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UPHOLDING THE RULE OF LAW IN THE MEMBER STATES: WHAT ROLE FOR THE EU?

INSTITUTE FOR EUROPEAN LAW
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Elise Muir, Piet Van Nuffel, Geert De Baere[*]

* The three authors are professors at the Institute for European Law, KU Leuven. All views are personal and cannot be ascribed to the respective institutions to which the second and third author belong (European Commission resp. General Court of the EU). The authors are very grateful to Serena Menzione, Sara van Steyvoort and Ilaria Gambardella for most valuable support in the preliminary stages that have led to the preparation of this Special Issue. We would also like to thank the Institute's (former) members who took part as discussants in the event on which this paper builds: Nathan Cambien, Elke Cloots, Tim Corthaut, Marlies Desomer, Petra Foubert, Kathleen Gutman, Jacques Steenbergen, Jan Vanhamme and Amaryllis Verhoeven. This Editorial is part of the RESHUFFLE research project hosted by the Institute for European Law of KU Leuven under the direction of Prof. Elise Muir, and supported by the European Research Council (European Union's Horizon 2020 research and innovation programme, grant agreement No 851621).

INTRODUCTION

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

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

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

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

[2] Ibid. p. 1.

[3] Art. 2 TEU.

[4] Eg. Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, p. 94.

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

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

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

THE RULE OF LAW IN EU LAW

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

Although the rule of law has been explicitly incorporated into the EU Treaty only since the Maastricht Treaty, the Court of Justice had already confirmed in its 1986 judgment in *Les Verts* – with as reporting judge René Joliet, for whom Lenaerts clerked as a legal secretary – that the then European Economic Community was ‘a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.’[10] Since that landmark judgment, the Court has defined the EU as ‘a union based on the rule of law in which individuals have the right to challenge before the courts the legality

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

[8] E.g. ‘Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.’ (Hungary v European Parliament and Council of the European Union (Conditionality Regulation), C-156/21, EU:C:2022:97, ¶ 232). Koen Lenaerts was President of the Court of Justice and presided over the Full Court that delivered the ruling.

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

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

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

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

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

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

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

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

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

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

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

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

ACTIVATING EU ORGANS TO RESPOND TO AN EXISTENTIAL THREAT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, p. 94.

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

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

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

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

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

BRIDGING THE GAP: A COLLECTIVE ENDEAVOR

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The rule of law 'aims to protect citizens from arbitrariness and abuse of power by those who govern. It intends to limit the exercise of power, to ensure that power is exercised in a just and fair manner, and to the benefit of the many, and that all governed under the law are guaranteed equal treatment, independent of their political influence or status.' After further fleshing out the key features of the concept, the author observes that the rule of law cannot be reduced to one of its sub-components, such as the role of courts or rules of the law themselves. Instead, to achieve its aim, the rule of law requires the existence of a shared and deep commitment by all those involved as part of a 'living culture' permeating the polity concerned.

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

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

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

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

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

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

[40] Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final; and Commission Recommendation (EU) 2022/1634 of 16 September 2022 on internal safeguards for editorial independence and ownership transparency in the media sector C/2022/6536.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BRINGING THE EU LEGISLATOR ON BOARD

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

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

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

[59] Quoted above.

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

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

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

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

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

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

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

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

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

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

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

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

ON CHECKS AND BALANCES: THE RULE OF LAW WITHIN THE EU

Koen Lenaerts[*]

The EU is, first and foremost, a 'Union of values'.[1] Those values are contained in Article 2 TEU and stand at the apex of the EU's legal order.[2] As the Court of Justice of the European Union (the 'Court of Justice') has put it, 'compliance by a Member State with [those] values … is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State'.[3]

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[1] Koen Lenaerts, *The European Union as a Union of Democracies, Justice and Rights*, INTERNATIONAL COMPARATIVE JURISPRUDENCE 132, 136 (2017). See also Armin von Bogdandy, *Towards a Tyranny of Values ?*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES 73, 79 (Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski & Matthias Schmidt eds, 2021) who uses the expression 'community of values'.

[2] Lucia S. Rossi, *La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 639 (2020).

[3] See, e.g., Repubblika, Case C-896/19, EU:C:2021:311, ¶ 63; Asociaţia 'Forumul Judecătorilor din România' and Others, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, ¶ 162; Euro Box Promotion and Others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, ¶ 162, Hungary v. Parliament and Council, Case C-156/21, EU:C:2022:97, ¶ 126, and Poland v. Parliament and Council, Case C-157/21, EU:C:2022:98, ¶ 144.

That is the reason why the Court of Justice has recently held that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which … are an integral part of the very identity of the EU as a common legal order, values which are given concrete expression in principles comprising legally binding obligations for the Member States'.[4]

The EU is a common legal order because the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are part of our inheritance as Europeans, and capture the true meaning behind the expression 'an ever closer union among the peoples of Europe'.[5] Those values are shared and cherished by 'the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'.[6]

Writing extrajudicially,[7] I have stressed the fact that there is an unbreakable link between those founding values.[8] Two examples taken from the case law of the Court of Justice may illustrate that point.

In the so-called *Conditionality Judgments*, the Court of Justice dismissed as unfounded two annulment actions brought respectively by Hungary and Poland against Regulation 2020/2092 establishing a horizontal conditionality mechanism.[9] In so doing, it observed that in the context of the EU budget there is a clear link between respect for the rule of law and solidarity, which are both mentioned in Article 2 TEU. That link exists because as 'one of the principal instruments for giving practical effect … to the principle of solidarity',[10] the efficient implementation of the EU budget requires respect for the rule of law. Otherwise, there would be 'no guarantee that expenditure covered by the [EU] budget satisfies

[4] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶¶ 127 and 232, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶¶ 145 and 264. See, in this regard, Marek Safjan, *Rule of Law and the Future of Europe*, IL DIRITTO DELL'UNIONE EUROPEA 425 (2019), at 437-438, and von Bogdandy, *supra* note 1, at 86 (who observes that '[the] most important path to condensing the values lies in connecting these values to fundamental rights and the well-established principles of the common constitutional traditions'). See also Armin von Bogdandy & Luke D. Spieker, *Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions*, COLUMBIA JOURNAL OF EUROPEAN LAW (*forthcoming*) (who examine, *inter alia*, the question whether Article 2 TEU is a self-standing provision).

[5] See Preamble to the TEU.

[6] See Article 2 TEU.

[7] Koen Lenaerts, *New Horizons for the Rule of Law Within the EU*, 21 GERMAN LAW JOURNAL 29, 34 (2020), and *The Two Dimensions of Judicial Independence in the EU Legal Order*, *in* FAIR TRIAL: REGIONAL AND INTERNATIONAL PERSPECTIVES/PROCÈS ÉQUITABLE: PERSPECTIVES RÉGIONALES ET INTERNATIONALES. LIBER AMICORUM LINOS-ALEXANDRE SICILIANOS, 333, 348 (Lubarda Branko, Iulia Motoc, Paulo Pinto de Albuquerque, Robert Spano & Maria Tsirli eds., 2020).

[8] See, in this regard, the Preamble to the Charter of Fundamental Rights of the European Union (the 'Charter'), which states that those values are 'indivisible [and] universal'.

[9] Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, (2020) O.J. (L 433I) 1, and corrigendum (2021) O.J. (L 373) 94 (EU, Euratom).

[10] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 129, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 147.

all the financing conditions laid down by EU law and therefore meets the objectives pursued by the [EU] when it finances such expenditure'.[11]

Similarly, in order to prevent the political majority of the moment from becoming the tyranny of tomorrow and to ensure liberty and justice for all, fundamental rights and the rule of law must be upheld.[12] The rule of law, democratic principles and the protection of fundamental rights are deeply intertwined so that one cannot exist without the other two.[13] For example, in *Commission v. Hungary (Transparency of association)*,[14] the Court of Justice found that restrictions imposed by Hungary on the financing of civil organisations by persons established outside that Member State did not respect the right to freedom of association enshrined in Article 12(1) of the Charter, which is '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'.[15] By holding that Hungary had failed to fulfil its obligations under that provision of the Charter, the Court of Justice was also upholding the rule of law and protecting the value of democracy.

Moreover, those two examples show that the protection of the values contained in Article 2 TEU is not limited to what some have referred as the 'nuclear option' laid down in Article 7 TEU.[16] On the contrary, as the Court of Justice has put it, 'numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, impose penalties for breaches of the values laid down in Article 2 TEU committed in a Member State'.[17]

As a matter of fact, the value of respect for the rule of law was upheld by the Court of Justice long before Article 7 TEU found its way into the Treaties. Suffice it to refer to the landmark judgment in *Les Verts*,[18] whose reporting judge was René Joliet and for whom I worked as *référendaire* during that time. That judgment is

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[11] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 131, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 149.

[12] Siniša Rodin, *Liberal Constitutionalism, Rule of Law and Revolution by Other Means*, IL DIRITTO DELL'UNIONE EUROPEA 203, 244 (2021) (who eloquently states that '[the] role [of the judiciary] is to secure democratic decision making while protecting the weaker side, without jeopardizing fundamental constitutional choices').

[13] The EU legislature has itself recognized that link. See recital 6 of Regulation 2020/2092, *supra* note 9, which states that '[w]hile there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality and respect for human rights. Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa'.

[14] Commission v. Hungary (Transparency of association), Case C-78/18, EU:C:2020:476.

[15] *Id*. ¶ 112. It is true that Article 2 TEU is not mentioned in that judgment. This is due to the fact that the Commission did not refer to that Treaty provision in the dispositive part of its application. That said, the link between those three values underpins, albeit implicitly, the rationale of the judgment.

[16] José Manuel Durão Barroso, 'State of the Union 2012 Address', Plenary session of the European Parliament/Strasbourg, 12 September 2012, available at: <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_596>

[17] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 159, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 196. See Rossi, *supra* note 2, at 655, and von Bogdandy, *supra* note 1, at 84.

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

crucial as it captures the essence of the rule of law, i.e. the basic ideal that neither the EU institutions nor the Member States are above the law.[19] As the EU is a 'Union based on the rule of law',[20] it establishes a multilevel system of governance of *laws*, not *men*. That is nothing new, nor unique to European integration. 'The rule of law is the backbone of any modern democratic society'.[21] In the EU legal order, the value of the rule of law is protected, in particular, by Article 19 TEU and by Articles 47 to 50 of the Charter, contained in Title VI, entitled 'Justice'.[22]

As the Court of Justice ruled in the *Conditionality Judgments*, '[the] principles of the rule of law, as developed in the case-law …, are thus recognised and specified in the [EU] legal order … and have their source in common values which are also recognised and applied by the Member States in their own legal systems'.[23] In light of that case law, those principles may be examined from three different perspectives.[24]

From the first perspective, in the EU legal order, the rule of law relates to the principle of legality, according to which the exercise of public power must be grounded in a legal basis,[25] and not give rise to arbitrariness.[26] In addition, EU law must be sufficiently clear so as to allow citizens to predict the consequences of their actions,[27] and the decision-making process leading to the adoption of EU legislation must be underpinned by democratic principles (such as transparency, accountability

[19] *Id*. ¶ 23, where the Court of Justice famously held that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.'

[20] See, e.g., Associação Sindical dos Juízes Portugueses, Case C-64/16, EU:C:2018:117, ¶ 31 and the case law cited. See also LM v. Minister for Justice and Equality (Deficiencies in the system of justice), Case C-216/18 PPU, EU:C:2018:586, ¶ 49.

[21] European Commission, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final.

[22] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 160, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 195.

[23] See, in this regard, *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 236, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 290.

[24] It is worth pointing out that the EU legislature has defined, for the purposes of Regulation 2020/2092, *supra* note 9, the notion of 'rule of law' in Article 2(a) of that regulation. See, in this regard, *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 236, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 290, where the Court of Justice noted that 'while it is true that Article 2(a) of [that] regulation does not set out in detail the principles of the rule of law that it mentions, nevertheless recital 3 of that regulation notes that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection and separation of powers, referred to in that provision, have been the subject of extensive case-law of the Court. The same is true of the principles of equality before the law and non-discrimination'. This means, in essence, that this provision is to be interpreted in light of that case law and in keeping with Article 2 TEU.

[25] Knauf Gips v. Commission, Case C-407/08 P, EU:C:2010:389, ¶ 91. Article 52(1) of the Charter requires that any limitation on the exercise of a fundamental right must be 'provided by law', 'which implies that the legal basis which permits the interference with that right must itself define, clearly and precisely, the scope of the limitation on its exercise'. See, e.g., WebMindLicenses, Case C-419/14, EU:C:2015:832, ¶ 81; Opinion 1/15 (EU-Canada PNR Agreement), EU:C:2017:592, ¶ 139; and Facebook Ireland and Schrems, Case C-311/18, EU: C:2020:559, ¶¶ 175 and 176.

[26] Al Chodor, Case C-528/15, EU:C:2017:213, ¶ 43, and Deutsche Umwelthilfe, C-752/18, EU:C:2019:1114, ¶ 48.

[27] See, e.g., Recorded Artists Actors Performers, Case C-265/19, EU:C:2020:677 ¶¶ 86-87.

and pluralism).[28] Moreover, the rule of law within the EU is not an 'empty vessel' in which all norms regardless of their content may 'come on board'. On the contrary, in the EU legal order substance matters and respect for the rule of law requires the entire body of EU law to comply with the values on which the EU is founded,[29] such as respect for fundamental rights.[30]

From the second perspective, the rule of law within the EU focuses on the proper administration of justice.[31] That focus is, in my view, threefold, since it looks at *how* one may have access to justice, *how* justice is served and *how* it is enforced. To begin with, respect for the rule of law implies that for every EU right, there must be an effective remedy ('ubi jus ibi remedium').[32] A remedy may only be effective where individuals have access to justice,[33] and enjoy the full protection of their rights, obtaining, as the case may be, interim,[34] injunctive,[35] declaratory,[36] and/or monetary relief.[37] Access to justice does not mean, however, that Article 47 of the Charter may confer jurisdiction on the Court of Justice, where the Treaties exclude it.[38] That said, respect for the rule of law does require such an exclusion to be interpreted restrictively, as the case law relating to the CFSP reveals.[39] In addition, the extent of the financial risk of bringing judicial proceedings may not be such as to deter individuals from initiating them. In Opinion 1/17, for example, the Court of Justice found that the CETA was, *inter alia*, compatible with EU law in so far as the Commission and the Council had given a commitment to ensure that the envisaged

[28] See, e.g, Council v. Access Info Europe, Case C-280/11 P, EU:C:2013:671, ¶ 33. (holding that '[o]penness [when the Council acts in its legislative capacity] contributes to strengthening democracy by enabling citizens to scrutinise all the information which has formed the basis for a legislative act. The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights').

[29] See Article 2 TEU.

[30] Kadi and Al Barakaat International Foundation v. Council and Commission, Joined Cases C-402/05 P and C-415/05 P, EU:C:2008:461, ¶¶ 281-285.

[31] See Sacha Prechal, *Effective Judicial Protection: some recent developments – moving to the essence*, 13 REVIEW OF EUROPEAN ADMINISTRATIVE LAW 175 (2020).

[32] See Rosneft, Case C-72/15, EU: C:2017:236, ¶ 73, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, ¶ 35, and Bank Refah Kargaran v. Council, Case C-134/19 P, EU:C:2020:793, ¶ 36 (holding that '[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law').

[33] DEB, Case C-279/09, EU:C:2010:811. See also Opinion of Advocate General Cruz Villalón in Joined Cases Gbagbo and Others v. Council, C-478/11 P to C-482/11 P, EU:C:2012:831, ¶ 72 (holding that 'since the Union is clearly a community based on the rule of law, that system must respond to the demands inherent in access to justice, as a necessary part of the right to effective judicial protection, now guaranteed by Article 47 of the Charter').

[34] According to settled case law, 'a national court seised of a dispute governed by [EU] law must be in a position to grant interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under European Union law'. See, in this regard, Factortame and Others, Case C-213/89, EU:C:1990:257, ¶ 21; Križan and Others, Case C-416/10, EU: C:2013:8, ¶ 107, and Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság , Joined Cases C-924/19 PPU and C-925/19 PPU, EU: C:2020:367, ¶ 29.

[35] See, e.g., UPC Telekabel Wien, Case C-314/12, EU: C:2014:192, and *Deutsche Umwelthilfe*, EU: C:2019:1114.

[36] See, e.g., Braathens Regional Aviation, Case C-30/19, EU:C:2021:269.

[37] Brasserie du pêcheur and Factortame, Joined Cases C-46/93 and C-48/93, EU:C:1996:79, ¶¶ 20, 39 and 52, and Tomášová, Case C-168/15, EU: C:2016:602, ¶ 18 and the case law cited.

[38] *Rosneft*, EU:C:2017:236, ¶ 74.

[39] *Id*. See also Bank Refah Kargaran v. Council, Case C-134/19 P, EU:C:2020:793, ¶ 32.

CETA tribunals would be financially accessible by small and medium-sized investors so as to meet the requirements of Article 47 of the Charter.[40]

Next, as the Court of Justice famously held in *Associação Sindical dos Juízes Portugueses*, it is for the Member States to provide effective judicial protection of EU rights, which may only be provided by courts that are independent.[41] That requirement, which 'is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial', [42] both rights being enshrined in Article 47 of the Charter of Fundamental Rights of the EU (the 'Charter'). In the EU legal order, the concept of judicial independence, as developed in the seminal *Wilson* judgment,[43] has both an internal and an external component. Internally, judicial independence is intended to ensure a level playing field for the parties to proceedings and for their competing interests. In other words, independence requires courts to be impartial.[44] Externally, judicial independence draws the dividing line between the political process and the courts. Courts must be shielded from any external influence or pressure that might jeopardise the independent judgement of their members as regards proceedings before them. Ultimately, the principle of judicial independence seeks to exclude any 'political control over the content of judicial decisions'.[45]

Moreover, for the purposes of the fundamental right to a fair trial, within the meaning of Article 47 of the Charter, the Court of Justice has highlighted the importance of the links that exist 'between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law'.[46] In particular, regarding the judicial appointment procedure, those links exist because that procedure constitutes an inherent element of the concept of a 'tribunal established by law', whilst also being a factor by which the independence of the judges appointed 'may be measured'.[47] Those two guarantees 'seek to observe the fundamental principles of the rule of law and the separation of powers', both of which are common to the Member States in a society in which, *inter alia*, justice prevails.[48]

In addition, public authorities must not call into question the position taken by a court in a final decision. As the Court of Justice held in *Torubarov*, 'the right to an effective remedy would be illusory if a Member State's legal system were to allow a

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[40] Opinion 1/17 (EU-Canada CET Agreement), EU:C:2019:341, ¶ 218.

[41] *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, ¶ 41; *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, ¶ 53, and Commission v. Poland (Independence of the Supreme Court), Case C-619/18, EU:C:2019:531, ¶ 57.

[42] *Commission v. Poland (Independence of the ordinary courts)*, EU:C:2019:924, ¶ 106 and the case law cited.

[43] Wilson, Case C-506/04, EU:C:2006:587, ¶¶ 49-52.

[44] Banco de Santander, Case C-274/14, EU:C:2020:17, ¶¶57-63.

[45] *Asociația 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, ¶ 198 and case law cited.

[46] Openbaar Ministerie (Tribunal established by law in the issuing Member State), Joined Cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100, ¶ 56.

[47] *Id.*, ¶ 57.

[48] W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), Case C-487/19, EU:C:2021:798, ¶ 127 and case law cited.

final, binding judicial decision to remain inoperative to the detriment of one party'.[49] In the same way, 'the fact that the public authorities do not comply with a final, enforceable judicial decision', the Court wrote in the seminal *Deutsche Umwelthilfe*, 'deprives [Article 47 of the Charter] of all useful effect'.[50] In the EU legal order, the principle of finality of judgments also applies to those issued by the Court of Justice. Accordingly, when it comes to the interpretation of EU law, the Court of Justice has the *final* say,[51] and when it comes to the validity of that law, it has the *only* say.[52] Otherwise, if public authorities, in general, and national courts, in particular, were to second-guess the interpretation of EU law put forward by the Court of Justice, the rule of law within the EU would become no more than the rule of lawlessness.[53]

From the third and last perspective, respect for the rule of law within the EU implies that both the EU institutions and the Member States adopt safeguards in order to protect the EU's constitutional structure. Seen in this light, the rule of law focuses on protecting the institutional design and the structured network of legal norms provided for by the Treaties.[54] The principle of mutual trust illustrates that point. Since by virtue of that principle, the Member States are deemed equally committed to respecting the values on which the EU is founded, including respect for the rule of law, it enables the establishment and proper functioning of an Area of Freedom, Security and Justice (the 'AFSJ').[55] National measures that call into question the rule of law within the EU undermine that mutual trust, giving rise to the fragmentation of the AFSJ.

Needless to say, those three perspectives overlap in practice. For example, laws that adversely affect the independence of national courts open the door to the arbitrary exercise of public power, undermine the proper administration of justice and call into question the uniform interpretation and application of EU law as well as the principle of mutual trust. Such overlapping can also be found in the normative content of Articles 19(1) TEU, 267 TFEU and 47 of the Charter.[56] In relation to

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[49] Torubarov, Case C-556/17, EU:C:2019:626, ¶ 57.

[50] *Deutsche Umwelthilfe*, EU: C:2019:1114, ¶ 37.

[51] See, in this regard, Republic of Moldova, Case C-741/19, EU:C:2021:655, ¶ 45, and RS (Effects of the decisions of a constitutional court), Case C-430/21, EU:C:2022:99, ¶ 52.

[52] *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 71.

[53] See, on this point, Koen Lenaerts, *No Member State is More Equal than Others*, in GERMAN LEGAL HEGEMONY? MPIL RESEARCH PAPER SERIES no. 2020-43, 37 (Armin von Bogdandy and Anne Peters eds, 2020). See also Opinion of Advocate General Tanchev in A.B. and Others (Appointment of judges to the Supreme Court – Actions), Case C-824/18, EU:C:2020:1053, ¶¶ 80-84.

[54] For a structural understanding of rule of law, in general, and of judicial independence, in particular, see Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346. See also Panagiotis Zinonos, *Judicial Independence & National Judges in the Recent Case Law of the Court of Justice*, 25 EUROPEAN PUBLIC LAW 615 (2019); Aida Torres Pérez, *From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence*, 27 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 105, 111 (2020), and von Bogdandy, *supra* note 1, at 80.

[55] *Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 35 and the case law cited.

[56] See Opinion of Advocate General Tanchev in Commission v. Poland (Disciplinary Regime for Judges), Case C-791/19, EU:C:2021:366, ¶¶ 69, 71 and 72 (holding that 'there is a "constitutional passerelle" between the second subparagraph of Article 19(1) TEU and Article 47 of the Charter and the case-law concerning them inevitably intersects, given that those provisions share common legal sources. Thus, the rights covered by each are bound to overlap, and the second subparagraph of Article 19(1) TEU

those provisions, the Court of Justice has engaged in a cross-fertilisation of its case law when determining the meaning of the principle of judicial independence.[57] This is so despite the fact that those provisions do not have the same scope of application, and cover different dimensions of that principle.

As the title of my contribution reveals, I shall argue that the Court of Justice has interpreted the rule of law within the EU in keeping with the checks and balances laid down in the Treaties. To that end, my contribution is divided into two parts. Part I highlights the structural considerations that played an essential role in the seminal judgments of the Court of Justice *Associação Sindical dos Juízes Portugueses*,[58] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*,[59] *Commission v. Poland (Independence of the Supreme Court)*,[60] and *Miasto Łowicz*.[61] It posits that upholding the rule of law within the EU serves to protect the EU's constitutional structure in general and the EU's judicial architecture in particular. At the same time, respect for the rule of law also means that the Court of Justice may not overstep the limits of its jurisdiction, but must actively enforce those limits. Part II examines to what extent upholding the rule of law within the EU allows room for diversity. In my view, the rule of law within the EU is not 'one rule to rule them all'. Each Member State has its own understanding of what respect for the rule of law exactly means, and rightly so.[62] However, in order to fit in with the European integration project,[63] the national understanding of the rule of law is 'circumscribed' by the contents of the rule of law at EU level.[64] These contents do not militate in favour of a single, specific constitutional model, but limit themselves to providing a 'framework of reference' compliance with which protects the values on which the EU is founded: such a framework favours mutual trust among the Member States, and enables the smooth interlocking of legal orders. It is a prerequisite for the creation and proper functioning of an area without internal frontiers where citizens may move freely and securely. Finally, some concluding remarks support the contention that if Europeans are to reach a new frontier in their quest for an ever-

includes, but is not limited to, the obligation to have independent and impartial courts'. In his view, drawing from the content of Articles 47 and 48 of the Charter, the latter Treaty provision includes the right to a court established by law, the right to have a case examined within a reasonable time and the rights of the defence).

[57] This was made explicitly clear by the Court in A.B. and Others (Appointment of judges to the Supreme Court – Actions), Case C-824/18, EU:C:2021:153, ¶ 143 (holding that '[the] second subparagraph of Article 19(1) TEU requires Member States to provide remedies that are sufficient to ensure effective legal protection, within the meaning in particular of Article 47 of the Charter, in the fields covered by EU law …, meaning that the latter provision must be duly taken into consideration for the purposes of interpreting the second subparagraph of Article 19(1) TEU').

[58] *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117

[59] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586.

[60] *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

[61] Miasto Łowicz and Prokurator Generalny, Joined Cases C-558/18 and C-563/18, EU:C:2020:234.

[62] *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 43, and *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 229 and the case-law cited. For a comparative law study of the meaning of the rule of law, see Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 SOUTHERN CALIFORNIA LAW REVIEW 1307 (2001).

[63] *Repubblika*, EU:C:2021:311, ¶ 63.

[64] This is known in French academia as « *la théorie de l'encadrement* ». For an illustration of how this theory works in the EU legal order, see Koen Lenaerts, *Federalism and the Rule of Law: Perspectives from the European Court of Justice*, 33 FORDHAM INTERNATIONAL LAW JOURNAL 1338 (2011).

closer union, *integration through the rule of law* is the only way forward.[65] Crucially, this means that authoritarian tendencies at national level have simply no room in the EU legal order.[66]

I. STRUCTURALISM AND THE RULE OF LAW WITHIN THE EU

A. National courts as an essential building block of the EU's constitutional structure

As the Court of Justice observed in Opinion 2/13, the EU has its own constitutional structure that enables it to uphold the values on which it is founded, and to attain the objectives set out in the Treaties. This constitutional structure not only includes the EU institutional design but also 'a [network] of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other'.[67]

As an essential component of that constitutional structure, the EU's judicial architecture serves to secure the operation of the principles of effective judicial protection and of equality before the law. Both principles are an integral part of the rule of law within the EU.[68] The EU's judicial architecture further seeks to facilitate the operation of the twin principles of mutual trust and mutual recognition. That architecture includes not only the EU Courts (the Court of Justice and the General Court) but also the courts of the Member States, which are the courts of general jurisdiction for the application and enforcement of EU law. National courts are therefore an essential building block of the EU's constitutional structure,[69] playing three vital roles within it. First and foremost, they are to provide individuals with effective judicial protection of their EU rights. It is therefore for the Member States, in accordance with Article 19(1) TEU, to provide 'remedies sufficient to ensure effective legal protection in the fields covered by Union law'. Second, national courts in cooperation with the Court of Justice secure the uniform interpretation and application of EU law and in so doing, they guarantee that EU law has the same meaning throughout the Member States. Since there is no equality before EU law without such uniform interpretation and application, Member States must refrain from adopting measures that may undermine the operation of the preliminary reference mechanism,[70] laid down in Article 267 TFEU, which is the 'keystone of the EU judicial system'.[71] Third and last, in order to establish an AFSJ which guarantees the free movement of judicial decisions, national courts must trust each

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[65] Lenaerts, *New Horizons for the Rule of Law Within the EU*, *supra* note 7, at 34.

[66] Rodin, *supra* note 12, at 230.

