threaten the specific dynamics of the process of European integration. The importance of law, and law abidance, in that process is universally accepted. In reaction to challenges to the rule of law, EU organs and experts in the field notably look within EU law for possible palliatives. This can be understood as the expression of a survival instinct: in seeking to guard the rule of law, the EU and the related epistemic community react to threats to 'the very structure of constitutional democracies governed under the rule of law and the fabric of open societies in Europe (and beyond)'[18] on which it itself relies and depends.

In the Treaties, a specific mechanism has been created, now to be found in Article 7 TEU, to identify threats to the rule of law, and possibly sanction them. Yet, as we know from latest efforts by the European Commission and the European Parliament to make use of this mechanism against Poland and Hungary, respectively, Article 7 TEU is very difficult to deploy. EU institutions have been seeking to develop new monitoring tools. In particular, the European Commission has started following rule of law developments in all the Member States on a systematic basis, examining any relevant developments as regards the Member States' justice systems, their action in fighting corruption and preserving media pluralism and freedom, and as regards other institutional issues linked to checks and balances. The European Commission now regularly gives an account of these developments in its annual rule of law report,[19] including with respect to emergency measures taken by Member States to tackle the outbreak of the coronavirus.[20] The Council has set up its own rule of law 'annual dialogue', each time discussing the rule of law situation in a group of Member States, for which it now takes the Commission's rule of law reports as a basis for the peer review.[21] From its side, the European Parliament has reiterated its request for setting up an 'EU mechanism on democracy, the rule of law and fundamental rights', which would consist of annual monitoring on an inter-institutional basis and lead to the adoption of recommendations per Member State

[16] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I , 22.12.2020, p. 1.

[17] Ibid., Art. 2(a).

[18] M. Claes, in this Special Issue.

[19] Eg. European Commission, '2022 Rule of Law Report: The rule of law situation in the European Union' (COM/2022/500 final, 13.7.2022).

[20] Thus, the Commission in its 2021 and 2022 Rule of Law reports analysed the impact and challenges brought by the COVID-19 pandemic in the areas covered by the reports. As noted by the Commission in its 2022 Rule of Law report, "[t]he COVID-19 pandemic tested the resilience of national systems in upholding the rule of law in times of crisis, putting pressure on the established systems of constitutional checks and balances and on the ability of democratic institutions and their watchdogs to do their work". European Commission, '2022 Rule of Law Report: The rule of law situation in the European Union' (COM/2022/500 final, 13.7.2022), at 1.

[21] See Council of the European Union, 'Note – Annual rule of law dialogue', doc. n° 11510/022 of 2 September 2022.

covering all values set out in Article 2 TEU.[22] Whereas the Commission prefers continuing its own rule of law reporting, it has since 2022 accepted to have its country-reports supplemented by country-specific recommendations.

The EU legislator has also now adopted specific mechanisms related to the implementation of the EU budget, including the General Conditionality Regulation. Several Member States, including Poland and Hungary, committed in their Recovery and Resilience Plans to implement reforms strengthening their capacities in rule of law related matters, such as judicial independence.[23] In December 2022, as this Special Issue was going to press, a first application of the General Conditionality Regulation was made, with the Council imposing measures against Hungary to protect the EU budget against breaches of the rule of law principles in the areas of public procurement, prosecutorial action and the fight against corruption.[24] Also in December 2022, the Commission considered that for the implementation in Hungary of cohesion policy and home affairs programmes the so-called 'enabling condition' on compliance with the Charter of Fundamental Rights may be considered fulfilled only once Hungary has taken the measures on the judiciary to which it has committed under its Recovery and Resilience Plan.[25]

Next to these developments, which explicitly address problems with respect to the 'rule of law' within the EU, the entire apparatus of EU law is regularly affected, or mobilised, in the context of the broader debate on the rule of law.[26] The free provision of audio-visual services, the freedom of establishment, data protection law, or the prohibition of discrimination and more generally the system for the protection of fundamental rights may be relied upon to support, or put pressure on, key players at national level from complementary angles. We are still in the early stages of seeking to understand how effective these mechanisms taken as a whole might be.

There is little doubt that, in response to the challenges posed by rule of law backsliding in several Member States, the Court of Justice stands out as a key EU institution asserting the role of EU law in constraining Member States' ability to reform their systems of governance, and their judicial systems in particular. The Court of Justice has issued a number of seminal rulings, starting with *Associação Sindical dos Juízes Portugueses ('ASJP'),*[27] allowing it to exercise a level of scrutiny on domestic measures threatening the independence of the judiciary. In a subsequent

[22] European Parliament, resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights, OJ C 363, 28.10.2020, p. 45.

[23] E.g. European Commission, Press release of 1 July 2022 'NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan'; European Commission, Press release of 30 November 2022, 'Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds'.

[24] 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 L 325, 20.12.2022, p. 94.

[25] E.g. European Commission, Press release of 22 December 2022, 'EU Cohesion Policy 2021-2027: Investing in a fair climate and digital transition while strengthening Hungary's administrative capacity, transparency and prevention of corruption'.

[26] See also: Editorial, 'The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems', (2016) Common Market Law Review, 53(3), pp. 597-605.

[27] Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, EU:C:2018:117.

series of infringement actions and preliminary rulings, Member States' laws have been assessed and some found to be in breach of Article 19(1) TEU, which sets out the Member States' duty to provide remedies sufficient to ensure effective legal protection within the meaning of Article 47 of the Charter in the fields covered by EU law, and which gives concrete expression to the value of the rule of law.

Yet, this case law also faces important limitations. As recalled by Lenaerts in this Special Issue, the use of Article 19(1) TEU does not modify the nature of the preliminary ruling, which is to help the referring national court to resolve a specific dispute pending before it.[28] Furthermore, as noted by Takis Tridimas also in this Issue, the Court's approach to Article 19(1) TEU 'is first and foremost about institutional powers and government structures and not about substantive rights in concrete situations'.[29] As a result, the systemic nature of the threat to judicial independence may condition also the use of infringement actions in situations that do not fall within the scope of EU law in the traditional sense. Article 19(1) TEU thus cannot be used to tackle all threats to effective judicial protection, in addition to being limited to threats to the rule of law that are related to the role of the judiciary in the EU constitutional structure. Ensuring compliance with the rule of law in the Member States must of course go hand in hand with respect for the rule of law at EU level, including the structural limits and principles enshrined in the Treaties.

