TRANSFORMATIVE CONSTITUTIONALISM IN LUXEMBOURG: HOW THE COURT CAN SUPPORT DEMOCRATIC TRANSITIONS

Armin von Bogdandy[*] *& Luke Dimitrios Spieker*[**]

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INTRODUCTION

For more than a decade, the illiberal developments in Hungary and Poland pose an ever-growing challenge to the European Union and the very idea of liberal democracy. Though the European legislature has eventually adopted the rule of law conditionality regulation, the political processes seem hardly capable of meeting the challenge alone. So again, the Court of Justice has stood up for the European

* Director at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. This article was written in the context of a research event hosted by the Institute for European Law of KU Leuven and the RESHUFFLE project (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621).

** Research Fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Legal Trainee at the Berlin Higher Regional Court. This contribution brings together our research over the last five years. Accordingly, parts of this Article draw on previously published material. This article was written in the context of a research event hosted by the Institute for European Law of KU Leuven and the RESHUFFLE project (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621).

integration agenda[1] – this time by mobilizing the Union's common values. Pushed by the developments in Poland and Hungary, the Court's jurisprudence has evolved with unprecedented speed.[2]

We suggest reframing this jurisprudence as an expression of transformative constitutionalism. At its heart, this concept addresses the question of how constitutional adjudication can propel societal transformation (Section I). What is the added value of such a framing? First, it provides a better understanding of the problem. There is no quick fix for Hungary and Poland. Even if the respective governments change, it will take time, effort and support to overcome entrenched, systemic deficiencies and restore democracy. Transformative constitutionalism sheds a light on such processes and provides insights from other jurisdictions facing similar challenges. Second, the concept may justify a court's active involvement in such transformative processes. The CJEU's interventions are criticized as yet another power-grab from Luxembourg, not only by recalcitrant Member State governments, but also by constitutional courts and scholars. Framing the decisions in terms of transformative constitutionalism provides a constructive attitude towards court-driven transformations.

Liberal democracy cannot be externally imposed. Ultimately, it must emerge from within a society, especially by electing a new government. However, external forces can support such processes. Against this backdrop, we will demonstrate how the CJEU has mobilized the Union's values and assess the grounds that justify this extensive interpretation of its mandate (Section II). We then develop the potential of this jurisprudence for democratic transitions (Section III). Over the past years, the Court has focused on defending European values in reaction to illiberal challenges in the Member States. We suggest expanding the Court's horizon by taking a more forward-looking perspective. Judicial decisions can support democratic transitions both *before* and *after* elections. Before election day, the Court can aim at safeguarding the preconditions for democratic processes. Once elections have taken place, it can support new governments in restoring their legal systems in line with the Union's common values.

PART I. FEATURES OF TRANSFORMATIVE CONSTITUTIONALISM

The concept of transformative constitutionalism emerged from the Global South. The notion was initially coined by Karl Klare in the context of the South African constitutional adjudication during the Mandela era. 'By transformative constitutionalism', so Klare, 'I mean a long-term project of constitutional enactment, interpretation, and enforcement committed … to transforming a country's political and social institutions and power relationships in a democratic, participatory, and

[1] On this narrative, see Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians in the European Community*, 12 Y.B. EUR. L. 1, 2, 10 (1992); PIERRE PESCATORE, THE LAW OF INTEGRATION at 89 (1974); ROBERT LECOURT, L'EUROPE DES JUGES at 306-307 (1976).

[2] For a mapping of the CJEU's rule of law-related jurisprudence, see DIMITRY KOCHENOV & LAURENT PECH, RESPECT FOR THE RULE OF LAW IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE (2021). For a broader take, see LUKE D. SPIEKER, EU VALUES BEFORE THE COURT (2022) (forth.).

egalitarian direction.'[3] Adapting this definition for contemporary Europe, we define it as a judicial practice of interpreting and applying constitutional provisions with the goal of overcoming systemic deficiencies. In the following, we will briefly outline its thrust, means and actors.

A. *Its Thrust: Overcoming Systemic Deficiencies*

We understand transformative constitutionalism as addressing systemic deficiencies.[4] These consist of serious infringements that occur in a wide-spread manner with a certain regularity and persistence. Systemic deficiencies are not an exception but rather a deeply rooted characteristic. They often emerge when a legal system lacks 'sufficient structural guarantees to self-correct the problem'.[5] In consequence, trust in the law crumbles. Systemic deficiencies can appear in very different forms, scales and intensities. Well studied examples include the racial segregation in the United States, South African apartheid, or precarious statehood in Colombia. Also certain EU Member States, face systemic deficiencies, be it for weak public institutions or defective democracy.

Transformative constitutionalism describes the practice of interpreting and applying constitutional provisions with the goal to overcome such deficiencies. To better understand its features, it may be helpful to situate transformative constitutionalism among the different forms of legal ordering developed by Nonet and Selznick.[6] They distinguish three archetypes. The first one is *repressive* law, in which the legal system's main function is to render power more effective. Law is subordinated to power politics, legal reasoning is expedient, coercion is weakly restrained. Features of this type can be found in today's Poland and Hungary. Second, there is the type of *autonomous* law, where legal institutions are not at the whim of politics, where sound legal reasoning is required and where coercion is subject to legal restraints. Finally, Nonet and Selznick suggest the form of *responsive* law in which the legal system addresses pressing social issues. Its aspiration is to mobilize the law's potential for fostering social transformation. Transformative constitutionalism fits into this last category.[7]

Transformative constitutionalism demands endurance and begs for patience. Systemic deficiencies cannot be overcome overnight. Accordingly, swift compliance

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[3] Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998). For an overview of the approaches, see Karin van Marle, *Transformative Constitutionalism as/and Critique*, 20 STELLENBOSCH L. REV. 286 (2009).

[4] The following part draws on Armin von Bogdandy & René Urueña, *International Transformative Constitutionalism in Latin America*, 114 AM. J. INT'L L. 403–442 (2020). In the European context, see Armin von Bogdandy, *Principles of a systemic deficiencies doctrine*, 57 COMMON MKT. L. REV. 705 (2020). For a broader understanding, see Michaela Hailbronner, *Transformative constitutionalism: Not only in the Global South*, 65 AM. J. COMP. L. 527 (2017).

[5] Opinion of Advocate General Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim*, Joined Cases C-748 to 754/19, EU:C:2021:403, ¶ 150.

[6] PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978). See also Manuel J. Cepeda Espinosa, *Responsive Constitutionalism*, 15 ANN. REV. L. SOC. SCI. 21 (2019).

[7] In this sense, see also Ximena Soley, *The Transformative Dimension of Inter-American Jurisprudence*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA at 337, 342 (Armin von Bogdandy et al., 2017).

cannot be the main yardstick for assessing the success of a court's decision.[8] This is especially the case for decisions against recalcitrant governments. The yardstick for success in these situations is rather their broader impact. Judicial decisions exert such an impact when they put pressure on the respective government and keep the domestic legal struggle for a democratic transition alive, i.e. by supporting citizens to claim their rights, organizations to contest infringements and institutions to faithfully apply the law.

B. *Its Actors: The Transformative Mandate of Courts*

Transformative constitutionalism is the joint product of a diverse set of actors, including courts, bureaucracies, ombudspersons, public prosecutors, academics, journalists, NGOs, and not least dedicated politicians. For this community, transformative constitutionalism is not just law, but also a social practice.[9] Accordingly, judicial decisions are but an element of transformative constitutionalism. Still, the notion is intimately linked to the rise of 'activist' courts in the Global South.[10] As such, courts remain the central actors. The Inter-American Court of Human Rights (IACtHR) represents the epitome of a supranational court tasked with a transformative mandate. The adoption of domestic constitutions with generous bills of rights paired with constitutional clauses that opened national legal systems to the American Convention support this mandate.[11] After the fall of several authoritarian regimes in the 1980s, many Latin American societies embraced the Inter-American system to prevent domestic regressions to authoritarian rule.[12] Such constitutional texts can be interpreted as expressing an expectation on behalf of states and civil societies that the IACtHR is an active ally in the domestic transformative agenda.[13] In fulfilling this transformative mandate, the IACtHR contributes to resolving domestic blockages and triggers action where power structures, political paralysis or bureaucratic inertia stand in the way of change, or where regression occurs.

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[8] See James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 771 et seq. (2008); Rene Urueña, *Compliance as transformation: the Inter-American system of human rights and its impact(s)*, in RESEARCH HANDBOOK ON COMPLIANCE IN INTERNATIONAL HUMAN RIGHTS LAW at 225 (Rainer Grote, Mariela Morales Antoniazzi & Davide Paris eds., 2021). But see emphasizing the importance of compliance, Antonio A. Cançado Trindade, *Compliance with Judgments and Decisions - The Experience of the Inter-American Court of Human Rights: A Reassessment*, REVISTA DO INSTITUTO BRASILEIRO DE DIREITOS HUMANOS 29 (2013).

[9] In detail, see von Bogdandy & Urueña, *supra* note 8, 413 et seq.

[10] See e.g. COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES (Roberto Gargarella et al. eds., 2006); CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA (Daniel Bonilla Maldonado ed., 2013); TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA (Oscar Vilhena, Upendra Baxi & Frans Viljoen eds., 2013).

[11] On these domestic provisions, see Manuel Eduardo Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune*, in Armin von Bogdandy et al., *supra* note 8, at 235.

[12] For a similar process in Central and Eastern Europe, see THE IMPACT OF THE ECHR ON DEMOCRATIC CHANGE IN CENTRAL AND EASTERN EUROPE. JUDICIAL PERSPECTIVES (Iulia Motoc & Ineta Ziemele eds., 2016)

[13] von Bogdandy & Urueña, *supra* note 8, 431 et seq.

C. Its Critique: Objections in the Name of Democracy

Approaching legal texts with the ambition of transforming deeply entrenched structures is bound to be controversial. Many critics of transformative constitutionalism question whether courts may interpret texts from a transformative vantage point, in particular when this runs against decisions of elected bodies. Eventually, this leads to the general question of judicial overreach, a topic that has been debated with much passion and theoretical effort.[14] We do not intend to reopen this long-standing debate, but only stress two considerations that justify a more positive attitude towards court-driven transformations.

First, we plead for context-sensitivity. Any court's mandate depends on its context. There is more than one way of balancing the relationship between law and politics.[15] The EU Treaties, for instance, express the choice for a strong judiciary. The CJEU's powerful position in the Union's institutional setting permeates the entire Treaty framework.[16] For instance, the Court of Justice is not only mandated to review EU legislation and national measures. It is also tasked to authoritatively interpret the Treaties. Further, its interpretations are difficult to override due to the high thresholds for Treaty revision. As such, Luxembourg's position within the Union's institutional landscape is comparable to that of the most powerful constitutional courts.[17] This choice for a powerful judiciary must be factored in when considering whether the Court has overstepped its constraints.