[67] Opinion 2/13 (Accession of the European Union to the ECHR), EU:C:2014:2454, ¶ 167. *See* K. Lenaerts & José A. Gutiérrez-Fons, *A Constitutional Perspective*, OXFORD PRINCIPLES OF EUROPEAN UNION LAW, Vol. 1, The European Union Legal Order 1034 (Takis Tridimas, Robert Schütze eds, 2018).

[68] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 229, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 324.

[69] Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346.

[70] A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, ¶¶ 56-57.

[71] *Id*. 176. See also Achmea, Case C-284/16, EU:C:2018:158, ¶ 37, and XC and Others, Case C-234/17, EU:C:2018:853, ¶ 41

other in that they are equally committed to providing effective judicial protection to the EU rights.

Where a Member State adopts measures that undermine the independence of national courts, the EU judicial architecture is compromised and so is the rule of law within the EU. *Without judicial independence*, there is no effective judicial protection of EU rights 'which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded'.[72] *Without judicial independence*, a court may not engage in a dialogue based on the law – and the law only – with the Court of Justice. *Without judicial independence*, national courts stop trusting each other, leading to the fragmentation of the AFSJ.[73]

Logically, the question that arises is how EU law protects the independence of national courts and in so doing, the EU's constitutional structure. That question is examined in the following section by looking at the scope of application of the relevant provisions of EU law.

B. How is judicial independence of national courts protected under EU law

1. Protecting national judges in their institutional capacity

To begin with, Article 19(1) TEU, which gives concrete expression to the rule of law,[74] imposes on the Member States the obligation to provide for effective remedies 'in the fields covered by EU law'. Given that there is an unbreakable link between effective remedies and independent courts, Article 19(1) TEU obliges the Member States to protect the independence of their courts. Since that independence serves, in turn, to protect the integrity of the EU judicial architecture, the Court of Justice has interpreted the scope of application of Article 19(1) TEU in the light of structural considerations.

Unlike Article 51(1) of the Charter, the application of Article 19(1) TEU is not made conditional upon EU law being implemented in the case at hand. That Treaty provision applies where a particular body, which is considered to be a 'court or tribunal' within the meaning of EU law, enjoys jurisdiction over questions pertaining

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[72] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 45, *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 58, and *Commission v. Poland (Independence of ordinary courts)*, EU:C:2019:924, ¶ 106; Simpson v. Council and HG v. Commission, Case C-542/18 RX-II and C-543/18 RX II, EU:C:2020:232, ¶¶ 70 and 71; Land Hessen, Case C-272/19, EU:C:2020:535, ¶ 45; Openbaar Ministerie (Independence of the issuing judicial authority), Joined Cases C-354/20 PPU et C-412/20 PPU, EU:C:2020:1033, ¶ 39; *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 108, and Prokuratura Rejonowa w Mińsku Mazowieckim and Others, Joined Cases C-748/19 to C-754/19, EU:C:2021:931, ¶ 66.

[73] The Court of Justice has summarised those three aspects of judicial independence in its case law. See *Land Hessen*, EU:C:2020:535, ¶ 45.

[74] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, ¶ 50 and the case law cited. See also *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 47, and *Commission v. Poland (Independence of ordinary courts)*, EU:C:2019:924, ¶ 98.

to the interpretation and application of EU law.[75] If that is the case, Article 19(1) TEU applies, protecting the independence of such a court. It follows that this Treaty provision protects the independence of Member State courts *at all times*. That is because only such permanent protection may prevent the entire edifice of EU judicial remedies from collapsing.[76]

In particular, unlike Article 47 of the Charter, the scope of application of Article 19(1) TEU is not limited to protecting the rights that EU law confers on individuals.[77] Acting in an individual capacity (as the holder of EU rights), a judge, just like any person, has the right to effective judicial protection of his or her EU rights before 'an independent judge or tribunal' as provided for by Article 47 of the Charter. For example, where a judge considers that he or she has been victim of discrimination on grounds of age, he or she may bring an action in the competent court, which must be independent.[78] By contrast, when bringing an action in an institutional capacity, a judge is not acting as the holder of EU rights but as a body who wields EU judicial power (as the 'arm of EU law'). Where the independence of such a judge is being undermined by executive or legislative action, he or she may bring proceedings before another court on the ground that such course of action is contrary to Article 19(1) TEU. This is so regardless of whether his or her EU rights are directly at issue.[79]

That said, whilst Article 47 of the Charter and Article 19(1) TEU cover different dimensions of judicial independence (the first as fundamental right, the second as a concrete expression of the rule of law),[80] both provisions give the same normative content to it.[81] First, they both cover internal and external independence. Both provisions also cover the guarantee of access to a tribunal previously established by law.[82] Second, both provisions apply with regard to all rules that may adversely affect the independence of Member State courts. Those rules relate *inter alia* to the

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[75] *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117, ¶ 29, and *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 82 and the case law cited.

[76] Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 346.

[77] *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶¶ 87-88. *Repubblika*, EU:C:2021:311, ¶ 41.

[78] For example, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, ¶ 79, the Court of Justice applied Article 47 of the Charter since the applicants in the main proceedings, who were two judges of the Polish Supreme Court, 'relied, inter alia, on infringements to their detriment of the prohibition of discrimination in employment on the ground of age, which is provided for by Directive 2000/78'. See, in the same way, Commission v. Hungary, Case C 286/12, EU:C:2012:687.

[79] See, for example, *Associação Sindical dos Juízes Portugueses*, EU:C:2018:117.

[80] See, in this regard, Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7. In *Repubblika*, EU:C:2021:311, ¶ 52, the Court of Justice explicitly referred to those two dimensions. It held that 'while Article 47 of the Charter helps to ensure respect for the right to effective judicial protection of any individual relying, in a given case, on a right which he or she derives from EU law, the second subparagraph of Article 19(1) TEU seeks to ensure that the system of legal remedies established by each Member State guarantees effective judicial protection in the fields covered by EU law'.

[81] Prechal, *supra* note 31, at 179.

[82] W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798, ¶ 122.

composition of a 'court or tribunal',[83] within the meaning of EU law, and the appointment, length of service and grounds for abstention, recusal and dismissal of its members. In particular, they may relate to disciplinary matters,[84] secondments,[85] and involuntary transfers.[86] Third, the Court of Justice has explicitly stated that the interpretation of Article 19 TEU draws on that of Article 47 of the Charter.[87] Fourth and last, both provisions produce direct effect.[88]

As to the procedural avenues for invoking Article 19(1) TEU before the Court of Justice, a distinction must be drawn between infringement actions and the preliminary reference mechanism. In the context of infringement actions, the application of Article 19(1) TEU only requires the independence of the courts of the defendant Member State which may be called upon to rule on questions relating to the interpretation of EU law, to be adversely affected by the national measure(s) or practice(s) challenged by the Commission (or another Member State). If that is the case, the Court of Justice will find that Article 19(1) TEU applies and proceed to examine the merits of the action.[89] Given that infringement actions seek to determine whether the defendant Member State infringes EU law in general, there is no need for there to be a relevant dispute before the national courts.[90]

Article 19(1) TEU may not, however, be construed in such a way as to change the function of the Court of Justice in the context of the preliminary reference mechanism, which 'is … to help the referring court to resolve the specific dispute pending before that court'.[91] As the Court of Justice observed in *Miasto Łowicz*, access to the preliminary reference mechanism is made conditional upon the existence of a connecting factor between the interpretation of Article 19(1) TEU sought by the referring court and the dispute before it.[92] That connecting factor may be of a substantive or procedural nature. For example, in *Associação Sindical dos Juízes Portugueses*, it was substantive since the referring court had to decide whether it annulled administrative decisions reducing the salaries of members of the Tribunal de Contas (Court of Auditors) on the ground that the national legislation providing

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[83] Both the Court of Justice and the ECtHR have ruled that the right to an independent judge or tribunal "established by the law" -- as provided for by Articles 6 ECHR and 47 of the Charter – "encompasses, by its very nature, the process of appointing judges." "[An] irregularity committed during the appointment of judges within the judicial system concerned entails an infringement of the first sentence of the second paragraph of Article 47 of the Charter." *See* Simpson v. Council and HG v. Comm'n, EU:C:2020:232, ¶¶ 73 - 75. As to the ECtHR, see Guðmundur Andri Ástráðsson v. Iceland [Grand Chamber], app. no. 26374/18, CE:ECHR:2020:1201JUD002637418, ¶ 98.

[84] *See, e.g.*, Comm'n v Poland (Disciplinary regime for judges), Case C-791/19, EU:C:2021:596, ¶ 1.

[85] *See* Prokuratura Rejonowa w Mińsku Mazowieckim and Others, EU:C:2021:931.

[86] *See* W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798.

[87] A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), ¶ 143, and *Repubblika*, EU:2021: EU:C:2021:311, ¶ 45.

[88] A.B. and Others (Appointment of judges to the Supreme Court – Actions), EU:C:2021:153, ¶ 146.

[89] *See* Comm'n v. Poland (Independence of the Supreme Court*)*, EU:C:2019:531, ¶¶ 55-59, and Comm'n v. Poland (Independence of ordinary courts), EU:C:2019:924, ¶¶ 104-107.

[90] Miasto Łowicz and Prokurator Generalny, EU:C:2020:234, ¶ 47.

[91] *Id*. *See also Repubblika*, EU:2021: EU:C:2021:311, ¶ 48.

[92] Miasto Łowicz and Prokurator Generalny, EU: C:2020:234, ¶ 48. However, see Kim L. Scheppele, *The Responsibility of the European Commission to Ensure the Rule of Law*, COLUMBIA JOURNAL OF EUROPEAN LAW (forthcoming) (who advocates a broad interpretation of that link).

for such reduction was incompatible with Article 19(1) TEU.[93] In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, that connecting factor was procedural, since the interpretation of Article 19(1) TEU was sought in order to determine the competent court for the purposes of settling disputes relating to EU law.[94] In more recent cases, the Court has declared admissible references that relate to procedural questions of national law raised *in limine litis*, before the referring court can, as required, rule on the substance of the case.[95]

Similarly, in *IS (Illegality of the order for reference)*,[96] the *Kúria* (the Supreme Court of Hungary) decided, upon an appeal brought in the interest of the law by the Prosecutor General, that a request for a preliminary ruling which had been submitted to the Court of Justice by a first instance court, sitting as a single-judge formation, was unlawful on the ground that the questions referred were not necessary for that court to give judgment, without, however, altering the legal effects of that request. Following this decision of the *Kúria*, the referring court added new questions to its initial request, asking, in essence, whether EU law was to be interpreted as opposing that decision. The Court of Justice replied in the affirmative, holding that the decision of the *Kúria* encroached upon the exclusive jurisdiction of the Court to rule on the admissibility of the questions referred for a preliminary ruling.[97] The referring court also drew the attention of the Court of Justice to the fact that disciplinary proceedings had been brought against the judge sitting as a single-judge court following the decision of the *Kúria* and on the same grounds. Accordingly, the referring judge asked whether EU law precluded those proceedings from being brought against him on the ground that he had made a reference to the Court of Justice. Hungary contested the admissibility of that question, since those disciplinary proceedings had subsequently been brought to an end. However, the Court of Justice upheld the admissibility of that question, given that the referring judge needed to know 'whether he will be able to refrain from complying with the *Kúria* decision when he rules on the substance of the case in the main proceedings without having to fear that, in so doing, the disciplinary proceedings that were brought against him, based on the *Kúria* decision, will be reopened'.[98] Thus, the referring judge needed to resolve a procedural question before being able to rule on the substance of the dispute before him.

By contrast, in *Miasto Łowicz,* that connecting factor was missing, since an answer to the questions referred by the national courts was not objectively needed for the resolution of the disputes in the main proceedings.[99] Those questions, which

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[93] Associação Sindical dos Juízes Portugueses, EU:C:2018:117, ¶ 12. See, in the same way, Escribano Vindel, C-49/18, EU:C:2019:106.

[94] A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), EU:C:2019:982, ¶¶ 99-100.

[95] See, for example, W.*Ż.* (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment), EU:C:2021:798, ¶ 94; Prokuratura Rejonowa w Mińsku Mazowieckim and Others, EU:C:2021:931, ¶ 49, and Getin Noble Bank, Case C-132/20, EU:C:2022:235, ¶ 67.

[96] IS (Illegality of the order for reference), Case C-564/19, EU:C:2021:949, ¶ 148.

[97] *Id*. ¶ 72.

[98] *Id*. ¶ 86.

[99] See also order of 3 September 2020, S.A.D. Maler und Anstreicher, Case C-256/19, EU:C:2020:684, ¶ 49. In that case, the referring court took the view that the case at issue in the main proceedings was not properly allocated to it. It thus asked the Court of Justice whether such allocation

were of a general nature, sought to determine whether the legislative reforms affecting the disciplinary proceedings applicable to judges called into question the principle of judicial independence within the meaning of Article 19(1) TEU. It is worth noting that the judges who made the references were, as a result of making them, the subject of an investigation prior to the possible initiation of disciplinary proceedings against them. However, the dispute in the main proceedings did not relate to that investigation which was, in any event, closed since no disciplinary misconduct was found.[100]

In my view, it is rather straightforward to establish the connecting factor between Article 19(1) TEU and the dispute in the main proceedings in cases where the judges whose independence is being threatened are parties to those proceedings. In order to ensure compliance with the rule of law, those judges must have access to justice. The Court of Justice has been categorical in that respect, holding that an independent court of law must provide them with effective remedies. Just like any other individual, a national judge – who seeks to challenge measures that he or she deems incompatible with judicial independence – has a right to an independent court or tribunal. Since Article 19(1) TEU produces direct effect, applicants may rely on that Treaty provision in order to set aside conflicting national measures. For example, in *Associação Sindical dos Juízes Portugueses*, the applicant, an association representing members of the Tribunal de Contas (Portuguese Court of Auditors), claimed before the Portuguese Supreme Administrative Court that salary-reduction measures passed by the Portuguese legislature were contrary to the principle of judicial independence. The Court of Justice held that Article 19(1) TEU applied to the case at hand, provided that the Tribunal de Contas was a court within the meaning of EU law that was called upon to interpret and apply that law. On the merits, it found, however, that the judicial independence of those members was not called into question by the salary-reduction measures at issue since those measures were of general application, proportional and temporary.

Similarly, the connecting factor is even more straightforward where the applicant, who is a judge, seeks judicial protection of his or her EU rights. In that type of situations, both Article 47 of the Charter and Article 19(1) TEU apply to the case at hand. For example, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the applicants in the main proceedings, who were judges of the Polish Supreme Court, challenged their early retirement which was brought about by the entry into force of new national legislation. They argued that that legislation was incompatible with the prohibition of non-discrimination on grounds of age set out in Directive 2000/78. Since effective judicial protection must be afforded to the rights contained in that directive, the Court of Justice held that the contested measures 'implemented EU law' within the meaning of Article 51(1) of

complied with Article 19(1) TEU. However, the Court of Justice declared the reference inadmissible, since a connecting factor between the dispute in the main proceedings and that Treaty provision was missing. Substantively, Article 19(1) TEU was not required to solve the merits of the dispute in the main proceedings. Procedurally, there was no connecting factor either: the referring court could not call into question the lawfulness of the allocation in the context of the main proceedings, but that question fell within the jurisdiction of a superior court in the event of an appeal.

[100] *See* Miasto Łowicz and Prokurator Generalny, EU: C:2020:234, ¶¶ 56-59. See *infra* notes 118 and 119, and accompanying text.

the Charter, so that Article 47 of the Charter applied to the cases at hand.[101] The Court of Justice then went on to find that Article 47 of the Charter precludes a Member State from stripping a court of its jurisdiction over disputes concerning the retirement regime applicable to judges in order to confer that jurisdiction on another court that is not independent.[102] The Court of Justice also held that the same reasoning applied in respect of Article 19(1) TEU.[103]

Conversely, the connecting factor is missing where the referring court seeks to have access to the preliminary reference mechanism in order to question, in a general fashion, whether legislative reforms comply with the principle of judicial independence, in so far as that question has no bearing on the main proceedings.[104] The reason for imposing such connecting factor lies again in structural considerations that seek to draw a clear distinction between the preliminary reference mechanism and infringement actions.

Moreover, the judgment of the Court of Justice in *Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment*),[105] suggests that the connecting factor between the interpretation of Article 19(1) TEU sought by the referring court and the dispute before it must be of a direct nature. In that case, the Court of Justice declared the reference inadmissible. It reasoned that 'the questions referred to the Court in the present case relate intrinsically to a dispute other than that in the main proceedings, to which the latter is in fact merely incidental. In those circumstances, the Court would be obliged, in order fully to determine the scope of those questions and to provide them with an appropriate answer, to have regard to the relevant factors characterising that other dispute rather than to confine itself to the configuration of the dispute in the main proceedings, as required however by Article 267 TFEU'. [106] In addition, the referring court had said itself that it had, under national law, no jurisdiction to rule on that 'other' dispute, which related to the circumstances in which a judge was appointed to the Disciplinary Chamber of the Polish Supreme Court and in which the latter judge adopted a decision designating the disciplinary court in charge of examining the disciplinary proceedings brought against the applicant.[107] It is worth noting that, in an obiter dictum, the Court of Justice pointed towards the procedural avenue that the applicant should have followed: by virtue of Article 19(1) TEU, the applicant 'could have raised before

[101] A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), EU:C:2019:982, ¶¶ 79-81.

[102] *Id*. ¶ 166.

[103] *Id*. ¶¶ 168 and 169.

[104] *See* Opinion of Advocate General Pikamäe in IS (Illegality of the order for reference), C-564/19, EU:C:2021:292.

[105] Prokurator Generalny and Others (Disciplinary Chamber of the Supreme Court - Appointment), Case C-508/19, EU:C:2022:201, ¶¶ 69 to 71.

[106] *Id*. ¶ 71. See, in this regard, *id.* ¶ 63 ('[in] the present case, … the civil action brought by the applicant in the main proceedings does indeed formally seek a declaration that a service relationship does not exist between J.M. and the Sąd Najwyższy (Supreme Court). However, the description of the dispute in the main proceedings set out in that decision makes it clear that [the applicant] challenges not so much the existence of such a contractual or administrative relationship between J.M. and the Sąd Najwyższy (Supreme Court) in their respective capacities as employee and employer, or that of rights or obligations arising from such a service relationship between the parties thereto, as the circumstances in which J.M. was appointed judge in the disciplinary chamber of that court'.)

[107] *Id*., ¶¶ 25 and 26.

that [disciplinary] court an objection alleging a possible infringement, arising from that decision, of her right to have the said dispute determined by an independent and impartial tribunal previously established by law'.[108]

That said, such connecting factor is present where national rules of procedure provide for actions that enable applicants to challenge laws directly and in an abstract fashion, without having to demonstrate any individual interest in the outcome of the proceedings. For example, in *Repubblika*, the Court of Justice declared admissible a reference made by a Maltese court in the context of an *actio popularis* brought by an association whose purpose was to promote the rule of law in Malta. This association argued that the Maltese system of appointments of judges, as provided for by the Maltese Constitution, was incompatible with Article 19(1) TEU.[109] Just like the dispute at issue in *Associação Sindical dos Juízes Portugueses*, there was a substantive connecting factor between Article 19(1) TEU and the dispute in the main proceedings since the interpretation of that Treaty provision by the Court of Justice would contribute to determining whether the *actio popularis* was to be successful or not.[110]

2. Protecting the preliminary reference mechanism

As to Article 267 TFEU, one must draw a distinction between cases where the independence of the referring court is called into question,[111] and cases where national measures interfere with the dialogue between that court and the Court of Justice and in so doing, disrespect the principle of judicial independence.

In relation to the first type of cases, compliance with the principle of judicial independence is examined as an admissibility requirement. In *Land Hessen*, the Court of Justice stated that it would only look at factors that may call into question the independence of the judges that made the reference, but not at those that are irrelevant for the case at hand.[112] For example, the referring court questioned whether 'temporary judges', i.e. civil servants with a legal background who covered temporary staff requirements in the judiciary of Land Hessen, were independent. However, 'since such judges [were] not members of the formation of the [referring] court', the Court of Justice found that the question of temporary judges to be manifestly irrelevant.[113]

Most importantly for present purposes, in *Getin Noble Bank*, the Court of Justice held that '[in] so far as a request for a preliminary ruling emanates from a national court or tribunal, it must be presumed that it satisfies [the requirements by reference to which EU law defines the notion of 'court or tribunal'], irrespective of its actual

[108] *Id*. ¶ 72.
[109] *Repubblika*, EU:2021: EU:C:2021:311, ¶ 34.
[110] *Id*., ¶ 27.
[111] I refer here to courts that form part of the judiciary of the Member State concerned, as opposed to bodies that do not form part of that judiciary and may – or may not – comply with the definition of 'court or tribunal' within the meaning of Article 267 TFEU. For example, Cf. Consorci Sanitari del Maresme, Case C-203/14, EU:C:2015:664, ¶ 17, with *Banco de Santander*, EU:C:2020:17, ¶ 50.
[112] *Land Hessen*, Case C-272/19, EU:C:2020:535, ¶¶ 46 and 47.
[113] *Id*. ¶ 49

composition'.[114] A court or tribunal that forms part of the judiciary of the Member State concerned is therefore presumed to be a 'court or tribunal' within the meaning of Article 267 TFEU. However, that presumption 'may … be rebutted where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19(1) TEU, read in the light of the second paragraph of Article 47 of the Charter'. [115] That said, the scope of that presumption is limited to the admissibility requirements under Article 267 TFEU. It does not follow from that presumption that the conditions for appointment of the judges that make up the referring court necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law.[116] Stated differently, that presumption says nothing as to whether the referring court provides effective judicial protection to the rights of the parties before it.

As to the second type of cases, it is settled case law that Article 267 TFEU confers on national courts the widest discretion in referring matters to the Court of Justice. Accordingly, national measures that curtail that discretion are incompatible with EU law.[117] Whilst declaring the reference in *Miasto Łowicz* inadmissible, the Court of Justice did send, nevertheless, a clear message regarding measures that prevent a court from using that discretion. In an obiter dictum, it recalled that Article 267 TFEU will protect any judge who is subject to disciplinary proceedings as a result of making a reference. Those disciplinary proceedings 'cannot be permitted', since not only do they interrupt the dialogue between the Court of Justice and the referring court, but also undermine the judicial independence of the latter court.[118] This obiter dictum constitutes an important development in the case law of the Court of Justice since it incorporates the discretion of the judge to make a reference into the content of the principle of judicial independence. In his Opinion in *Commission v. Poland (Disciplinary Regime for Judges)*, AG Tanchev drew on that obiter dictum, adding that the prospect of disciplinary proceedings against courts which made a reference could have a 'chilling effect' on all courts of the Member State concerned, since those courts would, in future cases, think twice before engaging in a dialogue with the Court of Justice. In his view, that prospect 'strikes at the heart of the procedure governed by Article 267 TFEU and with it, the very foundations of the Union itself'.[119]

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[114] *Getin Noble Bank*, EU:C:2022:235, ¶ 69.

[115] *Id*. ¶ 72. In Advance Pharma sp. z o.o v. Poland, app. no. 1469/20, CE:ECHR:2022:0203JUD000146920, the ECtHR found that the Civil Chamber of the Supreme Court in which the referring judge sat was not an 'independent and impartial tribunal established by law' within the meaning of Article 6 ECHR. However, whilst that judgment would have constituted a good and sufficient basis for rebutting the presumption of admissibility, it only became final on 3 May 2022, i.e. after the Court of Justice delivered its judgment in *Getin Noble Bank*, i.e. on 29 March 2022.

[116] *See Getin Noble Bank*, EU:C:2022:235, ¶ 74.

[117] *See, e.g*, Elchinov, Case C-173/09, EU:C:2010:581, ¶ 26, and XC and Others, Case C-234/17, EU:C:2018:853, ¶ 42 and the case law cited.

[118] *See Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, ¶ 59.

[119] Opinion of Advocate General Tanchev in *Commission v. Poland (Disciplinary Regime for Judges)*, EU:C:2021:366, ¶ 132.

In *IS (Illegality of the order for reference)*, the Court of Justice confirmed that line of case law. First, citing its seminal *van Gend & Loos* judgment, the Court of Justice recalled that, as regards the preliminary reference mechanism, 'the vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles [258 and 259 TFEU] to the diligence of the Commission and the Member States'.[120] Limitations on the exercise by national courts of the jurisdiction conferred on them by Article 267 TFEU would have the effect of restricting the effective judicial protection of the rights which individuals derive from EU law.[121] Second, it referred explicitly to its previous judgment in *Miasto Łowicz*, holding that judges may not be exposed to disciplinary proceedings or measures for having exercised their discretion to make a reference for a preliminary ruling to the Court.

Subsequently, the Court of Justice developed that line of case law further in *RS (Effects of the decisions of a constitutional court)*, this time in respect of national constitutional courts. It held that Article 267 TFEU, among other Treaty provisions, prohibits 'national rules or a national practice under which the ordinary courts of a Member State have no jurisdiction to examine the compatibility with EU law of national legislation which the constitutional court of that Member State has found to be consistent with a national constitutional provision that requires compliance with the principle of the primacy of EU law'.[122] The Court of Justice reasoned that those national rules or that practice would prevent the ordinary court called upon to ensure the application of EU law from itself assessing whether the legislative provisions at issue are compatible with EU law. Since in the context of that assessment, a national court may or, as the case may be, must engage in a dialogue with the Court of Justice, the national rules and practice at issue undermined the effectiveness of Article 267 TFEU. In addition, the Court of Justice found that that Treaty provision precludes disciplinary proceedings from being brought against a judge who sets aside a judgment of the constitutional court of a Member State by which that court refused to give effect to a preliminary ruling from the Court of Justice.[123]

Moreover, in *A.B. and Others. (Appointment of judges to the Supreme Court – Actions),* the Court of Justice pointed out that Article 267 TFEU does not oppose national laws that change the organisation of national courts and in so doing, repeal the legal basis on which the referring court exercises its jurisdiction. However, those changes may not produce the *specific* effects of preventing national courts from maintaining requests for a preliminary ruling that have already been made, and from repeating similar requests in the future.[124] In other words, those changes may not 'shut the door' to an ongoing dialogue between the Court of Justice and national courts, and 'lock that door' forever in relation to new similar cases.

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[120] Van Gend & Loos, Case 26/62, EU:C:1963:1, p. 13.
[121] *IS (Illegality of the order for reference)*, EU:C:2021:949, ¶ 76.
[122] *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 78.
[123] *Id.* ¶ 88.
[124] *See A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶¶ 95 and 106.

3. Mutual trust and national courts

The EU has clearly evolved beyond the internal market paradigm. Currently, it seeks to offer its citizens an AFSJ without internal frontiers, where citizens may move freely and securely. In an area without internal frontiers, the exercise of free movement should not undermine the jurisdiction of the competent national court and the effectiveness of the applicable national laws, which operate on a territorial basis. As internal frontiers disappear in Europe, the *long arm of the law* should acquire a transnational dimension, so that, for example, criminals are prevented from relying on free movement as a means of pursuing their activities with impunity. Accordingly, the authors of the EU Treaties took the view that the free movement of persons should be accompanied by the free movement of judicial decisions. By virtue of the principle of mutual recognition, judicial decisions adopted in the Member State of origin are to be recognised and enforced in the other Member States as if they were their own.

The European Arrest Warrant mechanism (the 'EAW mechanism') illustrates this point.[125] This mechanism aims to replace the multilateral system of extradition between Member States with a simplified and more effective system of surrender between judicial authorities which facilitates and accelerates judicial cooperation.[126] In that regard, the Court of Justice has held that 'while execution of the [EAW] constitutes the rule, refusal to execute is intended to be an exception which must be interpreted strictly'.[127]

It follows that, in order to establish an AFSJ, judicial cooperation in civil and criminal matters must be facilitated to the greatest extent possible. Such cooperation is based on the fundamental premise that Member State courts trust each other and see each other as equals. Thus, in the light of the principle of mutual trust, 'each of [the Member] States, save in exceptional circumstances, [is] to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law'.[128] This shows that, whilst the principle of mutual trust is of paramount importance for the creation and maintenance of the AFSJ, 'mutual trust is not to be confused with blind trust'.[129] In exceptional circumstances, that fundamental premise may be set aside.