BRIDGING THE GAP: A COLLECTIVE ENDEAVOR

The tools identified above, without any intent to be exhaustive, thus all have limitations. The EU may have been constructed to consolidate a sense of 'togetherness' in Europe[30], but it was simply not designed for the purpose of combatting threats to the rule of law in its Member States. On the one hand, the EU may be facing an existential threat. On the other hand, it is ill-equipped to combat the roots of threats to the rule of law in its Member States. It is thus necessary to reflect critically on the design of the instruments existing under EU law to address challenges to the rule of law and on their use (or lack thereof, as stressed by Kim Scheppele in this Issue). How then may we articulate the tension between, on the one hand, the clear commitment of the EU and its Member States to the rule of law and, on the other hand, the incomplete and imperfect nature of EU instruments to protect the rule of law in its Member States?

We are most grateful that a set of most prominent EU scholars have kindly accepted to share their own perspectives of this central research question. In his contribution, Lenaerts calls for 'integration through the rule of law' and spells out his understanding of the role of the Court of Justice in that process, arguing that this role is ambitious yet fits into a clearly defined constitutional framework. Armin von Bogdandy and Luke Dimitrios Spieker wish that the Court of Justice would be yet more creative and suggest avenues for novel judicial reasoning articulated around Article 2 TEU, with a view both to protecting against rule of law backsliding in the Member States and to facilitating transitions back to liberal democracies. Concluding that the Commission is failing in its duty to act as a guardian of the rule of law in the

[28] K. Lenaerts, in this Special Issue.
[29] T. Tridimas, in this Special Issue.
[30] Art. 1, para. 2 TEU.

EU, Scheppele also turns to the Court of Justice and pleads for a stronger alliance with national judges to tackle threats to judicial independence.

In response to these calls for greater Court involvement, Tridimas invites us to take a step back and to look at how constitutional adjudication, as that of the Court of Justice in particular, normally balances rights and the public interest. In turn, Monica Claes takes yet more distance from the Court's centred approach and emphasizes the need for a 'rule of law culture'. Christophe Hillion closes this Special Issue by stressing not only the duty to respect and promote the rule of law in the EU's external action, but also the EU and the Member States' obligation to comply with the rule of law internally so as not to compromise EU constitutional and external commitments.

The subsequent sections come back on what we have deemed to constitute the key arguments put forward by our guests, placing emphasis on the ways they respond and complement each other, before concluding with some suggestions of directions for further reflection.

'Integration through the rule of law':[31] *in defense of the role of the Court and courts in the process, by K. Lenaerts*

The first article of this Issue, by Lenaerts, simultaneously achieves three objectives. It synthetizes the main cases of the Court of Justice on the rule of law in recent years to emphasize their overall coherence and complementariness. The article also demonstrates that these jurisprudential developments squarely fit in the EU's constitutional architecture. For that purpose, the author elaborates on what may be perceived as controversial aspects of this developing area of law and addresses criticisms. As a result, the Court's case law is understood both as protecting the rule of law in the Member States to the extent that this is necessary to ensure the integrity of the EU's constitutional - in particular judicial - structure, and as complying with the rule of law as it applies to EU institutions and to the Court itself. Finally, the article calls for 'integration through the rule of law' owing to the identification and imposition of both a rich and nuanced frame of reference.

To start with, Lenaerts explains how the Court's case law in this field is imbued with considerations on the essential features of the EU's constitutional model: its institutional design, as well as essential principles such as effective judicial protection and equality before the law, mutual trust and mutual recognition. References to these meta principles are echoed in Hillion's subsequent paper, which promotes a systemic reading of the EU's approach to the rule of law in its internal and external action, as well as in that of Tridimas who more generally observes a shift in the integration paradigm in contemporary EU law with the enhanced 'prominence of EU structural principles'. As national courts are understood to constitute 'an essential building block of the EU's constitutional structure', Lenaerts further moves on to examine how EU law naturally seeks to protect their independence and does so in several ways.

[31] K. Lenaerts, in this Special Issue.

Lenaerts explains that EU law protects the independence of judges both in their individual and in their institutional capacity. In her individual capacity, any judge invoking EU rights (e.g. when challenging a discrimination on grounds of age) is entitled to bring a claim for the protection of these rights before an independent court: Article 47 CFEU thereby ensures the fundamental right to an effective judicial remedy. In her institutional capacity, a judge who believes that her independence is undermined by executive or legislative action may challenge the incompatibility of such action with Article 19(1) TEU: this argument is not conditional upon the existence of an individual right of the judge protected by EU law; it can be based on Article 19(1) TEU. Both Article 47 CFEU and Article 19(1) TEU have direct effect. Lenaerts sheds light on how both infringement actions and the preliminary ruling procedure may be used to enforce the requirement of independence of judges enshrined in Article 19(1) TEU to which much of the recent case law is devoted. In the context of infringement actions, the application of that article only requires the independence of the courts which may be called upon to rule on EU law to be adversely affected by the measures/practices under scrutiny. Instead, the preliminary ruling procedure can only be used in relation to Article 19(1) TEU if that article is relevant to help the national court to resolve the specific dispute pending before it. The said procedure thus cannot be used to ask the Court, in general terms, to examine whether judicial systems or reforms comply with judicial independence.

Next, Lenaerts recalls how the case law protects, as it has always done, the preliminary ruling procedure itself to ensure a sound dialogue between the Court of justice and national judges. The author also runs through the case law on judicial independence and mutual trust to explain how the two-step examination to be performed by the judicial authority requested to execute a European Arrest Warrant ('EAW') fits in his understanding of the constitutional design of the EU. According to these two steps, the executing authority must first examine the situation of the justice system as a whole to identify the possible existence of systemic or generalized deficiencies. If such deficiencies exist, the executing authority ought then to look at the impact of these deficiencies on the independence of the court that actually issued the EAW decision leading to a risk of a breach of the surrendered person's fundamental rights. This two-step approach has been criticized by authors such as Scheppele to whom we come back below, for making it difficult to react to problems in the domestic judicial system of the requesting state. In response, Lenaerts explains that the two-step approach is warranted by the principle of mutual trust and further meets the twofold need to fight impunity (as the refusal to execute a EAW may result in criminals being set free), and to protect the rights of the victims of the offences concerned.