Second, we challenge the view that the 'activism' of courts, whatever this means, leads to depoliticization. Some argue that judicial procedures and decisions juridify and thus depoliticize societal issues, which in turn hinders successfully addressing deep social problems.[18] We observe rather the opposite. In fact, judicial proceedings often stir and improve the quality of public discourse. This becomes particularly important when the political process does not prove to be sufficiently discursive or inclusive.[19] In this sense, juridification can provide new fora to identify structural deficiencies and a new language for articulating demands – all features of politicization rather than depoliticization. Put differently, it does not *restrict* but

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[14] For a concise overview of the European debate, see e.g. VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE at 86 et seq. (2009). On the issues and challenges at the EU level, see only JUDICIAL ACTIVISM AT THE EUROPEAN COURT OF JUSTICE (Mark Dawson et al. eds., 2013).

[15] Dieter Grimm, *Constitutional Adjudication and Democracy*, in CONSTITUTIONALISM at 213, 217-219 (2016).

[16] See e.g. PIERRE-EMMANUEL PIGNARRE, LA COUR DE JUSTICE DE L'UNION EUROPÉENNE, JURIDICTION CONSTITUTIONNELLE at 743 et seq. (2021); Federico Fabbrini & Miguel Maduro, *Supranational Constitutional Courts*, in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW ¶¶ 12 et seq. (Rainer Grote et al. eds., 2016). From within the Court, see through time José Luís da Cruz Vilaça, *Reflections on Judicial Review of the Constitutionality of EU Legislation*, in EU LAW AND INTEGRATION at 44 (2014); Gil C. Rodríguez Iglesias, *Der Gerichtshof der Europäischen Gemeinschaften als Verfassungsgericht*, 27 EUROPARECHT 225 (1992); Pierre Pescatore, *La Cour en tant que juridiction fédérale et constitutionnelle (1963)*, in ÉTUDES DE DROIT COMMUNAUTAIRE EUROPÉEN 1962-2007 at 61 (Fabrice Picod ed., 2008).

[17] See e.g. ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE at 1 (2004).

[18] See only Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93 (2008).

[19] See e.g. Susanne Baer, *Who cares? A defence of judicial review*, 8 J. BRIT. ACAD. 75, 95 et seq. (2020).

generates political processes. As such, juridification and politicization can be constructively linked.

Certainly, constitutional courts should be careful when exercising their transformative mandate. If pushed too far, this might result in an asphyxiation of political processes or – to the contrary – political hostility expressed in defiance, court curbing or attempts to delegitimize the judiciary. This implies the need for judicial restraint. Most constitutional judges are well aware of their limits.[20] As Judge Susanne Baer noted, 'courts are not suicidal' but usually follow a 'natural call for restraint'.[21]

PART II. TRANSFORMATIVE CONSTITUTIONALISM AT THE CJEU: MOBILIZING THE UNION'S VALUES

It is broadly accepted that the CJEU's case law is powerful and transformative. Many scholars frame the Court's decisions even in constitutional terms.[22] In this light, judgments like *Van Gend en Loos* and *Costa/ENEL* could be perceived as expressing a transformative constitutionalism. Yet, this would obscure the fact that the initial path of integration took primarily an economic rather than constitutional direction. For sure, this case law has constitutionalist elements, for instance, when the Court developed EU fundamental rights or strengthened the participation of the European Parliament. But these innovations from the 1960s to the 1990s are better understood as support for functional market integration rather than transformative constitutionalism.

The foundations of a substantive constitutional adjudication appeared with Article 6(1) TEU-Amsterdam. Since Lisbon, a common European constitutional core is enshrined in Article 2 TEU. At first, the Court embraced this constitutional core only hesitantly. For years, systemic deficiencies in the Member States' democratic constitutions remained outside its field of vision. It is emblematic how the CJEU handled the overhaul of the Hungarian judiciary pursued by the newly elected Orbán government, which involved the forced early retirement of many judges. When the Commission launched infringement proceedings in 2012, the Court addressed these measures – as requested – as a matter of age discrimination, thus sidestepping the constitutional and systemic dimension.[23] Still in 2017, the Court's president Koen Lenaerts stressed that 'outside the scope of application of EU law' the Treaties have

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[20] See e.g. from different jurisdictions Guy Canivet, *Les limites de la mission du juge constitutionnel*, 69 CITÉS 41 (2017); Andreas Voßkuhle, *Karlsruhe Unlimited? Zu den (unsichtbaren) Grenzen der Verfassungsgerichtsbarkeit*, in EUROPA, DEMOKRATIE, VERFASSUNGSGERICHTE 314 (2021); Jonathan H. Mance, *The Role of Judges in a Representative Democracy*, in RULE OF LAW VS MAJORITARIAN DEMOCRACY 335 (Giuliano Amato et al. eds., 2021).

[21] Baer, *supra* note 20, 91.

[22] Famously Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

[23] Comm'n v. Hungary, Case C-286/12, EU:C:2012:687, ¶¶ 24 et seq. See also Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, in EU LAW STORIES at 471 (Fernanda Nicola & Bill Davies eds., 2017).

entrusted the EU's political institutions – through the Article 7 TEU-procedure – with monitoring Article 2 TEU compliance.[24]

A. Breakthrough

In response to the overhaul of the Polish judiciary, however, the Court changed course. This overhaul is pursued by forcing judges into retirement, bringing appointment procedures under political control and threatening resisting judges with disciplinary measures.[25] Although the EU's toolbox to counter these developments has evolved over the last years,[26] the political process remains beset by an astounding inertia.[27] Both Article 7 TEU procedures launched against Poland and Hungary have been pending for years in the deadlocked Council. In these extraordinary circumstances, the Court made an extraordinary move. It ventured into uncharted territory, mobilized the Union's common values and became a central forum to address their violations.

The breakthrough occurred in 2018 with the judgment in *Associação Sindical dos Juízes Portugueses.*[28] With this decision, the CJEU started to operationalize the values in Article 2 TEU and review systemic deficiencies in the Member States. On its face, the case seemed rather unsuspicious.[29] *ASJP* concerned salary reductions for Portuguese judges adopted in the context of an EU financial assistance program. The referring court asked whether these cuts violated judicial independence. In its response, the CJEU relied on Article 19(1)(2) TEU, which entails the Member States' obligation to guarantee judicial independence.[30] Member States must ensure the independence of any court that 'may rule … on questions concerning the application or interpretation of EU law'.[31] Considering the breadth of Union law today, this includes the entire Member State judiciary.[32]

The Court justifies this expansion by recourse to Article 2 TEU. It states that Article 19 TEU 'gives concrete expression' to the value of the rule of law in Article 2 TEU.[33] This nexus has a twofold effect. On the one hand, Article 19(1)(2) TEU operationalizes the value of the rule of law. On the other hand, interpreting Article 19(1)(2) TEU in light of Article 2 TEU justifies an extensive reading. Thereby, both

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[24] Koen Lenaerts & José A. Gutiérrez-Fons, *Epilogue on EU Citizenship: Hopes and Fears?*, in EU CITIZENSHIP AND FEDERALISM at 751, 774 (Dimitry Kochenov ed., 2017).

[25] For the status quo in this respect, see e.g. the Commission's 2021 Rule of Law Report, especially the country chapters on Hungary (SWD(2021) 714 final) and Poland (SWD(2021) 722 final). See in detail WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[26] See e.g. Laurent Pech, *The Rule of Law in the EU*, in THE EVOLUTION OF EU LAW at 307 (Paul Craig & Gráinne de Búrca eds., 3rd edn., 2021).

[27] See e.g. R. Daniel Kelemen, *Appeasement, Ad Infinitum*, 29 MAASTRICHT J. EUR. & COMP. L. 177 (2022); Gráinne de Búrca, *Poland and Hungary's EU membership: On not confronting authoritarian governments*, INT'L J. CONST. L. 13 (2022).

[28] Associação Sindical dos Juízes Portugueses, Case C-64/16, EU:C:2018:117.

[29] On the decision's context, see Michal Ovádek, *The making of landmark rulings in the European Union: the case of national judicial independence*, 29 J. EUR. PUB. POLICY (2022) (forth.).

[30] *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, ¶ 36.

[31] *Id.* ¶ 40.

[32] Thus, some argue that *ASJP* established a 'quasi federal standard', see Laurent Pech & Sébastien Platon, *Judicial Independence under Threat*, 55 COMMON MKT. L. REV. 1827, 1847 (2018).

[33] *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, ¶ 32.

provisions reinforce each other. Their interplay leads to a mutual amplification.[34] In this way, the Court can review the Member States' constitutional structures that seemed previously beyond its reach. *ASJP* was embraced as a constitutional moment heralding the judicial activation of EU values. According to Koen Lenaerts *ASJP* 'has the same significance as cases like *Van Gend en Loos*, *Costa/ENEL*, *Simmenthal* or *ERTA* – it's a judgment of the same order and we were absolutely aware of that constitutional moment.'[35]

B. Doctrine

A transformative jurisprudence tests a court's judicial function and the support of the political system in which it is embedded. Even the most powerful courts need that support.[36] In this sense, the Luxembourg court must consider its horizontal relationship to the EU institutions as well as its vertical relationship to the Member States' governments and judiciaries. Even if there is a general 'habit of obedience', the Court's authority can always be challenged.[37] Still, all political EU institutions have endorsed the Court's mobilization of Article 2 TEU. When adopting the controversial Conditionality Regulation, all institutions justified it by recourse to this jurisprudence: the Commission, the Parliament, the national heads of state or government in the European Council as well as the responsible Member State ministers in the Council.[38] Accordingly, all institutions perceive this case law to be within the Court's mandate.

Beyond the EU level, also institutions at the national level must be convinced. Especially the German Constitutional Court monitors whether its Luxembourg counterpart sticks to its mandate. According to the Bundesverfassungsgericht, this is the case 'as long as the CJEU applies recognised methodological principles'.[39] In that light, we briefly recap the central arguments that support the legal soundness of the Court's move. This concerns especially Article 2 TEU's legal nature, its justiciability and the Court's jurisdiction.

The shift from the *principles* in Article 6(1) TEU-Amsterdam/Nice to the *values* of Article 2 TEU introduced an ambiguous notion into EU primary law that casted

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[34] In detail, see Luke D. Spieker, *Breathing Life into the Union's Common Values*, 20 GERMAN L. J. 1182, 1204 et seq. (2019). Stressing the link to Article 2 TEU, see also Lucia S. Rossi, *La valeur juridique des valeurs*, REVUE TRIMESTRIELLE DE DROIT EUROPEEN 639, 650 (2020); Koen Lenaerts, *Upholding the Rule of Law through Judicial Dialogue*, 38 Y.B. EUR. L. 3, 5 (2019); José Martín y Pérez de Nanclares, *La Unión Europea como comunidad de valores*, 43 TEORIA Y REALIDAD CONSTITUCIONAL 121, 135 (2019).