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[125] *See* Council Framework Decision 2002/584, On the European arrest warrant and the surrender procedures between Member States, 2002 O.J. (L 190) 1 (JHA), *amended by* Council Framework Decision 2009/299 amending Framework Decisions 2002/584, 2005/214, 2006/783, 2008/909 and 2008/947, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, 2009 O.J. (L 81) 24 (JHA).

[126] *See, eg*, F, Case C-168/13 PPU, EU:C:2013:358, ¶ 57; Lanigan, Case C-237/15 PPU, EU:C:2015:474, ¶ 27; Aranyosi and Căldăraru, Joined Cases C-404/15 and C-659/15 PPU, EU:C:2016:198, ¶ 76; Poltorak, Case C-452/16 PPU, EU:C:2016:858, ¶ 15 ; and *Minister for Justice and Equality (Deficiencies in the system of justice)* EU:C:2018:586, ¶ 25.

[127] *See, eg, Tupikas*, Case C-270/17 PPU, EU:C:2017:628 ¶ 50.

[128] Opinion 2/13 (Accession of the European Union to the ECHR) EU:C:2014:2454, ¶ 192. *See* also Puig Gordi and Others, Case C-158/21, EU:C:2023:57, ¶ 93.

[129] *See* Koen Lenaerts, *La vie après l'avis: Exploring the Principle of Mutual (Yet Not Blind) Trust* 54 COMMON MARKET LAW REVIEW 805, 821 (2017).

As to the principles of mutual trust and judicial independence, two lines of case law are relevant for present purposes, both of which concern the European Arrest Warrant Framework Decision (the 'EAW Framework Decision').

a. Judicial independence and mutual trust

As to the first line of case law, in *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, the Court of Justice held that the executing judicial authority must refuse to execute an EAW where there is 'a real risk that the person [concerned] will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal'.[130] Therefore, the existence of such a real risk constitutes an 'exceptional circumstance' that limits the operation of the principles of mutual trust and mutual recognition.

In assessing the existence of that risk, the Court of Justice pointed out that the referring court must carry out a two-step examination.[131] The first step focuses on the situation of the justice system of the Member State concerned as a whole.[132] The executing judicial authority must, in the light of objective, reliable, specific and properly updated material, find that there is such a real risk on account of systemic or generalised deficiencies in the justice system of the issuing Member State. As a second step, the executing judicial authority must assess the circumstances of the case at hand. Having regard to the personal circumstances of the individual concerned, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis for the EAW, the executing judicial authority must determine whether the systemic or generalised deficiencies in the justice system of the issuing Member State are liable to call into question the independence of the court that actually issued the EAW in question. [133]

Again, one of the reasons for this two-step examination rests on structural considerations.[134] If the executing judicial authorities were entitled to refuse to execute an EAW on the sole account of systemic or generalised deficiencies in the justice system of the issuing Member State, such refusal would amount to a *de facto* suspension of the EAW mechanism for that Member State. However, the prerogatives to declare such a suspension are vested in the Council acting upon a decision of the European Council grounded in Article 7 TEU, according to which the issuing Member State has committed a serious and persistent breach of the rule of law. Whilst most scholars agree that Article 7 TEU is not an effective tool that prevents the rule of law from backsliding in the issuing Member State, the truth is that it would be wrong for the Court of Justice to change the rules of the game. Article 7 TEU is what it is and it is not for the Court of Justice but for the Member States – acting as Masters of the Treaties – to change it. Moreover, those structural

[130] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586. ¶ 59.

[131] Lenaerts, *The Two Dimensions of Judicial Independence in the EU Legal Order*, *supra* note 7, at 336 et seq. *See* also *Puig Gordi and Others*, EU:C:2023:57, ¶ 97.

[132] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586. ¶ 61.

[133] *Id*., ¶¶ 74 to 77. See infra footnotes 154 to 156 and accompanying text.

[134] The Court of Justice has also grounded the two-step assessment in the need to fight impunity. See *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033, ¶¶ 62 – 63.

considerations are also consistent with the findings of the Court of Justice in the *Conditionality Judgments*. In those two cases, it held that the EU legislature may establish procedures that seek to protect the values contained in Article 2 TEU, 'provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7 TEU'.[135] However, such a *de facto* suspension of the EAW mechanism would be incompatible with Article 7 TEU, as it would create 'a procedure parallel to that laid down by that provision'.[136]

Subsequently, the Court of Justice has put forward two additional justifications for the application of the two-step examination, despite calls from referring courts to limit their assessment to finding systemic or generalised deficiencies.[137] First, in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court recalled that the EAW mechanism seeks to combat the impunity of a requested person who is present in a territory other than that in which he or she has allegedly committed an offence. In its view, if the second step were to be abandoned, this would allow those persons to go free, 'even if there is no evidence, relating to the personal situation of those individuals, to suggest that they would run a real risk of breach of their fundamental right to a fair trial' if the EAW is executed.[138] Second, in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, the Court of Justice added that the EAW framework decision had to be interpreted not only in the light of the rights of the person concerned by the EAW but also in light of those 'of the victims of the offences concerned'. This means that a finding that the person concerned faces a real risk of breach of his or her fundamental right to a fair trial must have 'a sufficient factual basis'.[139]

Furthermore, in *Openbaar Ministerie (Tribunal established by law in the issuing Member State)*, the referring court asked, in essence, whether the two-step examination was also applicable where the fundamental right to 'a tribunal previously established by law' is at issue. To that end, it drew the attention of the Court of Justice to the fact that in the issuing Member State, the KRS – a body that proposes to the President of Poland the name of candidates for judicial office – was

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[135] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 168, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 207.

[136] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 167, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 206.

[137] In that regard, some scholars have also criticized the need for a concrete examination (the second step). See, in this regard, LAURENT PECH & DIMITRY KOCHENOV, RESPECT FOR THE RULE OF LAW IN THE CASE LAW OF THE EUROPEAN COURT OF JUSTICE 165 et seq (2021), who observe that '[it] is just not good enough to force the surrender of suspects to a country on the ground that one can still potentially secure a fair trial on a few scattered islands of independence in an ocean increasingly polluted by authoritarianism'. However, see Koen Lenaerts & José A. Gutiérrez-Fons, *The Court of Justice of the European Union and Fundamental Rights in the field of criminal law, in* RESEARCH HANDBOOK ON EU CRIMINAL LAW, 2ND ED (Maria Bergström, Teresa Quintel & Valsamis Mitsilegas eds, *forthcoming*), who argue that 'the two-step examination protects judges who strive to act independently despite having to operate in a justice system that is subjected to constant attacks from the legislature and/or the executive. Those judges cannot be left to stand alone, since they have proven their loyalty to the rule of law and their trustworthiness. Metaphorically speaking, we believe that the two-step examination enables the executing judicial authorities to "*separate the wheat from the chaff"* on a case-by-case basis'.

[138] *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033, ¶¶ 62 – 63.

[139] *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶¶ 60 and 61. *See* also *Puig Gordi and Others*, EU:C:2023:57, ¶ 118.

no longer independent. This was because, following the adoption of a new law reforming it, the KRS is, for the most part, made up of members chosen by the legislature. If the KRS proposed the appointment of one or more of the judges who had imposed the custodial sentence or detention order in the issuing Member State, the referring court reasoned that this could give rise to doubts as to whether those judges were members of 'a tribunal previously established by law'. The same doubts could also arise in relation to the judges who would conduct criminal proceedings following the execution an EAW.

At the outset, the Court of Justice confirmed the application of the two-step examination, highlighting 'the inextricable links which… exist, for the purposes of the fundamental right to a fair trial, within the meaning of [Article 47 of the Charter], between the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law'.[140] In particular, regarding the judicial appointment procedure, those links exist because that procedure constitutes an inherent element of the concept of a 'tribunal previously established by law', whilst also being a factor by which the independence of the judges appointed 'may be measured'.[141]

As to the first step, drawing on its case law on the rule of law, the Court of Justice held that not every irregularity in the judicial appointment procedure constitutes a breach of the fundamental right to 'a tribunal previously established by law', but only those 'of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could undermine the integrity of the outcome of the appointment procedure'.[142] Finding such a breach requires 'an overall assessment of a number of factors which, taken together, serve to create in the minds of individuals reasonable doubt as to the independence and impartiality of the judges'.[143] This meant, for present purposes, that the fact that a judge is appointed on a proposal from the KRS is not sufficient in itself to call into question his or her independence, nor to refuse to execute the EAW in question. That overall assessment is to be carried out on the basis of objective, reliable, specific and properly updated information, which may be obtained from the case law of the courts in the issuing Member State, of the Court of Justice and of the European Court of Human Rights (the 'ECtHR'). The requirement of an overall assessment fits well with the need to establish systemic or generalised deficiencies in the justice system of the issuing Member State. Indeed, it is only by carrying out an overall assessment that one may identify those deficiencies.[144]

As to the second step, it is for the executing judicial authority to examine whether the systemic and generalised deficiencies found are likely to materialise if the person concerned is surrendered to the issuing Member State. To that effect, the executing judicial authority must '[have] regard to that person's personal situation, the nature of the offence for which he or she is prosecuted and the factual context in

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[140] *Id*., ¶ 56.
[141] *Id*., ¶ 57.
[142] *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶ 73
[143] *Id*., ¶ 74.
[144] von Bogdandy, *supra* note 1, at 93-94.

which that arrest warrant was issued'.[145] It is for the person concerned to adduce specific evidence that those deficiencies had or are liable to have 'a tangible influence on the handling of his or her criminal case'. That evidence may, for example, relate to the secondment of a particular judge within the panel that imposed the custodial sentence that the EAW seeks to execute, where that secondment was made by the Minister for Justice on the basis of arbitrary criteria. Similarly, that evidence may also include statements made by public authorities which could have an influence on the specific case in question. That said, the Court of Justice again stressed the importance of judicial cooperation: if the person concerned puts forward evidence that is relevant but not sufficient to demonstrate the existence of a real risk of breach of his or her fundamental right to a tribunal previously established by law, the executing judicial authority is required to ask the issuing judicial authority to provide it with supplementary information. Failure to cooperate may be taken into account by the executing judicial authority for the purposes of establishing the existence of such a real risk.[146]

b. The notion of 'judicial authority'

As to the second line of case law, in *Poltorak* and the cases that followed,[147] the Court of Justice has been called upon to interpret the notion of 'judicial authority' within the meaning of the EAW Framework Decision. In that regard, the Court of Justice has pointed out that that notion is broader than that of 'court or tribunal' within the meaning of EU law, since it may include other authorities involved in the administration of criminal justice, which are distinct from, *inter alia*, ministries or police services which are part of the executive.[148] Given that the EAW mechanism imposes limitations on the exercise of the fundamental rights of the persons concerned, in particular on the right to liberty, its proper functioning requires a high level of trust between the Member States. That high level of trust may only be provided by authorities that are independent from the legislature and the executive.[149] 'That independence requires that there are statutory rules and an

[145] *Openbaar Ministerie (Tribunal established by law in the issuing Member State)* EU:C:2022:100, ¶ 53.

[146] *Id*., ¶¶ 84 and 85.

[147] *Poltorak*, EU:C:2016:858. See also Özçelik, Case C-453/16 PPU, EU:C:2016:860; Kovalkovas, Case C-477/16 PPU, EU:C:2016:861; OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau), Case C-508/18, EU:C:2019:456; PF (Prosecutor General of Lithuania), Case C-509/18, EU: C:2019:457; Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours), Joined Cases C-566/19 PPU and C-626/19 PPU, EU:C:2019:1077; Openbaar Ministerie (Swedish Public Prosecutor's Office), Case C-625/19 PPU, EU:C:2019:1078, and Openbaar Ministerie (Public Prosecutor, Brussels), Case C-627/19 PPU, EU:C:2019:1079. For an analysis of that line of case law, see K. Lenaerts, *On Judicial Independence and the Quest for National, Supranational and Transnational Justice*, in THE ART OF JUDICIAL REASONING. FESTSCHRIFT IN HONOUR OF CARL BAUDENBACHER 155, 170 et seq. (Gunnar Selvik, Michael-James Clifton, Theresa Haas, Luísa Lourenço, & Kerstin Schwiesow, eds).

[148] *Poltorak*, EU: C:2016:858, ¶¶ 33 and 35; *Kovalkovas*, EU:C:2016:861, ¶¶ 34 and 36; *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 50, and *PF (Prosecutor General of Lithuania)*, EU: C:2019:457, ¶ 29.

[149] *Poltorak*, EU:C:2016:858, ¶ 35. However, textual, contextual and teleological differences between the EAW Framework Decision and other EU law instruments pertaining to the AFSJ may justify a different interpretation of the notion of 'judicial authority'. This is the case of that notion within the meaning of Parliament and Council Directive 2014/41, Regarding the European Investigation Order

institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, *inter alia*, to an instruction in a specific case from the executive'.[150]

For example, neither ministries nor police services which are part of the executive may be considered to be 'issuing judicial authorities'.[151] Similarly, in *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, the Court of Justice found that the notion of 'issuing judicial authority' must be interpreted as not including public prosecutors' offices of Germany which are exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as a Minister for Justice of a Land, in connection with the adoption of a decision to issue [an EAW].[152] By contrast, in the light of the applicable statutory rules and institutional framework, the Court of Justice found that Lithuanian, French, Swedish and Belgian public prosecutors' offices enjoy the status of 'judicial authority'.[153]

c. When two lines of case law intersect

Logically, the question that arises is what happens when the *Poltorak* and *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)* lines of case law intersect. May the executing judicial authority deny the status of 'issuing judicial authority' to the courts belonging to the judicial system of the issuing Member State, where there is evidence of systemic or generalised deficiencies concerning the independence of the judiciary in that Member State? In *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court of Justice was confronted with that very question and replied in the negative.[154] It found that denying such status would extend the limitations on the operation of the principles of mutual trust and mutual recognition beyond 'exceptional circumstances', within the meaning of its case law, since such denial would lead to a general exclusion of those principles in respect of all judges or all courts of the issuing Member State. Moreover, those systemic or generalised deficiencies do not necessarily affect every decision that the courts of the issuing Member State may adopt in a particular case. Most importantly, the criteria developed in the *Poltorak* line of case law with respect to the public

('EIO') in criminal matters, 2014 O.J. (L 130) 1 (EU). See, in this regard, Staatsanwaltschaft Wien (Falsified transfer orders), Case C-584/19, EU:C:2020:1002. Moreover, another distinguishing factor to be taken into account is whether there are limitations on the right to liberty. In that regard, the Court of Justice pointed out that 'except in the specific case of the temporary transfer of persons already held in custody for the purpose of carrying out an investigative measure …, the [EIO], unlike [an EAW], is not such as to interfere with the right to liberty of the person concerned, enshrined in Article 6 of the Charter.' See, *id.*, ¶ 73.

[150] *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 74, and *(Prosecutor General of Lithuania)*, C-509/18, EU:C:2019:457, ¶ 52.

[151] *Poltorak*, EU: C:2016:858, and *Kovalkovas*, EU: C:2016:861.

[152] *OG and PI (Public Prosecutor's Offices, Lübeck and Zwickau)*, EU:C:2019:456, ¶ 90. However, those same authorities would be considered to be 'judicial authorities' for the purposes of issuing an EIO. See, in this, regard, *Staatsanwaltschaft Wien (Falsified transfer orders)*, EU:C:2020:1002, ¶ 74.

[153] *PF (Prosecutor General of Lithuania)*, C-509/18, EU: C:2019:457, *Parquet général du Grand-Duché de Luxembourg and Openbaar Ministerie (Public Prosecutors of Lyons and Tours)*, EU:C:2019:1077; *Openbaar Ministerie (Swedish Public Prosecutor's Office)*, EU:C:2019:1078, and *Openbaar Ministerie (Public Prosecutor, Brussels)*, EU: C:2019:1079.

[154] *Openbaar Ministerie (Independence of the issuing judicial authority)*, EU:C:2020:1033.

prosecutor's offices do not apply *mutatis mutandis* to courts, within the meaning of EU law. The reason is twofold. First, with regard to the public prosecutor's offices, the requirement of independence looks at the applicable statutory rules and institutional framework, and not at the existence or absence of systemic or generalised deficiencies. Second, since courts, within the meaning of EU law, are required to be independent, they are not subordinated to the executive. Accordingly, an executing judicial authority may not deprive those courts of their status of 'issuing judicial authorities', even if their independence is being threatened by those deficiencies. That does not mean, however, that the right to a fair trial of the person concerned is left unprotected, since the executing judicial authority may still refuse to execute the EAW by applying the two-step examination set out in *LM v. Minister for Justice and Equality (Deficiencies in the system of justice).*

To some extent, the rationale underpinning the findings of the Court of Justice in *Getin Noble Bank* echo those in *Openbaar Ministerie (Independence of the issuing judicial authority)*. It follows from those two judgments that the notion of 'court or tribunal', within the meaning of Article 267 TFEU, and that of 'judicial authority', within the meaning of the EAW mechanism, apply, in principle, to national courts, even if the Member State in question suffers from systemic deficiencies in its justice system. There is a presumption of compliance, which may, however, be rebutted. Moreover, that presumption only opens the door respectively to judicial dialogue and to the application of the EAW mechanism.

Indeed, that presumption only applies to the admissibility of the reference under Article 267 TFEU, but says nothing as to whether the referring court respects the right of the parties in the main proceedings to an independent tribunal.

Similarly, that presumption says nothing as to whether the EAW in question must be executed. To that end, in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the Court of Justice confirmed the two-step examination, drawing, nonetheless, a distinction between EAWs issued for the purpose of conducting a criminal prosecution and those issued for the purpose of executing a custodial sentence or detention order, both types being at issue in that case. In relation to the former type, the executing judicial authorities must take into account whether the systemic or generalised deficiencies – including those arising after the issue of the EAW – may adversely affect the trial to be held in the issuing Member State.[155] In relation to the latter type, the executing judicial authority should focus solely on whether those deficiencies – at the time of the issue of the EAW – affected the independence of the court that imposed the custodial sentence or detention order.[156]

It is worth mentioning that both referring courts in *LM* and in *Openbaar Ministerie (Independence of the issuing judicial authority)* – respectively the High Court of Ireland and the District Court of Amsterdam – applied that two-step examination, reaching, however, different outcomes in relation to the EAWs issued by the Polish judicial authorities for the purpose of conducting a criminal

[155] *Id*., ¶ 66.
[156] *Id*., ¶ 68.

prosecution. Whilst the High Court decided to execute the EAW,[157] the District Court of Amsterdam refused to do so.[158] By contrast, in relation to the EAW issued for the purpose of executing a custodial sentence at issue in *Openbaar Ministerie (Independence of the issuing judicial authority)*, the District Court of Amsterdam decided to execute it.[159]

II. THE RULE OF LAW WITHIN THE EU AS A FRAMEWORK OF REFERENCE

A. EU membership as a starting point and the prohibition of value regression

As mentioned above, the rule of law within the EU allows room for diversity in the Member States. The latter are free to choose their own constitutional arrangements as they see fit, provided that those arrangements secure compliance with the values on which the EU is founded. As the Court of Justice has held in respect of national measures that adversely affect judicial independence, 'although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law'.[160]

Understanding the rule of law as a framework may explain why before joining the EU, a candidate Member State must align its own constitution (or Basic law) – including institutional and substantive provisions – with the values on which the EU is founded. The so-called Copenhagen Criteria implied, *inter alia*, a strict control of those values. The decision to align its own constitutional arrangements with EU

[157] Following the ruling of the Court of Justice in *LM*, the High Court of Ireland decided to execute the warrants at issue. It reasoned that "although recent reforms had brought about systemic deficiencies in the Polish justice system, there [was] no evidence showing that any other aspect of the fair trial right — such as the right to know the nature of the charge, the right to counsel, the right to challenge evidence and the right to present evidence — [was] at risk in Poland". The Minister for Justice and Equality v. Celmer. No 5 [2018] IEHC 639, ¶ 103. Subsequently, that ruling was upheld by the Irish Supreme Court in Minister for Justice & Equality v. Celmer [2019] IESC 80.

[158] The District Court of Amsterdam found that Polish laws reforming the judicial system had had a 'chilling effect' on the members of the judiciary, who now feared being sanctioned in the event of adopting a decision running against the interests of the executive. As to the case at hand, the District Court observed that two Polish judges, who sit in the court having jurisdiction for the trial of the person concerned by the EAW at issue, had been the subject of disciplinary proceedings before the Disciplinary Chamber of the Supreme Court. The District Court called into question the independence and impartiality of that Chamber. Moreover, it pointed out that the case at hand had attracted the attention of the media, and that the Polish Public Prosecutor's office had given instructions to scrutinise the EAWs issued by Dutch judicial authorities in order to find grounds for mandatory non-execution. In the light of the foregoing considerations, the District Court decided not to execute the EAW at issue in Case C-345/20 PPU. See Rechtbank Amsterdam, order of 10 February 2021, ECLI:NL:RBAMS:2021:420.

[159] The District Court found that the systemic deficiencies in the Polish justice system had not adversely affected the independence of the Polish court that imposed the custodial sentence and accordingly, did not call into question the right to a fair trial of the person concerned. See Rechtbank Amsterdam, order of 27 January 2021, ECLI:NL:RBAMS:2021:179.

[160] *Commission v. Poland (Independance of the Supreme Court)*, EU:C:2019:531, ¶ 52 and the case law cited, and *Miasto Łowicz and Prokurator Generalny*, EU:C:2020:234, ¶ 36 and the case law cited.

values is a sovereign choice of the candidate Member State.[161] However, if such a State fails to do so, Article 49 TEU bars it from becoming a member of the EU.[162]

Becoming a Member State is, therefore, a 'constitutional moment' for the State concerned since at that very moment, the legal order of the new Member State is deemed by the 'Masters of the Treaties' to uphold the values on which the EU is founded. The judgment of the Court of Justice in *Getin Noble Bank* illustrates this point. In that case, the Court ruled that the fact that the Polish judge in question was firstly appointed during the regime established by the Polish People's Republic (the 'PPR') was not sufficient in itself to call into question his independence. When that undemocratic regime ended, the democratic constitutional order that followed it accepted that judges who were appointed by bodies of the PPR could, in principle, remain in office. Those judges were part of the judicial system in force at the time when Poland acceded to the EU. Since accession can only take place in compliance with the so-called Copenhagen criteria and Article 49 TEU, the Court of Justice reasoned that 'at the time the Republic of Poland acceded to the EU, it was considered that, in principle, the judicial system was compatible with EU law'.[163] In the absence of any concrete and clear explanation to the contrary, the Court of Justice found that the appointment of a judge during the PPR regime was not 'such as to give rise to legitimate and serious doubts, in the minds of individuals, as to the independence and impartiality of that judge in the exercise of his or her judicial functions'.[164]

From the moment of accession onwards, interlocking the legal order of the *new* Member State with the EU legal order and the other Member States' legal orders takes place. The Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That ongoing commitment means that there is 'no turning back the clock' when it comes to respecting the values contained in Article 2 TEU. This was made clear by the Court of Justice in the *Conditionality Judgments*, ruling that '[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the [EU] and which it may disregard after its accession'.[165] The Member States must respect them 'at all times'.[166]

The level of value protection provided for by a Member State when it joined the EU is a starting point and the trend of constitutional reforms must always be towards strengthening that protection. As the Court of Justice held in *Repubblika*, '[a] Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given

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[161] The same applies where a Member State decides to withdraw from the EU. See Wightman and Others, Case C-621/18, EU:C:2018:999, ¶ 50.

[162] That provision states that '[a] ny European State *which respects the values referred to in Article 2* and is committed to promoting them may apply to become a member of the Union.' (Emphasis added). *Repubblika*, EU:C:2021:311, ¶ 61.

[163] *Getin Noble Bank*, EU:C:2022:235, ¶ 104.

[164] *Id*., ¶ 105.

[165] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 126, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 144.

[166] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 234, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 266.

concrete expression by, inter alia, Article 19 TEU'.[167] It follows from that judgment that the EU legal order prohibits 'value regression'. Authoritarian drifts have simply no room in the EU legal order, since they would call into question the effectiveness of Articles 2, 19(1) and 49 TEU.

The prohibition of value regression is highlighted by contrasting the judgments of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, with that in *Repubblika*. In those cases, the Court of Justice held that the principle of judicial independence does not prevent the executive from appointing judges, provided that 'once appointed, they are free from influence or pressure when carrying out their role'.[168] That proviso means, in essence, that the substantive conditions and procedural rules governing the adoption of those appointment decisions must not give rise to reasonable doubts as to the internal and external independence of those judges.[169] Those doubts arise where the reforms at issue bring about a regression of the rule of law. This may occur where the constitutional body in charge of evaluating the suitability of candidates for judicial office is no longer independent. In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and *A.B. and Others. (Appointment of judges to the Supreme Court – Actions)*, that appears to be the case since the reforms at issue sought –- subject to confirmation by the referring courts – to undermine the independence of the Polish National Judicial Council (the 'KRS'), which, as the constitutional body entrusted with protecting judicial independence, submits proposals for appointment to judicial positions to the Polish President.[170] Following the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the referring court found that the KRS was not an independent body.[171] When compared with the appointment process in force at the time Poland acceded to the EU in 2004, the reforms at issue – which were passed in 2017 and 2018 – were a step backward.

By contrast, in *Repubblika*, the reforms in question had actually strengthened the guarantee of judicial independence.[172] They established a body, the Judicial Appointments Committee, that gave advice to the Prime Minister about the eligibility and merit of the candidates for appointment to judicial positions. Since the

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[167] *Repubblika*, EU:C:2021:311, ¶ 63.

[168] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 133; *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 122, and *Repubblika*, EU:C:2021:311, ¶ 56.

[169] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶¶ 134 and 135; *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 123, and *Repubblika*, EU:C:2021:311, ¶ 57.

[170] The Court of Justice drew the attention of the referring court to a series of elements on the basis of which it could carry out its assessment as to whether the KRS was independent. Notably, it had to examine the fact that the law reforming the KRS had shortened the mandate of incumbent members, that 22 out of 25 members of the KRS were directly elected by the *Sejm* (the Lower House of the Polish Parliament); that some of the new members of the KRS had, according to the referring court, been appointed in spite of significant irregularities, and the way in which the KRS exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary and its various powers.

[171] Polish Supreme Court, judgment of 5 December 2019. For a summary of that judgment, see order of 8 April 2020, Commission v. Poland, Case C-791/19 R, EU:C:2020:277, ¶ 19.

[172] *Repubblika*, EU:C:2021:311, ¶ 69.

independence of that body was not questioned by the referring court, it contributed to objectivising the appointment process to judicial positions. When compared with the appointment process in force at the time Malta acceded to the EU in 2004, the reforms at issue – which were passed in 2016 – were a step forward.

Moreover, that ongoing and reciprocal commitment to upholding the values on which the EU is founded is precisely what may distinguish a 'Member State' from a 'third country'. Since the Member States share and cherish the same values, they trust each other and may, on the basis of that mutual trust, create an area without internal frontiers where citizens may move freely and securely.[173] By contrast, the principle of mutual trust is not applicable to third countries.[174] Seen in this light, EU membership implies, first and foremost, entering into a 'Union of values'.

That said, value alignment must *not* be confused with constitutional modelling.[175] As the Court of Justice made clear in *Euro Box Promotion and Others* and in *RS*, the rule of law within the EU does not seek to impose 'a particular constitutional model' to which all Member States must aspire.[176] Imposing such a model would be contrary to the principle of national identity enshrined in Article 4(2) TEU, which expressly states that the EU shall respect the identities of the Member States, 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. Instead, as the Court of Justice pointed out in the *Conditionality Judgments*, '[the Member] States enjoy a certain degree of discretion in implementing the principles of the rule of law'.[177] However, the obligation to implement those principles 'as to the result to be achieved may [not] vary from one Member State to another'.[178] This is because the Member States share a common understanding of the rule of law despite having 'separate national identities' which the EU respects.[179]

It follows from the case law of the Court of Justice that EU law provides for a framework within which the Member States may make their own constitutional

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[173] *Id.*, ¶ 62. Iris Canor, *Suspending Horizontal Solange: A Decentralized Instrument for Protecting Mutual Trust and the European Rule of Law*, in DEFENDING CHECKS AND BALANCES IN EU MEMBER STATES, *supra* note 1, 183, at 189.