Having thereby explained why the growing case law on judicial independence modifies neither the main features of the preliminary ruling procedure nor those of mutual trust in the operation of the EAW, Lenaerts moves on to call for the recognition of a 'framework of reference' for a rule of law based on common values in the EU. While such a framework is necessary in a legal order in which the national and the EU legal systems are interlocked and to ensure the integrity of the EU's constitutional structure, it must not be 'confused with constitutional modeling' and thus cannot be considered as *ultra vires*. Referring to Article 4(2) TEU, the author notes that imposing a specific constitutional model would run against the

Union's duty to respect national identity. In contrast, the EU framework of reference is itself grounded in the constitutional traditions common to the Member States and also draws inspiration from the ECHR, as interpreted by the ECtHR. Lenaerts provides examples of, and welcomes, the fruitful interactions between the case law of the two courts leading to their 'symbiotic relationship' (quoting the former President of the ECtHR, Robert Spano). Finally, the author notes that national developments will not be tested against the EU framework of reference in abstract ways, but in specific contexts.

Calling for Court-driven transformative constitutionalism owing to Article 2 TEU, by A. von Bogdandy and L. D. Spieker

The call from Lenaerts for 'integration through the rule of law' is taken one step further in the article by von Bogdandy and Spieker. These authors plead for a more ambitious court-driven transformation of society. They draw on the work of Karl Klare on 'transformative constitutionalism', which they transpose from the South African context to the EU one. After having anticipated objections to judicial overreach based on democratic arguments, and after having noted that juridication may generate rather than restrict sound democratic political processes, they argue that Article 2 TEU could be interpreted by the EU's highest Court to support democratic processes.

For that purpose, the authors observe that the Court may have already embraced its function as a transformative constitutional court. In *ASJP*, the Court already started to operationalise Article 2 TEU, to which Article 19 TEU is said to give expression, in order to review features of the organisation of the national judiciary.[32] More recently, in the *Conditionality Judgments*, the Court stressed that Article 2 TEU is 'not merely a statement of policy guidelines or intentions', but 'contains values' which are given 'concrete expression in principles containing legally binding obligations for the Member States' as confirmed by multiple provisions of the Charter and of the EU Treaties.[33]

Building on these observations, von Bogdandy and Spieker observe that Article 2 TEU could be further relied upon to *hinder* rule of law backsliding. The proposed interpretation requires from the Member States that they comply with the essence of the fundamental rights enshrined in the Charter of fundamental rights of the EU even beyond the scope of application of that Charter. Essential democratic requirements on which the EU's democracy is inherently based, as confirmed by Article 10 TEU, would also be protected. Article 2 TEU, taken in conjunction with selected provisions of the Charter or with Article 10 TEU, could thereby be used to protect a range of safeguards of the rule of law such as independence of media, academic freedom or fairness of elections.

The authors anticipate claims of EU judicial overreach. To the extent that their proposal refers to joint reliance on Article 2 TEU and the Charter beyond its scope of application, only the 'essence' of Charter rights would be protected, and thus Article

[32] Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, EU:C:2018:117, ¶ 32.

[33] Hungary v European Parliament and Council of the European Union, C-156/21, EU:C:2022:97, ¶ 232 and 156-158.

2 TEU would only be used as an extraordinary remedy. As for the joint reliance on Article 2 and Article 10 TEU, a parallel is drawn with the dual use of Article 2 and Article 19 TEU: although in each case the second provision primarily relates to institutions at EU level - such as the European Parliament or the Court -, these cannot function if safeguards do not exist at national level to ensure their compliance with the (essence of the) rule of law. The national institutional system on which these EU institutions rely must thus comply with EU law safeguards ranging from democratic decision-making to independence of judges at national level. Von Bogdandy and Spieker further identify two ways of nuancing the role of the Court in monitoring compliance with Article 2 TEU. First, the Court would be expected to refrain from requiring compliance with a specific constitutional model, and instead focus on establishing red lines in a specific case. This echoes the notion of 'frame of reference' to be applied in specific contexts, in Lenaerts' contribution. Second, this form of judicial intervention could be limited to situations in which a presumption of compliance with Article 2 TEU is rebutted.

Next to thereby protecting the preconditions for democratic elections, the authors call for yet more 'creative lawyering' so that EU law could also be used to actually support the transition *back* to liberal democracy after a period of backsliding. On the one hand, rules in breach of EU law – including of a joint reading of Article 2 TEU and another provision of EU law as explored above – ought to be disregarded by the newly elected authorities and removed by virtue of the primacy of EU law. On the other hand, the authors go as far as arguing that where national law provides for (criminal) liability of judges exceeding public powers, such a mechanism should be used to trigger liability of a judge who has seriously and intentionally acted in violation of the values enshrined in Article 2 TEU. Interestingly, the authors here touch upon a situation covered by Lenaerts from the angle of judicial independence, where he stressed that personal liability of judges for judicial errors must remain exceptional in order to prevent any risk of external pressure.

Blaming the Commission and also turning to the Court: for a stronger alliance with national judges, by K. Scheppele

The call by Lenaerts for 'integration through the rule of law' is also echoed in Scheppele's contribution; and as von Bogdandy and Spieker, Scheppele turns to the Court of Justice for greater engagement in the process. However, she only does so after having critically analysed what she identifies as the failure of the Commission to protect the rule of law in the Member States as Guardian of the EU Treaties, and of the values listed in Article 2 TEU in particular. Her article looks back at policy and legal developments from the past 10-15 years in Poland and Hungary, respectively. She identifies these Member States as having actively and visibly descended from democracy into autocracy. She notes the disarray of a number of para-institutional actors, to which Claes comes back in her paper, such as the European Network on Councils of the Judiciary, which expelled Poland's Council for the judiciary from membership in the organization, and the Global Alliance of National Human Rights Institutions, which downgraded the Hungarian human rights ombudsman to non-voting status.

After a thorough examination, Scheppele concludes that the Commission could have made, and should make - as also argued by Hillion below -, a much greater and more timely use of the infringement procedure against these two Member States. She documents what she understands as the Commission's 'steady retrenchment' in its use of infringement actions and notes that this 'accommodating stance' may well actually have 'encouraged budding autocrats' to consolidate power at home without encountering tough enforcement of EU law. Next to calling for a more aggressive use of the infringement procedure, with greater emphasis on systemic infringements, Scheppele explores complementary options and turns to the Court of Justice for 'supplemental' guardianship of the basic principles enshrined in Article 2 TEU.