[35] Koen Lenaerts, Upholding the Rule of Law through Judicial Dialogue, Speech at King's College London (21 March 2019), <https://www.youtube.com/watch?v=qBOeopzvPBY&t=37s> [min: 19:23].

[36] Ulrich Everling, *The Court of Justice as a Decision-Making Authority*, 82 MICHIGAN L. REV. 1294, 1308 (1984).

[37] Joseph H.H. Weiler, *The political and legal culture of European integration*, 9 INT'L J. CONST. L. 678, 691 (2011). On strategies of non-compliance with and containment in the Member States, see Andreas Hofmann, *Resistance against the Court of Justice of the European Union*, 14 INT'L J. L. CONTEXT 258 (2018).

[38] See rec. 12 of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget (Dec. 16, 2020), 2020 O.J. (L 433I) 1.

[39] BVerfG, Judgment of 5 May 2020, 2 BvR 859/15, *PSPP*, ¶ 112.

doubt over the provision's legal nature.[40] In this spirit, the captured Polish Constitutional Tribunal asserts that Article 2 TEU does not contain legal principles but merely values of 'axiological significance'.[41] Such reservations were also harbored in EU institutions. Even the reporting judge in *ASJP* advocated caution.[42] During the past years, however, the Court's activity has incited an 'overwhelming agreement' on the legal character of Article 2 TEU.[43]

The provision's *wording* does not preclude such a reading. The terminology of the Treaties is often inconsistent and misleading.[44] For instance, the preamble employs the notion of values and principles interchangeably. *Systematically*, the values of Article 2 TEU are laid down in the operative part of a legal text – the TEU. They are applied in legally determined procedures by public institutions (Articles 7, 13(1) or 49(1) TEU) and their disregard leads to sanctions, which are of legal nature. Also *historically*, there are strong arguments for the legal character of Article 2 TEU values. Its predecessor, Article 6(1) TEU-Nice/Amsterdam referred to them as principles. The 'travaux préparatoires' to the European Convention, which introduced the value semantics, clearly indicate that the drafters did not intend to weaken the provision's legal force.[45] The prevalent understanding was that the values enshrined in Article 2 TEU were an 'héritier direct' of the former principles of Article 6(1) TEU-Nice/Amsterdam.[46]

[40] For a distinction between values of *moral* normativity and principles of *legal* normativity, see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS at 255 et seq. (1996).

[41] See the press release accompanying the Judgment of 7 October 2021, K 3/21, ¶ 19.

[42] Egils Levits, *L'Union européenne en tant que communauté des valeurs partagées*, in LIBER AMICORUM ANTONIO TIZZANO at 509, 521 (2018). See also skeptical Matteo Bonelli, *Infringement Actions 2.0: How to Protect EU Values before the Court of Justice*, EUR. CONST. L. REV. 30 (2022); CHRISTOPH MÖLLERS, THE EUROPEAN UNION AS A DEMOCRATIC FEDERATION at 127 (2018); Jan W. Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, 21 EUR. L. J. 141, 146 (2015). Critical of the Court's mobilization, see Mark Dawson, *How Can EU Law Respond to Populism?*, 40 OXFORD J. LEGAL STUD. 183, 211 (2020) ('dubious legal grounding'); RICHARD BELLAMY, SANDRA KRÖGER & MARTA LORIMER, FLEXIBLE EUROPE at 79 (2022) ('weakly based judicial rulings').

[43] Contrast Carlos Closa & Dimitry Kochenov, *Reinforcement of the Rule of Law Oversight in the European Union*, in STRENGTHENING THE RULE OF LAW IN EUROPE at 173, 183 (Werner Schröder ed., 2015) with Kim L. Scheppele, Dimitry Kochenov & Barbara Grabowska-Moroz, *EU Values Are Law, after All*, 38 Y.B. EUR. L. 3, 67 (2020).

[44] Dimitry Kochenov, *The Acquis and Its Principles*, in THE ENFORCEMENT OF EU LAW AND VALUES at 9, 10 (Id. & András Jakab eds., 2017); Rudolf Streinz, *Principles and Values in the European Union*, in LIABILITY OF MEMBER STATES FOR THE VIOLATION OF FUNDAMENTAL VALUES at 9, 10 (Armin Hatje & Lubos Tichý eds., 2018).

[45] From within the Convention secretariat, see Alain Pilette & Etienne de Poncins, *Valeurs, objectives et nature de l'Union*, in GENÈSE ET DESTINÉE DE LA CONSTITUTION EUROPÉENNE at 287, 300-301 (Giuliano Amato et al. eds., 2007); Giuliano Amato & Nicola Verola, *Freedom, Democracy, the Rule of Law*, in THE HISTORY OF THE EUROPEAN UNION: CONSTRUCTING UTOPIA at 57, 60, 74 (Giuliano Amato et al. eds., 2019); Clemens Ladenburger & Pierre Rabourdin, *La constitutionalisation des valeurs de l'Union. Commentaire sur la genèse des articles 2 et 7 du Traité sur l'Union européenne*, REVUE DES AFFAIRES EUROPÉENNES 231, 236 (2022).

[46] Florence Benoît-Rohmer, *Valeurs et droits fondamentaux dans la Constitution*, 41 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 261, 262 (2005); TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW at 15 (2007, 2nd edn.).

More problematic is the provision's justiciability, as the values of Article 2 TEU are extremely indeterminate.[47] The criteria for direct effect, i.e. for the justiciability in domestic proceedings, require a provision of EU law to be clear, precise and unconditional. For that reason, even voices from within the Court doubt that the Court could apply Article 2 TEU as a freestanding provision.[48] Advocate General Tanchev argued in 2018 that Article 2 TEU does not constitute a standalone yardstick for the assessment of national law.[49] Similarly, Advocate General Pikamäe stated that the value of the rule of law 'cannot be relied upon on its own.'[50]

So far, the Court has avoided using Article 2 TEU as a self-standing yardstick. As previously indicated, it rather chose to operationalize Article 2 TEU through more specific Treaty provisions. The Court starts with a systematic interpretation of Article 2 TEU in light of a more specific Treaty provision to substantiate these values.[51] It then complements this step with a systematic interpretation of the specific provision in light of Article 2 TEU.[52] This reasoning can apply to all Treaty provisions that give specific expression to a value. In its ruling on the conditionality regulation, 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'.[53] In addition, it noted that Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter of Fundamental Rights define the scope of the values of human dignity, freedom, equality, and respect for human rights, whereas Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men.[54]

While the operationalization of Article 2 TEU through specific Treaty provisions has become a consolidated practice, its self-standing application remains unresolved. The Maltese and Romanian judges cases might indicate a further move in this direction. Though still employing Article 2 TEU and Article 19(1)(2) TEU as cumulative yardsticks, the Court placed Article 2 TEU at the center. Member States are precluded from adopting measures that lead to 'a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia,

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[47] Arguing against its justiciability, see e.g. Bonelli, *supra* note 40; Tom L. Boekestein, *Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values*, 23 GERMAN L.J. 431, 437 (2022); Pekka Pohjankoski, *Rule of law with leverage*, 58 COMMON MKT. L. REV. 1341, 1345 et seq. (2021).

[48] But see, openly considering a self-standing application, Rossi, *supra* note 33, 657; Marek Safjan, *On Symmetry: in Search of an appropriate Response to the Crisis of the Democratic State*, IL DIRITTO DELL'UNIONE EUROPEA 673, 696 (2020).

[49] Opinion of Advocate General Tanchev, A.B. and Others, Case C-824/18, EU:C:2020:1053, ¶ 35.

[50] Opinion of Advocate General Pikamäe, Slovenia v. Croatia, Case C-457/18, EU:C: 2019:1067, ¶¶ 132-133.

[51] On this method, see THOMAS MÖLLERS, LEGAL METHODS at 259 et seq. (2020).

[52] Understanding this step rather as a teleological interpretation, see KOEN LENAERTS & JOSÉ A. GUTIÉRREZ-FONS, LES MÉTHODES D'INTERPRÉTATION DE LA COUR DE JUSTICE DE L'UNION EUROPÉENNE at 61 et seq. (2020).

[53] Hungary v. Parliament and Council, Case C-126/21, EU:C:2021:974, ¶ 232.

[54] *Id.* ¶¶ 157 et seq.

Article 19 TEU'.[55] Similarly, the Commission based its infringement proceedings against the Hungarian and Polish violations of LGBTIQ rights straight on Article 2 TEU: 'Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU'.[56]

Even if Article 2 TEU – either as self-standing provision or read together with other Treaty provisions – contains justiciable principles, the Court of Justice might nevertheless lack jurisdiction to assess and enforce them. This argument can be made in two degrees.

On a general level, the Court could be *entirely excluded* from reviewing whether Member States comply with Article 2 TEU. One could argue that infringement procedures are designed to counter violations of EU law in specific cases only.[57] Article 258 TFEU mentions 'an obligation under the Treaties' in the singular, not large-scale deficiencies. Moreover, Article 7 TEU read together with Article 269 TFEU could be lex specialis for the enforcement of EU values, thus barring parallel procedures under Articles 258 or 267 TFEU.[58] At a closer look, these arguments cannot convince. For one, there are no reasons why the Commission should not address structural issues beyond individualized breaches of EU law.[59] The bundling of several infringements against general and persistent violations is established practice.[60] The high procedural and substantive thresholds of Article 7 TEU do not exclude parallel procedures before the Court as both are different in logic and consequences.[61] Whereas Article 7 TEU is a political procedure that may lead to the suspension of Member State rights, the Court operates in judicial proceedings that may lead to penalties under Article 260 TFEU. Unlike former Treaties, Lisbon does not contain any provision that keep the EU's foundational principles out of the Court's reach.[62] Instead, the CJEU enjoys 'jurisdiction by default'.[63] As Article 269

[55] See e.g. Repubblika, Case C-896/19, EU:C:2021:311, ¶ 63; Asociația 'Forumul Judecătorilor din România' and Others, Joined Cases C-83, 127, 195, 291, 355 & 397/19, ¶¶ 162; Comm'n v. Poland (Régime disciplinaire des juges), Case C-791/19, EU:C:2021:596, ¶ 51.

[56] European Commission, EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people (15 July 2021), IP/21/3668.

[57] See e.g. Hermann-Josef Blanke, *Article 7*, in THE TREATY ON EUROPEAN UNION (TEU): A COMMENTARY at ¶¶ 7 et seq. (Id. & Stelio Mangiameli eds., 2013).

[58] See e.g. Editorial, *Safeguarding EU values in the Member States*, 52 COMMON MKT. L. REV. 619, 626 et seq. (2015). See also Bonelli, *supra* note 40; Peter Van Elsuwege & Femke Gremmelprez, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, 16 EUR. CONST. L. REV. 8, 9 (2020); Bernd Martenczuk, *Art. 7 EUV und der Rechtsstaatsrahmen als Instrument der Wahrung der Grundwerte der Union*, in VERFASSUNGSKRISEN IN DER EUROPÄISCHEN UNION at 41, 45 (Stefan Kadelbach ed., 2018).