[174] Opinion 1/17 (EU-Canada CET Agreement), EU:C:2019:341, ¶ 129 (holding that '[the] principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State'). That said, whilst mutual trust cannot be presumed in the relations with third countries, the latter may gain that trust by building a special relationship with the EU and by being equally committed to the values on which the EU is founded. See I.N., Case C-897/19 PPU, EU:C:2020:262, ¶¶ 44 and 77. See, in this regard, Koen Lenaerts, José A. Gutiérrez-Fons and Stanislas Adam, *Exploring the Autonomy of the European Union Legal Order*, 81 ZAÖRV/HJIL 47 (2021).

[175] See, in this regard, Opinion of Advocate General Bobek in Statul Român – Ministerul Finanțelor Publice, Case, C-397/19, EU:C:2020:747, ¶¶ 100 and 101.

[176] *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 43, and *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 229 and the case-law cited.

[177] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 233, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 265.

[178] *Id*.

[179] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 234, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 266.

choices.[180] Those choices may vary from one Member State to another, but no choice must give rise to authoritarian tendencies that would call into question the values contained in Article 2 TEU.[181] On the contrary, those choices must, first, be sufficient in themselves to guarantee compliance with those values and, second, not constitute a regression. Subject to those two limitations, a Member State may organise its own system of checks and balances as it wishes.

Arguments that consider that framework as being 'ultra vires' are ill founded, since without that framework, the EU cannot operate. The EU's constitutional structure would collapse in the absence of a rule of law based on common values. Value alignment and the prohibition of value regression are two essential conditions for a Member State to participate in that structure.[182]

B. Building the framework

Logically, the question that arises is how the Court of Justice – as the ultimate interpreter of the Treaties – is to build such a framework.[183] In my view, a close reading of the case law reveals that the rule of law within the EU is not the result of a 'top-down' approach. It is rather a 'bottom-up' construction that seeks to reinforce the ongoing commitment of the Member States towards the values on which the EU is founded. The essence of the rule of law draws inspiration from the Europeans' common struggle to find liberty, democracy and justice by fighting the tyranny of those who want to remain in power at all costs. That is why the rule of law within the EU is grounded in the constitutional traditions common to the Member States.[184] By upholding the rule of law, the Court of Justice is also making sure that the Member States remain loyal to their own common traditions. As the Court of Justice held in *Repubblika*, the prohibition of value regression implies that authoritarian tendencies can never form part of the EU's common constitutional space. They will never become part of the constitutional traditions common to the Member States. In order to identify those traditions, the Court of Justice will embark on a comparative law study that would obviously exclude those tendencies.

For example, in *Ax v. Statul Român*, A.G. Bobek argued that, where a Member State has been found liable for damages caused by judicial error, the principle of judicial independence as enshrined in Article 19(1) TEU does not preclude, *per se*, the possibility for such a Member State to initiate subsequently a recovery action for

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[180] Prechal, *supra* note 31, at 187 (pointing out that '[an] issue like the independence of the judiciary operates in a specific institutional, political, legal and cultural context. What is unacceptable in one system may seem rather normal in another. There should certainly not be "one-size fits all solutions"; space should be left to the Member States to make their choices').

[181] von Bogdandy, *supra* note 1, at 91 (observing that the values contained in Article 2 TEU 'do not constitute "laws of construction", but rather "red lines"').

[182] *Repubblika*, EU:C:2021:311, ¶ 63; compare Opinion of Advocate General Tanchev in *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2020:1053, ¶ 83.

[183] *Republic of Moldova*, EU:C:2021:655, ¶ 45, and *RS (Effects of the decisions of a constitutional court)*, EU:C:2022:99, ¶ 52

[184] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 237, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 291 (holding that '[the] principles of the rule of law, as developed in the case-law of the Court on the basis of the EU Treaties, are thus recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems').

civil liability against the judge concerned in cases of bad faith or gross negligence on the part of that judge. In putting forward that argument, AG Bobek relied on comparative law. He noted that, with the exception of Member States belonging to the common law tradition, 'State liability for damages caused by the judiciary is widely accepted'.[185] Where such liability is accepted, several Member States – albeit not all of them – enable the State to recover the sums paid from the judge concerned. However, those Member States do not follow the same approach as to the way of recovering the sums paid. 'These divergences show that the balance between accountability and judicial independence is understood rather differently in various jurisdictions, depending on judicial traditions and constitutional conceptions concerning the principle of the separation of powers and the different arrangements of checks and balances between those powers'.[186] He rightly observed that it was not for EU law to strike that right balance by imposing a specific regime of liability. Instead, EU law must limit itself to circumscribing the choices made by the Member State concerned so that the model of civil liability of judges chosen by that Member State ensures that 'judges are protected against pressure liable to impair their independence of judgment and to influence their decisions'.[187] On this point, the Court of Justice followed the Opinion of the Advocate General. It held that whether the State may bring a recovery action for civil liability against the judge concerned is a question that pertains to the organisation of justice and as such, falls within the competences of the Member States.[188] That said, where national law recognises a principle of personal liability of judges for judicial errors, that law must comply with the principle of judicial independence as defined by EU law, meaning that such recognition must not 'influence the decision-making of those having the task of adjudicating'.[189] In particular, the liability of the judge concerned for judicial error must be limited to exceptional cases. '[The] fact that a decision contains a judicial error', the Court of Justice wrote, 'cannot, in itself, suffice to render the judge concerned personally liable'.[190] That liability must also be based on objective and verifiable criteria, seek to guarantee the good administration of justice, and prevent any risk of external pressure that might unduly influence the content of judicial decisions. Moreover, the rights of the defence and to effective judicial protection of the judge concerned must be protected.[191]

In the same way, given that both the EU legal order and the system established by the European Convention on Human Rights (the 'ECHR') are based on a set of common values, the rule of law within the EU draws inspiration from the ECHR, as interpreted by the ECtHR. In turn, the case law of the Court of Justice on the rule of law has positively influenced the case law of the ECtHR, showing that both legal

[185] Opinion of Advocate General Bobek in *Statul Român – Ministerul Finanţelor Publice*, EU:C:2020:747, ¶ 96.
[186] *Id*., ¶ 97.
[187] *Id*., ¶ 101.
[188] See *Asociaţia "Forumul Judecătorilor din România" and Others*,:EU:C:2021:393, ¶ 229.
[189] *Id*., ¶ 232.
[190] *Id*., ¶ 234.
[191] *Id*., ¶ 237.

systems are, as former President Spano put it, in 'a symbiotic relationship' when it comes to strengthening the rule of law in Europe.[192]

The principle of judicial independence illustrates this point. In *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, the Court of Justice held that the principle of judicial independence within the meaning of EU law provides a level of protection at least equivalent to that guaranteed by the ECHR.[193] It therefore referred extensively to the case law of the ECtHR when making its findings.[194] Similarly, when examining the right to an independent and impartial tribunal previously established by law enshrined in Article 47 of the Charter, in *Simpson v. Council and HG v. Commission*, the Court of Justice referred to the findings of the ECtHR in *Guðmundur Andri Ástráðsson v. Iceland*.[195]

For its part, the ECtHR has referred to the judgment of the Court of Justice in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* and to that in Commission v. Poland (Independance of the Supreme Court) when interpreting the principle of irremovability of judges.[196] More recently, referring again to those two judgments, the ECtHR held in *Reczkowicz v. Poland* that the procedure for the appointment of the members of the Disciplinary Chamber of the Polish Supreme Court was unduly influenced by the legislature and the executive, which is per se incompatible with Article 6(1) ECHR.[197] Subsequently, in *Getin Noble Bank*, the Court of Justice referred to that judgment of the ECtHR, thereby highlighting the convergence between the two courts.[198]

Most importantly for present purposes, both courts seem to share the same understanding of the rule of law within their respective legal systems as not prescribing a particular constitutional model but a framework of reference.[199]

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[192] Robert Spano, *The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary*, EUROPEAN LAW JOURNAL 1, 13 (2021).

[193] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶¶ 117 and 118.

[194] *Id*., ¶¶ 127 and 128. As to the notion of 'independent tribunal' within the meaning of Article 6 ECHR, the Court of Justice referred to Ramos Nunes de Carvalho e Sá v. Portugal [Grand Chamber], app. nos. 55391/13, 57728/13 and 74041/13, CE:ECHR:2018:1106JUD005539113, ¶ 144, and Fruni v. Slovakia, app. no. 8014/07, CE:ECHR:2011:0621JUD000801407, ¶ 141. As to the notion of impartiality within the meaning of Article 6 ECHR, it referred to Kleyn and Others v. the Netherlands, app. nos. 39343/98, 39651/98, 43147/98 and 46664/99, CE:ECHR:2003:0506JUD003934398, ¶. 191, and *Ramos Nunes de Carvalho e Sá v. Portugal*, CE:ECHR:2018:1106JUD005539113, ¶¶ 145, 147 and 149.

[195] See *supra* note 83.

[196] In particular, the ECtHR concurs with the Court of Justice in that 'that principle is not absolute, although an exception to that principle would only be acceptable "if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the court concerned to external factors and its neutrality with respect to the interests before it'. See *Guðmundur Andri Ástráðsson v. Iceland*, CE:ECHR:2020:1201JUD002637418, ¶ 239 (quoting *Commission v. Poland (Independance of the Supreme Court)*, EU:C:2019:531, ¶ 139). See also Xhoxhaj v. Albania, app. no. 15227/19, CE:ECHR: 2021:0209JUD001522719, ¶ 331.

[197] ECtHR, Reczkowicz v. Poland, app. no. 43447/19, CE:ECHR:2021:0722JUD004344719, ¶ 276.

[198] *Getin Noble Bank*, EU:C:2022:235, ¶ 128.

[199] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 130, where the Court of Justice noted that 'neither Article 6 nor any other provision of the ECHR requires States to adopt a particular constitutional model governing in one way or another the relationship and interaction between the various branches of the State, nor requires those States to comply

C. Law in context

The rule of law within the EU allows room for diversity not only because it is normatively construed as a framework of reference, but also because the Court of Justice has embraced a 'law in context' approach. This idea is illustrated by the interpretation and application of the principle of judicial independence put forward by the Court of Justice. In order to determine whether that principle is called into question, the referring court, in cooperation with the Court of Justice (or just the latter in the context of infringement proceedings), must not only examine the laws at issue but also the relevant facts. As the Court of Justice has held, 'the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'.[200]

Whether those doubts are dispelled or not depends not only on the way in which those rules are drafted but also on the reasons behind their adoption and the manner in which they are enforced.[201] Put differently, the Court of Justice has taken the view that the principle of judicial independence requires to look at the 'specific national legal and factual context'.[202] That is why the guarantee of judicial independence 'preclude[s] not only any direct influence, in the form of instructions, but also types of influence which are more indirect and which are liable to have an effect on the decisions of the judges concerned'.[203] To some extent, that understanding of judicial independence echoes the case law of the ECtHR, according to which the relevant provisions of the ECHR protect not only 'judicial independence *de jure*' but also 'judicial independence *de facto*'.[204]

This means, in essence, that a rule regarding, for example, the appointment of judges may be incompatible with the principle of judicial independence, as protected under EU law, in a specific legal and factual context. However, that same rule may not be so in a different legal and factual context.

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with any theoretical constitutional concepts regarding the permissible limits of such interaction. The question is always whether, in a given case, the requirements of the ECHR have been met'. It referred to the following case law of the ECtHR: *Kleyn and Others v. Netherlands*, CE:ECHR:2003:0506JUD003934398, ¶ 193 and the case law cited; Sacilor Lormines v. France, app. no. 65411/01, CE:ECHR:2006:1109JUD006541101, ¶ 59; and Thiam v. France, app. no. 80018/12, CE:ECHR:2018:1018JUD008001812, ¶ 62 and the case law cited.

[200] *LM v. Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586. ¶ 66; *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531, ¶ 74; *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 123, and *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 117. See also *Wilson*, EU:C:2006:587, ¶ 53.

[201] Prechal, *supra* note 31, at 187 and 188.

[202] *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 129.

[203] *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 119, and *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 125.

[204] Spano, *supra* 192, at 8.

In *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, the Court of Justice made this point crystal clear, holding that 'the fact that it may not be possible to exercise a legal remedy in the context of a process of appointment to judicial positions of a national supreme court may, in certain cases, not prove to be problematic'.[205] It noted, however, that problems with the rule of law do arise 'where the adoption of provisions undermining the effectiveness of judicial remedies of that kind which previously existed, … considered together with other relevant factors characterising such an appointment process in *a specific national legal and factual context*, appear such as to give rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges appointed at the end of that process'.[206] In that case, which concerned the process of appointment of judges of the Polish Supreme Court, the Court of Justice drew the attention of the referring court to three relevant factors. First, the remedies set out by the new provisions at issue were illusory.[207] Second, those provisions limited the intensity of judicial review regarding appointment to judicial positions in the Supreme Court, without doing so for other judicial positions. Those new provisions had thus the effect of 'undermin[ing] the effectiveness of the judicial review provided for until then in the national legislation'.[208] Third, those provisions were adopted in parallel with other reforms that were deemed problematic in terms of protecting the rule of law within the EU. Those reforms involved the lowering of the retirement age for judges of the Supreme Court,[209] and the new composition and functioning of the KRS.[210]

Moreover, when examining the relevant rules and the factual context in which they apply, the Court of Justice follows a combined assessment of all the relevant factors.[211] Whilst one factor may not suffice in itself to call into question the principle of judicial independence, that factor taken together with others may cast doubt in the minds of individuals as to the imperviousness of the body at issue to external factors, and its neutrality with respect to the interests before it.[212] In *Land Hessen*, for example, the referring court questioned the compatibility of the

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[205] *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, EU:C:2021:153, ¶ 156.

[206] *Id*. (emphasis added).

[207] The new provisions governing the appointment process to the Polish Supreme Court provide that, unless all candidates who have been put forward for appointment by the KRS challenged the proposal – which would be against their own interests – , that proposal becomes final, even if it is challenged by all other candidates. As the referring court noted, because of the new provisions, 'the part of [the] resolution [of the KRS] putting forward candidates for appointment will de facto always become final in that way'. *Id*. ¶¶ 35 and 158.

[208] *Id*. ¶ 60.

[209] *Commission v. Poland (Independence of the Supreme Court)*, EU:C:2019:531.

[210] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982.

[211] See, e.g., *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶ 152, and *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 87. In those two judgments, the Court used the expression 'taken together' to stress the importance of carrying out an overall assessment.

[212] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 142. See also *Getin Noble Bank*, EU:C:2022:235, ¶ 126. Prechal rightly observes that the need for an overall assessment also holds true 'the other way around': 'while certain rules or practices might be questionable from the perspective of independence when taken separately, they might, in the bigger picture, be outweighed by other factors in the system'. See *Effective Judicial Protection: some recent developments*, *supra* note 31, at 187.

composition of the Judicial Appointments Committee with the principle of independence, given that the majority of its members were chosen by the legislature of Land Hessen. However, the Court of Justice found that that circumstance alone did not suffice to question the independence of that body, nor that of the referring court.[213]

By contrast, in *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, in addition to pointing out that judges in Poland are appointed by the President, the referring court alluded to a series of factors that could cast doubt in the minds of individuals as to the independence of the newly established Disciplinary Chamber of the Supreme Court.[214] First, it described a series of elements that could call into question the independence of the KRS when it proposed candidates to sit in that Chamber.[215] Second, the jurisdiction of the Disciplinary Chamber had been established concomitantly with the provisions of the Law on the Supreme Court of 2017 that lowered the retirement age from 70 to 65 and forced the sitting judges who were already 65 years old – or older – to retire. Those provisions had already been declared incompatible with EU law in *Commission v. Poland (Independence of the Supreme Court)*.[216] Third and last, the Disciplinary Chamber was not composed of sitting judges but only of newly appointed judges, and that Chamber enjoyed a particularly high level of autonomy within the Supreme Court.[217]

Furthermore, since the guarantee of judicial independence incorporates a combination of both legal and factual elements, it entails significant differences between the role that the Court of Justice plays in the context of the preliminary reference mechanism and that it plays in the context of infringement proceedings. As to the preliminary reference mechanism, the Court of Justice does not enjoy jurisdiction to establish the relevant facts, nor may it apply the relevant provisions of EU law to the case at hand. Those determinations are for the referring court to undertake, notwithstanding the fact that the Court of Justice may 'provide the national court with an interpretation of EU law which may be useful to it in assessing the effects of one or other of its provisions'.[218]

Notably, the Court of Justice may identify the factors, as they result from the material in the case file, in light of which the referring court must carry out its overall assessment.[219] *Prokuratura Rejonowa w Mińsku Mazowieckim and Others* is an excellent example in that regard. In that case, the Court of Justice was asked to determine whether Article 19(1) TEU was to be interpreted as precluding the Minister for Justice of a Member State, i.e. Poland, from seconding a judge to a

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[213] *Land Hessen*, Case C-272/19, EU:C:2020:535, ¶¶ 55-56.

[214] A similar approach relating to the right to an independent and impartial tribunal previously established by law can be found in *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798.

[215] See to that effect, *supra* note 170.

[216] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 149.

[217] *Id*. ¶ 151.

[218] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 132.

[219] See also *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, EU:C:2021:798, ¶¶ 131 to 133, and *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 74 and 75.

higher criminal court. After looking at the legal and factual context of the case, the Court of Justice identified four relevant factors that could give rise to doubts in the minds of individuals as to the imperviousness of the seconded judges and that of the panels on which they sat. First, the criteria applied by the Minister for Justice for the purposes of seconding judges and for those of terminating such secondments were not made public. Nor was the Minister for Justice required to state the reasons for terminating the secondment.[220] Second, the termination of the secondment could take place at any time, regardless of whether it was for a fixed or indefinite period. The fear of termination of the secondment coupled with the feeling of having to meet the expectations of the Minister for Justice could influence the content of the decisions of the seconded judge in a way that was incompatible with the principle of judicial independence. Such termination would, in practice, amount to imposing disciplinary sanctions on the seconded judges.[221] Third, the Minister for Justice was also the Public Prosecutor General, meaning that he had authority over both prosecutors attached to the ordinary criminal courts and the seconded judges. This could give rise to doubts as to the impartiality of the seconded judges when they rule in such a case.[222] Fourth and last, in the main proceedings, the Court of Justice observed that the seconded judges continued to perform the duties of deputy disciplinary officers. This could affect the independence of the other members of the panels on which the seconded judges sat, since they were likely to fear that the seconded judge was or would be involved in disciplinary proceedings concerning them.[223]

Where an infringement action is brought before the Court of Justice, the latter will provide a definitive answer as to whether the Member State concerned has failed to fulfil its obligations under EU law. In so doing, it enjoys exclusive jurisdiction to evaluate the relevant facts and its effects, and to apply the relevant provisions of EU law to those facts. In the context of that action, it may also provide for interim relief, ensuring the effectiveness of its final judgment and preventing national measures – which at first sight, appear to be incompatible with the rule of law – from producing effects. In *Commission v. Poland (Independence of the Supreme Court)*, the Court of Justice issued an order in which it required Poland, *inter alia*, to suspend the relevant provisions of the law on the Supreme Court that were challenged by the Commission. It also ordered that Member State to take all necessary measures to reinstate judges of the Polish Supreme Court who were forced to retire, and to refrain from appointing new judges to replace the judges concerned by the contested provisions.[224] It is worth pointing out that Poland complied with that order. Similarly, in *Commission v. Poland (Disciplinary Regime for Judges)*, the Court of Justice ordered Poland to suspend the application of the legislative provisions conferring jurisdiction on the Disciplinary Chamber, and to refrain from transferring pending cases to judges who do not comply with the guarantees of independence.[225]

By contrast, in pending case *Commission v. Poland (Independence and private life of judges)*, the Vice-President of the Court, acting upon request of the

[220] *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, EU:C:2021:931, ¶ 78.
[221] *Id*., ¶¶ 81 to 83.
[222] *Id*., ¶ 84.
[223] *Id*., ¶ 86.
[224] See Commission v. Poland, Case C-619/18 R, EU:C:2018:1021.
[225] See Commission v. Poland, C-791/19 R, EU:C:2020:277.

Commission, found that Poland had failed to comply with a previous interim order.[226] Under the latter order,[227] Poland was, *inter alia*, obliged to suspend the application of legislation that prohibited Polish judges from examining whether the guarantees of judicial independence and impartiality as well as that of access to a tribunal previously established by law, as provided for by EU law, had been respected. If, despite that prohibition, a Polish judge carried out such examination, the contested legislation also stated that he or she could face disciplinary sanctions. Since Poland had failed to comply with the interim order, the Vice-President imposed a penalty payment of 1 000 000 EUR per day until Poland complies with that order or, failing to do so, until the Court of Justice delivers its judgment in the infringement proceedings.[228]

III. CONCLUDING REMARKS

In the EU legal order, values matter. As the Court of Justice made clear in the *Conditionality Judgments*, the values contained in Article 2 TEU are not merely statements of policy guidelines or intentions, but they define 'the very identity of the [EU] as a common legal order'.[229]

EU values must operate as the moral compass that helps Europeans to navigate through unchartered waters. They constitute the bridge between past and present, and serve as the foundation on which future generations must overcome the challenges ahead.

Can European integration move forward without upholding common values such as the rule of law? The Court of Justice has been categorical in its reply to that question, answering with a resounding "NO". The EU is its values. They are embedded in the very DNA of the European integration project. Those values are the soul of the EU that enables the Member States to grow together whilst preserving their national identity. 'United in diversity' means, in my view, united by common values that we share and cherish and, at the same time, respecting our cultural and social differences.

Five years ago, when the Court of Justice issued its landmark judgment in *Associação Sindical dos Juízes Portugueses*, it indicated the path towards defending the values contained in Article 2 TEU. Upholding the rule of law is of cardinal importance for the rights that EU law confers on individuals and for the other founding values. That is because European integration and the rule of law go hand in hand. Ever since that judgment was delivered, the Court of Justice has developed and consolidated a line of case law that clarifies, in general, the meaning of the rule of law within the EU and, in particular, that of judicial independence.

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[226] See Vice-President of the Court of Justice, order of 27 October 2021, Commission v Poland, C-204/21 R, not published, EU:C:2021:877.

[227] See Vice-President of the Court, order of 14 July 2021, Commission v Poland, C-204/21 R, EU:C:2021:593.

[228] Vice-President of the Court, *Commission v Poland*, EU:C:2021:877, ¶ 64.

[229] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶¶ 127 and 232, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶¶ 145 and 264. See, in this regard, FRANCIS FUKUYAMA, IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT 167 (2018) (who posits that European identity should be built 'on adherence to basic liberal democratic principles').

In the EU legal order, judges are not only protected in their individual capacity but also in their institutional capacity. Just like any individual, national judges have the right to effective judicial protection of the rights that EU law confers on them, a right enshrined in Article 47 of the Charter. In addition, by virtue of Article 19(1) TEU and Article 267 TFEU, those judges are protected as members of the courts of general jurisdiction for the application and enforcement of EU law. They are protected as the 'arm of EU law'. Any national judge from the four corners of the EU may say '*iudex europeus sum*' and benefit from that institutional protection stemming from the upholding of the rule of law within the EU. This means, *inter alia*, that a national measure that is repugnant to the principle of judicial independence is to be set aside. Since that institutional protection aims to prevent the EU's constitutional structure from collapsing, it must operate at all times in the fields covered by EU law and may not be made conditional upon finding that the national measure at issue is implementing EU law.

Respect for the rule of law within the EU also means that the Court of Justice must not overstep the limits of its jurisdiction, by encroaching upon the prerogatives of the EU political institutions or the competences retained by the Member States. Those limits reflect the checks and balances laid down in the Treaties and, as such, are an integral part of the rule of law within the EU.

First, Article 19(1) TEU may not be interpreted as modifying the role that the Court of Justice plays in the context of the preliminary reference mechanism. A national court has no access to the preliminary reference mechanism in order to question, in a general fashion, whether legislative reforms comply with the principle of judicial independence, when that question has no bearing on the main proceedings.

Second, the notion of 'judicial authority', within the meaning of the EAW Framework Decision, is to be interpreted as including the national courts of the issuing Member State, even if the justice system of that Member State suffers from systemic or generalised deficiencies. Otherwise, the executing judicial authority would be empowered to suspend the EAW mechanism in respect of all the courts of that Member State. However, such empowerment would encroach upon the prerogatives of the European Council and those of the Council under Article 7 TEU, since it would establish a procedure parallel to that laid down in that Treaty provision.

Third and last, the Court of Justice has, time and again, stressed the fact that the organisation of justice in the Member States falls within their competences. Yet, in exercising those competences, they must comply with EU law. This means, in essence, that the rule of law within the EU does not prescribe a particular constitutional model but a framework of reference within which the Member States may make their own constitutional choices. It is in accordance with that framework of reference that the Court of Justice has developed the principle of judicial independence, allowing room for diversity. Member States are therefore free to choose different rules regarding the appointment, length of service and grounds for abstention, rejection and dismissal of judges, as well as different rules determining the disciplinary regime and type of personal liability for judicial error applicable to them. However, in order to comply with EU law, those rules must be such as 'to

dispel any reasonable doubt in the minds of individuals as to the imperviousness of [those judges] to external factors and [their] neutrality with respect to the interests before [them]'. In order to determine whether those rules dispel those doubts, the Court of Justice and national courts must not only examine their normative content, but also the reasons behind their adoption and the way they are enforced. Just like the ECtHR, the Court of Justice has endorsed an understanding of judicial independence that includes both legal and factual elements (independence *de jure* and independence *de facto*). Moreover, when examining the relevant rules and the factual context in which they apply, the Court of Justice follows a combined assessment of all the relevant factors. Whilst one factor may not suffice in itself to call into question the principle of judicial independence, that factor taken together with others may cast doubt as to the independence of the national court in question.[230]

Most importantly, as a framework of reference, the rule of law requires 'value alignment'. Before joining the EU, a Member State must align its institutional and constitutional provisions with the values on which the EU is founded. A Member State must therefore establish a legal order where the exercise of public power is based on democratic principles, where fundamental rights are respected and where the rule of law is upheld. That alignment is a continuous process for as long as such a Member State remains within the EU. The level of protection of the EU values within a Member State existing at the moment of acquiring that status, is not the finish line but rather the starting point. Whilst that level of value protection may always be improved, it may not suffer value regression. This is an important development in the case law of the Court of Justice,[231] which shows beyond any doubt that authoritarian tendencies at national level have no room in the EU. Those tendencies can never be part of our European heritage, nor become a common constitutional tradition for future generations. If the EU is to operate as an area without internal frontiers, where there is liberty, democracy and justice for all, integration through the rule of law is the only way forward.

[230] *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, ¶ 142.

[231] *Repubblika*, EU:C:2021:311, ¶ 63; *Asociaţia 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393, ¶ 162; *Euro Box Promotion and Others*, EU:C:2021:1034, ¶ 162; *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 126, and *Poland v. Parliament and Council*, EU:C:2022:98, ¶ 144.

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

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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

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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

[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]

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[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; Asociaţia '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

[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

[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

[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.

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[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

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[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, Asociația '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.