She praises the Court for having already 'strongly suggested' new lines of argument that the Commission might use to bring infringement actions. For instance, in its preliminary ruling in *ASJP*[34], the Court made it very clear that Article 19(1) TEU could be relied upon to call for the review of the independence of judges. The Court also did so in *A.K.*, where it was clear from that preliminary ruling that the new Disciplinary Chamber of the Supreme Court was not independent.[35] This point on the Court speaking to (potential) litigants may remind the reader of Lenaerts' emphasis on an *obiter dictum* in *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment)*.[36] This *obiter* points at the possibility for a party before the referring court to raise concerns under Article 19(1) TEU in the context of a parallel procedure before another court. Such indication sheds light on the context in which the Court considered the questions asked in that case as inadmissible; they did not relate to the dispute pending before the referring court.

As von Bogdandy and Spieker, Scheppele calls for a yet 'more creative' role of the Court. She hopes for a more dynamic alliance with national judges themselves bringing cases to the Court through the preliminary ruling procedure, and thereby palliating the limitations of the Commission-driven infringement procedures. She sees potential for change in cases concerned with the European Arrest Warrant where the two-steps approach (introduced earlier) often results in people being transferred to what she identifies as 'rogue states': she suggests the creation of a system of 'parallel prosecution' in the Member State where the person is apprehended to ensure that criminal justice can be rendered without transferring persons back to a Member State where the judicial system is compromised. In addition, Scheppele is critical of the Court's refusal to find admissible questions referred for preliminary ruling that are understood as not being relevant for the dispute pending before the referring court. As noted above, Lenaerts indeed observed that the conditions for admissibility of questions referred for preliminary ruling remain unchanged. In *I.S.* though for instance, Sheppele regrets that the Court did not examine features of the organisation of the national judiciary, such as

[34] Portuguese Judges, EU:C:2018:117.

[35] A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

[36] Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment), Case C-508/19, EU:C:2022:201, ¶ 72.

appointment of a superior and salary bonuses, threatening judges attempting to apply EU law properly.[37]

In essence, Scheppele's concern is that the type of constraints imposed by 'rogue states' on the national judiciary may be so that the chances of a national judge contesting the reforms and actually being able to refer questions for a preliminary ruling are highly limited. This aggravates the negative impact of the unwillingness of the Commission to bring cases in infringement actions, and explains why the author turns to the Court for solutions. To come back to *I.S.*, for instance, a judge who has been irregularly appointed will have no reasons to refer a question for a preliminary ruling, or a judge not granted a bonus may find it difficult to establish the existence of a right to a bonus on the ground of which to bring a challenge. In such settings, the Court would have to 'stretch its conception' of what is 'necessary' for the national judge in the context of the preliminary ruling procedure, with a view to addressing questions that are crucial for the independence of the judiciary.

Balancing rights and the public interest in the case law of the Court, by T. Tridimas

The first three contributions to this Special Issue thus each draw attention, although in different ways, to the centrality of judicial engagement in response to threats to the rule of law such as those currently unfolding in Poland and Hungary. This court-centered approach naturally paves the way for the next contribution of this Special Issue, by Tridimas. In his insightful analysis, he examines the challenge of balancing ever more sensitive competing claims and interests, which the Court is faced with as a result of a 'shifting integration paradigm', also noticed by Lenaerts, whereby the internal market is 'no longer the only gravitational force but one constellation in a multi-polar regulatory universe'. In this shifting landscape, the Court is increasingly expected to balance conflicting rights, principles and interests of a constitutional nature.

Tridimas notes that the Court's role must be understood in a context characterized by a multiplication of EU rights, greater emphasis of EU structural principles (or 'meta principles', as they were referred to above) as well as reliance on the values of Article 2 TEU as overarching legal principles. Importantly, the tensions between EU law and national law cannot be limited to a black and white dichotomy between law-making powers attributed to the EU and those not attributed to the EU. Instead, EU law imposes a broad range of requirements on domestic legal systems even in areas where it has no law-making power. In particular, the commitment to the values in Article 2 TEU, and the Court's reliance thereupon in conjunction with Article 19(1) TEU, create expectations that 'permeate the national legal system and apply beyond the material scope of the Charter'. With a view to informing the debate on the ever-growing role of the Court in disputes related to the rule of law, he offers a taxonomy of the types of conflicts that are brought before the Court and identifies factors to be taken into account to understand the Court's principle-based reasoning.

The article first maps out the types of conflicts that may arise before the Court, as well as the different procedures in the context of which related conflicts are more

[37] Criminal proceedings against IS, C-564/19, EU:C:2021:949, ¶ 139 et seq.

likely to occur. Conflicts may crystalize in different constellations opposing a fundamental right and a public interest: EU fundamental right v EU public interest, which relates to the validity of an EU act; EU fundamental right v national interest, as is usually the case in preliminary ruling procedures in relation to the rule of law in the Member States; national fundamental right v EU objectives, whereby the effectiveness of the EU objective may conflict with a fundamental right. Similarly, conflicts may be between fundamental rights.

The article then explores a series of factors that the Court takes into account to resolve conflicts between rights and public interest objectives. The first factor relates precisely to the importance rights in the EU's normative hierarchy. Tridimas notes that although EU law does not expressly create a hierarchy between rights, there is a form of judicial ranking: judicial protection can be understood to stand at the 'apex of the constitutional edifice' in particular due to its link with the value of the rule of law enshrined in Article 2 TEU.[38] The author therefore spells out some of the main features of the right to judicial protection that has reached 'an almost supra-constitutional status'. In doing so, he discusses controversial areas of the case law of the Court in relation to the - at times - extensive and - on other occasions - restrictive use of the right. Illustrating an extensive approach, he notes that the special authority of this right has resulted in the availability of a procedure even when the text of the Treaties seem to exclude it; such as in the field of the Common Foreign and Security Policy (CFSP) or in older case law on the position of the European Parliament in annulment actions. Conversely, Tridimas observes that the right is 'optimistically' considered to be guaranteed by both the Court of Justice and national courts acting as a complete system of remedies. Furthermore, the right is conditioned by a given understanding of the autonomy of the EU legal order and of the exclusivity of the jurisdiction of the Court of Justice, to the effect that the ambit of the right to a judicial remedy remains limited in certain contexts as illustrated in *Achmea* (on the rejection of investor-state arbitration clauses in intra-EU bilateral investment treaties) and in *Komstroy* (disputes between the Member States relating to EU law may not be submitted to any investment arbitration tribunal set up by an international treaty).