[59] See Kim L. Scheppele, *Enforcing the Basic Principles of EU Law through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION at 105 (Carlos Closa & Dimitry Kochenov eds., 2016); Matthias Schmidt & Piotr Bogdanowicz, *The Infringement Procedure in the Rule of Law Crisis*, 55 COMMON MKT. L. REV. 1061, 1069 et seq. (2018).

[60] See e.g. LUCA PRETE, INFRINGEMENT PROCEEDINGS IN EU LAW at 54 et seq. (2017); KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, EU PROCEDURAL LAW at ¶¶ 5.11 et seq. (2014),

[61] Opinion of Advocate General Tanchev, Comm'n v. Poland (Independence of the Supreme Court), Case C-619/18, EU:C:2019:325, ¶ 50. See also Schmidt & Bogdanowicz, *supra* note 57, 1061, 1072 et seq.; Rossi, *supra* note 33, at 655 et seq.; VASSILIOS SKOURIS, DEMOKRATIE UND RECHTSSTAAT at 50 et seq. (2018).

[62] Under Art. 46(d) TEU-Nice the Court had only jurisdiction over Art. 6(2) but not the 'principles' in Art. 6(1).

TFEU constitutes an exception to this general jurisdiction, it must be interpreted restrictively.[64]

On a narrower level, some suggest that the Court lacks jurisdiction to enforce Article 2 TEU values *beyond the areas covered by EU competences*. In 2014, the Council Legal Service argued that the enforcement of EU values beyond Article 7 TEU is excluded 'in a context that is not related to a specific material competence' of the EU.[65] However, the Court, with broad support, has demonstrated the opposite. Although the organisation of the judiciary in the Member States falls within the competence of the Member States, 'the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.[66] Pursuant to Article 19(1)(1) TEU, the Court is tasked to ensure that EU law is observed, even in areas of sensitive Member State competences.[67] This includes matters such as nationality, criminal law, extradition, direct taxation, surnames, social security, civil status or the organisation of education systems.[68] Reviewing the Member States' compliance with EU law is thus indifferent to the attribution of law making competences.[69]

C. Limits

The activation of Article 2 TEU has certainly far-reaching effects. It could bring about a massive power shift to the detriment of the Member States' autonomy, identity, and diversity which is to be avoided. Hence, the Court must prevent Article

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[63] Opinion of Advocate General Bobek, Hungary v. Parliament, Case C-650/18, EU:C:2020:985, ¶ 35.

[64] Hungary v. Parliament, Case C-650/18, EU:C:2021:426, ¶ 31. For a compelling argument that Art. 269 TFEU *establishes* the Court's jurisdiction to review preparatory acts under Art. 7 TEU rather than to *restrict* jurisdiction, see Op. Advoc. Gen., Hungary v. Parliament, Case C-650/18, EU:C:2020:985, ¶ 44.

[65] Council, Opinion of the Legal Service: Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, 10296/14, ¶¶ 16 f. This conception was taken up by the captured Polish Constitutional Tribunal, see the press release accompanying the Judgment of 7 October 2021, K 3/21, ¶¶ 18 et seq.

[66] A.K. and Others, Joined Cases C-585, 624 & 625/18, EU:C:2019:982, ¶ 75; Comm'n v. Poland (Independence of the Supreme Court), Case C-619/18, EU:C:2019:531, ¶ 52; *Repubblika*, EU:C:2021:311, ¶ 48. See also Serena Menzione, *The organization of the national judiciary: A Competence of the Member States within the Scope of EU Law*, ANNUAIRE DE DROIT DE L'UNION EUROPÉENNE 361 (2020).

[67] Loic Azoulai, *The 'Retained Powers' Formula in the Case Law of the European Court of Justice*, 4 EUR. J. LEGAL STUD. 192 (2011). See also Koen Lenaerts, *L'encadrement par le droit de l'Union européenne des compétences des États membres*, in MÉLANGES EN L'HONNEUR DE JEAN PAUL JACQUÉ at 421 (2010); Lena Boucon, *EU Law and Retained Powers of Member States*, in THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION at 168 (Loïc Azoulai ed., 2014); MARIA E. BARTOLONI, AMBITO D'APPLICAZIONE DEL DIRITTO DELL'UNIONE EUROPEA E ORDINAMENTI NAZIONALI at 119 et seq. (2018).

[68] See e,g. Tjebbes, Case C-221/17, EU:C:2019:189, ¶ 32 (nationality); Rimšēvičs, Joined Cases C-202 & 238/18, EU:C: 2019:139, ¶ 57 (criminal law); Petruhhin, Case C-182/15, EU:C:2016:630, ¶ 30 (extradition); Schumacker, Case C-279/93, EU:C:1995:31, ¶ 21(direct taxation); Grunkin and Paul, Case C-353/06, EU:C:2008:559, ¶ 16 (surnames); Kohll, Case C-158/96, EU:C:1998:171, ¶¶ 18-19 (social security); Coman, Case C-673/16, EU:C:2018:385, ¶¶ 37 et seq. (civil status); Bressol, Case C-73/08, EU:C:2010:181, ¶ 28 (education).

[69] Bruno de Witte, *Exclusive Member State Competences – Is There Such a Thing?*, in THE DIVISION OF COMPETENCES BETWEEN THE EU AND THE MEMBER STATES at 59, 62 (Sacha Garben & Inge Govaere eds., 2017).

2 TEU from becoming a tool of constitutional harmonization.[70] While a common narrative presents the CJEU as a power grabbing institution, it seems that Members of the Court are well-aware of the need for self-restraint.[71] Three main doctrinal paths can limit the Court's transformative jurisprudence.

First, we suggest a minimalist reading of Article 2 TEU. That provision, irrespective of whether it is applied in a self-standing manner or through more specific Treaty provisions, should remain an 'extraordinary remedy for extraordinary situations' when applied to the Member States structures.[72] This corresponds to the drafters' considerations, who emphasized that Article 2 TEU can only contain a 'hard core' of values.[73] Accordingly, the value of 'respect for human rights' cannot encompass the entire range of Charter rights but only their essence.[74] In the words of Advocate General Kokott, 'the examination under Article 2 TEU must be limited to observance of the essence of those principles and rights.'[75] Though 'essence' is a difficult concept,[76] both the Court and EU legal scholarship have been increasingly active in fleshing out this notion.[77] In this spirit, the Court's recent jurisprudence stressed the link between the notion of essence and Article 2 TEU.[78]

Second, the Luxembourg judges should refrain from providing a full-blown account of each value. Instead, they would only establish red lines and assess whether these lines are crossed in the specific case.[79] In other words, the Court's reasoning would be thick on the context while remaining thin on the law. The CJEU's case law provides some promising examples in this respect. Many decisions reveal a remarkable context-sensitivity.[80] The Court seems to embrace the suggested approach by stressing that 'neither Article 2 TEU …, nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the

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[70] In this sense, Dean Spielmann, *The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union*, in THE RULE OF LAW IN EUROPE at 3, 19 (María Elósegui et al. eds., 2021).

[71] See through time Lenaert, *supra* note 1; TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS at 98 et seq., 268 et seq. (2003) 98 ff, 268 ff; Eleanor Sharpston, *Legislating and Adjudicating*, in THE FOUNDATIONS AND FUTURE OF PUBLIC LAW 173 (Elizabeth Fisher et al. eds., 2020).

[72] Op. Advoc. Gen., *Prokuratura Rejonowa w Mińsku Mazowieckim*, EU:C:2021:403, ¶ 147.

[73] Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, at 11.

[74] See already Armin von Bogdandy et al., *Reverse Solange*, 49 COMMON MKT. L. REV. 489, 509 et seq. (2012).

[75] Opinion of Advocate General Kokott, Stolichna obshtina, rayon 'Pancharevo', Case C-490/20, EU:C:2021:296, ¶ 118.

[76] On the methodological uncertainties, see Orlando Scarcello, *Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter*, 16 EUR. CONST. L. REV. 647 (2021); Sébastien Van Drooghenbroeck & Cécilia Rizcallah, *Art. 52*, in CHARTE DES DROITS FONDAMENTAUX DE L'UNION EUROPÉENNE at 1249, 1254 et seq. (id. & Fabrice Picod eds., 2nd edn., 2020); Mark Dawson, Orla Lynskey & Elise Muir, *What Is the Added Value of the Concept of the 'Essence' of EU Fundamental Rights?*, 20 GERMAN L. J. 763 (2019).

[77] In this sense Daniel Sarmiento, *The Essential Content of EU Fundamental Rights*, QUADERNI COSTITUZIONALI 851 (2020); Romain Tinière, *Le contenu essentiel des droits fondamentaux dans la jurisprudence de la Cour de Justice de l'Union européenne*, 57 CAHIERS DE DROIT EUROPÉEN 417, 436 (2021).

[78] See e.g. Minister for Justice and Equality (Deficiencies in the system of justice), Case C-216/18 PPU, EU:C:2018:586, ¶ 48; *Repubblika*, EU:C:2021:311, ¶ 51; *A.B. and Others*, EU:C:2021:153, ¶ 116.

[79] von Bogdandy, *supra* note 5, at 732 et seq.

[80] See e.g. *A.B. and Others*, EU:C:2021:153, ¶ 129; *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2020:277, ¶¶ 88-89, 99, 102, 107, 110, 154.

relationships and interaction between the various branches of the State'.[81] Also the Court's regression test set out in *Repubblika* expresses a minimalist methodology.[82] This test checks whether a Member State shows a significant regression from pre-existing, national standards. A Member State cannot 'amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law'.[83] This test is largely neutral with regard to substantive standards and allows different conceptions to coexist.[84]

Finally, the Court could mitigate the impact of Article 2 TEU on the level of enforcement. In many cases, it could apply a *Solange*-like logic. The Court would not police Article 2 TEU *as long as* the presumption of general compliance holds.[85] The presumption can be refuted on two levels. At a macro-level, a systemic deficiency would be required.[86] At a micro-level, the Court could look at the seriousness of the individual violation, which by itself can indicate underlying systemic deficiencies. If a right's essence is seriously violated, even an isolated incident might suffice to refute the presumption of value compliance. In such a case, the seriousness of the violation – to employ the vocabulary of Article 7 TEU – might outweigh its lack of persistence. This concerns, for example, instances of torture or extrajudicial killings without available remedies. In other, less extreme cases, the Court could employ a deferential strategy. Generally, there are two deference routes: decentralised judicial review and margin of appreciation.[87] The former is usually applied in preliminary reference proceedings and concerns an institutional question, namely the locus of scrutiny. The margin of appreciation, by contrast, is primarily a substantive question and relates to the degree, intensity, or level of scrutiny. Whereas the Court already takes the first deference route by leaving the final assessments to the referring courts,[88] the potential of a margin of appreciation remains still to be explored.[89]

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[81] RS (Effet des arrêts d'une cour constitutionnelle), Case C-430/21, EU:C:2022:99, ¶ 43; Euro Box Promotion, Joined Cases C-357, 379, 547, 811 & 840/19, EU:C:2021:1034, ¶ 229; *A.K. and Others*, EU:C:2019:982, ¶ 130.