THE TREATIES WITHOUT A GUARDIAN: THE EUROPEAN COMMISSION AND THE RULE OF LAW

Kim Lane Scheppele[*]

INTRODUCTION

The Treaty on European Union assigns responsibility for the enforcement of Union law to the European Commission: "Article 17(1) TEU: The Commission shall . . . ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. . . ."[1]

In pursuit of this mandate, the Commission has taken lead responsibility for strengthening the rule of law, given that the rule of law in the European Union requires – among other things – the effective and uniform application of Union law across the Member States. Toward that end, the Commission has stated:

> Strengthening the rule of law in the Union is, and must remain, a key objective for all. Therefore. . . the Commission has set out concrete actions to strengthen the Union's capacity to promote and

* Professor of Sociology and International Affairs in the School of Public and International Affairs and the University Center for Human Values, Princeton University. Faculty Fellow, University of Pennsylvania Carey School of Law. Paper prepared for the conference "Reshuffling the Institutional Framework for the Protection of the Rule of Law in Europe: The EU as a Guardian of the Rule of Law," Institute for European Law, KU Leuven, Belgium, June 3, 2022. I learned much from that conference as well as from important challenges posed by the anonymous reviewers of this article and detailed comments from Laurent Pech. I have also benefited in developing these ideas over the years from work with various coauthors and collaborators: Dimitry Kochenov, Petra Bárd, John Morijn, Dan Kelemen, Tom Pavone, Sébastien Platon, Gábor Halmai and Gábor Mészáros. This Article deals with developments that are still in progress, but it is current as of October 2022. 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).

[1] Treaty on European Union, art. 17, Oct. 26, 2012, 2012 O.J. (C 326) 1 [hereinafter TEU].

> uphold the rule of law, through promotion of a common rule of law culture, prevention of rule of law problems and an effective response.[2]

If my task in this Article is to discuss the responsibility of the European Commission to ensure the rule of law, then the black-letter answer seems absolutely easy. The Commission has the mandate to ensure that Union law is applied across the Member States and it has positioned itself as the central coordinating actor in the EU when it comes to the rule of law. As I will argue in the Article, however, the Commission has failed on both counts – both in ensuring the effective and uniform application of Union law and in effectively guiding the European Union's efforts to ensure that the rule of law is defended.

While the rule of law embraces many different dimensions of legality, the enforcement of law as written is particularly crucial to realizing the "the rule of law – a value common to the European Union and the Member States which forms part of the very foundations of the European Union and its legal order."[3] In Union law, enforcement involves a division of labor. Each Member State has the front-line obligation to ensure that Union law has primacy and direct effect within its legal system, guaranteeing also that Union law is both effective and uniformly applied across the Member States. The Commission has the back-up obligation to ensure that the Member States are actually following through on their commitments, which includes monitoring and ensuring that the jurisprudence of the Court of Justice – requiring independent courts, irremovability of judges, guarantees against disciplining judges for the content of their decisions and a commitment to maintaining high standards once achieved – is observed.[4]

Promoting a rule of law culture across Union institutions as well as within Member States must also be part of the mix, but the Commission is in the best position to guarantee – as it itself has said – that "rule of law problems" must be met with an "effective response." This will be especially true when rule of law backsliding affects the central institutions within Member States that are tasked with ensuring that Union law is connected to a system of effective remedies, which means that the Commission should be particularly concerned about the state of the independent national judiciaries. In this Article, then, I will examine the Commission's track record in acting to ensure the rule of law through the enforcement of EU law in the Member States, particularly when it comes to protecting and defending the independence of national courts.

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[2] *Initiative to Strengthen the Rule of Law in the EU*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/initiative-strengthen-rule-law-eu_en (last visited February 13, 2023).

[3] Hungary v. Parliament and Council, Case C-156/21, EU:C:2022:97, ¶ 128.

[4] This Article will elaborate on the Court decisions that have announced these principles, but for now, a good summary of the jurisprudence of the Court in its first five years of decisions on point can be found in LAURENT PECH & DIMITRY KOCHENOV, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments Since the Portuguese Judges Case*, SIEPS, Sept. 2021, https://sieps.se/en/publications/2021/respect-for-the-rule-of-law-in-the-case-law-of-the-european-court-of-justice/ [hereinafter PECH & KOCHENOV, *Respect for the Rule of Law*].

The key tool that the Commission has to accomplish this task is the infringement procedure specified in Article 258 TFEU, with a backup capacity to enforce decisions of the European Court of Justice [ECJ] through penalty payments under Article 260 TFEU. When we look at what the European Commission has done over the last two decades as the rule of law issues in the EU have become more prominent, however, its track record is spotty at best. As R. Daniel Kelemen and Tommaso Pavone have documented in a recent paper, the Commission's overall use of infringement actions across the board has fallen continuously ever since the Barroso Commission took office in 2004. As they show: "Between 2004 and 2018, infringements opened by the Commission dropped by 67%, and infringements referred to the ECJ dropped by 87%."[5]

Even though the EU admitted 10 new states in 2004, the Commission's infringement actions declined in absolute numbers around the same time and fell even more dramatically when one calculates the number of infringements launched per Member State. As the Kelemen and Pavone study shows, in 2004 – the year of "big bang" enlargement – the Commission sent 259 infringement cases to the ECJ but by 2016, only 34 cases were sent.[6] Since that time, the decline has continued. In 2021, the most recent year for which statistics are now available,[7] the Commission sent only two cases to the Court of Justice, one each under Article 258 TFEU and Article 260(3) TFEU, during that entire year.[8]

Of course, it's not impossible that EU Member States have become angels who need no external enforcement of EU law (hence the drop in the total number of infringement cases opened). They may also have become eager implementers who need only the slightest suggestion that they are in violation of Union law before they hasten to comply (hence the even sharper decline in cases referred to the Court of Justice). If so, the precipitous drop in both numbers would just be a reflection of

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[5] R. Daniel Kelemen & Tommaso Pavone, *Where Have all the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union* 3 (Working Paper, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3994918. Forthcoming in *World Politics*, 2023.

[6] *Id.* at 4-5.

[7] The Commission breaks out the number of complaints it receives, the number of files it closes and the number of cases taken forward through different stages of the process across different areas of EU law in annual statistical reports. The most recent report is the *Comm'n Staff Working Document - General Statistical Overview Accompanying the Report from the 2021 Annual Report on Monitoring the Application of EU Law*, SWD (2022) 194 final (July 15, 2022), https://ec.europa.eu/info/sites/default/files/2021-swd-annual-report-eulaw-overview_en.pdf [hereinafter *Comm'n Staff General Statistical Overview 2021*]. In looking at the substantive areas in which the Commission has been active, about one-quarter of the pilot files, generally the first step in an infringement procedure, were in the area of migration and home affairs and another quarter covered taxation and the customs union. Most of these cases were opened on the initiative of the Commission, since migration and home affairs accounted for only 6% of the complaints made to the Commission and taxation and customs accounted for only 9% of the complaints. The gap between the subjects of the complaints filed and cases taken to the pilot and infringement stages is most pronounced in the area of justice and consumers, which accounted for about one-third of the complaints received by the Commission but which registered such a negligible number of pilot procedures and infringements that the whole category was subsumed under "other" which makes it impossible to tease out from the statistics published just how many of the complaints were taken up for action. Given that complaints about judicial independence are most likely to fall into this category, it seems that the pressures on the Commission to act could be quite substantial but the Commission is finding the complaints do not warrant a follow-up.

[8] *Id.* at 3.

extraordinary compliance by the Member States. The reality, however, is rather the reverse. The timing of the Commission's steady retrenchment in its use of infringement actions coincides with the Era of Crises, in which the Euro Crisis was followed by the Migration Crisis. Each of these crises brought about serious challenges to the uniform application of EU law[9] as some Member States in each crisis went their own delinquent ways and as complaints against Member States mounted.[10] Since that time, of course, both Covid and the Ukraine War have also

[9] With regard the Euro Crisis: The fiscal rules set out in the Maastricht Treaty specified that budget deficits should run no higher than 3% of GDP and that public debt should not exceed 60% of GDP, but these rules were honored in the breach during and after the financial crisis of 2008 when nearly all Member States violated the rules at once. Piort Arak et al., *How the EU's Fiscal Rules Should be Reformed*, LONDON SCHOOL OF ECONOMICS: EUROPP BLOG (Apr. 16, 2021), https://blogs.lse.ac.uk/europpblog/2021/04/16/how-the-eus-fiscal-rules-should-be-reformed/. The triggering of the Excessive Deficit Procedure (EDP), the enforcement mechanism provided for in the law, did not result in widespread conformity with the target figures and was never carried through to its logical conclusion with sanctions even for Member States that remained in stubborn noncompliance over a decade or more. A study of the effectiveness of the use of the Excessive Deficit Procedure during the Euro Crisis found that net contributor countries – which would have been in better financial shape to begin with – did attempt to enforce the EDP recommendations which resulted in these Member States coming closer to the fiscal targets. The EDP did seem to work in those countries, at least in part. But in net beneficiary states, the researchers struggled to find a connection between the recommendations and the fiscal results so there seemed to be no traceable effect at all. Jasper F.M. DeJong & Niels D. Gilbert, *Fiscal Discipline in the EMU? Testing the effectiveness of the Excessive Deficit Procedure*, 61 J. OF EUR. POL. ECON. 1018 (2020). Paralleling the Kelemen and Pavone finding on infringement actions, the Commission seems to have made repeated recommendations, but it did not issue a single fine through 2016 under the EDP despite the fact that many countries – most notably, Spain, Portugal and Hungary – had been in violation of the standards long before the financial crisis and remained in violation for years afterwards. Anna auf dem Brinke, *The Excessive Deficit Procedure has Never Led to a Fine: So What Does it Actually Do?* JACQUES DELORS INSTITUT: BLOG (July 29, 2016), https://www.hertie-school.org/fileadmin/user_upload/20160729_Excessive-deficit-Brinke-AB.pdf. One might conclude from this that once countries realize that recommendations will be made with no consequence for ignoring them, the recommendations cease to have an effect on the persistent violators.

With regard to migration rules, Alezini Loxa and Vladislava Stoyanova have documented "the collapse of the Common European Asylum System, manifested through its systemic non-application" throughout the migration crisis of 2015. They argued that "If the EU cannot guarantee compliance with its rules (such as those in the CEAS) in a context where mutual trust among the Member States must be assumed, Member States will resort to self-help, that is, each Member State will try to individually solve the issues in accordance with its own interests as perceived at the particular point in time." Alezini Loxa & Vladislava Stoyanova, *Migration as a Constitutional Crisis for the European Union*, *in* MIGRANTS' RIGHTS, POPULISM AND LEGAL RESILIENCE IN EUROPE 139, 141-42 (Vladislava Stoyanova & Stijn Smet eds., 2022). Here, the Commission did act against the most blatant breaches of the rules – for example filing five infringements against Hungary for its violation of CEAS and related directives. But seven years past the end of the crisis, the Commission has neither achieved compliance nor levied sanctions with regard to Hungary. In November 2021, the Commission finally referred Hungary to the Court of Justice under Article 260 TFEU for penalty payments that have yet to be determined. European Comm'n Press Release IP/21/5801, Migration: Commission Refers Hungary to the Court of Justice of the European Union over its Failure to Comply with Court Judgment (Nov. 12, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5801.

Even with these crises happening in quick succession, the number of infringements and referrals to the Court of Justice still steadily decreased during this period, as the Kelemen and Pavone data show. Kelemen & Pavone, *supra* note 5.

[10] Kelemen and Pavone found that complaints to the Commission of violations of EU law on the part of the Member States grew during this period as did national court referrals of questions to the ECJ, both of which would indicate that enforcement issues were rising. Kelemen & Pavone, *supra* note 5, at 11-13. Of course, if national courts can address the EU law enforcement problems on their own through references to the Court of Justice, there may not be a need for the Commission to bring infringements. But it is not always possible to address serious and systemic infringements of EU law from the legal posture of

posed new dilemmas for the EU. [11] Under the circumstances, one might have expected the number of infringements to grow given the larger number of Member

a reference, as the Court currently understands the limits of the procedure. For the reasons I will explain below, many crucial issues remain unaddressed in the area of judicial independence because no national cause of action exists that would allow the national courts to tee up the relevant questions to the ECJ. *See infra* notes 303-304. If the Court were to adjust the way it handles reference cases, however, it might be able to address serious and systemic problems better than it currently does. I will develop those arguments in the last section of this paper.

[11] The Covid pandemic resulted in serious breaches of EU law, for example unilateral restrictions on mobility across borders in excess of permissible deviations. *See* Daniel Thum and Jonas Bornemann, *Schengen and Free Movement Law During the First Phase of the Covid-19 Pandemic: Of Symbolism Law and Politics*, 5 EUR. PAPERS 1143 (2020) https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2020_3_4_Articles_Daniel_Thym_Jonas_Bornemann_00420_0.pdf. In addition, the declaration of national states of emergency in many Member States threatened the protection of EU law rights across the EU. *See* MARIA DIAZ CREGO ET AL., EUR. PARL. RES. SERV., STATES OF EMERGENCY IN RESPONSE TO THE CORONAVIRUS CRISIS (2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/659385/EPRS_STU(2020)659385_EN.pdf.

In response, the Commission bent the rules rather than simply watch most Member States breaking them. DAVID EDWARD ET AL., EUROPEAN POLICY CENTER, EU LAW IN THE TIME OF COVID-19 (2020), https://www.epc.eu/content/PDF/2020/EU_law_in_the_time_of_COVID_v6.pdf. All told, the Commission acted quickly in this crisis to loosen the rules and allow Member States a great deal of leeway to violate EU law temporarily.

But where the violations were not temporary, for example in Hungary, a declaration of a state of emergency in March 2020 allowed the prime minister to govern by decree for more than two years. In May 2022, the Hungarian Covid emergency was replaced by a state of emergency declared for the war in neighboring Ukraine so that the prime minister's emergency powers continue to this day. While the European Commission's 2022 Rule of Law Report on Hungary mentioned these developments as disturbing, it ultimately said nothing about more than two years of emergency rule in its country recommendations. *Comm'n Staff Working Document: 2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary*, at 2, SWD (2022) 517 final (July 13, 2022), https://ec.europa.eu/info/sites/default/files/40_1_193993_coun_chap_hungary_en.pdf [hereinafter *Comm'n Staff Situation in Hungary 2022*]. One might have thought that the fact that one of the first decrees exempted a wide swath of public contracts from EU public procurement rules might have attracted the Commission's enforcement attention, but it did not. *Hungary Relaxes Certain Public Procurement Rules During the Covid-19 Crisis*, CMS LAW-NOW, Mar. 23, 2020, https://www.cms-lawnow.com/ealerts/2020/03/hungary-relaxes-certain-public-procurement-rules-during-covid-19-crisis . One year into the crisis as Hungary remained under a state of emergency, Transparency International Hungary concluded that the amount of cronyism in the awarding of public contracts increased during the pandemic: "[p]ublic resources reallocated for crisis management purposes were often used inefficiently, or to promote oligarchs and the government's clientele. . . .[I]n 2019, 51 percent of tenders won by businesses with government ties lacked competition, and this proportion increased in 2020's first trimester." Bálint Mikola, *Hungary's Rule of Law Backsliding Continues Amidst the Covid-19 Crisis*, TRANSPARENCY INTERNATIONAL: BLOG (Feb. 18, 2021), https://www.transparency.org/en/blog/hungarys-rule-of-law-backsliding-continues-amidst-the-covid-19-crisis. In April 2022, the Commission launched the new Conditionality Regulation against Hungary given its track-record in misspending EU funds. This action allows the Commission to reach corruption, but it is harder to address other structural issues related to the rule of law through this action (for example, the crackdown on NGOs and consolidated control over the media). Now that the Commission has published its recommendation to the Council on application of the Conditionality Regulation, we can see that tackling judicial independence is not on the list of changes that it insists that Hungary make to receive EU funds. *Comm'n Proposal for a Council Implementing Decision on Measures for the Protection of the Union Budget against Breaches of the Principles of the Rule of Law in Hungary*, COM (2022) 485 final (Sept. 18, 2022), https://ec.europa.eu/info/sites/default/files/about_the_european_commission/eu_budget/com_2022_485_f1_proposal_for_a_decision_en_v7_p1_2236449.pdf.

With regard to the Ukraine crisis, the Commission loosened the application of state aid and competition law rules, again to avoid the situation in which many Member States would be in violation of the rules at once. Dzhuliia Lypaio, *Competition Law in Times of War: Response to the Russian Invasion of Ukraine*, WOLTERS KLUWER: KLUWER COMPETITION L. BLOG (Apr. 4, 2023), http://competitionlawblog.

States and the succession of crises that tested normal rules. But the extensive interviews conducted by Kelemen and Pavone indicate that non-enforcement became a deliberate policy at the Commission in order to avoid conflict with the Member States. As Kelemen and Pavone concluded:

> . . . the Commission's political leadership rolled back enforcement to address declining intergovernmental support and the damage that was doing to its ability to pursue its policy agenda. . . . This strategy succeeded in its political aim: Governments in the Council responded as hoped, becoming broadly supportive of the Commission and its softer enforcement approach. However, forbearance was applied so broadly that it generated a pervasive chilling effect on enforcement that proved harder to revoke than anticipated. In particular, forbearance discouraged Commission civil servants from laboring to build enforcement cases, given that most of these files ended up being dropped after an opaque political dialogue with national capitals.[12]

As Kelemen and Pavone show, the Commission was not failing to enforce EU law because EU law was being rigorously applied by Member States. The Commission was deliberately reducing the effort it spent on enforcement in an effort to generate support from the Member States for its other projects. And as Commission leadership dropped potential infringement actions in order to curry favor with the Member States, Commission staff produced fewer cases.

The Commission has been very sensitive on this point. When criticized for failing to use infringement procedures effectively, the Commission has boasted about its excellent track record. In July 2021, President von der Leyen claimed that on her watch fully 42 rule-of-law-related infringements had been launched.[13] Closer inspection revealed this to be a seriously inflated claim.[14] Faced with the evidence

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kluwercompetitionlaw.com/2022/04/04/competition-law-in-times-of-war-response-to-the-russian-invasion-of-ukraine/. This crisis is too new to be able to tell whether the Commission can guide a return to the prior rules after the crisis is over, but its track record from earlier crises in which it relaxed rules and then restored them without an enforcement effort to go after those who did not restore the pre-crisis rules is not promising given that the Commission is not inclined to engage in rigorous enforcement in general these days.

[12] Kelemen & Pavone, *supra* note 5 at 10.

[13] Ursula von der Leyen, President, European Comm'n, Speech by President von der Leyen at the European Parliament Plenary on the Conclusions of the European Council Meeting of 24-25 June 2021 (July 7, 2021), https://ec.europa.eu/commission/presscorner/detail/en/speech_21_3526 .

[14] "[M]ost of these actions are primarily about the incorrect or partial transposition of directives adopted more than a decade before. Furthermore, almost half these actions relate to EU environmental law – total of 17 environmental law transposition related actions concerned with access to justice as regards Environmental Liability Directive 2004/35 and Air Quality Directive 2008/50/EC – with an additional total
of 11 actions relating to transposition issues concerning EU Framework Decision 2008/913 on combating certain forms of expressions of racism and xenophobia by means of criminal law. The list of 42 actions also include a couple of actions which do not primarily, if at all, raise violations of Article 2 TEU values such as the ones raising the issue of access to high-level posts in the Greek public service, Cyprus and Malta's investor citizenship schemes, or the non-conformity of Bulgarian pension law with Directive 79/7." LAURENT PECH & PETRA BÁRD, EUROPEAN PARLIAMENT POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS, THE COMMISSION'S RULE OF LAW REPORT AND THE EU MONITORING AND ENFORCEMENT OF ARTICLE 2 TEU VALUES 85 (2022), https://www.europarl.europa.eu/

from the Kelemen and Pavone article about the declining use of infringements and also with a strong reaction from the Parliament as the Commission continued to delay in bringing enforcement actions on the rule of law in Poland and Hungary,[15] the Commission has since issued a Communication boasting again about its track record, shifting some of the blame for rule of law problems to others and emphasizing prevention over enforcement.[16] In reporting on recent records bringing infringement cases in this Communication, the Communication primarily analyzed the last five years,[17] which obscures the sharp drop that occurred before that time as well as the fact that nearly all of these infringements were routine non-transposition cases that did not address rule of law issues.

Whatever the wisdom of the Commission strategy to avoid infringement actions where possible, there is no doubting that the Rule of Law Crisis grew steadily during precisely the period when the Commission sharply reduced its enforcement of EU law. The accommodating stance of the Commission might well have encouraged budding autocrats who wanted to consolidate power at home without encountering tough enforcement of EU law from Brussels. Even if loosening enforcement didn't cause the Rule of Law Crisis, however, it was, at a minimum, an unfortunate coincidence that helped it along. As I will explain below, it's not that the Commission did nothing as the rule of law crisis intensified. Instead of bringing infringement actions, it spent much of its energy inventing new tools to cope with the crisis, tools that were either not used or were not effective.[18] But while the Commission was doing this, it left its most effective tool –infringement procedures – underutilized.

The Rule of Law Crisis started in earnest in 2010 with the election of Viktor Orbán in Hungary and his immediate autocratic consolidation of power, which involved rewriting the Hungarian constitutional order with hundreds of new laws that removed checks and balances and put the judiciary under political control.[19] EU Law was implicated, at a minimum, in the attacks on the judiciary (about which more below),[20] the violation of data protection rules,[21] and the independence of the

RegData/etudes/STUD/2022/727551/IPOL_STU(2022)727551_EN.pdf [hereinafter PECH & BÁRD, ARTICLE 2 TEU VALUES]. Report prepared at the Request of the LIBE and AFCO Committees.

[15] Andreas Rogal, *European Comm'n Rejects MEPs' Demand To Take Legal Action on Rule-of-Law Violations*, THE PARLIAMENT MAGAZINE, Aug. 26, 2021, https://www.theparliamentmagazine.eu/news/article/european-commission-rejects-meps-demand-to-take-legal-action-on-ruleoflaw-violations.

[16] *Communication from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Enforcing EU Law for a Europe that Delivers*, COM (2022) 518 final (Oct. 13, 2022), https://ec.europa.eu/info/sites/default/files/com_2022_518_1_en.pdf.

[17] *Id.* at 20-24.

[18] *See infra* Part II.

[19] *See* Miklós Bánkuti et al., *Hungary's Illiberal Turn: Dismantling the Constitution*, 21 J. OF DEMOCRACY 138 (2012).

[20] *See infra* notes 44-59.

[21] The Commission did bring a successful infringement action in 2012 against Hungary for the removal of the data protection ombudsman before the end of his term, although the action did not succeed in restoring him to office. Comm'n. v. Hungary, Case C-288/12, EU:C:2014:237. But the Commission never asked the next logical question, which is why it was so important to the government to replace the fired official. The data protection ombudsman had brought an action in the Hungarian courts against the government's mass collection of citizens' political opinions through "social consultations," a practice that

central bank.[22] The establishment of a functional media monopoly controlled by a politically dependent media regulator might have attracted the Commission's

continues to this day in violation of Article 9 of the General Data Protection Regulation. European Parliament and Council Regulation (EU) 2016/679, On the Protection of Natural Persons with regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1 [hereinafter GDPR]. Before the Hungarian court could decide the matter, however, government removed the data protection ombudsman rather than stop its data collection and the newly installed data privacy officer presided over a newly constituted office that dropped the case. Kim Lane Scheppele, *Making Infringement Procedures More Effective: A Comment on Comm'n v. Hungary*, VERFASSUNGSBLOG (Apr. 30. 2014), https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/. The Hungarian government has since gone on to lose a case at the European Court of Human Rights, which found that the newly created anti-terrorism police force was given unlimited surveillance powers, not even tethered to terrorism, in violation of the Article 8 of the Convention. Szabó & Vissy v. Hungary, app. no. 37138/14, CE:ECHR:2016:0112JUD003713814. Hungary has still not complied with this judgment and the Commission has not visibly assessed the implications of this non-compliance with the ECtHR decision for compliance with the GDPR. The European Court of Human Rights again confirmed in September 2022 its finding that the Hungarian government has no meaningful checks on domestic police surveillance. *See* Hüttl v. Hungary, app. no. 58032/16, CE:ECHR:2022:0929JUD005803216. More recently, the Hungarian government admitted to using the cellphone-infiltration software Pegasus against journalists and government critics, but the data protection officer who replaced the fired ombudsman determined that the use of Pegasus was legal under Hungarian law. Here, too, after excusing the government's practices, he dropped the case. NEMZETI ADATVÉDELMI ÉS INFORMÁCIÓSZABADSÁG HATÓSÁG (HUNGARIAN NATIONAL AUTHORITY FOR DATA PROTECTION AND FREEDOM OF INFORMATION), FINDINGS OF THE INVESTIGATION LAUNCHED EX OFFICIO CONCERNING THE APPLICATION OF THE "PEGASUS" SPYWARE IN HUNGARY (2022), https://www.naih.hu/data-protection/data-protection-reports/file/492-findings-of-the-investigation-of-the-nemzeti-adatvedelmi-es-informacioszabadsag-hatosag-hungarian-national-authority-for-data-protection-and-freedom-of-information-launched-ex-officio-concerning-the-application-of-the-pegasus-spyware-in-hungary. Since the initial exposé of the Pegasus surveillance, new investigative reporting has uncovered evidence that the Hungarian government has purchased from foreign sellers a whole range of deep surveillance tools beyond Pegasus. Szabolcs Pányi, *Boosting of Spying Capabilities Stokes Fear Hungary is Building a Surveillance State*, BALKAN INSIGHT, Oct. 13. 2022, https://balkaninsight.com/2022/10/13/boosting-of-spying-capabilities-stokes-fear-hungary-is-building-a-surveillance-state/.

While widespread surveillance is a problem in many EU Member States, the Commission has not taken steps to challenge its use anywhere in the EU nor has it seen a particular urgency in examining widespread surveillance in a Member State that is no longer classified by democracy raters as a democracy. Vincent Manancourt, *Europe's State of Mass Surveillance: The EU's Top Court Says Mass Surveillance is Banned. Governments Do it Anyway*, POLITICO.EU, July 6, 2022, https://www.politico.eu/article/data-retention-europe-mass-surveillance/. The key cases in which the Court of Justice has recently and urgently elaborated its view of what EU law requires in this regard are all reference cases and notably not infringements: Privacy International v. U.K., Case C-623/17, EU:C:2020:790; La Quadrature du Net v. France, Joined Cases C-511/18 & C-512/1, EU:C:2020:791; Ordre des Barreaux Francophones & Germanophone v. Belgium (forthcoming), Case C-520/18, EU:C:2020:7, for which the Opinion of Advocate General Sánchez-Bordona has already issued.

[22] The Barroso Commission criticized the government of Hungary for trying to remove the president of the Hungarian central bank before his lawful term expired. European Comm'n Press Release MEMO/12/165, Comm'n Takes Further Legal Steps on Measures Affecting the Judiciary and the Independence of the Data Protection Authority, Notes Some Progress on Central Bank Independence, but Further Evidence and Clarification Needed (Mar. 7, 2012), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_165. At first, the Hungarian government backed down. But because the central bank president's term expired the following year, the Hungarian government simply waited and then installed a member of the government's inner circle as bank president when the previous bank president's term expired, thus bringing the bank under government control only a short time later, all without complaint from the Commission or the European Central Bank. Krisztina Than & Marton Dunai, *Hungary PM Names Right-Hand Matolcsy for Central Bank*, REUTERS, Mar. 1, 2013, https://www.reuters.com/article/uk-hungary-centralbank/hungary-pm-names-right-hand-matolcsy-for-central-bank-idUKBRE9200CY20130301. The Commission might have assessed this development against its obligation to ensure the application of art. 130 of the Treaty on the Functioning of

attention earlier than it did.[23] The political capture of the prosecutor's office, audit office, procurement process and other institutions responsible for the adequate monitoring of EU funds continued for more than a decade before the Commission finally took steps to cut the flow of EU funds to Hungary.[24]

As Hungary swiftly declined into autocracy, the Rule of Law Crisis got worse with the election of the PiS party in Poland. In back-to-back elections in 2015, PiS won both the presidency and majorities in both parliamentary chambers. Immediately, the PiS government began open assaults on the Polish judiciary.[25] As we will see below, the Commission responded more swiftly to these violations than

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the European Union [hereinafter TFEU], which says in relevant part: "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB . . . [no] national central bank . . . shall seek or take instructions from . . . any government of a Member State . . . Member States undertake to respect this principle and not to seek to influence the members of decision-making bodies . . .of the national central banks in the performance of their tasks." TFEU, art. 130, Oct. 26, 2012, 2012 O.J. (C 326) 1.