Other factors that the Court may take into account to resolve conflicts between rights and public interest objectives include, as a second factor, the degree of legislative elaboration to which we come back below. Third, the seriousness and extent of the restriction may matter. This can be articulated in terms of the protection of the 'essence' of the right, despite the lack of clarity of the concept in the author's view. The systemic character of the restriction may be taken into account. Tridimas notes in particular that the characterization of the restriction as systemic is important in activating the application of Article 19(1) TEU, despite the absence of such a requirement in the key ruling on the matter. Fourth, the origin of the restriction may play a role in the balancing exercise as the Court tends to be more deferential with EU authorities when they act as primary legislature, than with national ones. In the authors view, such a difference of standards should not be permitted in relation to the application of the Charter, which is intended to constrain both levels of authority equally. Fifth, the Court will naturally pay attention to the importance of the

[38] LM, C-216/18 PPU, EU:C:2018:586, ¶ 48.

countervailing interest or right. Sixth and seventh, process consideration and the degree of consensus among the Member States are factors to be taken into account.

Looking beyond judicial protection of the rule of law: nourishing a 'rule of law culture', by M. Claes

After these four contributions devoted to the Court, Claes invites us to take a step back and to reflect more broadly on the role of the EU in the transition to, and support for, liberal democracies in the Member States. She notes that countries such as Hungary and Poland to which much attention is devoted in literature on rule of law backsliding are only thirty years into the process of transitioning to liberal democracies. As a consequence, while acknowledging the importance of issues of judicial independence discussed in earlier contributions to this Special Issue, she calls for greater attention being paid to the need for a 'rule of law *culture'* to cement the commitment to the principles of the constitutional democratic state across the EU.

Such a culture, she stresses, requires political and legal actors as well as civil society and the public at large to take responsibility for protecting the best system available to date to prevent arbitrariness and to achieve a good life for the many. Claes recalls that we do not to date fully understand why certain polities resist populism and others do not, and why citizens elect representatives and decision-makers who reject the values of liberal democracies. Judicial independence is thus only one element of a broader and deeper threat to the 'liberal script' on which the constitutional design of the European Union itself rests. This leads Claes to reflecting back on the diffuse nature of the notion of rule of law. Despite conceptual uncertainties on the precise definition, she notes that in essence there is agreement on what the rule of law seeks to achieve.

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, independent of their political influence or status.' After further fleshing out the key features of the concept, the author observes that the rule of law cannot be reduced to one of its sub-components, such as the role of courts or rules of the law themselves. Instead, to achieve its aim, the rule of law requires the existence of a shared and deep commitment by all those involved as part of a 'living culture' permeating the polity concerned.

How can the EU contribute to establishing and consolidating these pre-conditions for the realization of the objectives of the rule of law thereby understood? Claes' answer is 'sobering', as she herself acknowledges. Although important and with noticeable successes already, greater engagement through law and creative adjudication - as explored by Lenaerts and called for by von Bogdandy and Spieker as well as Scheppele - is unlikely to turn the tide if taken in isolation. That is precisely because the governments concerned no longer feel unconditionally bound by these very laws and courts. Furthermore, EU law and EU institutions themselves are ill-equipped to tackle the breadth and depth of the challenge.

Claes however sketches directions for further research, political and legal action, all intended to create 'positive incentives' and to increase public support for the rule of law. She insists in particular on the role of civil society and of a sound space for public debate. She welcomes for instance the proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings (so-called anti-SLAPP directive)[39] as well as the initiative for a European Media Freedom Act.[40] Claes also draws attention to the use of EU funding to steer change at domestic level, to the creation for transnational cooperation and networks - the important function of which is well illustrated in Scheppele's paper as noted above -, as well as to increasingly thorough reporting on threats to the rule of law as the Commission now does.

Looking at the EU from the outside: protection of the rule of law internally and externally as a constitutional duty, by C. Hillion

Hillion similarly prompts us to change perspective, and to look this time at the (in)ability of the EU to protect and promote the rule of law from the perspective of its external partners. The author argues that the EU must not only ensure consistency in its external action on the rule of law, but the EU and its Member States ought also to abide by the rule of law internally in order to honor their international commitments. Both sets of imperatives are furthermore warranted by the EU's own constitutional framework enshrined in Article 2 TEU, as well as more specifically in Articles 3(5) on the EU's relations with the wider world and 21 TEU on the EU's external action and coherence with internal action. The analysis in this article builds on the main constitutional features of the EU legal order with a view to providing a coherent and systemic analysis both of the relationship between EU internal and external action, and of the system of judicial remedies framing EU legal action in the field.

In its external action, the author notes, the EU promotes respect for the rule of law through a broad range of tools. The essential elements clause, for instance, is often included in external agreements. The clause labels respect for the rule of law as an element of the agreement that is of such importance that, if one party considers that the other has breached it, the application of the agreement can be suspended. Positive financial and/or trade incentives may also seek to encourage a partner to respect the rule of law. Perhaps less well known, the EU engages in 'targeted export of specific rule of law standards' such as in the 2011 CFSP Agreement between the EU and the Republic of Mauritius on combatting piracy, which includes a detailed article on the 'Treatment, prosecution and trial of transferred persons'.[41] The

[39] Proposal for a Directive on protecting persons who engage in public participation from manifestly unfounded or abusive court proceedings ("Strategic lawsuits against public participation"), COM (2022) 177.

[40] Proposal for a Regulation 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; and Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector C/2022/6536.