[82] Mathieu Leloup, Dimitry Kochenov & Aleksejs Dimitrovs, *Opening the door to solving the 'Copenhagen dilemma'? All eyes on Repubblika v Il-Prim Ministru*, 46 EUR. L. REV. 692 (2021); Oliver Mader, *Wege aus der Rechtsstaatsmisere: der neue EU-Verfassungsgrundsatz des Rückschrittsverbots und seine Bedeutung für die Wertedurchsetzung*, 32 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 917 (2021); Nicola Canzian, *Indipendenza dei giudici e divieto di regressione della tutela nella sentenza Repubblika*, QUADERNI COSTITUZIONALI 715 (2021).

[83] *Repubblika*, EU:C:2021:311, ¶ 63. See also *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2020:277, ¶ 51.

[84] In detail Luke D. Spieker, *The conflict over the Polish disciplinary regime for judges – An acid test for judicial independence, Union values and the primacy of EU law*, 59 COMMON MKT. L. REV. 777, 781 et seq. (2022).

[85] See already von Bogdandy et al., *supra* note 72.

[86] See also Op. Advoc. Gen., Prokuratura Rejonowa w Mińsku Mazowieckim, EU:C:2021:403, ¶¶ 140-148, 159.

[87] Jan Zglinski, *The Rise of Deference: The Margin of Appreciation and Decentralized Judicial Review in EU Free Movement Law*, 55 COMMON MKT. L. REV. 1341, 1343 et seq. (2018).

[88] See e.g. *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586 or *A.K. and Others*, EU:C:2019:982. Critically with regard to this deferential approach, see e.g. Mathieu Leloup, *An uncertain first step in the field of judicial self-government*, 16 EUR. CONST. L. REV. 145, 157-158 (2020); Stanisław Biernat & Paweł Filipek, *The Assessment of Judicial Independence Following the*

PART III. SUPPORT FOR DEMOCRATIC TRANSITIONS

The judicial mobilization of EU values is an important step for liberal democracy in Europe. Of course, CJEU decisions alone cannot reverse the illiberal trend in some Member States. Legal actions are only one among several responses and must be accompanied by efforts to embed the values in Article 2 TEU throughout society.[90] Ultimately, the transition back to full democracy is up to a Member States' society. However, if transformative constitutionalism teaches us anything, it is that courts can play a role in supporting these societies in their decision to overcome illiberal governments. Along these lines, we argue that the CJEU can foster democratic transitions *before* and *after* the vote for a new government. It can help keeping the channels for democratic change open and support new governments in accomplishing democratic transitions. Article 2 TEU can play a crucial role in both respects.

A. Before Election Day

In Hungary, the channels of democratic change are in a critical condition. Many argue that it has ceased to be fully-fledged democracy.[91] The OSCE mission noted that the 2022 election campaign was marked by an 'an absence of a level playing field' as media bias and campaign financing regulations constricted genuine political debate.[92] When the parliamentary opposition and the courts are hollowed out, when free media, civil society and academia are systematically silenced, when the laws governing elections, gerrymandering, party financing or campaigning are framed in favor of the ruling party, a change in government becomes unlikely. If the Court of Justice mobilizes Article 2 TEU against such measures, it supports democratic processes. Even critical accounts of judicial review consider securing the functioning of democratic decision making legitimate.[93] Whereas the Court responded to the overhaul of the Polish judiciary with powerful doctrinal innovations, it has

CJEU Ruling in C-216/18 LM, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 403, at 423. (Armin von Bogdandy et al. eds, 2021).

[89] For an assessment, see Spieker, *supra* note 2, at 266.

[90] On such complementary avenues, see e.g. KRIS GRIMONPREZ, THE EUROPEAN UNION AND EDUCATION FOR DEMOCRATIC CITIZENSHIP. LEGAL FOUNDATIONS FOR EU LEARNING AT SCHOOL (2020); Bojan Bugaric, *The Populist Backlash against Europe. Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe*, in EU LAW IN POPULIST TIMES 477, at 493 (Francesca Bignami ed., 2020).

[91] Listing Hungary and Poland under the top-5 'autocratizing countries' and Hungary even as 'electoral autocracy', see V-DEM INSTITUTE, DEMOCRACY REPORT 2022, at 33, 45. See also FREEDOM HOUSE, NATIONS IN TRANSIT 2022.

[92] OSCE, Hungary, Parliamentary Elections and Referendum, 3 April 2022: Statement of Preliminary Findings and Conclusions. See already OSCE, Hungary, Parliamentary Elections, 8 April 2018: Statement of Preliminary Findings and Conclusions; European Parliament, Resolution 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 (12 September 2018), 2017/2131(INL), Rec. 10.

[93] See in particular JOHN H. ELY, DEMOCRACY AND DISTRUST at 73, 105 (1980); Habermas, *supra* note 38, at 264, 285. Further Grimm, *supra* note 16, at 215; CHRISTOPH MÖLLERS, THE THREE BRANCHES at 127 (2013); Michel Troper, *The Logic of Justification of Judicial Review*, 1 INT'L J. CONST. L. 99, 109 (2003).

approached the developments in Hungary much more hesitantly. In our view, however, there is much potential for a stronger involvement.

1. Current Timidity

The Commission brought various value-related infringement proceedings against Hungary. These concerned the repressive Hungarian transparency requirements for foreign funded NGOs as well as the oppression of academic freedom. Unlike its decisions concerning the Polish judiciary, the Court refrained from mobilizing the Union's values in these cases. The judgment concerning foreign-funded NGOs illustrates this point. In 2020, the Commission brought an action against a Hungarian statute that imposed duties of registration, reporting, and disclosure on civil society organizations which receive funding from abroad.[94] Such statutes weaken forces of civil society that allow for democratic discourse and control. Nonetheless, the Court's decision fell behind the already established jurisprudence in two respects.

First, it addressed the Hungarian measures mainly as a violation of the free movement of capital under Article 63 TFEU, not under Article 2 TEU.[95] Admittedly, the Court also relied on EU fundamental rights by stressing that 'the right to freedom of association constitutes one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life'.[96] In this sense, the judgment constitutes an improvement when compared to the first timid cases on the overhaul of the Hungarian judiciary.[97] Still, fundamental rights remain an accessory to the internal market. For sure, abstaining from the highly politicized value rhetoric can contribute to defusing the conflict. At the same time, however, it marginalizes the erosion of European values. The focus on the internal market conveys a 'business as usual' image and obscures the real threats.

Second, unlike the rulings on the Polish judiciary, the Hungarian decisions lack contextualization. The respective measures are taken out of their overall context and judged in an isolated manner. This ignores that the government's actions against critics acquire a systemic dimension. Indeed, context is decisive when assessing violations of EU values. Many developments consist of a bundle of individual measures, which, when considered individually, do not transgress a critical threshold. Only together do they constitute a violation of Article 2 TEU.[98] Some call

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[94] Comm'n v. Hungary (Transparency of Associations), Case C-78/18, EU:C:2020:476.

[95] Arguing for this approach, see Mark Dawson & Elise Muir, *Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law*, 14 GERMAN L. J. 1959 (2013). A very similar strategy can be observed in the CEU case, see Comm'n v. Hungary (Enseignement supérieur), Case C-66/18, EU:C:2020:792. In detail, Andi Hoxhaj, *The CJEU in Commission v Hungary Higher Education Defends Academic Freedom Through WTO Provisions*, 85 MOD. L. REV. 773 (2022); Erich Vranes, *Enforcing WTO/GATS Law and Fundamental Rights in EU Infringement Proceedings*, 28 MAASTRICHT J. EUR. & COMP. L. 699 (2021); Vasiliki Kosta & Darinka Piqani, *Where trade and academic freedom meet: Commission v. Hungary (LEX CEU)*, 59 COMMON MKT. L. REV. 813 (2022).

[96] Comm'n v. Hungary (Transparency of Associations), Case C-78/18, EU:C:2020:476, ¶ 112.

[97] As promising decision, see Matteo Bonelli, *European Commission v Hungary (Transparency of associations) (C-78/18): The 'NGOs case': on how to use the EU Charter of Fundamental Rights in infringement actions*, 46 EUR. L. REV. 258, 268 (2021).

[98] Scheppele, *supra* note 57, at 108.

this a 'cocktail effect'.[99] In addition, such developments are often, though not always, cloaked as lawful measures that hide the underlying political agenda.[100] Only by applying a comprehensive and contextual approach can the Court address these measures as what they are: a breach of the Union's values.

2. Future Potential

To safeguard democratic processes in Hungary, the Commission and the CJEU could take bolder steps towards the judicial activation of Article 2 TEU. The ongoing attacks on the freedom of press and media pluralism could become a springboard. Already in 2011, the European Parliament expressed concern for media pluralism in Hungary.[101] Since then, the situation has further deteriorated.[102] Nevertheless, these issues did not trigger any legal proceedings until June 2021, when the Commission announced an infringement procedure against Hungary for rejecting an application by Klubrádió – Hungary's last outspoken opposition channel – to use the national radio spectrum.[103] But even then, the Commission only relied on the European Electronic Communications Code (Directive (EU) 2018/1972) rather than on the essence of media freedom protected by Article 11(2) CFR, which gives specific expression to the value of 'human rights' in Article 2 TEU.

The Court started to operationalize Article 2 TEU through more specific provisions of EU law (see Section II.B.). Reading a specific provision in light of the Union's values justifies its extensive interpretation. This approach could be extended to other provisions that give expression to the values in Article 2 TEU, such as the Charter of Fundamental Rights: human dignity (Title I), freedom (Title II), equality (Title III), democracy (Articles 10 to 12 and Title V) and the rule of law (Title VI).[104] In this spirit, the Court has connected Article 2 TEU with Charter rights. In *Patriciello* and *Tele2 Sverige*, it established a continuum between the freedom of expression under Article 11 CFR and the value of democracy.[105] Similarly, the Court stressed in *La Quadrature du Net* and *Privacy International* that 'freedom of

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[99] Sébastien Platon, *Preliminary references and rule of law*, 57 COMMON MKT. L. REV. 1843, 1864 (2020).

[100] On this strategy, see e.g. Kim L. Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018).

[101] European Parliament, Resolution of 10 March 2011 on media law in Hungary.

[102] 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)), Annex ¶¶ 27-32; Venice Commission, Opinion of Media Legislation of Hungary, No. 798/2015. More generally, European Parliament, Resolution of 3 May 2018 on media pluralism and media freedom in the European Union, 2017/2209(INI).