[23] After more than 10 years of harassment and the serial refusal of broadcasting rights of independent and opposition-controlled media by the Media Council in Hungary, the Commission finally advanced an infringement action against Hungary for cancelling the broadcast license of the last remaining independent radio station in the country, Klubrádió. European Comm'n Press Release IP/22/2688, Media Freedom: The Comm'n Refers Hungary to the Court of Justice of the European Union for Failure to Comply with EU Electronic Communications Rules (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688. The Commission had not acted once over the preceding decade when all other broadcast media outlets came under control of government-friendly autocrats or were denied broadcasting licenses. Instead, the Commission waited until the last independent radio station had already lost its last frequency and was pushed online before bringing an infringement.

[24] The Commission had argued that it needed "new tools" before it could withhold funds from a Member State, but as Dan Kelemen and I argued, the Commission already had extensive power under the Common Provisions Regulation to do just this. R. Daniel Kelemen & Kim Lane Scheppele, *How to Stop Funding Autocracy in the EU*, VERFASSUNGSBLOG (Sept. 10, 2018), https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/. Eventually in 2020, the Council and Parliament passed the Conditionality Regulation giving the Commission this power. European Parliament and Council Regulation (EU) 2020/2092, General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1 [hereinafter Conditionality Regulation]. The Commission delayed more than a year after the regulation took effect in using it, waiting for a Court of Justice judgment as to its legality, before it finally triggered the new Conditionality Regulation against Hungary on April 27, 2022. *EC Triggers Rule of Law Conditionality Mechanism against Hungary*, BNE INTELLINEWS, Apr. 28. 2022, https://www.intellinews.com/ec-triggers-rule-of-law-conditionality-mechanism-against-hungary-242718/. For a detailed analysis of why the Commission was justified in triggering the regulation, *see* KIM LANE SCHEPPELE ET AL., THE EU COMM'N HAS TO CUT FUNDING TO HUNGARY: THE LEGAL CASE (2021), bit.ly/3xofAtT (study commissioned by the Greens/EFA group in the European Parliament). As for why the Commission would be justified in cutting *all* of Hungary's EU funds, *see* KIM LANE SCHEPPELE ET AL., FREEZING ALL FUNDS TO HUNGARY (2022), https://t.co/l6wVCzEPwj [hereinafter SCHEPPELE ET AL., FREEZING ALL FUNDS] (study commissioned by the Green/EFA group in the European Parliament).

[25] The attacks on the Polish judiciary produced a line of cases, as we will see below. *See infra* Part I (B) elaborating the Article 2 TEU value of "rule of law" as it is given concrete form in Article 19(1) TEU . Using this framework, the Court of Justice found that Member State courts must remain independent to provide "remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law." Associacao Sindical dos Juizes Portugueses, Case C-64/16, EU:C:2018:117 [hereinafter *Portuguese Judges.*] As the ECJ has elaborated these standards in the Polish cases, however, the Commission has not enforced them with regard to the Hungarian courts. For a detailed comparison of Hungary and Poland, *see* Kriszta Kovács & Kim Lane Scheppele, *The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union*, 51 J. OF COMMUNIST & POST-COMMUNIST STUD. 189 (2018) [hereinafter Kovács & Scheppele, *Fragility*].

it did in the case of Hungary, though even then the Commission did too little, too late and in ways that have yet to make a substantial difference.[26]

The Rule of Law Crisis has grown larger, to the point where it now threatens the very existence of the European Union[27] because the rule of law is, as Court of Justice President Koen Lenaerts observed, "the precondition for the union's cohesion."[28] In particular, if Member States' judiciaries are not reliably independent but are instead subject to political pressure, then the principle of mutual trust, which requires that all Member States assume that the other Member States are good-faith enforcers of EU law, is seriously damaged. If the Commission is not ensuring that the conditions for mutual trust prevail by enforcing EU law in the Member States when the Member States have failed to enforce it themselves, then cooperation under the Treaties no longer has a firm basis. Without centralized enforcement to back up the principle of mutual trust, then, Member States may find themselves resorting to self-help outside the Treaty framework. During all of these crises in which many Member States were either finding it challenging to follow EU law or had decided to go their own way by flouting European rules, the precipitous decline in the Commission's enforcement of EU law was particularly ill-timed.

The statistics documenting the Commission's sharp reductions in its enforcement activity are therefore even worse than they look since there are many signs that violations of EU law were increasing while the Commission's enforcement effort decreased so that, if the Commission had continued to enforce EU law at the rate it did before 2004, cases should have skyrocketed. But infringement actions fell as one Member State – Hungary – ceased being a consolidated democracy, falling through the ranks of semi-consolidated democracies into the category of a hybrid or "competitive authoritarian" regime[29] and as another state – Poland – moved from being a consolidated to a semi-consolidated democracy

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[26] For one critical overview of the Commission's handling of the Polish rule of law crisis in its first five years, *see* Laurent Pech et al., *Poland's Rule of Law Breakdown: A Five-Year Assessment of the EU's (In)Action*, 13 HAGUE J. RULE L. 1 (2021) [hereinafter Pech et al., *The EU's (In)Action*].

[27] *See generally* Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the European Union*, 19 CAMBRIDGE Y.B. Eur. L. 3 (2017).

[28] Derek Scally, *ECJ President Warns EU Cannot Survive Solo Runs by Member States on Rule of Law*, IRISH TIMES, Nov. 2, 2021, https://www.irishtimes.com/news/world/europe/ecj-president-warns-eu-cannot-survive-solo-runs-by-member-states-on-rule-of-law-1.4717440 .

[29] The Varieties of Democracy project, V-Dem, downgraded Hungary to an "electoral autocracy" in 2020, explaining, "Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State." VARIETIES OF DEMOCRACY INSTITUTE, DEMOCRACY REPORT 2020: AUTOCRATIZATION SURGES – RESISTANCE GROWS 4 (2020), https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf. Hungary has remained in the "electoral autocracy" category since. *See* VARIETIES OF DEMOCRACY INSTITUTE, DEMOCRACY REPORT 2021: AUTOCRATIZATION TURNS VIRAL (2021), https://www.v-dem.net/media/filer_public/c9/3f/c93f8e74-a3fd-4bac-adfd-ee2cfbc0a375/dr_2021.pdf [hereinafter AUTOCRATIZATION TURNS VIRAL]. Freedom House downgraded Hungary from a democracy to a "transitional/hybrid regime" in 2020, explaining that Hungary's decline has been the most precipitous ever tracked in the Nations in Transit Report on post-communist states. Hungary had been one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely. FREEDOM HOUSE, NATIONS IN TRANSIT 2020: DROPPING THE DEMOCRATIC FAÇADE 2 (2020), https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

status and it is still falling fast.[30] Other countries – among them Romania, Slovenia, Croatia, Bulgaria and Malta – have also registered serious rule-of-law problems in recent years.[31] Judicial independence in backsliding Member States may be a dominant first casualty but the damage does not end there. Most crucially, it is much easier to reverse the damage to democratic institutions before democratic institutions become fully compromised and the damage becomes entrenched. Once independent and democratic institutions have been captured, the possibilities for reversal are much more limited.

The Court of Justice is now plainly alarmed at what is happening to the Article 2 TEU values and is signaling that the failure to enforce EU law is an existential crisis for the EU. The Court's concern applies not just to the rule of law as one central value, but it extends to all Article 2 values. The Court of Justice recently announced that *all* of the values of Article 2 TEU not only constitute "the very identity of the European legal order" but also that they are legally enforceable in a variety of ways, giving a strong hint to the Commission to use all available tools. As the full Court proclaimed in its recent decision in *Hungary v. Parliament and Council (Conditionality Regulation)*:

> 126. It follows that compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State . . . . Compliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.
>
> 127. The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties. . . .
>
> 159. . . . in addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the

[30] In 2021, V-Dem found that Poland "takes a dubious first place" among "major autocratizers," leaving the category of "liberal democracy" and joining the category of "electoral democracy" run on the principle of pure majoritarianism. *See* AUTOCRATIZATION TURNS VIRAL, *supra* note 29 at 18-19. In 2022, Freedom House report labeled Poland a "semi-consolidated democracy" in which "national governance remains democratic, but the ruling parties have changed the system to their advantage, capturing and instrumentalizing key institutions such as the Constitutional Tribunal." FREEDOM HOUSE, NATIONS IN TRANSIT 2022: POLAND (2022), https://freedomhouse.org/country/poland/nations-transit/2022.

[31] JAKUB JARACZEWSKI & NINO TSERETELI, DEMOCRACY REPORTING INTERNATIONAL, THE RULE OF LAW IN THE EU IN 2021: WHAT WENT RIGHT? WHAT WENT WRONG? (2021), https://democracy-reporting.org/en/office/EU/publications/the-rule-of-law-in-the-eu-in-2021-what-went-right-what-went-wrong. One tracker of the litigation surrounding the rule of law crisis – including infringement actions but more numerously, preliminary references and cases brought by aggrieved parties to the European Court of Human Rights – can be found in the EU Rule of Law Dashboard established by the Meijers Committee in the Netherlands. *See Rule of Law Dashboard*, SAFEGUARDING THE RULE OF LAW IN THE EUROPEAN UNION, https://euruleoflaw.eu/rule-of-law-dashboard-new/ (last visited Feb. 13, 2023). That site presently lists the cases for Hungary, Poland, Romania and Malta with more countries coming soon.

> power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State. . . .
>
> 232. . . . it must be borne in mind that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing *legally binding obligations for the Member States.*[32]

As this introductory review indicates, deep problems in the governance of Member States threatening the basic elements of the EU legal order were accumulating while the Commission was failing to use the most reliable tool in its toolbox. Had the Commission shared the Court's urgency, it could have been acting more forcefully to prevent Member States from reversing their commitments to Union values so that they would not then become States that no longer met the criteria for admission. As I will argue, the Commission *should* have been doing this if it were taking its Treaty obligation seriously to ensure the consistent application of EU law across the Union. But what we saw over the last decade is something else. The Commission has made enforcement the option of last resort and has allowed rule of law problems to fester while it has continued to invent new tools that have so far not shown themselves to be nearly as effective as the Commission's tried-and-tested standard enforcement powers.

This Article will proceed as follows: In Part I, I'll show how the rule of law has been undermined in Hungary and Poland by focusing on their attacks on the judiciary in particular and I will explain how the Commission either did virtually nothing (in the case of Hungary) or did too little, too late (in the case of Poland). In Part II, I'll show how the Commission spent the crucial last decade creating a panoply of new tools instead of using the ones that it had to act quickly enough to head off the problems before they became intractable. Creating new tools allowed the Commission to appear to be doing something about a serious crisis while actually doing nothing to change facts on the ground. In Part III, I'll ask: What can be done now to make up for the Commission's past inaction? I will suggest that, while the Commission still has formal treaty responsibility for ensuring that Member States comply with EU values as an integral part of EU law and that it should more aggressively use infringement actions to ensure the effectiveness of EU law across the Union, the Court of Justice may have to fill in where the Commission has failed. In fact, the Court of Justice has already started to do this, but it needs to do more. The Treaties, in short, need more than one Guardian and those Guardians need to act decisively now.

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[32] *Hungary v. Parliament & Council*, EU:C:2022:97, ¶¶ 126–127, 159, 232 [emphasis added].

I. DROPPING THE BALL ON THE RULE OF LAW: THE CASE OF JUDICIAL INDEPENDENCE

The phrase "rule of law crisis in the EU" has become shorthand for discussing Hungary's and Poland's democratic backsliding.[33] Their attacks on the judiciary in particular have raised alarm bells across European institutions, especially at the Court of Justice. While democratic backsliding often comes with an attack on many other independent institutions as well, in this section I will focus on judicial independence as one of the core elements of the rule of law.

The Court has long noted that it works in partnership with national courts to ensure effective judicial protection under Union law. And it has long insisted that these national courts meet rigorous tests for independence. In 2006, for example, the Court in *Wilson v. Ordre des avocats du barreau de Luxembourg*,[34] addressing the right of lawyers licensed in one Member State to practice in another, the Court considered the role of the national judiciaries in enforcing Union law. The lack of a judicial remedy for a denial of the right led the Court to explain what would count as a national court or tribunal under then Article 234 EC (now Article 267 TFEU), with a particular emphasis on the requirement of judicial independence:

> 49. The concept of independence, which is inherent in the task of adjudication, involves primarily an authority acting as a third party in relation to the authority which adopted the contested decision . . . .
>
> 50. The concept has two other aspects.
>
> 51. The first aspect, which is external, presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them . . . That essential freedom from such external factors requires certain guarantees sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office . . .
>
> 52. The second aspect, which is internal, is linked to impartiality and seeks to ensure a level playing field for the parties to the proceedings and their respective interests . . . . That aspect requires objectivity . . . and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.
>
> 53. Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the

[33] Kim Lane Scheppele & Laurent Pech, *What is Rule of Law Backsliding?*, VERFASSUNGSBLOG (Mar. 2, 2018), https://verfassungsblog.de/what-is-rule-of-law-backsliding/.

[34] Wilson v. Ordre des Avocats du Barreau de Luxembourg, Case C-506/04, EU:C:2006:587.

> imperviousness of that body to external factors and its neutrality with respect to the interests before it . . .

This statement of the importance of judicial independence in the enforcement of Union law became more explicit as national courts started to come under pronounced attack in Hungary and it should have been a signal to the Commission that the Court would act to protect the independence of national courts as a crucial element of EU law.

If the Commission may have nonetheless doubted the Court's resolve in this matter, the Court's 2011 Opinion on the draft agreement creating a unified patent litigation system found the treaty incompatible with EU law precisely on the grounds that it deprived national courts of their powers with regard to the interpretation and application of Union law. [35] With this reaffirmation of the centrality of national courts as EU courts along with its prior insistence that national courts must remain independent, the Court of Justice had already signaled even before the Hungarian legal reforms began in earnest that both Member States and the Commission had obligations under the Treaties to ensure that national courts live up to the obligations required of them under Union law and that national courts must remain independent while doing so.

Deepening the point, the Court of Justice ruled in 2013 on an appeal from the General Court of an action for annulment in which the appellants challenged the lack of an avenue available to them for contesting the validity of a Union regulation. In this case, *Inuit Tapiriit Kanatami* v. *Parliament and Council*,[36] the Court recalled that national courts carry out EU law functions and therefore that Member States have an obligation to ensure that these national courts can provide effective judicial review as EU law requires. As it had in the Opinion on the draft patent agreement, the Court of Justice pointed specifically to the provision of the Treaties that would form the basis for the Court's later judicial independence jurisprudence:

> 100. [T]he Member States [must] establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection . . . .
>
> 101. That obligation on the Member States was reaffirmed by the second subparagraph of Article 19(1) TEU, which states that Member States 'shall provide remedies sufficient to ensure effective judicial protection in the fields covered by European Union law'.[37]

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[35] Opinion 1/09 of the Court (Full Court), Case C-1/09, EU:C:2011:123.

[36] Inuit Tapiriit Kanatami v. Parliament and Council, Case C-583/11 P, EU:C:2013:625, ¶¶ 100-101. Note that this was not an infringement action brought by the Commission.

[37] The Court also said in that judgment:

66. As is evident from Article 19(1) TEU, the guardians of [the Union] legal order and the judicial system of the European Union are the Court of Justice and the courts and tribunals of the Member States. . . .

68. It should also be observed that the Member States are obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for European Union law . . . Further, pursuant to the second subparagraph of Article 4(3) TEU, the Member States are to take any appropriate measure, general

Despite this consistent jurisprudence, the Commission did not take the hint in these cases (and others) that effective judicial protection in the national courts was an EU law matter that fell within the Commission's jurisdiction to enforce if a Member State failed to do so. Eventually, the Court of Justice made the point in such a way that the Commission could hardly avoid the message. In 2018, as the assault on judicial independence was already far advanced in both Poland and Hungary, the Court of Justice – significantly in a reference case out of Portugal and not in an infringement action – announced explicitly that EU law requires all Member States to maintain an independent judiciary, deriving this obligation from reading the "rule of law" as a core Article 2 TEU value together with both Article 19(1) TEU which ensures that effective remedies are available in each Member State for breaches of EU law and Article 47 CFR which provides an individual right to an effective remedy and a fair trial.[38] If the hints had been relatively subtle before this point, this *Portuguese Judges* shouted that judicial independence of national courts was part of the backbone of the Union legal order, implicating its central values.

The *Portuguese Judges* case emerged late in the process of judicial destruction, eight years into the rule of law crisis in Hungary and three years into the rule of law crisis in Poland.[39] Crucially, it did not emerge through an infringement action brought by the Commission. Given the importance of independent judiciaries across the EU for ensuring mutual trust, the Commission should have attempted to develop this legal argument further itself, especially once the Court had signaled in the earlier cases that Article 19(1) subparagraph 2 could be used as a resource for establishing the obligations of Member States with regard to national judiciaries. But the Commission did not. Until the Court of Justice laid out a clear path with the arguments already developed for the taking, the Commission – like the proverbial deer in the headlights – remained frozen in place as the speeding cars of autocracy bore in on it.

Even with open invitation from the Court of Justice to the Commission in the *Portuguese Judges* case to bring infringement actions involving the destruction of national judiciaries, the Commission did (and has still done) nothing with regard to the destruction of judicial independence in Hungary. While it attempted to intervene gingerly in Poland, the Commission avoided infringement actions for the first several years of judicial destruction and has used infringements for only some of the

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or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the European Union. In that context, it is for the national courts and tribunals and for the Court of Justice to ensure the full application of European Union law in all Member States and to ensure judicial protection of an individual's rights under that law . . .

Inuit Tapiriit Kanatami, EU:C:2013:625.

[38] "Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals." *Portuguese Judges*, EU:C:2018:117, ¶ 32; "It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection." *Id.* ¶ 37; "In order for that protection to be ensured, maintaining such a court or tribunal's independence is essential, as confirmed by the second subparagraph of Article 47 of the Charter, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy." *Id.* ¶ 41.

[39] For a casebook excerpting and explaining the rapidly developing jurisprudence in this area in its first five years, *see* PECH & KOCHENOV, *Respect for the Rule of Law*, *supra* note 4.

most blatant attacks on judicial independence. In the meantime, the damage to judicial independence spread in both countries. As I will show below, the Commission has failed to react in a timely way to the concerted attacks on judicial independence in Member States for more than a decade. And it has certainly not done all it could have done, even now that the Court has pushed it to do so. To explain in detail how the Commission missed opportunities it should have taken, I will start with Hungary before taking up the case of Poland.

A. Hungary

As Hungary has moved from a consolidated democracy to a competitive authoritarian regime in just one decade, the European Commission, Guardian of the Treaties, has been strangely silent on the most important elements of autocratic capture.[40] While the attacks on constitutional democracy under Prime Minister Viktor Orbán's government in Hungary have been mounted on many fronts,[41] perhaps the most consequential for the European Union have been the attacks on the independence of the judiciary.[42] Observers have repeatedly called attention to the

[40] By contrast, the European Parliament passed a resolution in September 2022 calling out the fact that "the lack of decisive EU action has contributed to a breakdown in democracy, the rule of law and fundamental rights in Hungary, turning the country into a hybrid regime of electoral autocracy." *European Parliament Resolution of 15 September 2022 on the Proposal for a Council Decision Determining, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded* (2018/0902R(NLE)), ¶ 2 (Sept. 15, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.html [hereinafter *European Parliament Resolution* (2018/0902R(NLE))].

[41] The Council of Europe voted in October 2022 to place Hungary under a full monitoring procedure due to concerns about the rule of law and democracy. Parliamentary Assembly of the Council of Europe Press Release, PACE Votes to Begin Monitoring of Hungary over Rule of Law and Democracy Issues (Oct. 12, 2022), https://pace.coe.int/en/news/8848/pace-votes-to-begin-monitoring-of-hungary-over-rule-of-law-and-democracy-issues. For earlier warnings, *see generally* INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, HUNGARY: DEMOCRACY UNDER THREAT: SIX YEARS OF ATTACKS ON THE RULE OF LAW (2016), https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf (describing attacks on the judiciary, the media, freedom of information, civil society, religious groups and electoral laws in the first six years of the Orbán regime).

[42] Because this Article is about the rule of law, and the rule of law has so far been interpreted primarily as affecting the status of the judiciary across the EU, I will limit the discussion in this section to judicial independence, though I point to a number of other areas in which the Commission could – and in my view, should – have been active enforcing EU law that would have made the consolidation of autocracy harder to accomplish. With regard to progress on the rule of law in particular, I am heartened by the broader definition of the rule of law given in the new Conditionality Regulation, Article 2(1):

'[T]he rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

European Parliament and Council Regulation (EU) 2020/2092, A General Regime of Conditionality for the Protection of the Union Budget, art. 2(a), 2020 O.J. (L 433) 6. This definition sweeps more broadly than judicial independence to include many other elements of democratic decay, though the requirement of a nexus between rule of law violations and the proper spending of EU funds limits the sweep of the definition in practice.

This definition and the pronouncements of the Court of Justice in the cases brought by Hungary and Poland challenging this regulation have established that the other values of Article 2 TEU might also be legally enforceable: "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which. . . are an integral part of the very identity of the European Union as a common

progressive destruction of judicial independence[43] since the Orbán government came to power in 2010 – and yet ongoing destruction continues to this day without substantial pushback from Union institutions. Admittedly, not all aspects of democratic backsliding will constitute violations of Union law but, as I will argue in this section, interference with judicial independence does – and that is why the Commission should have been more active in combatting it.

At the very start of Viktor Orbán's campaign to capture the independent judiciary in Hungary, the Commission acted once. It brought an infringement action in 2012 challenging the forced retirement of 274 Hungarian judges who were suddenly subject to a new retirement age.[44] The Commission expedited the case and prevailed, but only 20% of the abruptly pensioned judges were ever reinstated as judges, primarily because their positions had been filled with new judges in the time it took the Court of Justice to make its decision.[45] Because the Commission routinely fails to ask in a timely way for interim measures to keep a Member State's unlawful action from changing facts on the ground while the case is pending,[46] the Commission can win on the law but change nothing on the ground.

The Commission's only persistent foray into the attacks on judicial independence in Hungary – brought as a case about age discrimination – is a perfect example. The case met the standards for interim measures.[47] The Court agreed with

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legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States." *Hungary v. Parliament & Council*, EU:C:2022:97, ¶ 232.

[43] The Venice Commission has repeatedly criticized Hungarian attacks on the independence of the judiciary starting in 2011. *Venice Comm'n Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, Op. 663/2012 (March 19, 2012) , https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e; *Venice Comm'n Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001*, Op. 683/2012 (Oct. 15, 2012), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e ; *Venice Comm'n Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020*, ¶ 18, Op. 1051/2021 (Oct. 16, 2021). So did the International Bar Association. *See* INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, STILL UNDER THREAT: THE INDEPENDENCE OF THE JUDICIARY AND THE RULE OF LAW IN HUNGARY (2015), https://www.ajoa.asn.au/wp-content/uploads/2015/08/Hungary-report.pdf. So did the European Parliament. *European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary* (2012/2130(INI)) (Jul. 3, 2013), https://www.europarl.europa.eu/doceo/document/TA-7-2013-0315_EN.html ; *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)), ¶¶ 12-19 (Sept. 12, 2018), https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html; *European Parliament Resolution* (2018/0902R(NLE)), *supra* note 40.

[44] Comm'n v. Hungary, Case C-286/12, EU:C:2012:687. The story of this case is well told in Gábor Halmai, *The Early Retirement Age of the Hungarian Judges*, *in* EU LAW STORIES: CONTEXTUAL AND CRITICAL HISTORIES OF EUROPEAN JURISPRUDENCE 471 (Nicola Fernanda and Billy Davies eds., 2017) [hereinafter Halmai, *Retirement Age*].

[45] *See* Halmai, *Retirement Age*, *id.* at 483.

[46] For the failure of the Commission to ask for interim measures with regard to Poland and the damage that caused, *see generally* Pech et al., *The EU's (In)Action*, *supra* note 26.

[47] The ECJ is authorized to impose interim measures under Art. 279 TFEU. The Court has elaborated in its case law the standards for granting them:

the Commission's analysis, which meant that the legal basis for bringing the action was sound. And the judges were being speedily removed and replaced pending the Court's expedited judgment, which meant that the interests of the EU in blocking unlawful removal of judges were irreparably harmed by delay. The balance of interests tilted in favor of freezing the status quo in place since there was no obvious harm in delaying this judicial "reform" by half a year. Had the Commission asked for interim measures, the lawful judges would have still been in office to receive the benefits of the Court's decision. In one fell swoop, however, judges subject to new qualifications for office were dismissed and their replacements were appointed by the then-new politically appointed president of the National Office of the Judiciary (NOJ) [48] were installed in key positions throughout the Hungarian judiciary. The newly appointed judges remained in place even after the Court announced that the vacancies that these judges filled were creating unlawfully.

The retirement age case was just the start of the attack on independent judges and their replacement by government-friendly magistrates, but it is the last time that the Commission weighed in on judicial independence in Hungary. In this one time out, the Commission won its case, but the Hungarian government achieved what it sought anyway, which might have put the Commission on notice that it needed to seek interim measures to maintain the status quo while governments moved quickly to undermine judicial independence. Instead, the Commission backed off doing anything else with regard to the Hungarian judiciary for the next ten years (and counting) as the government has captured the key positions throughout the judiciary, allowing the government to channel all cases it cares about to friendly judges.

The Commission failed to act when the Orbán government overhauled the system for controlling judicial careers, placing near-total power for the appointment, promotion, demotion, reassignment, disciplining and removal of judges in the hands of one person, nominally a judge but politically elected by and accountable only to the Parliament. The overhaul created the NOJ with its all-powerful president, who began work in 2012 controlling virtually all aspects of judges' careers. The president from 2011 through 2019 was a close friend and law school classmate of the Prime Minister as well as married to the author of Hungary's new constitution.[49] It is hard to imagine a more politically connected appointee running this office.

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29. [T]he court hearing an application for interim relief may order an interim measure only if it is established that granting such a measure is justified, prima facie, in fact and in law (*fumus boni juris*) and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached regarding the substance. The court hearing the application for interim relief must, where appropriate, also weigh up the interests involved. Those conditions are cumulative, so that an application for interim measures must be dismissed if one of them is not met.

Comm'n. v. Poland, Case C-619/18, EU:C:2018:1021, ¶ 29 [hereinafter Interim Measures Order, *Second Infringement*].

[48] The office in Hungarian is called the *Országos Bírósági Hivatal*, generally abbreviated OBH, and in many international assessments of the system, it is called the National Judicial Office and abbreviated NJO. The Court of Justice in the *I.S.* case abbreviated it NOJ, which I will do in this Article to make cross-referencing with ECJ decisions easier. I.S., Case C-564/19, EU:C:2021:949, ¶ 33.

[49] Joshua Rozenberg, *Meet Tündo Handó: In Hungary, One Woman Effectively Controls the Judiciary, and She Happens to be Married to the Author of its Constitution*, GUARDIAN, Mar. 20, 2012, https://www.theguardian.com/law/2012/mar/20/tunde-hando-hungarian-judges .

The Venice Commission strongly objected to this arrangement in which so many powers were concentrated in one pair of politically connected hands:

> The main problem is the concentration of powers in the hands of one person, i.e. the President of the NJO [NOJ]. Although States enjoy a large margin of appreciation in designing a system for the administration of justice, in no other member state of the Council of Europe are such important powers, including the power to select judges and senior office holders, vested in one single person. Neither the way in which the President of the NJO is designated, nor the way in which the exercise of his or her functions is controlled, can reassure the Venice Commission. The President is indeed the crucial decision-maker of practically every aspect of the organisation of the judicial system and he or she has wide discretionary powers that are mostly not subject to judicial control. The President is elected without consultation of the members of the judiciary and not accountable in a meaningful way to anybody except in cases of violation of the law. The very long term of office (nine years) adds to these concerns.[50]

In response to the first Venice Commission report, the Hungarian government stingily granted a weak power to refuse consent to judicial appointments to the National Judicial Council (NJC), consisting of judges elected by their peers. But the relevant laws provided ways to bypass this consent by allowing the president of the NOJ to temporarily appoint judges whom the NJC had rejected into the positions anyway. Not surprisingly, the Venice Commission found these modifications did not address their earlier criticisms.[51] Even with this damning assessment, the European Commission still did not object to the concentration of extraordinary powers in the hands of a political official at the time, nor at any time since, despite the fact that the Venice Commission has repeatedly criticized – most recently in October 2021[52] – the structure of this office as well as its political dependency. The Commission has not even commented as the president of the NOJ has since promoted her favorites, demoted her enemies, seconded judges without their consent and used her arbitrary powers to appoint judges temporarily into important positions so frequently that many judges have decided that keeping their heads down or leaving the bench altogether are preferable to defending their own independence publicly.[53]

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[50] *Venice Comm'n Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, ¶ 118, Op. 663/2012 (March 19, 2012), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e.