[41] Agreement between the European Union and the Republic of Mauritius on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer, OJ L 254, 30.9.2011, 3-7; Article 4.

outcome is that while exporting some norms of legal protection, as Hillion stresses, the EU also 'subcontracts the responsibility of providing legal protection in relation to the measures the EU takes' to a partner State. The author furthermore sheds light on the 'feedback loop' between instruments for pre-accession and new instruments for the monitoring of the rule of law post-accession, to which we come back below. All in all, he notes that in its external action, the EU at times differentiates its approach depending on the third country partner; and that the EU does so in circumstances that are not always mandated by the Treaty. This last set of discrepancies, he stresses, sits uncomfortably with the EU's constitutional mandate in matters of rule of law.

Hillion then turns inwards, to demonstrate that the EU machinery itself must ensure compliance with the rule of law for the purpose of acting on the external stage. First, he recalls the 'fundamental tension' between, on the one hand, the constitutional duty of EU institutions to ensure respect for, and promote, the rule of law in EU external action and, on the other hand, the constitutional limitations on the ability of the Court to adjudicate on breaches of the law in the CFSP. After recalling the latest developments in the field, he notes that it is imperative that the Court resolves this contradiction by pursuing its efforts to ensure coherence in the system of effective judicial protection provided for by EU law as necessary to protect the rule of law as a founding value.[42] The Court should assert jurisdiction on restrictive measures even if adopted on the basis of the TEU only (rather than on the basis of Article 215(2) TFEU).[43]

Second, not only EU organs but also the Member States ought to abide by the rule of law to fulfill their commitments under EU law. They are indeed part of the 'composite structure' that allows EU external action to function, and ought to contribute to the fulfilment of EU objectives and tasks to comply with their obligations of sincere cooperation. Member States must not only therefore comply with EU external agreements, they must also comply with the rule of law to make sure that the EU's external commitments can be honored. Taking the reasoning one step further, the author observes that the EU is under a duty to deploy available enforcement tools to address internal breaches of the rule of law jeopardizing the effective application of the EU's external commitments. Hillion explores several avenues to hold the EU accountable for that purpose. In particular, and here his reasoning meets with that developed by Scheppele in an internal context, the Commission should be under a duty, under Article 17 TEU, to trigger infringement actions against Member States who, owing to breaches of the rule of law, threaten compliance with the EU's external commitments. The author further proposes that, should the Commission not comply with that duty, a third party to the EU legal order – by analogy with Venezuela, which was recently granted standing in an annulment

[42] PJSC Rosneft Oil Company v Her Majesty's Treasury and Others, C-72/15, EU:C:2017:236, ¶ ¶ 72, 75 and 78;

[43] Measures based on the latter are already clearly covered by the jurisdiction of the Court on the basis of Article 275 TFEU.

action[44] – should be granted access to the action for failure to act under Article 265 TFEU.

UNCOVERING *'*SHARED SPACES OF GOVERNANCE*'* SUBJECT TO COMPLIANCE WITH THE VALUES IN ARTICLE 2 TEU

Claes' contribution, inviting EU action to encourage and stimulate a rule of law culture at domestic level, as well as Scheppele and Hillion's call for recognizing a duty on the Commission to more actively combat threats to the rule of law, tie in with the shift in paradigm noted by other contributors: the EU's integration process has unquestionably evolved beyond the internal market towards establishing 'an area without internal frontiers, where there is liberty, democracy and justice for all' (Lenaerts). This evolution creates expectations which permeate the national legal system and apply beyond the material scope of the Charter (as already highlighted by Tridimas' work), thereby resulting in 'composite structures' – as noted by Hillion, in relation to the implementation of the EU's external commitments – whereby the EU and national systems of governance may be closely interdependent.

The interlocking of the EU and national systems of governance is particularly clear nowadays as regards an 'EU shared judicial space'.[45] To come back to the *ASJP* case, the Court observed that Article 19 TEU merely gives concrete expression to the value of the rule of law enshrined in Article 2 TEU; and that it entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. As a result, Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, to ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, do provide effective judicial review that is the essence of the rule of law protected by Article 2 TEU.[46] As is now well established, this approach allows Article 19(1) TEU to be invoked, taking duly into account Article 47 of the Charter that elaborates on effective judicial protection[47], to exercise a level of scrutiny on domestic measures threatening the independence of the judiciary in the absence of law-making powers of the EU in the field owing to infringement actions as well as preliminary rulings. In the absence of clear limits to the substantive scope of Article 19(1) TEU, there is some uncertainty as to the width and depth of such scrutiny and the necessity, in terms of subsidiarity, of harmonizing the Member States' models of adjudication, taking into account also the Member States' 'different legal systems and traditions' protected under Article 67(1) TEU. Through preliminary references a wide array of particularities of Member States' judicial systems may be brought up for scrutiny, such as the powers

[44] République bolivarienne du Venezuela v Council of the European Union ,C-872/19 P, EU:C:2021:507, ¶ ¶ 48-50.

[45] The expression is borrowed from the pending doctoral work of S. Menzione's, researcher and affiliated member of the Institute for European Law at KU Leuven.

[46] Associação Sindical dos Juízes Portugueses v Tribunal de Contas, C-64/16, EU:C:2018:117, ¶ ¶ 32-37

[47] Repubblika v Il-Prim Ministru, C-896/19, EU:C:2021:311, ¶ 45.

existing in some Member States – while expressly forbidden in others – for courts to define legal positions that bind judges in future cases.[48]

Furthermore, beyond judicial systems, we could wonder if there now exists other institutional structures in relation to which the interlocking of EU and national systems of governance is so strong, that the relevant national organs ought to comply with the values enshrined in Article 2 TEU, in similar ways as Articles 2 and 19 TEU interact in the 'EU shared judicial space'. In their contribution, von Bogdandy and Spieker, invite a parallel with what could be described as an 'EU shared democratic space'[49]. Mirroring the reasoning just described, it could indeed be argued that Article 10 TEU merely gives concrete expression to the value of democracy; and that it entrusts the responsibility for ensuring democratic representation and accountability in the EU legal order not only to EU institutions identified in that article but also to the relevant national organs. This is indeed necessary to enable citizen's participation in the democratic life of the Union, allowing the forming of European political awareness and the expression of the will of citizens as requested by Article 10 TEU. As a result, Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, to ensure that the organs which structure democratic participation in the fields covered by EU law, do respect for instance the right to freedom of association. The latter, as recalled by Lenaerts, is not only enshrined in Article 12(1) of the Charter, it is also 'one of the essential bases of a democratic and pluralist society' as protected by Article 2 TEU.[50] Similarly, von Bogdandy and Spieker, remind us that the Court noted that the right to freedom of expression guaranteed in Article 11 of the Charter constitutes 'one of the essential foundations of a pluralist, democratic society, and is one of the values under Article 2 TEU'.[51] Could we therefore imagine legal action on the joint basis of Articles 2 and 10 TEU, taking duly into account the relevant provisions of the Charter, to react to (systemic) threats to the right to freedom of association, or to freedom of expression, in a Member State in the context of European elections?