[103] On the status quo, see European Commission, Media freedom: The Commission calls on Hungary to comply with EU electronic communications rules (Dec. 2, 2021).

[104] *Hungary v. Parliament and Council*, EU:C:2021:974, ¶¶ 157. On the drafter's awareness of this interplay, see Amato & Verola, *supra* note 43, at 71; Jürgen Meyer, *Präambel*, in CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION at ¶ 6 (Id. & Sven Hölscheidt eds., 5th edn., 2019); Justus Schönlau, *New Values for Europe?*, in THE CHARTERING OF EUROPE at 112 (Erik O. Eriksen et al. eds., 2003).

[105] Criminal proceedings against Aldo Patriciello, Case C-163/10, EU:C:2011:543, ¶ 31; Tele2 Sverige AB v. Postoch telestyrelsen & Secretary of State for the Home Department, Joined Cases C-203 & 698/15, EU:C:2016:970, ¶ 93.

expression … is one of the values on which, under Article 2 TEU, the Union is founded'.[106]

In taking this nexus a step further, the Court could start reviewing violations of the essence of Charter rights even *beyond the scope of other EU law*.[107] This is close to a proposal made by András Jakab.[108] He suggested that Article 2 TEU could trigger the Charter's scope under Article 51(1) CFR[109] and render EU fundamental rights generally applicable in the Member States. It should be stressed, however, that this cannot lead to applying the full fundamental rights acquis beyond the confines of Article 51(1) CFR. Article 2 TEU only comprises the essence of fundamental rights (see Section II.C). Beyond the Charter's scope, EU fundamental rights apply only as far as their essence protected under Article 2 TEU is concerned.

Yet, some threats to democracy cannot be addressed through Charter rights. This concerns, for instance, the curtailing of opposition rights, unfair electoral laws, gerrymandering, party financing and campaigning rules. Still, such practices violate the value of democracy, which can be operationalized under the suggested scheme. With regard to the composition of the European Parliament, the Court noted that the principle of representative democracy in Article 10(1) TEU 'gives concrete form to the value of democracy referred to in Article 2 TEU'.[110] Though Article 10 TEU concerns primarily democracy at the EU level, the latter cannot function if democratic decision-making in the Member States falters.[111] Elections to the European Parliament are partially governed by national provisions and rely on the domestic public sphere.[112] Moreover, the Member State governments represented in the Council derive their legitimacy from the national level. Article 10(2) TEU specifies that they must be 'democratically accountable either to their national Parliaments, or to their citizens'.[113] In consequence, the democratic legitimacy at the EU level depends on the situation in each Member State.

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[106] La Quadrature du Net and Others v. Premier Ministre and Others, Joined Cases C-511, 512 & 520/18, EU:C:2020:791, ¶ 114; Privacy International v. Secretary of State for Foreign and Commonwealth Affairs and Others, Case C-623/17, EU:C:2020:790, ¶ 62. For a somewhat looser connection, see NH v. Associazione Avvocatura per i diritti LGBTI, Case C-507/18, EU:C:2020:289, ¶ 48.

[107] See already Armin von Bogdandy & Luke D. Spieker, *Protecting Fundamental Rights Beyond the Charter*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS IN THE MEMBER STATES at 525, 531 (Michal Bobek & Jeremias Adams-Prassl et al. eds., 2020).

[108] András Jakab, *Application of the Charter of Fundamental Rights by National Courts in Purely Domestic Cases*, in id. & Kochenov, *supra* note 42, at 252, 255.

[109] On such 'triggering rules', see Daniel Sarmiento, *Who's Afraid of the Charter?*, 50 COMMON MKT. L. REV. 1267, 1279 (2013).

[110] Junqueras Vies v. Ministerio Fiscal, Case C-502/19, EU:C:2019:1115, ¶ 63. See also Puppinck and Others v. Comm'n, Case C-418/18 P, EU:C:2019:1113, ¶ 64.

[111] On the EU's structure of dual legitimacy, see Armin von Bogdandy, *Founding Principles*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW at 11, 50 (id. & Jürgen Bast, 2nd edn., 2009). In detail, JELENA VON ACHENBACH, DEMOKRATISCHE GESETZGEBUNG IN DER EUROPÄISCHEN UNION: THEORIE UND PRAXIS DER DUALEN LEGITIMATIONSSTRUKTUR EUROPÄISCHER HOHEITSGEWALT (2014).

[112] Art. 8 of the Act concerning the election of the representatives of the Assembly by direct universal suffrage. See also *Junqueras Vies*, EU:C:2019:1115, ¶ 69.

[113] On this 'remarkable' interference in the Member States' constitutional autonomy, see Martin Nettesheim, *Art. 10 EUV*, in DAS RECHT DER EUROPÄISCHEN UNION at ¶ 74 (Eberhard Grabitz et al. eds., 74th edn., loose-leaf, 2022).

This logic underpinning Article 10(2) TEU is similar to the one underpinning Article 19(1)(2) TEU. Article 19 TEU integrates the national judiciaries into the EU system of judicial protection. All national courts are also Union courts. National democracy is similarly intertwined with the European one. The 'European' and 'national' facets of democracy in the Member States are closely related. A government cannot be 'democratically accountable' at the European level if its domestic accountability is weak. Based on these insights, a combined reading of Article 10 and 2 TEU can result in imposing essential democratic requirements on the Member States.[114] This applies to the 'European' dimensions of democracy in the Member States (e.g. the elections to the European Parliament) as well as to domestic democracy. In that light, the Court could review measures such as the 'wild gerrymandering' that favors the ruling *Fidesz* party.[115]

One might object that Article 10 TEU is as vague as Article 2 TEU and therefore not a justiciable, directly effective provision either. The understandings of democracy among the Member States are as diverse as their understandings of the rule of law. They include republics and monarchies, parliamentary and semi-presidential systems, strong and weak parliaments as well as strong and weak political party systems. Nonetheless, European standard setters, such as the Venice Commission, have been developing a common European core for many years.[116] Further, the Court has many tools to maintain the diversity between the Member States. This includes the minimalist, contextualised, case-by-case approach or the regression test developed in *Repubblika* (see Section II.C).

Eventually, such democratic standards can be invoked even by individuals against national measures. Article 10(3) TEU stipulates the citizens' 'right to participate in the democratic life of the Union'. Many understand this as an individual right to democratic participation.[117] As such, Article 10(3) TEU fulfills even the most demanding conception of direct effect, which requires a provision to contain a right that can be invoked by an individual before courts.[118] Such a right concerns democratic standards at the EU, but also at the national level. As explained,

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[114] See John Cotter, *To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council*, 46 EUR. L. REV. 77 (2021); David Krappitz & Niels Kirst, *An Infringement of Democracy in the EU Legal Order*, EU LAW LIVE (May 29, 2020); Thomas Verellen, *Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable*, VERFASSUNGSBLOG (April 8, 2022). See critically, Christian Hillgruber & Simon Strickrodt, *Unter der Kuratel des Europäischen Gerichtshofs*, FRANKFURTER ALLGEMEINE ZEITUNG - EINSPRUCH (Feb. 2, 2022).

[115] *A wild gerrymander makes Hungary's Fidesz party hard to dislodge. Opposition voters are packed into a few large constituencies*, THE ECONOMIST (Apr. 2, 2022).

[116] See e.g. Venice Commission, Parameters on the relationship between the parliamentary majority and the opposition in a democracy: A checklist, CDL-AD(2019)015-e.

[117] See in particular Matthias Ruffert, *Art. 10 EUV*, in EU-VERTRAG ¶ 12 (Christian Calliess & Matthias Ruffert eds., 6th edn., 2022); Marcel Haag, *Art. 10 EUV*, in EUROPÄISCHES UNIONSRECHT ¶ 12 (Hans von der Groeben et al., 7th edn., 2015). But see skeptically Thomas Kröll & Georg Lienbacher, *Art. 10 EUV*, in EU-KOMMENTAR at ¶ 16 (Jürgen Schwarze et al., 4th edn., 2019).

[118] In this sense, e.g. Koen Lenaerts & Tim Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, 31 EUR. L. REV. 287, 311 (2006). Critical Michal Bobek, *The effects of EU law in the national legal systems*, in EUROPEAN UNION LAW at 143 (Catherine Barnard & Steve Peers eds., 3rd edn., 2020); Olivier Peiffert, *Un possible malentendu en droit de l'Union européenne: le droit subjectif comme condition de l'effet direct,* REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 665, 689 (2017).

the democratic life *of the Union* presupposes a democratic life *in the Member States*. Therefore, Article 10(3) TEU can translate the value of democracy into justiciable obligations. This activates 'the vigilance of the individuals concerned to protect their rights', a central instrument in assuring that EU law is observed in the Member States since *Van Gend en Loos*.[119] Our proposal follows this well-trodden path of European integration.

B. *After Election Day*

The Court can also support a Member State's democratic transition after the opposition has won. Fast forward to the next Polish elections and imagine that *PiS* suffers an electoral defeat. Fast forward even further and imagine the Hungarian people voting *Fidesz* out of office. No government lasts forever. Any new government must face the challenge of overcoming its country's systemic deficiencies, be it a messed-up judicial system or entrenched laws that favor the currently ruling party. Given their entrenchment, this agenda cannot be implemented overnight but will require a democratic transition. In the following, we will assess how the CJEU could support such transitions in Poland and Hungary.

1. Poland: Restoring an Independent Judiciary

Any new Polish government will face the challenge of how to deal with the messed-up judicial system. Though its deficiencies have been established by the Luxembourg and the Strasbourg courts, the *PiS*-led government does not mend those deficiencies but continues appointing judges in open violation of EU law and the ECHR.[120] It seems close to completing its overhaul of the Polish judiciary. What are a new government's options to restore an independent judiciary that deserves the 'trust which the courts in a democratic society must inspire in individuals'?[121] For one, said government could employ a sledge-hammer method and reverse all appointments that were conducted in violation of the European rule of law. The consequences of such a complete reversal could be severe, reversing these appointments could create legal chaos. It is also unclear what should happen with decisions rendered by unlawfully appointed judges. Should they be open to appeal? Further, it cannot be excluded that many of these judges – though appointed in an unlawful manner – may still be devoted to their mission as independent judges. Hence, a one-size-fits-all solution seems hardly appropriate.

[119] Van Gend en Loos v. Nederlandse Administratie Der Belastingen, Case C-26/62, EU:C:1963:1. See further Damian Chalmers & Luis Barroso, *What Van Gend en Loos stands for*, 12 INT'L J. CONST. L. 105, 121 (2014); Joseph H.H. Weiler, *Van Gend en Loos: The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 INT'L J. CONST. L. 94, 102 (2014); JOHANNES MASING, DIE MOBILISIERUNG DES BÜRGERS FÜR DIE DURCHSETZUNG DES RECHTS at 44 (1997).