[51] The Venice Commission repeated this concern after "reforms" designed to respond to the Commission's criticisms. *Venice Comm'n Opinion on the Cardinal Acts on the Judiciary that were Amended following the Adoption of Opinion CDL-AD(2012)001*, ¶¶ 16-29, Op. 683/2012 (Oct. 15, 2012), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e.

[52] *Venice Comm'n Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020*, ¶ 18, Op. 1051/2021 (Oct. 16, 2021), https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e.

[53] For a list of the major attacks on the independent judiciary in Hungary over the last decade, *see* AMNESTY INTERNATIONAL & HUNGARIAN HELSINKI COMMITTEE, TIMELINE OF UNDERMINING THE INDEPENDENCE OF THE JUDICIARY IN HUNGARY 2012-2019 (2019), https://helsinki.hu/wp-content/uploads/Hungary_judicary_timeline_AI-HHC_2012-2019.pdf . For the atmosphere in the Hungarian judiciary, *see* Benjamin Novak, *Fear and Loathing in Hungary's Judiciary*, BUDAPEST BEACON, Nov. 8, 2017, https://budapestbeacon.com/fear-loathing-hungarys-judiciary/.

Failing to challenge a highly politicized judicial appointments process cannot be attributed to a lack of a legal basis for doing so. The Court of Justice has said repeatedly in elaborating in what Article 19(1) TEU means, "guarantees of independence and impartiality require rules, particularly as regards the composition of the body and *the appointment*, length of service and *grounds for abstention, rejection and dismissal of its members*, that are such as to dispel any reasonable doubt in the minds of individuals as to the *imperviousness of that body to external factors* and its neutrality with respect to the interests before it."[54] When a political figure single-handedly controls judicial careers, the external independence of the judiciary is in doubt. But the Commission has not brought an enforcement action to challenge this practice.

When the National Judicial Council (NJC), a body of judges elected by their peers, finally in 2019 rose up against the head of the NOJ seven years into this system of control, the judges elected to the Council by their peers accused the NOJ president – with copious evidence – of violating her legal minimal consultation obligations as she appointed temporary judges into important positions, including into court presidencies, over the objections of the NJC. Eventually, the NJC recommended her impeachment to the Parliament, which was the only disciplinary action that the NJC could initiate, but the Parliament considered the request for only three minutes before voting along party lines to reconfirm her in office.[55]

The public prosecutor (also affiliated with the governing party) then retaliated against the judges who had tried to remove the head of the NOJ. When one of the leading members of the National Judicial Council sent, in his capacity as national judge, a preliminary reference to the Court of Justice asking about the legality of temporarily appointed judges whose installation in office bypassed the consent of the

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[54] Comm'n. v. Poland, Case C-619/18, EU:C:2019:531, ¶ 74 [emphasis added] [hereinafter *Second Infringement*]. *See also* A.K. v. Krajowa Rada Sądownictwa, Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:982, ¶ 123. The Court in *A.K.* went into more detail: "it is still necessary to ensure that the substantive conditions and detailed procedural rules governing the adoption of appointment decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them, once appointed as judges." *Id.* ¶ 134.

[55] The story of the judicial uprising and putdown is explained in HUNGARIAN HELSINKI COMMITTEE & AMNESTY INTERNATIONAL, A CONSTITUTIONAL CRISIS IN THE HUNGARIAN JUDICIARY (2019), https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf. The European Commission took understated note of the controversy in its 2019 European Semester Country Report, finding that "checks and balances, which are crucial to ensuring judicial independence, have been further weakened within the ordinary court system. The National Judicial Council faces increasing difficulties in counter-balancing the powers of the President of the National Office for the Judiciary. This gives rise to concerns regarding judicial independence." The Commission vaguely recommended that Hungary "strengthen judicial independence." *Comm'n Recommendation for a Council Recommendation on the 2019 National Reform Programme of Hungary and Delivering a Council Opinion on the 2019 Convergence Programme of Hungary*, ¶ 17, Recommendation 4 COM (2019) 517 final (Jul. 9, 2019), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0517&from=EN. The standoff between the National Judicial Council and the head of the National Office for the Judiciary ended when Parliament backed the head of the NOJ, further marginalizing the role of the judges in the judicial appointments process, and implicitly approving the retaliatory measures she took against the judges who had recommended her impeachment. But the Commission took no action other than minimizing the extent and significance of the conflict in its European Semester Report.

NJC, the prosecutor used a newly created appeals process to leapfrog the case before the referring judge to the Supreme Court (*Kúria*) which found that the reference was both unnecessary and unlawful under Hungarian law. At that point, the temporarily appointed judge acting as the superior of the referring judge – the very judge complained about in the reference – initiated disciplinary proceedings against the referring judge for having sent an unlawful reference to Luxembourg.[56] The Commission expressed concern about this situation.[57] But the Commission did not file an infringement action despite the obvious interference with the preliminary reference process.[58] Even worse, when the reference went forward to the Court anyway, with the embattled judge adding new questions about the power of a national supreme court to declare references unlawful and about the lawfulness of disciplinary procedures initiated against a judge for making a reference, the Commission urged the Court to declare all questions involving the structure of the Hungarian judiciary inadmissible.[59] Ignoring the Commission, the Court made the two of these questions -- about the national court deciding on reference questions and initiating disciplinary procedures against a judge for making a reference -- the centerpiece of its judgment, anyway.

Both the European Court of Justice and the European Court of Human Rights (ECtHR) have found in cases arising out of Poland that overt political manipulation of judicial appointments and careers is unlawful. In Poland, the Justice Minister (who doubles as the Chief Prosecutor) has outsized powers to determine judicial careers similar to those possessed by the head of the NOJ in Hungary. In *W.Z.* , which challenged the lawfulness of the Polish Justice Minister moving judges from one court to another without publicly accessible criteria or individualized reasons, the Court of Justice repeated its view that:

> 109. It is settled case-law that the guarantees of independence and impartiality required under EU law presuppose rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests

[56] I tell this story in more detail in Kim Lane Scheppele, *The Law Requires Translation: The Hungarian Reference Case on Reference Cases, Case C-564/19, I.S., Judgment of the Court of Justice (Grand Chamber), 23 November 2021*, 59 COMMON MKT. L. REV 1107 (2022) [hereinafter Scheppele, *Translation*].

[57] *Comm'n Staff Working Document: 2020 Rule of Law Report, Country Chapter on the Rule of Law Situation in Hungary*, SWD (2020) 316 final (Sept. 30, 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1602582109481&uri=CELEX%3A52020SC0316.

[58] Ultimately, the reference went forward and was decided in *I.S.*, EU:C:2021:949. As I will explain below, the fact that the Court took the reference didn't mean that the problem was solved. Instead, the Court ruled in *I.S.* that the question of the legality of temporarily appointed judges in the court above the referring judge was not relevant to answering the EU law question at issue in the case. But temporarily appointed judges – put in place to avoid vetoes from the Judicial Council – raise serious questions about judicial independence that no Union institution has so far addressed. Not only did the Commission not bring the case, but it urged the Court not to answer any of the questions involving judicial independence raised by this case, including the matter of temporary judges. *Id*. ¶ 140.

[59] *Id*. ¶ 84.

> before it (judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311 . . .)[60]

Surely, this reasoning would cover Hungary as well, but the Commission has not challenged parallel practices there. And, of course, *W.Z.* itself was a reference case and not an infringement action, as was the *Repubblika* case it cited as authority.

The ECtHR has also objected to politicizing the appointment of judges and has even gone so far as to say – with regard to the Polish Constitutional Tribunal and the efforts made by the Polish government to pack the court with friendly judges – that the Constitutional Tribunal is no longer a tribunal established by law. In *Xero Flor w Polsce sp. z o.o. v. Poland*, the ECtHR was called upon to assess whether the Polish Constitutional Tribunal was properly constituted. The Strasbourg Court elaborated its general standards for making such an assessment:

> 249. In the first place, there must, in principle, be a manifest breach of the domestic law, in the sense that the breach must be objectively and genuinely identifiable. However, the absence of such a breach does not rule out the possibility of a violation of the right to a tribunal established by law, since a procedure that is seemingly in compliance with the domestic rules may nevertheless produce results that are incompatible with the object and purpose of that right [to an impartial tribunal] . . .
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> 250. Secondly, the breach in question must be assessed in the light of the object and purpose of the requirement of a "tribunal established by law", namely to ensure the ability of the judiciary to perform its duties free of undue interference and thereby to preserve the rule of law and the separation of powers. Accordingly, breaches of a purely technical nature that have no bearing on the legitimacy of the appointment process must be considered to fall below the relevant threshold. To the contrary, breaches that wholly disregard the most fundamental rules in the appointment or breaches that may otherwise undermine the purpose and effect of the "established by law" requirement must be considered to be in violation of that requirement . . . .
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> 251. Thirdly, the review conducted by national courts, if any, as to the legal consequences – in terms of an individual's Convention rights – of a breach of a domestic rule on judicial appointments plays a significant role in determining whether such a breach amounted to a violation of the right to a "tribunal established by law", and thus forms part of the test itself. The assessment by the

[60] W.Z., Case C-487/19, EU:C:2021:798. For the Court's elaboration on the problem of non-consensual secondments, *see* W.B., Joined Cases C-748/19 to C-754/19, EU:C:2021:931. As Advocate General Bobek noted in his *W.B.* opinion, "Quite simply, without an independent judiciary, there would no longer be a genuine legal system. If there is no 'law', there can hardly be more integration. The aspiration of creating 'an ever closer union among the peoples of Europe' is destined to collapse if legal black holes begin to appear on the judicial map of Europe." Opinion of Advocate General Bobek, W.B., Joined Cases C-748/19 to C-754/19, EU:C:2021:403, ¶ 138.

> national courts of the legal effects of such a breach must be carried out on the basis of the relevant Convention case-law and the principles derived therefrom . . . [61]

Applying these standards to the Polish Constitutional Tribunal, the ECtHR concluded that the body did not meet the standards of a tribunal established by law.[62] The Commission, taking the hint, subsequently filed an infringement action against Poland regarding the independence of its Constitutional Tribunal, precisely challenging the method of appointment of its judges.[63] Even though the jurisprudence of both European peak courts has provided a firm legal basis for challenging the politicization of judicial appointments, promotions, dismissals and secondments, the Commission to this day has never challenged the politicized system through which judges' careers are determined in Hungary.

The Constitutional Court in Hungary is no longer operating to check the government. From the start of his rein in 2010, Viktor Orbán made the Constitutional Court an early target for capture. As one of its first acts, the Fidesz Parliament removed the structural veto that opposition parties once had to Constitutional Court nominees. [64] Then the Parliament expanded the number of judges on the Court from 11 to 15. Then it elected – on party-line votes in the Parliament – judges who were Fidesz loyalists, an orientation that became obvious as soon as these judges began rubber-stamping whatever the government did. [65] By 2013, the Court was fully captured.[66] The Commission did not even take note of these developments while the Hungarian Constitutional Court was being packed with judges elected by the governing party alone.

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[61] Xero Flor w Polsce sp. z o.o. v. Poland, app. no. 4907/18, CE:ECHR:2021:0507JUD000490718, ¶ 251 [hereinafter *Xero Flor*].

[62] The ECtHR has also ruled that the Civil Chamber of the Polish Supreme Court, the Disciplinary Chamber of the Polish Supreme Court, and the Extraordinary Chamber of the Polish Supreme Court are not independent and impartial tribunals established by law. *See* Advance Pharma v. Poland, app. no. 1469/20, CE:ECHR:2022:0203JUD000146920, ¶ 349; Reczkowicz v. Poland, app. no. 43447/19, CE:ECHR:2021:0722JUD004344719, ¶ 280; Dolińska-Ficek & Ozimek v. Poland, app. nos. 49868/19 & 57511/19, CE:ECHR:2021:1108JUD004986819, ¶ 353; European Court of Human Rights Press Release ECHR 333, Poland Must Take Rapid Action to Resolve the Lack of Independence of the National Council of the Judiciary (Aug. 11, 2021), https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%22003-7174935-9736233%22%5D%7D. In each case, the ECtHR has noted that the appointment of judges to each of these benches through a politically tainted National Judicial Council adversely affected the independence of each of these chambers.

[63] *See* European Comm'n Press Release IP/21/7070, Rule of Law: Comm'n Launches Infringement Procedure Against Poland for Violations of EU Law by its Constitutional Tribunal (Dec. 22, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_7070 [hereinafter European Comm'n Press Release IP/21/7070].

[64] Bánkuti et al., *supra* note 19, at 139-40.

[65] For a description of the process of capturing the Constitutional Court, *see* Zoltán Szente, *The Political Orientation of Members of the Hungarian Constitutional Court between 2010 and 2014*, 1 CONST. STUD. 123 (2016), https://uwpress.wisc.edu/journals/pdfs/CSv01n01_06Szente_FINAL_web.pdf.

[66] For a detailed account of the Constitutional Court's struggle against being packed and the assistance it got from the Venice Commission and European courts (with little help from the European Commission), *see* Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)*, 23 TRANS. L. & CONTEMP. PROBS. 51 (2014).

The Commission expressed concern[67] but ultimately engaged in no visible enforcement actions when the Fourth Amendment to the 2012 Fundamental Law (constitution) was adopted in 2013. This amendment, half as long as the new constitution itself, nullified the entire rights-explicating jurisprudence of the Constitutional Court from 1990-2012 that had laid the foundations of Hungarian constitutional law and its protection of rights.[68] The newly packed Constitutional Court was therefore given the instant ability to ignore pesky precedents, thus destabilizing much of constitutional law including those parts that had brought European law into the Hungarian domestic legal system.

The Fourth Amendment also added directly to the constitution a number of laws declared unconstitutional by the not-yet-fully-packed Constitutional Court and that were also unlawful under EU law.[69] For example, the new Article XI(3) added by the Fourth Amendment permits the government to require university students whose education is subsidized by state fellowships to remain and work in the country for a fixed period of time after their university graduation.[70] The Constitutional Court – before it was packed – had struck down this law on the grounds that it infringed both the constitutional and EU law rights of free movement and residence.[71] But the Fourth Amendment inserted this into the Constitution, despite its conflict with EU law.[72]

With regard to judicial independence, the Fourth Amendment inserted into the Constitution the problematic division of labor between the National Office of the Judiciary and the National Judicial Council, through which the "central responsibilities of the administration of courts shall be performed by the President of the National Office of the Judiciary" while the National Judicial Council "shall participate" (without more) in those tasks.[73] Under this amendment, increasing the

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[67] *See* European Comm'n Press Release IP/13/327, The European Comm'n Reiterates its Serious Concern over the Fourth Amendment to the Constitution of Hungary (Apr. 12, 2013), https://ec.europa.eu/commission/presscorner/detail/en/IP_13_327.

[68] *See* Kim Lane Scheppele, *The Fog of Amendment*, N.Y. TIMES: PAUL KRUGMAN'S CONSCIENCE OF A LIBERAL BLOG (Mar. 11, 2013), https://archive.nytimes.com/krugman.blogs.nytimes.com/2013/03/12/guest-post-the-fog-of-amendment/.

[69] *See* Miklós Bánkuti et al., *Amicus Brief for the Venice Comm'n on the Fourth Amendment to the Fundamental Law of Hungary* (Gábor Halmai & Kim Lane Scheppele eds., 2013), http://fundamentum.hu/sites/default/files/amicus_brief_on_the_fourth_amendment.pdf .

[70] MAGYARORSZÁG ALAPTÖRVÉNYE [THE FUNDAMENTAL LAW OF HUNGARY], ALAPTÖRVÉNY art. XI(3), official translation at https://hunconcourt.hu/uploads/sites/3/2021/01/thefundamentallawofhungary_20201223_fin.pdf [hereinafter FUNDAMENTAL LAW OF HUNGARY].

[71] *See* Alkotmánybíróság [Constitutional Court] April 7, 2012, MK. 32/2012 (Hung.), http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2012-2-005 (English summary).

[72] In Laurence Prinz v. Region Hannover & Philipp Seeberger v. Studentenwerk Heidelberg, Joined Cases C-523/11 & C-585/11, EU:C:2013:524, ¶¶ 38-41, the Court found that EU law did not permit Member States to require a period of residence in their countries before enrolling in universities there. While the Court found that Member States could require a deeper connection with that Member State to qualify for funded educational places, the Court rejected mandatory residence as the sole criterion. Surely, the Court – if confronted with a case in which a Member State required a student to stay in that Member State *following* graduation for a period of years – would similarly find a violation of the freedom of movement of resident conferred on citizens of the EU through Articles 20 and 21 TFEU.

[73] Fundamental Law of Hungary, art. XXV(5).

powers of the National Judicial Council, as the Venice Commission strongly recommended, would be unconstitutional, so not surprisingly, the Venice Commission objected.[74] The European Commission did not. In its 2022 recommendations issued as part of the Rule of Law reporting mechanism, however, the Commission finally urged Hungary to strengthen the National Judicial Council relative to the president of the NOJ,[75] without noting that this system was entrenched in the constitution in 2013 without a word of objection from the Commission at the time.

The captured Hungarian Constitutional Court now routinely challenges the primacy of EU law and applies EU law in ways that raise questions about the consistent application of Union law across the Member States. For example, the Constitutional Court ruled in 2016[76] that it alone will be the guardian of Hungarian "constitutional identity" which, in its view, gives it the power to pick and choose which elements of EU law Hungarian courts will follow.[77] According to the Hungarian Constitutional Court:

> 67. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. [78]

In this decision, the Hungarian Constitutional Court pronounced that it had the last word over EU law.

The Commission may not have reacted to this particular case because it did not in fact nullify any law or decision of the EU. It was simply a shot over the bow to warn the Commission against requiring Hungary to honor the Common European Asylum System, which was the subject of the case. But the Constitutional Court

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[74] In its opinion on the Fourth Amendment, the Venice Commission noted: "In two earlier Opinions, the Venice Commission strongly criticised the extensive powers of the President of the National Judicial Office (PNJO) and the lack of appropriate accountability. The Commission emphasised the need to enhance the role of the National Judicial Council as a control instance." *Venice Comm'n Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, ¶ 68, Op. 720/2013, (June 17, 2013).

[75] *See* European Comm'n Press Release IP/22/4467, Rule of Law Report 2022: Comm'n Issues Specific Recommendations to Member States (July 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467.

[76] *See* Alkotmánybíróság [Constitutional Court] November 30, 2016, MK.22/2016 (Hung.), https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf.

[77] For an analysis of this decision *see* Gábor Halmai, *Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E(2) of the Fundamental Law*, 43 REV. OF CENT. & EAST EUR. L. 23 (2018). For the bigger picture within which "constitutional identity" is being constructed, *see* Petra Bárd et al., *Inventing Constitutional Identity in Hungary* (MTA Law Working Paper no. 2022/6, 2022), https://jog.tk.hu/en/mtalwp/inventing-constitutional-identity-in-hungary.

[78] Alkotmánybíróság [Constitutional Court] November 30, 2016, MK.22/2016 (Hung.), ¶ 67. For a history of the way that constitutional identity and the historic constitution of Hungary have been understood in the jurisprudence of the Constitutional Court, *see* Bárd et al., *supra* note 77.

decision and the lack of reaction of the Commission to it emboldened the Hungarian government to alter the Fundamental Law through the Seventh Amendment in 2018 to modify Article E, through which the authority of Union law is recognized in the Hungarian constitutional order. Under the amendment, the Fundamental Law now denies EU law primacy in crucial areas:

> The exercise of powers under this paragraph [bringing EU law into the Hungarian constitutional order] shall be in conformity with the fundamental rights and freedoms enshrined in the Fundamental Law, nor shall it restrict the inalienable right of disposition of the territorial unit, population, form of government and state system of Hungary.[79]

This was a warning to the Commission not to interfere with the Fidesz government's reorganization of the system of state power to concentrate control in the hands of the prime minister.

At the same time as the constitution was amended to deny primacy to Union law in crucial areas, the Seventh Amendment also added Article R(4) to make the protection of constitutional identity – that is the supremacy of the Fundamental Law over EU law – a general duty of all state bodies.[80] The Commission did not challenge this demotion of EU law in the Hungarian constitutional order, binding on Hungarian courts. Nor did the Commission challenge other decisions that denied the applicability of EU law or interpreted EU law in a wildly deviant way. [81]

Twice in one decade, the Hungarian government changed the qualifications for judges of the Supreme Court, applied immediately to sitting judges without a transitional period. In both cases, the new rules permitted the government to install its hand-picked favorite as the president of the court even though, in both cases, the persons selected would not have been qualified under the rules that existed before the rules were changed for the purpose of bringing that particular person into that office. Neither episode resulted in any action from the Commission.

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[79] Fundamental Law of Hungary, art. E(2). For a translation of the entire Seventh Amendment as it was passed, *see Proposed Seventh Amendment to the Fundamental Law [full text in English]*, ABOUT HUNGARY, Oct. 19, 2016, https://abouthungary.hu/news-in-brief/proposed-seventh-amendment-to-the-fundamental-law-full-text-in-english.

[80] *See* Fundamental Law of Hungary, art. R(4).

[81] The Commission did, however, file an infringement after the Constitutional Court issued a decision contrary to EU law involving the "Stop Soros" act which criminalized the provision of assistance to refugees by civil sector groups. The Constitutional Court had found this law constitutional. *See* Alkotmánybíróság [Constitutional Court] February 25, 2019, MK.3/2019 (Hung.), http://public.mkab.hu/dev/dontesek.nsf/0/db659534a12560d4c12583300058b33d/$FILE/3_2019%20AB%20hat%C3%A1rozat.pdf; Constitutional Court of Hungary Press Release, The Criminal Code's New Statutory Definition Sanctioning the Facilitating of Illegal Immigration is not in Conflict with the Fundamental Law (Mar. 5, 2019), https://hunconcourt.hu/announcement/the-criminal-codes-new-statutory-definition-sanctioning-the-facilitating-of-illegal-immigration-is-not-in-conflict-with-the-fundamental-law. The European Commission eventually took the Hungarian government to the Court of Justice over this law, and the ECJ ruled in favor of the Commission in Comm'n v. Hungary, Case C-821/19, EU:C:2021:930, ¶¶ 151-64. But the Commission did not raise the issue of the lack of independence of the Constitutional Court in its submission, focusing only on the substantive content of this one law.

In the first round of judicial disqualifications, then-Supreme Court President András Baka was removed from office on January 1, 2012, three years before the end of his lawful term. His removal occurred through the operation of a new law, which renamed the Supreme Court the *Kúria* and created new qualifications for serving on this "new" court, namely that all *Kúria* judges have at least five years of judicial experience on the ordinary courts in Hungary. Because President Baka had only three years of judicial experience in Hungary and his 17 years as a judge on the European Court of Human Rights did not count under the law, he was disqualified, the only Supreme Court judge who was removed by the new qualification. His case at the European Court of Human Rights challenging his dismissal confirmed that he had been punished, in violation of his Convention rights, for having criticized the government's changes to the judiciary.[82] The Commission has taken no note either of the original decision or of the fact that Hungary remains in non-compliance because it has not strengthened free speech protections for judges.[83] With its 2022 Rule of Law Reports, the Commission has begun calling attention to non-compliance with ECtHR decisions as an element of the rule of law and it reported that at the start of 2022, Hungary had 47 leading judgments that had not been implemented.[84] While the Commission does not have jurisdiction to enforce ECtHR decisions directly, non-enforcement of ECtHR decisions in areas of Union law competency should, at a minimum, trigger a review of these decisions by the Commission to assess whether a proven Convention violation is also a violation of Union law.[85] Following on the ECtHR decisions, Union case law has now independently established the principle of the irremovability of judges,[86] which puts the Baka matter more directly into the Commission's field of responsibility.

In 2019, the Hungarian government changed the qualifications for Supreme Court judges yet again[87] so that instead of requiring five years of experience in the

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[82] *See* Baka v. Hungary, app. no. 0261/12, CE:ECHR:2016:0623JUD002026112, ¶¶ 171-76.

[83] In a hearing in September 2021, the Council of Europe's Committee of Ministers noted "a continuing absence of safeguards in connection with *ad hominem* constitutional-level measures terminating a judicial mandate" and pressed the Hungarian government to adopt "effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression."

See Committee of Ministers Decision CM/Del/Dec(2021)1411/H46-16, Supervision of the Execution of the European Court's Judgments, H46-16 Baka v. Hungary (App. No 20261/12), ¶¶ 314-16 (Sept. 16, 2021), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

[84] *See Comm'n Staff Situation in Hungary 2022*, *supra* note 11, at 28.

[85] George Stafford & Jakub Jaraszewski, *Taking European Judgments Seriously: A Call for the EU Comm'n to Take into Account the Non-Implementation of European Court Judgments in its Rule of Law Reports*, VERFASSUNGSBLOG (Jan. 24, 2022), https://verfassungsblog.de/taking-european-judgments-seriously/. In 2022, the Commission finally began to mention ECtHR rulings and their implementation in some of its annual Rule of Law Report country chapters. For example, *see Comm'n Staff Working Document: 2022 Rule of Law Report: Country Chapter on the Rule of Law Situation in Poland*, at 4, 8, SWD (2022) 521 final (July 13, 2022), https://ec.europa.eu/info/sites/default/files/48_1_194008_coun_chap_poland_en.pdf. But it failed to mention any of the judgments against Hungary with which Hungary has not yet complied. *Comm'n Staff Situation in Hungary 2022*, *supra* note 11.

[86] When the Polish government lowered the judicial retirement age, copying Hungary, the Commission filed an infringement action, this time resting the argument on the principle of judicial independence newly elaborated in the Portuguese Judges case. The Court in this case elaborated that one facet of judicial independence consisted of the principle of the irremovability of judges. *Second Infringement*, EU:C:2019:531.

[87] 2019. évi CXXVII. törvény az egyes törvényeknek az egyfokú járási hivatali eljárások megteremtésével összefüggő módosításáról (Act CXXVII Amending Certain Laws in Connection with

Hungarian ordinary courts to sit as a judge on the *Kúria* (the very qualification that tripped up President Baka in 2012), there is now a side door through which judges can step into seats on the *Kúria* without any judicial experience at all in an ordinary court. Under a 2019 law, [88] a Constitutional Court judge can now be appointed to the bench anywhere in the ordinary judiciary – including to the *Kúria* and even to its presidency -- without having had a single day of experience as an ordinary judge. Conveniently for the government, moving a judge from the Constitutional Court directly to the *Kúria* bypasses the otherwise required consent of the National Judicial Council which has the legal (if weak) power to weigh in on a choice that runs through the normal appointment process. But Constitutional Court judges are elected by the Parliament without vetting from any judicial body, so this new trick allows the government to insert judges who would otherwise be rejected by the judiciary into key leadership positions in the ordinary courts by first running them through the Constitutional Court. At present, all of the constitutional judges have been elected by the governing party's two-thirds parliamentary majority so a constitutional judge can be counted on as a reliable government ally.