One could wonder if there may exist yet more areas of EU shared governance that could be subject to compliance with the values listed in Article 2 TEU owing to a similar reasoning. As recalled by Lenaerts for instance, in the *Conditionality Judgments*, the Court stressed that 'the Union budget is one of the principal instruments for giving practical effect, in the Union's policies and activities, to the principle of solidarity, mentioned in Article 2 TEU, which is itself one of the fundamental principles of EU law'.[52] Mirroring the reasoning just described in relation to an 'EU shared judicial space' and to a possible 'EU shared democratic space', might we envisage an 'EU shared space of solidarity'[53]? The Union budget

[48] See e.g. requests for a preliminary ruling from the Visoki trgovački sud Republike Hrvatske (Croatia) in cases C-361/21, C-554/21, C-622/21 and C-727/21.

[49] Reasoning by analogy with the expression 'EU's shared judicial space' borrowed from S. Menzione above.

[50] Lenaerts, footnote 15, commenting on Commission v. Hungary (Transparency of association), Case C-78/18, EU:C:2020:476, ¶ 112.

[51] Tele2 Sverige, Joined Cases C-203 & 698/15, EU:C:2016:970, ¶ 93.

[52] E.g. Hungary v. Parliament and Council, C-156/21, EU:C:2022:97, ¶ 129.

[53] The authors are grateful to Richard Crowe for most valuable comments and suggestions on the related analysis below. The usual disclaimer applies.

merely gives concrete expression to the notion of solidarity enshrined in Article 2 TEU. Article 317 TFEU entrusts the responsibility for ensuring the correct implementation of the EU budget not only to the Commission but also to the Member States. As a result, Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, to ensure that organs which contribute to the implementation of the budget at national level in the fields covered by EU law, comply with the requirement of sound financial management so as not to seriously compromise the value of solidary protected by Article 2 TEU. For instance, the functioning of the authorities carrying out financial control, monitoring and audit, in the context of the implementation of the Union budget falls within the scope of EU law and thus ought to comply with the requirement of sound financial management of the Union budget.[54]

Could we therefore also imagine legal action on the basis of 317 TFEU, read in light of Article 2 TEU, to react to systemic threats to the principles of economy, efficiency and effectivenesss, which are the key features of sound financial management in the context of the implementation of the EU budget, due to the ill functioning of the said authorities?[55] A similar reasoning might be conducted on the basis of Article 325 TFEU on the protection of the financial interests of the Union. What could this approach add to traditional enforcement tools, and what would the emphasis on 'solidarity' rather than 'rule of law' change? The issue is particularly pressing, as the Court has now asserted that 'the implementation of [the principle of solidarity], through the Union budget, is based on mutual trust between the Member States in the responsible use of the common resources included in that budget';[56] and as some of the greatest sources of concern come from Member States that are *not* part of the enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), which is responsible for enhancing the combat against criminal offences affecting the financial interests of the Union.[57]

These avenues for transposing the reasoning of the Court of Justice in *ASJP* to other fields of shared governance broaden the reflection on what are essential components of the rule of law in the European Union, as they take us well beyond the realm of effective judicial protection and towards the broader range of values enshrined in Article 2 TEU. The chances of success of such ideas depend on the support which they would obtain in the EU institutions, the Member States and the EU law community. They would require a certain audacity and creativity from the Commission, as called for by Scheppele and Hillion, or from parties which could trigger legal action. Undoubtedly, moreover, the EU institutions would have to assess such proposals in the light of fundamental tenets of the EU constitutional

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[54] Hungary v. Parliament and Council, EU:C:2022:97, ¶¶ 142-143 and 145: these paragraphs identify settings, relevant to the implementation of the Union budget, which fall within the scope of Union law.

[55] Hungary v. Parliament and Council, EU:C:2022:97, ¶ 263: the Court defines the concept of 'sound financial management' with reference to the relevant legislative instrument in EU law.

[56] Hungary v. Parliament and Council, C-156/21, EU:C:2022:97, ¶ 129.

[57] Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'; last amended in 2020); OJ L 283, 31.10.2017, p. 1–71. For an update on the lists of participating states see: https://www.eppo.europa.eu/en/members (last visited 1.2.2023).

order, which include the principle of conferred powers of the EU and the principles of subsidiarity and proportionality, so as to respect the rule of law at EU level. The Court would then also have to balance competing claims and to order structural (or 'meta') principles, as noted by Tridimas. As he observes, the systemic nature of the threat may condition of the possibility of legal action on the basis of provisions of the EU Treaties in situations that do not fall within the scope of EU law in the traditional sense.[58] Furthermore, and undeniably, the values of democracy and solidarity, both anchored in Article 2 TEU have been much less prominent in the Court's case law to date than that of rule of law; so do the rights to right to freedom of association, the right to freedom of expression and the principle of sound financial management when compared to the right to judicial protection. Yet, times may be changing.

BRINGING THE EU LEGISLATOR ON BOARD

The lines of reasoning thereby sketched out remain court-centered and overall top down, two important limitations of the contemporary debate on the rule of law helpfully identified by Claes. Furthermore, these types of creative legal reasoning inevitably trigger concerns of judicial overreach, as recalled by von Bogdandy and Spieker. While duly acknowledging the point made by Claes to the effect that the EU should not be understood as the only player involved, such sets of concerns can to some extent be addressed through greater involvement of the EU legislator. The latter can indeed make a considerable contribution to consolidating a rule of law culture as well as to provide stronger democratic credentials to EU action in the field. EU legislative acts, read as expressions of higher values and structural principles, can in turn helpfully be used in the process of judicial adjudication.