[120] These appointment procedures were subject of several decisions, see *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶¶ 138-152; *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596, ¶¶ 95 et seq.; *A.B. and Others*, EU:C:2021:153, ¶¶ 121 et seq.; *A.K. and Others*, EU:C:2019:982, ¶¶ 123 et seq. Finding a violation of Art. 6 ECHR, see also *Reczkowicz v. Poland*, app. no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, app. no. 49868/19 & 57511/19; *Advance Pharma sp. z o.o v. Poland*, app. no. 1469/20.

[121] For this formulation, see e.g. *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596, ¶ 167.

We suggest a much more constrained approach that resembles a scalpel rather than a sledgehammer. To restore an independent judiciary and – in a broader perspective – the rule of law, it might suffice to remove the central perpetrators from the judiciary. To achieve this aim, we plead for the responsibility, criminal or disciplinary, of those judges who *seriously and intentionally violate EU values*. Establishing a disciplinary or criminal responsibility in fair proceedings would then justify their removal from office. In other words, the responsibility of judges who disrespect EU values can lead to a targeted restoration of the rule of law. In the following, we will spell out this proposal on the terrain of criminal law. It should be noted, however, that similar results could be achieved through disciplinary proceedings.

Before diving into the specifics, we need to briefly explain why we suggest relying on violations of EU values – and not Polish constitutional law – to determine which judges should be removed from the judicial system. As many authoritative Polish judges and academics assert, the overhaul of the judiciary has taken place in blatant violation of the Polish constitution. So why do we suggest EU values as a point of reference? One answer is that the Polish Constitutional Tribunal, the institution tasked to authoritatively interpret the constitution, has been captured by the *PiS*-led government. The ECtHR ascertained in *Xero Flor* that, due to its unlawful composition, the Tribunal cannot be regarded as a court 'established by law' under Article 6 ECHR.[122] The Tribunal's practice clearly demonstrates its descent to a loyal servant rubberstamping the government's agenda.[123] In this context, the Polish constitution can hardly serve as yardstick for the criminal responsibility of perpetrators. Another answer is that by relying on EU values, the new government can count on support from the European level. Other examples of transformative constitutionalism show that such support is crucial for a transition's success (see Part I, B).

How can we establish the responsibility of judges who turn into tools of government repression? Exceeding public powers, even as a judge, is sanctioned under most legal orders (see e.g. Section 339 German StGB, Art. 434-7-1 French Code Pénal, Art. 323 Italian Codice Penale, Art. 446 f. Spanish Codigo Penal or Sections 305 and 306 of the Hungarian Criminal Code).[124] In this spirit, Article 231(1) of the Polish Kodeks Karny punishes the general excess of authority: 'A public official who, by exceeding his or her authority, or not performing his or her duty, acts to the detriment of a public or individual interest, is liable to imprisonment for up to three years.' This includes the activity of judges.[125]

Such an 'excess of authority' can also arise from disregarding EU law. The principles of primacy and direct effect require a domestic judge to apply EU law in national procedures. This duty might entail to disapply or re-interpret conflicting

[122] *Xero Flor v. Poland*, app. no. 4907/18, ¶¶ 252 et seq.

[123] See e.g. Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, 11 HAGUE J. RULE OF LAW 63 (2018).

[124] For comparative studies, see e.g. Guy Canivet & Julie Joly-Hurard, *La responsabilité des juges, ici et ailleurs*, 58 REVUE INTERNATIONAL DE DROIT COMPARÉ 1049, 1052 et seq. (2006); Mauro Cappelletti, *Who Watches the Watchmen? A Comparative Study on Judicial Responsibility,* 31 AM. J. COMP. L. 1, 36 et seq. (1983).

[125] See e.g. Sąd Najwyższy, Judgment of 30 August 2013, SNO 19/13.

national laws. It makes no difference whether a national judge disregards national or rather Union law: both can equally trigger the criminal responsibility of judges. Further, infringements of EU law must be punished under conditions 'analogous to those applicable to infringements of national law of a similar nature and importance.'[126] If it is a domestic criminal offence to disregard national law to the detriment of the person subject to the proceedings, the same must apply in cases where a national judge intentionally disregards EU law.

Without doubt, judges may err. Non-accountability is core to judicial independence. At the same time, a judge must observe the law. Accordingly, judicial independence cannot justify the total exclusion of any disciplinary or criminal liability.[127] In balancing these two principles, all legal orders limit the criminal responsibility of judges to *extreme cases*.[128] While the specific threshold is a matter of national criminal law, EU law provides some guidance. With regard to disciplinary regimes for judges, the CJEU noted that the respective offences must be confined to 'serious and totally inexcusable forms of conduct … which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law'.[129] In this light, the criminal responsibility of judges may only arise where they *seriously and intentionally* violate the law to the detriment of a party in the proceedings.

When is this threshold reached? Some ardent federalists might think of penalizing national judges for disregarding the primacy of EU law. This could include, for instance, the Bundesverfassungsgericht's Second Senate after rendering its *PSPP* judgment or the Danish Højesteret for its decision in *Ajos*. Yet, this would miss the core concern which is safeguarding an independent judiciary. No relevant observer doubts the independence of these courts. For that reason, we plead for a much narrower conception. A serious infringement requires disrespecting Article 2 TEU. Even though its values are vague, and thus difficult to apply, this neither excludes their legal nature nor their judicial applicability, especially when Article 2 TEU is operationalized through more specific Treaty provisions (see Section II.B). National law must be applied or interpreted in a way that complies with Article 2 TEU. This includes the meaning these values have acquired through the CJEU's interpretation.[130] At least courts of last instance cannot disregard a consolidated CJEU jurisprudence unless they refer again to the Court.[131]

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[126] See Opinion of Advocate General Kokott, Taricco, Case C-105/14, EU:C:2015:293, ¶ 80. See also Scialdone, Case C-574/15, EU:C:2018:295, ¶ 28; Rēdlihs, Case C-263/11, EU:C:2012:497, ¶ 44; Berlusconi and Others, Joined Cases C-387, 391 & 403/02, EU:C:2005:270, ¶ 65. See also Koen Lenaerts & José Gutiérrez-Fons, *The European Court of Justice and fundamental rights in the field of criminal law*, in RESEARCH HANDBOOK ON EU CRIMINAL LAW at 7 (Valsamis Mitsilegas et al. eds., 2016).

[127] *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596, ¶ 137.

[128] This is particularly true in Poland, where judicial immunity is explicitly enshrined in the Constitution (see Articles 173, 180(1) and (2) and 181 of the Polish Constitution), see Trybunał Konstytucyjny, Judgment of 28 November 2007, Case K 39/07; Judgment of 2 May 2015, Case P 31/12. On the special procedure for lifting the judicial immunity, see Adam Bodnar & Łukasz Bojarski, *Judicial Independence in Poland*, in JUDICIAL INDEPENDENCE IN TRANSITION at 667, 716 (Anja Seibert-Fohr ed., 2012).

[129] *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596, ¶¶ 137-140.

[130] On the binding effect of interpretations in preliminary rulings, see e.g. MORTEN BROBERG & NIELS FENGER, PRELIMINARY REFERENCES TO THE EUROPEAN COURT OF JUSTICE at 406 et seq. (3rd edn.,

Thus, judges might reach the threshold for criminal responsibility by interpreting the law in a way that blatantly violates the values protected in Article 2 TEU. This applies, in particular, to those judges who willingly become a tool of government repression. Such instrumentalized judges can be found in the Supreme Court's Disciplinary Chamber that adjudicates many proceedings against those parts of the judiciary that seeks to defend its independence.[132] The case of Igor Tuleya stands out as a gloomy example. In 2017, he demanded that the public prosecutor's office initiate proceedings for unlawful obstruction of the opposition's work. Since then, a cascade of disciplinary proceedings was initiated against him.[133] Also beyond the Disciplinary Chamber, Polish judges might face cases that reach the severity of Article 2 TEU. Polish authorities have brought numerous civil suits against critical academics or journalists.[134] Wojciech Sadurski, for instance, faced several court cases brought by *PiS* and the government-controlled public television because of his vocal and often polemical criticism of the Polish government.[135] Judges who actively participate in this silencing of government critics might violate Article 2 TEU.

Certainly, any conviction requires proving the intention of the judge concerned, i.e. substantiating that he or she knew the relevant law and deliberately disregarded these values. Determining this intention falls to the trial judge. But here again, actions by EU institutions will be important. If a Polish judge intentionally disrespects a CJEU decision based on EU values in the case at hand, a red line and, in all likelihood, the threshold of criminal responsibility are crossed.

Two fundamental objections could be raised against this proposal. First, the criminal responsibility of judges for infringements of Union law could be understood as an inadmissible harmonization of the Member States' criminal law. Especially the German Constitutional Court expressed strong reservations in this respect and considers substantive criminal law to be 'particularly sensitive for the ability of a constitutional state to democratically shape itself'.[136] Yet, in our proposal criminal justice firmly remains in national hands. The suggested criminal proceedings would be part of a national process to restore the rule of law, conducted before national courts in accordance with national criminal law.

2021); Jürgen Schwarze & Nina Wunderlich, *Art. 267 AEUV*, in EU-KOMMENTAR at ¶ 72 (Jürgen Schwarze et al. eds, 4th edn. 2019); Bernd Schima, *Article 267 TFEU*, in THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY at ¶ 61 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2018). Critically, see ROBERT SCHÜTZE, EUROPEAN UNION LAW at 398 et seq. (3rd edn., 2021).

[131] See already *CILFIT*, Case 283/81, EU:C:1982:335, ¶ 21 and, more recently, Consorzio Italian Management, Case C-561/19, EU:C:2021:799, ¶ 33. Discussing also a duty of lower courts to refer, see Lenaerts, Maselis & Gutman, *supra* note 58, at ¶ 3.61; Ulrich Ehricke, *Art. 267 AEUV*, in EUV/AEUV at ¶ 69 (Rudolf Streinz ed., 3rd edn., 2018).

[132] On the plethora of proceedings, see only <https://www.iustitia.pl/en/disciplinary-proceedings>.

[133] Tuleya is still suspended from his work, see Alicja Ptak, *Polish judge critical of government blocked from return to work after lifting of suspension reversed,* NOTES FROM POLAND (Aug. 8, 2022).

[134] Dominika Maciejasz, *Gag Lawsuits and Judicial Intimidation: PiS Seeks to Turn Courts Into an Instrument of State Censorship*, GAZETA WYBORCZA (Mar. 16, 2021).

[135] For his critique, see, e.g., W. Sadurski, *Poland's Constitutional Breakdown* (2019).

[136] BVerfG, Judgment of 30 June 2009, *Lisbon*, 2 BvE 2/08, ¶ 252.