The various forms of EU action touched upon in this Special Issue are best understood as interacting with one another, hopefully leading to the types of 'feedback loop', whereby one set of tools foreshadows another set of tools. This is exemplified in Hillion's paper by reference to pre-, and post-, accession instruments. He notes that references and methodologies developed by the EU towards candidate countries are now appearing in instruments aimed at ensuring compliance with the rule of law internally. Features of the monitoring processes from the annual rule of law report or the General Conditionality Regulation[59] can for that purpose be traced back to the Cooperation and Verification Mechanism, which itself constituted an 'incremental internalization of the EU pre-accession toolbox'. Recent case law on the principle of 'non-regression', and whereby a new Member State is to be prevented from bringing about a reduction in the protection of the value of the rule of law compared to pre-accession standards, can be expected to bolster this feedback effect as hoped for by Hillion,[60] although questions remain as to the concrete limits that such principle imposes on the freedom of Member States to adopt and implement reforms, in particular to systems set up after their accession.

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[58] See further R. Gadbled and C. Rizcallah (guest editors), Special Issue: 'The Systemic and the Particular in European Law', *German Law Journal*, forthcoming in 2023.

[59] Quoted above.

[60] Repubblika v Il-Prim Ministru, C-896/19, EU:C:2021:311, ¶¶ 63-64.

Coming back to internal action, it has already been argued for a long time that EU legislation can set standards of protection of non-economic values.[61] As stressed by Lenaerts and noted by the Court in the *Conditionality Judgements*, today Article 2 TEU is given expression by a broad range of provisions in the EU Treaties, in the Charter, as well as in EU secondary legislation. The diversification of legal bases in the EU Treaties allowing legislation on social, economic and political aspects of the lives of people has considerably increased with the latest treaty reforms, enhancing the ability of the EU's political institutions to legislate in related fields. Next to the examples provided by Claes on public participation and media freedom, we could think of more examples such as the proposal for a Regulation on the statute and funding of European political parties and European political foundations[62], that for a Regulation on the transparency and targeting of political advertising[63], or the recently adopted Digital Services Acts. The latter for instance requires providers of very large online platforms to diligently identify 'systemic risks' stemming from their service, including use of algorithmic systems, for civic discourse and electoral processes or for the exercise of fundamental rights.[64] Though limited to the specific context of measures impacting the EU budget, the General Conditionality Regulation may also be a powerful precedent, whereby, even in a situation where the EU competence was initially contested by some Member States, the Court's confirmation of the choices made by the EU legislator paved the way for the concrete application of the instrument, resulting in reforms undertaken by a Member State to reinforce the rule of law.

Legislative intervention that elaborates on specific components of a rule of law culture and is thereby intended to protect citizens from arbitrariness and abuse of power by those who govern, as defined by Claes, has multiple advantages. First, it defines and possibly extends the scope of EU law in visible and easily accessible ways, after due and transparent deliberation within EU institutions and with engagement from all actors involved at EU and national level in accordance with both EU and national constitutional law. Second, a legislative act may establish and define clearly identifiable rights enforceable before national courts. Third, a legislative act can – and increasingly often does – create, or rely upon, national organs and civil society actors, thereby not only forging visible ties between them and the EU, but also incentivizing further financial, educational and networking support from the EU.[65] Fourth, legislative intervention is a natural ally for judicial adjudication, as highlighted by Tridimas. On the one hand, the content of the legislative act can align well with the protection of a right considered by EU law as

[61] Reflecting on the non-economic dimension of EU internal market legislative powers: B. de Witte, 'Non-Market Values in Internal Market Legislation' in N. Nic Shuibhne (ed), Regulating the Internal Market (Edward Elgar 2006), 61-86; and V. Kosta, Fundamental Rights in EU Internal Market Legislation (Hart Publishing 2015).

[62] Proposal for a Regulation on the statute and funding of European political parties and European political foundations (recast); COM/2021/734 final.

[63] Proposal for a Regulation on the transparency and targeting of political advertising; COM/2021/731 final.

[64] Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC; *OJ L 277, 27.10.2022, p. 1–102; Art. 34.*

[65] See for instance the factual and legal background in: Commission v Hungary (Criminalisation of assistance to asylum seekers), C-821/19, EU:C:2021:930.

particularly important, thereby enabling the Court to seek to boost the effective protection of the said right. This alignment of provisions of a legislative act and higher rights or principles can be very powerful.[66] On the other hand, the substance of the legislative act may spell out a politically agreed shared understanding of the balance between competing rights and interests relevant to the protection of the rule of law.[67] This can be useful both to decide a specific case with reference to the legislative act when the rules are clear, or to assist in fleshing out the concrete implications of broader values and structural principles when recourse to these higher sources is necessary, such as in case of uncertainty.

Admittedly, EU legislative intervention will not in and of itself address immediate and systemic threats to the rule of law and to the functioning of liberal democracies in the Member States. It is argued more modestly that the legislative process of the EU can, and must, be part of large scale efforts both to consolidate existing democratic infrastructures in the Member States, and to extend the reach of EU law where these are threatened. Now, if we may hope for positive feedback loops initiated by EU action, the initial input must be provided scrupulously, as noted by Hillion pleading for demanding pre-accession conditionality to pave the way for subsequent rule of law monitoring processes. Looking at internal action, the legislative process is not perfect. It may fail, its outcome may be unclear, incomplete or faulty. As helpfully recalled by Tridimas, the compliance of EU acts themselves with the Charter should be subject to appropriate judicial scrutiny as the relevant law-making processes at EU level 'cannot be trusted to internalize fundamental rights externalities'. Furthermore, attention should be paid to the careful articulation of the various sources in the field to respect their hierarchical relationship and respective functions in the EU constitutional system. The EU itself ought to be credible if it is to make any meaningful contribution with a view to addressing threats to the rule of law in its Member States.

[66] For an example of the Court relying on the dense legislative framework giving expression to the right to liberty and the right to an effective judicial remedy to support the finding that, a judicial authority reviewing compliance with the conditions governing the lawfulness of the detention of a third-country national which derive from EU law, must raise of its own motion any failure to comply with a condition governing lawfulness which has not been invoked by the person concerned: Staatssecretaris van Justitie en Veiligheid v C and B and X v Staatssecretaris van Justitie en Veiligheid, C-704/20, ECLI:EU:C:2022:858.

[67] Depending on the legal basis of the instrument this may naturally require different voting thresholds in the Council and different degrees of involvement of the Parliament.