Secondly, the Polish Constitutional Tribunal prohibits national courts from following the CJEU's decisions[137] and rather confirms the constitutionality, for instance, of the judicial appointment processes[138] This puts Polish judges in a difficult spot. The diverging pronouncements from Luxembourg and Warsaw may be considered as creating a situation of legal uncertainty that excludes criminal liability. However, the Tribunal is composed in manifest violation of Polish law and cannot be considered a 'tribunal established by law'. For that reason, decisions taken by the respective panels must be disregarded. This is the gist of the CJEU's decisions in *Euro Box Promotion* and *RS*.[139]

The criminal responsibility of judges is a delicate topic as it sits uneasy with the requirements of judicial independence. Still, it must be considered in light of its alternatives, either doing nothing or removing all judges appointed illegally. Our approach targets few chief perpetrators who have accepted to become executioners of government repression. Moreover, these proceedings must conform by themselves with EU values.[140] Under these conditions, the criminal responsibility of judges might support efforts to restore a judicial system in line with the rule of law.

2. Hungary: Breaking the Constitutional Entrenchment

The situation in Hungary seems even more entrenched than the Polish one. Over the last decade, *Fidesz* has skillfully and ruthlessly cemented its power, personnel and policies. Central instruments for this entrenchment are constitutional amendments and so-called cardinal laws, which require a two-thirds majority of members present in parliament for their amendment.[141] In the run-up to the 2022 elections, many reform options were discussed.[142] Some suggested to adopt a new constitution.[143] But even if a new government would finally replace *Fidesz*, the adoption of a new constitution would not only be legally difficult – given the unlikeliness of a two-thirds majority – but also a long and cumbersome process. This is especially the case if the new government does not want to repeat previous mistakes and deliver on its promise of greater inclusiveness.[144]

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[137] See e.g. Polish Constitutional Tribunal, Judgment of 14 July 2021, P 7/20 and Judgment of 7 Oct. 2021, K 3/21.

[138] Polish Constitutional Tribunal, Judgment of 20 April 2020, U 2/20 and Judgment of 21 April 2020, Kpt. 1/20.

[139] *Euro Box Promotion*, EU:C:2021:1034, ¶ 230; *RS*, EU:C:2021:1034, ¶ 44. See also Luke D. Spieker, *Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH*, 33 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 305, 309 (2022).

[140] With regard to disciplinary regimes *Comm'n v. Poland (Régime disciplinaire des juges)*, EU:C:2021:596, ¶ 61.

[141] On the former practice, see e.g. Pál Sonnevend, András Jakab & Csink, Lóránt, *The constitution as an instrument of everyday party politics: The basic law of Hungary*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA at 33 (Armin von Bogdandy & Pál Sonnevend eds., 2016).

[142] For a concise overview, see e.g. Beáta Bakó, *Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary*, 82 HEIDELBERG J. INT'L LAW 223, 236 et seq. (2022).

[143] Among many others, see Andrew Arato & Gábor Halmai, *So that the Name Hungarian Regain its Dignity: Strategy for the Making of a New Constitution*, VERFASSUNGSBLOG (July 2, 2021).

[144] On the lack of representation in the adoption process of the current Fundamental Law, see e.g. Venice Commission, Opinion on the new Constitution of Hungary, No. 621/2011, ¶¶ 11, 144. See also

How could a new majority overcome the cardinal laws and align the Hungarian legal order with European standards? Again, reliance on Article 2 TEU, operationalized by other Treaty provisions, could support a new government and muster support from within and from without. We argue that Article 2 TEU allows – in fact, even requires – a new Hungarian government to set aside constitutional provisions and cardinal laws that violate these values.[145] One example for a cardinal law that might conflict with Articles 2 and 10 TEU is Act CLXVII of 2020, which amended the Hungarian electoral laws. Adopted in a 'fast track process' without public consultation and during a state of emergency, this piece of legislation is at odds with EU values. Article 2 TEU requires 'a transparent, accountable, democratic and pluralistic law-making process'.[146] Both the Venice Commission and the OSCE noted that the respective amendments did not meet these standards and consider them to preclude fair elections.[147]

What flows from such a finding? A Member State government must change or, if incapable thereof, disregard national laws that violate EU law. Primacy requires *all* Member State bodies to give full effect to EU law.[148] Accordingly, they must refrain from applying national legislation that is contrary to EU law, including constitutional provisions.[149] For sure, such an EU obligation sits uneasily with the principles of legality and legal certainty, both of which are important components of the rule of law as well.[150] At the same time, conflicts among norms are a regular feature in all legal orders. For that reason, there are rules governing conflicts of laws. The primacy of EU law constitutes such a rule that requires all public authorities to set aside conflicting national law.[151] There are exceptions to this rule based on 'overriding considerations of legal certainty'.[152] Still, these exceptions would probably not apply once a violation of Article 2 TEU is established. Further, they require the respective Member State to take steps to remedy the illegality. If a new government does not reach the necessary majority for repealing the laws at issue, it must therefore set them aside.

András Jakab & Pál Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, 9 EUR. CONST. L. REV. 102 (2013).

[145] A similar idea has been previously suggested by Kim Scheppele. Her proposal, however, concentrates on how the Hungarian Fundamental Law could permit disregarding those cardinal laws that violate EU law, see Kim L. Scheppele, *Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament*, VERFASSUNGSBLOG (Dec. 21, 2021).

[146] Art. 2 (a) of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

[147] Venice Commission & OSCE/ODIHR, Hungary – Joint Opinion on amendments to electoral legislation, Opinion No. 1040/2021.

[148] See only Garda Síochána, Case C-378/17, EU:C:2018:979.

[149] Internationale Handelsgesellschaft, Case 11/70, EU:C:1970:114, ¶ 3; *Euro Box Promotion*, EU:C:2021:1034, ¶ 251; *RS (Effet des arrêts d'une cour constitutionnelle)*, EU:C:2022:99, ¶ 51.

[150] Venice Commission, Rule of law Checklist, Study No. 711/2013.

[151] Considering primacy's role as a rule of conflict as its first and foremost function, see Clara Rauchegger, *Four Functions of the Principle of Primacy in the ECJ's Post-Lisbon Case Law*, in RESEARCH HANDBOOK: THE GENERAL PRINCIPLES OF EU LAW at 157, 159 et seq. (Katja Ziegler et al. eds., 2022). See also Herwig Hofmann, *Conflicts and Integration: Revisiting Costa v ENEL and Simmental II*, in THE PAST AND FUTURE OF EU LAW at 62 (Miguel Maduro & Loïc Azoulai eds., 2010).

[152] A and Others (Wind turbines at Aalter and Nevele), Case C-24/19, EU:C:2020:503, ¶ 84; Inter-Environnement Wallonie, Case C-411/17, EU:C:2019:622, ¶ 177; Winner Wetten, Case C-409/06, EU:C:2010:503, ¶ 67.

How could the new government proceed? It could start by identifying the most problematic provisions and assessing their compatibility with Article 2 TEU. To that end, it could rely on decisions and reports by numerous European, international, and academic institutions. Following this assessment, the government could issue a reasoned decision declaring its intention to no longer apply the identified norms. To support this move, it could involve European institutions. It could start by requesting the Venice Commission to adopt a concurrent opinion. Though the Venice Commission cannot establish a violation of Article 2 TEU, it is accepted as a constitutional standard setter in Europe.[153] Pursuant to Article 1 of its Statute, its mission is to spread the 'fundamental values of the rule of law, human rights and democracy'. Its assessments are more than a 'useful source of information' in the context of EU law,[154] as they have an immediate bearing on the interpretation of Article 2 TEU. The Union's values must be interpreted on the basis of the Member States' common constitutional traditions.[155] Opinions of the Venice Commission may help identifying these traditions.[156]

A new Hungarian government could further ask the European Commission to initiate infringement proceedings against its own country. Such an invitation might sound counter intuitive. Usually, the infringement procedure under Article 258 TFEU is an adversarial procedure between the Commission and a Member State government. Here, both the Commission and the Hungarian government would represent the *same* side. Yet, insights from the Latin American context support such an approach. Some governments have asked the IACtHR to issue decisions bolstering their policies. In May 2016, the Costa Rican government submitted a request for an advisory opinion on the issue of same-sex marriage with the goal to allowing it against a hesitant legislature. The Court issued a ground-breaking opinion in 2017 by holding that same-sex couples should enjoy all rights, including marriage, without discrimination.[157] Another example is the *Barrios Altos* case, although it was not the government that formally initiated the procedure.[158] The decision addressed an amnesty law that was enacted on the initiative of President Alberto Fujimori that shielded him and his henchmen after the so-called 'auto-coup' of 1992. When the proceedings reached the Inter-American Court, Fujimori's regime had fallen, and the new democratic government pleaded before the IACtHR to establish the illegality of that law in order to support the Peruvian democratic transition. The Court did so by declaring that the law lacked legal effects.

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[153] Christoph Grabenwarter, *Standard-Setting in the Spirit of the European Constitutional Heritage*, in THIRTY-YEAR QUEST FOR DEMOCRACY THROUGH LAW at 257 (2020).

[154] Opinion of Advocate General Bobek, Asociaţia 'Forumul Judecătorilor din România', Joined Cases C-83, 127, 195, 291 & 355/19, EU:C:2020:746, ¶ 170; Opinion of Advocate General Hogan, Repubblika, Case C-896/19, EU:C:2020:1055, ¶ 88.

[155] See e.g. Opinion of Advocate General Cruz Villalón, Gauweiler, Case C-62/14, EU:C:2015:7, ¶ 61. There is a general agreement on this point, see e.g. ANDREAS VOßKUHLE, THE IDEA OF THE EUROPEAN COMMUNITY OF VALUES at 114 (2018).

[156] See e.g. Sergio Bartole, *Comparative Constitutional Law – an Indispensable Tool for the Creation of Transnational Law*, 13 EUR. CONST. L. REV. 601 (2017).

[157] IACtHR, Advisory Opinion of November 24, 2017, OC-24/17, Series A, No. 24.

[158] IACtHR, *Barrios Altos v. Peru,* Decision of 14 March 2001, Series C, No. 75.

CONCLUSION

We suggest conceiving the Court's mobilization of Article 2 TEU in terms of transformative constitutionalism. Such a framing provides a constructive attitude towards court-driven transformations of society. Against this backdrop, the Court can support democratic change and transitions in Member States that suffer from systemic deficiencies. This support can take two forms. First, the Court can insist on the essential preconditions for democratic elections. In particular, it can review whether the Member States observe the essence of Charter rights, such as the freedom of expression, media and academia, and other democratic standards protected under Article 2 TEU in combination with Article 11 of the Charter or Article 10(1) and (2) TEU. Second, the Court can support newly elected governments in leading their country back to liberal democracy, for instance, by removing perpetrators from a packed judiciary or by breaking partisan constitutional entrenchments.

Is all this legal science fiction? It is certainly not legal practice yet. However, EU law has always been a dynamic legal order, responding to the challenges of the time by creative lawyering. While surely innovative, our proposals remain in line with Europe's constitutional framework and within the CJEU's mandate. Whether they make for good law is for others to decide.