Indeed, the 2019 Omnibus Act took effect on January 1, 2020, and precisely one year later, a Constitutional Court judge without any experience in the ordinary courts was dropped by the Parliament into the presidency of the *Kúria* over the unified opposition of the National Judicial Council.[89] The governing party's parliamentary supermajority elected Constitutional Judge Zsolt András Varga as the new president of the *Kúria*, even though he had had never served a single day as a judge on an ordinary court and so did not otherwise meet the qualifications to sit on that court. Instead, he had had a career in the public prosecution service before his short five-year tenure on the Constitutional Court (out of a term of 12 years). Judge Varga was therefore not qualified under the very law that had disqualified President Baka. The Parliament elected him on a party-line vote anyway.

In its 2021 Rule of Law Report country chapter on Hungary, the Commission expressed concern over this development:

> These developments confirm the concerns already flagged in the 2020 Rule of Law Report, with an appointment to the top judicial post being decided without involvement of a judicial body, and not in line with European standards. The UN Special Rapporteur on the independence of judges and lawyers characterised the election as an 'attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers'. In the light of

Establishment of One-Stop District Office Procedures) (Hung.), ¶¶ 44, 91, https://mkogy.jogtar.hu/jogszabaly?docid=A1900127.TV [hereinafter Omnibus Act of 2019].

[88] Omnibus Act of 2019, ¶ 91 permits constitutional judges, for the first time, to parachute from their positions on the Constitutional Court – for which there is no judicial vetting by the NJC – directly into a judgeship in any ordinary court, even if the constitutional judges have had no experience in the ordinary judiciary and thus did not otherwise meet the minimum qualifications for those positions. HUNGARIAN HELSINKI COMMITTEE, THE NEW PRESIDENT OF THE *KÚRIA:* A POTENTIAL TRANSMISSION BELT OF THE EXECUTIVE WITHIN THE JUDICIARY (2020), https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf.

[89] *Id*.

> the administrative powers of the *Kúria* President and the key role of the *Kúria* in the justice system, these developments raise serious concerns as regards judicial independence.[90]

But if the Commission believed that independence of national courts was required by Union law and that this appointment seriously challenged the principle, the Commission did not act to enforce the rule of law here.

This is not for lack of relevant legal authority. The Court of Justice had recently considered the lawfulness of a tribunal whose members were appointed in an irregular process. It did so in *Simpson v. Council* and *HG v. Commission*,[91] a joined case involving the appointment of judges to the General Court and Civil Service Tribunal. In the case at issue, the irregularity was judged to be minor so the appointments did not affect the legality of the judgments of the tribunal. But, relevant to our analysis here, the Court said that, "As regards appointment decision specifically, it is in particular necessary for the substantive conditions and detailed procedural rules governing the adoption of those decisions to be such that they cannot give rise to such reasonable doubts with respect to the judges appointed."[92] Rules that have been changed twice in a decade to allow the government to put particular candidates into the presidency of the Hungarian Supreme Court surely raise reasonable doubts.

Advocate General Sharpston's Opinion in *Simpson and HG* provides a fuller account of the spectrum of irregularities that can occur in judicial appointments and suggests what follows from them:

> 107. . . . . As I see it, there is a wide spectrum, ranging from a procedural irregularity that is truly '*de minimis*' to a flagrant breach of the essential criteria governing the appointment of judges. The first category of irregularities would include, for example, a situation where a stamp in green ink should have been placed underneath the responsible minister's signature on the judge's letter of appointment but an assistant in a hurry picked up the wrong cartridge and the ink used was not green but blue. An example of the second category of irregularities would be where the procedure is manipulated by political leaders in order to secure the appointment as judge of a supporter of theirs who does not have the legal qualification required by the call for applications but

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[90] *Comm'n Staff Working Document: 2021 Rule of Law Report: Country Chapter on the Rule of Law Situation in Hungary*, at 5-6, SWD (2021) 714 final (July 20, 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0714 [hereinafter *Comm'n Staff Situation in Hungary 2021*].

[91] Simpson v. Council & HG v. Comm'n, Joined Cases C-542/18 RX-II & C-543/18 RX-II *H*, EU:C:2020:232. For a deeper discussion of this case and the issues it raises for judicial independence, *see* Laurent Pech, *Dealing with 'Fake Judges' Under EU Law: Poland as a Case Study in Light of the Court of Justice's Ruling of 26 March 2020 in Simpson and HG (*RECONNECT, Working Paper no. 8, 2020), https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf.

[92] *Id.* ¶ 71.

> who would unquestionably sentence anyone opposed to the government to life imprisonment.[93]

The case of the appointment of Judge Varga in Hungary as president of the *Kúria* is almost a textbook example of the second case, except that the Hungarian Parliament changed the law just before his appointment so that his appointment was not strictly illegal. But AG Sharpston's assessment of the consequences for a court of having such an irregularly appointed judge on it was clear and sharp: "Where there is a 'flagrant' breach of the right to a tribunal established by law that operates to the detriment of the confidence which justice in a democratic society should inspire in litigants, the judgments affected by that irregularity should evidently be set aside without more ado."[94] Judgments of the *Kúria* in Hungary continue to be final and binding despite the irregular appointment of its president.

In fact, the Hungarian case may well be worse than AG Sharpston's hypothetical "flagrant" example. The *Kúria* president was not only irregularly appointed himself but, as the president of the court, he was also given the power both to increase the number of judges on his court by fully one quarter and to pick these new judges himself.[95] He has now gone on to appoint other judges to his court irregularly.[96] The new law also gave him the power not only to assign specific cases to specific judges but also to continually rearrange the panels of judges who hear each case so that he can now design a unique configuration of judges for each case.[97] Even though the Hungarian Supreme Court's independence is surely compromised by all of these changes, the Commission has not found reason to launch an infringement procedure with the abundant case law that the Court of Justice has generated on the meaning of judicial independence.[98] Their lack of enforcement is made worse by the fact that the new *Kúria* president made many statements hostile to the EU and to Union law before taking office, raising serious questions about whether he will apply EU law in a spirit of sincere cooperation.[99]

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[93] Opinion of Advocate General Sharpston, Simpson v. Council & HG v. Comm'n, Joined Cases C-542/18 RX-II & C-543/18 RX-II, EU:C:2019:977, ¶ 107.

[94] *Id.* ¶ 109.

[95] AMNESTY INTERNATIONAL ET AL., CONTRIBUTIONS OF HUNGARIAN NGOS TO THE EUROPEAN COMMISSION'S RULE OF LAW REPORT 4 (2021), https://transparency.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf.

[96] The Hungarian Helsinki Committee has now documented a number of instances in which President Varga has manipulated the appointment procedure to ensure that his favored candidates are appointed to the *Kúria* over the objections of the National Judicial Council. *Tribunal Established by Sleight of Hand*, HUNGARIAN HELSINKI COMMITTEE, Sept. 2, 2022, https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/.

[97] The Omnibus Act of 2019, ¶¶ 66-74.

[98] The Commission extensively described this situation in its 2021 Rule of Law Report, noting "In the light of the administrative powers of the *Kúria* President and the key role of the *Kúria* in the justice system, these developments raise serious concerns as regards judicial independence." *Comm'n Staff Situation in Hungary 2021*, *supra* note 90, at 6. But no enforcement action followed.

[99] For many of the statements Judge Varga made before being elected President of the *Kúria* indicating his hostility to the EU, *see An Illiberal Chief Justice*, HUNGARIAN HELSINKI COMMITTEE, Jan. 7, 2021, https://helsinki.hu/en/an-illiberal-chief-justice/. As for sincere cooperation, the TEU states: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." TEU, art. 4(3).

The appointment of a new president of the *Kúria* over the heads of the judges on the National Judicial Council occurred after the serious constitutional crisis in 2019 that we have discussed above[100] when the National Judicial Council referred the president of the NOJ to the Parliament for impeachment because she had repeatedly skirted the law by irregularly appointing temporary judges after the NJC had refused her initial selections.[101] After the Parliament voted to keep her in office, she then responded by retaliating against the NJC in general and against its members in particular.[102] Even though the European Association of Judges noted the issue in real time and sounded the alarm about the assault on judicial independence in Hungary,[103] the Commission noted only in its Rule of Law report that "[t]he National Judicial Council continues to face challenges in counter-balancing the powers of the President of the National Office for the Judiciary as regards the management of the courts. . . . The NOJ President has repeatedly filled vacancies in higher courts, without a call for applications. . . ."[104]

The attacks on judicial independence continue including most recently – as I write – a case in which the wife of the Supreme Court president has been appointed as a senior judge in an important court despite being ranked lower than her competition by the National Judicial Council[105] and a case in another judge has been dismissed apparently for making a reference to the Court of Justice. [106] This latter case has gone to Strasbourg because she has no judicial appeal against her dismissal at home and, without a judicial route to contest her dismissal, she also cannot get a case on reference to the Court of Justice, as I will discuss in the final section of this

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[100] *See supra* notes 55-59.

[101] HUNGARIAN HELSINKI COMMITTEE & AMNESTY INTERNATIONAL, A CONSTITUTIONAL CRISIS IN THE HUNGARIAN JUDICIARY (2019), https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf.

[102] The *I.S.* case that came to the Court of Justice was one of them. *I.S.*, EU:C:2021:949. The referring judge had been subjected to a disciplinary procedure for sending a reference to the Court of Justice that the *Kúria* judged was both unnecessary and a violation of Hungarian law. The Court of Justice found that the *Kúria's* substitution of its judgment for the Court's judgment as well as its initiation of the disciplinary procedure against the referring judge were unlawful. But the Court did not answer the primary question that the referring judge was initially interested in, which was whether the irregularly appointed president of the court above him affected his own independence. The referring judge one of the NJC members who had voted to refer the president of the NOJ for impeachment and what happened to him was clearly retaliation. For an analysis of this decision *see* Scheppele, *Translation*, *supra* note 56.

[103] EUROPEAN ASSOCIATION OF JUDGES, REPORT ON THE FACT-FINDING MISSION OF THE EAJ TO HUNGARY (2019), https://birosag.hu/sites/default/files/users/2019.05.17_Report%20EAJ%20Hungary.pdf.

[104] *Comm'n Staff Situation in Hungary 2022*, *supra* note 11, at 2-3.

[105] Flora Garamvolgyi & Jennifer Rankin, *Viktor Orbán's Grip on Hungary's Courts Threatens Rule of Law, Warns Judge*, OBSERVER, Aug. 14, 2022, https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge.

[106] Gabriella Szabó was dismissed from her position as an administrative law judge after she was found unsuitable for reappointment. During her short tenure on the bench, she had sent a preliminary reference to the Court of Justice regarding the "Stop Soros" law and the Court of Justice confirmed in March 2020 that her suspicions of an EU law violation were correct. L.H., Case C-564/18, EU:C:2020:218. The administrative procedure through which her appointment was terminated has no judicial appeal under Hungarian law, so she has now taken her case to the European Court of Human Rights to seek redress. *Another Scandal at the Judiciary: No Effective Remedy for Judges Dismissed from the Bench*, HUNGARIAN HELSINKI COMMITTEE, Sept. 12, 2022, https://helsinki.hu/en/another-scandal-at-the-judiciary-no-effective-remedy-for-judges-dismissed-from-the-bench/.

paper. That, of course, doesn't make her dismissal any less a violation of Union law but it limits the avenues through which such dismissals can be contested, which is why the Commission failure to bring infringements is particularly disturbing. The pattern of these individual cases suggests that those who control the judiciary are systemically purging the judiciary of uppity judges while ensuring government-friendly ones are appointed instead.

As the judiciary has come under increasing political pressure over more than a decade, the Commission has not brought a single infringement case against Hungary for its repeated attacks on judicial independence. While the Commission may not have felt it could invent arguments directly invoking judicial independence at the start of this process before the Court elaborated Union law directly on point, four years have passed since *Portuguese Judges* without the Commission initiating a single enforcement action against a country that has taken new steps each year to bring the judiciary to heel. The Commission has failed to be the Guardian of the Treaties in protecting the rule of law in Hungary. [107]

B. Poland

The Law and Justice (Polish acronym PiS) government in Poland, elected in 2015 to both the presidency and majorities in both houses of the Parliament, has attacked the judiciary far more comprehensively, overtly and without benefit of law than did Hungary. The crisis began when Poland's new president refused in 2015 to swear in Constitutional Tribunal judges properly elected by the outgoing Civic Platform Parliament while the incoming PiS Parliament voted not only to fill the seats that were its turn to fill but also to fill the seats that were legally filled by the preceding Parliament.[108] The resulting battle over Constitutional Tribunal membership featured the Constitutional Tribunal itself ruling that attacks on it were

[107] Because this Article deals primarily with the European Commission and the Court of Justice, I have not discussed the numerous resolutions of the European Parliament criticizing the Hungarian government for attacks on the judiciary, the media, the civil sector and more, culminating in the European Parliament triggering Article 7(1) with regard to Hungary in September 2018. *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded* (2017/2131(INL)), 2019 O.J. (C 433) 66 (Sept. 12, 2018). The Council has so far held hearings on Hungary in September 2019, December 2019, June 2021 and May 2022. On the September and December 2019 meetings, see Laurent Pech, *From "Nuclear Option" to Damp Squib? A Critical Assessment of the Four Article 7(1) TEU Hearings to Date*, RECONNECT, 18 Nov. 2019, https://reconnect-europe.eu/blog/blog-fourart71teuhearings-pech/. On the June 2021 hearing, see Statewatch, *EU: Rule of Law: Reports of Council Hearings of Hungary and Poland*, https://www.statewatch.org/news/2021/july/eu-rule-of-law-reports-of-council-hearings-of-hungary-and-poland/ .On the May 2022 meeting, see Statewatch, *EU: Rule of Law: Nothing to See Here, Hungarian Government Tells the Council*, 15 June 2022, https://www.statewatch.org/news/2022/june/eu-rule-of-law-nothing-to-see-here-hungarian-government-tells-the-council/. Another meeting was scheduled for November 2022 under the Czech presidency of the Council. But to date the Council has not been able to generate the votes necessary for issuing the formal Article 7(1) warning.

[108] The outgoing Civic Platform government began the battle over Constitutional Tribunal judges when it changed the law strategically before the 2015 election to give itself five new appointments to the Constitutional Tribunal instead of the three that would have been lawfully within its power to fill before this legal modification. The Constitutional Court declared those extra two appointments unlawful, finding three were lawfully made. But the incoming government acted as if all five appointments were improper and so elected five new judges of its own. Kovács & Scheppele, *Fragility*, *supra* note 25, at 194-195.

illegal, after which the PiS government refused to publish or honor the Tribunal's decisions. The Parliament then passed six laws between November 2015 and December 2016 that clipped the wings of the Tribunal by limiting its ability to rule against the government's new initiatives, hampering its internal operation and disempowering it in crucial ways.[109] The Hungarian approach to capturing its Constitutional Court was more stealthy and technical, with every step formally legal and the whole process taking three years to complete. By contrast, the Polish government's opening assaults on the independent judiciary flouted Polish law and captured the Constitutional Tribunal in a little over one year.

The measures taken against the Constitutional Tribunal in Poland were so breathtaking and so obviously illegal under national law that the Commission reacted quickly. That said, the sudden mobilization of the Commission was due not only to the extreme and extremely visible actions of the Polish government but also to the changing of the guard at the European Commission itself. The 2015 Polish national elections had brought a new party into power, and the 2015 European elections also changed who was managing the rule of law files in the Commission. In particular, Dutch Commissioner Frans Timmermans became the Commission's vice-president, tasked with enforcing the rule of law. He had been the foreign minister of the Netherlands when Hungary started to go off the rails and was the prime architect of the "four foreign ministers' letter" urging the Commission to act more forcefully as Hungary became a pariah and suggesting that the EU find a way to cut funds to rogue Member States.[110] He was clearly personally committed to fighting for the rule of law. In his time holding this portfolio at the Commission, he pushed the issue as hard as he could with respect to Poland, but the Commission often dragged its feet and did not allow him to run with the brief.[111]

In December 2015, during the Constitutional Tribunal standoff, the Commission – namely Timmermans -- wrote to the PiS government, asking it to comply with the Tribunal's decisions and to delay enacting pending legislation affecting the Tribunal's powers. But when the PiS government both failed to honor the Tribunal's

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[109] As Wojciech Sadurksi explains, the laws on the Constitutional Tribunal fell into three main categories: Provisions exempting the governing party from constitutional scrutiny, provisions paralyzing decision-making at the Constitutional Tribunal and provisions enhancing the powers of the executive and legislative branches with respect to the Constitutional Tribunal. WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN 58-95 (2019). For a description of the laws affecting the Constitutional Tribunal in particular, *see id.* at 70-74.

[110] "We … believe that a new and more effective mechanism to safeguard fundamental values in Member States is needed," write the foreign ministers of Germany, the Netherlands, Denmark and Finland in the letter, seen by Real Time Brussels. "We propose that the Commission as the guardian of the Treaties should have a stronger role here." Frances Robinson, *Laws, Rules for Rule of Law?* WALL ST. J., Mar. 8, 2013, https://www.wsj.com/articles/BL-RTBB-3594.

[111] After his performance on the Rule of Law portfolio, Frans Timmermans was widely touted as the next president of the Commission. His bid, however, was vetoed by Hungary and Poland precisely because he had tried to enforce the rule of law. Rather than stand up to the rogue states, the other Member States deferred to them and handed the presidency to Ursula von der Leyen, outside the system of *Spitzenkandidaten* nominated by the major parties. *Frans Timmermans Fails to get European Comm'n President Role*, DutchNews.NL, July 3, 2019, https://www.dutchnews.nl/news/2019/07/frans-timmermans-fails-to-get-european-commission-president-role/. This was no doubt a signal to the new Commission that going too hard on these rogue countries could have negative consequences for one's career.

decisions and passed the offending laws in January 2016 anyway,[112] the European Commission began an intense correspondence with the Polish government before triggering application of its newly created Rule of Law Framework in July 2016.[113] The Framework establishes a process through which the Commission can enter into a structured dialogue with a Member State and issue warnings and recommendations as the Commission assesses whether Article 7(1) TEU should be launched. Article 7 is the part of the Treaty on European Union that was designed to warn and discipline Member States that violate the basic values of the Treaties.[114]

Over the course of 2016 and 2017, the Commission walked through all the complex stages of its new Rule of Law Framework – assessing and warning, and assessing and warning again, and assessing and warning a third time, and then a fourth time – all without launching any infringements against Poland for its attacks on the judiciary. But the Commission's monitoring of and recommendations[115] to the PiS government did not deter the Polish government from continuing to attack the independence of Polish courts. By the end of 2016,[116] the Constitutional Tribunal was completely captured and it has since issued judgments that do not recognize the authority of either the Court of Justice or the European Court of Human Rights over rule of law matters.[117] And then the PiS government attacked the ordinary courts.

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[112] *Venice Comm'n Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, Op. 833/2015 (March 11, 2016)**,** https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)001-e .

[113] The Commission invoked the Rule of Law Framework with regard to Poland in *Comm'n Recommendation (EU) 2016/1374 of 27 July 2016 Regarding the Rule of Law in Poland* (C/2016/5703), 2016 O.J. (L 217) 53 (Jul. 27, 2016), https://op.europa.eu/en/publication-detail/-/publication/bc443bd0-604f-11e6-9b08-01aa75ed71a1/language-sk [hereinafter *Comm'n Recommendation (EU) 2016/1374*]. The recommendation describes the trail of correspondence between the Polish government and the Commission before the Framework was launched. For a fuller analysis of the Rule of Law Framework's first invocation, *see* Dimitry Kochenov & Laurent Pech, *Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation*, 54 J.C.M.S. 1062 (2016). For an explanation of how and why the Rule of Law Framework was created, *see infra* note 239.

[114] TEU art. 7(1) is the treaty provision that allows the Council and Parliament, acting together, to warn a Member State that its actions may breach EU values. TEU arts. 7(2)-(3), which lay out a sequence of steps through which sanctions may issue against an offending state, is a totally separate procedure that does not require the invocation of TEU art. 7(1) first.

[115] The Commission issued four "recommendations" against Poland within the Rule of Law Framework:

1) *Comm'n Recommendation (EU) 2016/1374* (Jul. 27, 2016), *supra* note 113.

2) *Comm'n Recommendation (EU) 2017/146 of 21 December 2016 Regarding the Rule of Law in Poland*, 2016 O.J. (L 22) 65 (Dec. 21, 2016);

3) *Comm'n Recommendation (EU) 2017/1520 of 26 July 2017 Regarding the Rule of Law in Poland*, 2017 O.J. (L 228) 19 (Jul. 26, 2017) [hereinafter *Comm'n Recommendation (EU) 2017/1520*]; and

4) *Comm'n Recommendation (EU) 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland*, 2017 O.J. (L 17) 50 (Dec. 20, 2017).

[116] Pech et al., *The EU's (In)Action*, *supra* note 26, at 6-7.

[117] In July 2021, the Polish Constitutional Tribunal ruled that the second sentence of TEU art. 4(3) taken in conjunction with TFEU art. 279 violated the Polish Constitution. Constitutional Tribunal of the Republic of Poland July 14, 2021, Case P 7/20. In October 2021, the Constitutional Tribunal ruled that the second subparagraph of TEU art. 19(1) violated the Polish Constitution, holding that the Polish government did not have to comply with any ECJ judgments citing that provision. Constitutional Tribunal of Republic of Poland Oct. 7, 2021, Case K 3/21. In November 2021, the Constitutional Tribunal ruled that ECHR art. 6(1) was incompatible with the Polish Constitution. Constitutional Tribunal of the Republic of Poland Nov. 24, 2021, Case K 6/21. And in March 2022, the Constitutional Tribunal again

Even as the Commission walked through all of the steps of the Rule of Law Framework, finally recommending to the Council in December 2017 that it invoke Article 7(1) to warn Poland of a serious breach of EU values,[118] the Polish government continued to take measures that would bring the courts under political control. In summer 2017, the PiS-dominated Parliament passed three new laws to make the ordinary courts politically dependent.[119] One law would have allowed the National Judicial Council (the KRS), which makes judicial appointments, to be dissolved and then captured by the PiS party through a new system for politically appointing its members. Another law would have dismissed all Supreme Court judges so that the PiS government could appoint an entirely new bench using its newly dominated KRS to select the new judges. The third law permitted the Justice Minister to fire all sitting lower-court presidents and replace them with new ones, and it also lowered the judicial retirement age, effectively immediately, for all courts apart from the Supreme Court (but differently for men and women). This third law also contained an option for newly pensioned judges to appeal to the Justice Minister for a discretionary extension of their terms. In the face of massive public demonstrations and an international outcry, Polish President Andrzej Duda vetoed the first two laws but signed the third that allowed the firing of court presidents and vice-presidents throughout the judiciary within the following six months without having to provide reasons.[120] In addition, the new retirement age took effect immediately in the lower courts, removing senior judges and generating a "recommendation" from the Commission under the Rule of Law mechanism.[121]

In fall 2017, President Duda emerged with new draft laws to replace the two he had vetoed.[122] The first, like the one it replaced, prematurely dissolved the old KRS

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held that ECHR art. 6(1) was incompatible with the Polish Constitution and further said that it would be unconstitutional for any Polish authorities to comply with decisions of the Court of Human Rights invoking this article. Constitutional Tribunal of the Republic of Poland Mar. 10, 2022, Case K 7/21. The Commission eventually initiated an infringement action against Poland for the Constitutional Tribunal's violation of EU law by refusing to recognize EU law primacy in December 2021. European Comm'n Press Release IP/21/7070, Rule of Law: Comm'n Launches Infringement Procedure against Poland for Violations of EU Law by its Constitutional Tribunal (Dec. 22, 2021), https://ec.europa.eu /commission/presscorner/detail/en/ip_21_7070.

[118] *European Comm'n, Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, at 1, COM (2017) 0835 final (Dec. 20, 2017).

[119] This paragraph and the next are drawn from the more detailed account in SADURSKI, *supra* note 109, at 98-124.

[120] *Polish President Signs Bill Giving Justice Minister Power to Hire Court Heads*, REUTERS, July 25, 2017, https://www.reuters.com/article/poland-judiciary-bill/polish-president-signs-bill-giving-justice-minister-power-to-hire-court-heads-idINL5N1KG1E6 . This third law generated an adverse decision at the European Court of Human Rights finding that two vice-presidents of Polish courts had not been given reasons for their dismissal in violation of their right to access to a court. Broda & Bojara v. Poland, apps. no. 26691/18 & 27367/18, CE:ECHR:2021:0629JUD002669118. This might well have triggered a parallel infringement procedure in Union law, but the Commission never mentioned the dismissal of court leadership in its infringement action against the part of the third law prematurely retiring judges in the lower courts.

[121] *Comm'n Recommendation (EU) 2017/1520*, *supra* note 115.

[122] The European Commission requested that Poland seek the Venice Commission's opinion on both draft laws before passage. Jan Strupczewski, *EU Calls for Legal Comm'n to Vet New Polish Judicial Reform Laws*, REUTERS, Sept. 25, 2017, https://www.reuters.com/article/us-poland-judiciary-eu/eu-calls-for-legal-commission-to-vet-new-polish-judicial-reform-laws-idUSKCN1C0205.

without allowing its then-current members to finish their lawful terms and created a new one packed with judges approved by the governing party and its parliamentary majority.[123] The second, repeating the tactic used by the Orbán government, forced nearly 40% of the sitting Supreme Court judges into early retirement by lowering the judicial retirement age, something that the Polish government had already done over the summer with the lower courts. This new law on the Supreme Court also created two new Supreme Court chambers – a disciplinary chamber and an "extraordinary chamber" – and staffed them with individuals who would be appointed through the new politically packed KRS. While the Polish government waited to put these two laws up for a parliamentary vote until the Venice Commission assessed them, the Parliament passed the laws without responding to the Venice Commission's many criticisms.[124]

As a result, in December 2017, the Commission triggered Article 7(1)TEU by publishing a "Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law."[125] On one hand, launching Article 7(1) TEU was a major step, as it signaled the first time that the Commission – or for that matter, any EU institution – had found a Member State deserving of the most comprehensive condemnation that the Treaties have to offer. But on the other hand, it was all just words. Article 7(1) comes with no sanctions, and the Commission's negative assessment by itself isn't even sufficient to constitute an official warning. Both the Parliament and the Council must approve by supermajorities first – and even then, it is just a warning. Although the European Parliament then voted in favor of Article 7(1) with regard to Poland,[126] the Member

[123] The procedure was actually slightly more complicated than this but the result was the same: Party control of the membership of the KRS by prematurely firing the judges who lawfully sat on the Council to make way for new judges elected by the Parliament. The premature firings were found to constitute a Convention violation by the European Court of Human Rights in Grzęda v. Poland, app. no. 43572/18, CE:ECHR:2022:0315JUD004357218, ¶ 348, because the applicants had been denied access to a court to challenge their dismissals. In this 2022 case, however, the ECHR minced no words in providing a devastating overview of the situation in Poland as regards judicial independence by that point:

> The Court notes that the whole sequence of events in Poland . . . vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ [KRS] and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. . . . As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened.

[124] *Venice Comm'n Opinion on the Draft Act Amending the Act on the National Council of the Judiciary; on the Draft Act Amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, Op. 904/2017 (Dec. 11, 2017), https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e. The law was passed three days before the Venice Commission opinion was approved, at which time the Polish government surely knew what the opinion said because that national governments are always given copies of opinions before they are voted on before the whole Commission. Christian Davies, *Polish MPs Pass Judicial Bills Amid Accusations of Threat to Democracy*, GUARDIAN, Dec. 8, 2017, https://www.theguardian.com/world/2017/dec/08/polish-mps-pass-supreme-court-bill-criticised-as-grave-threat .

[125] *Comm'n Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 0835 final (Dec. 20, 2017).

[126] *European Parliament Resolution of 1 March 2018 on the Commission's Decision to Activate Article 7(1) TEU as regards the Situation in Poland* (2018/2541(RSP)), 2019 O.J. (C 129) 13 (Mar. 1, 2018) [hereinafter *European Parliament Resolution* (2018/2541(RSP))].

States in the Council have dragged out the process and as of the time of this writing, going on five years later, the Council has still failed to act. Article 7(1) TEU hangs in the air – neither a sanction nor a threat. It is merely the possibility of a warning with no consequences, and yet the Council cannot muster the votes to pass it, holding only occasional hearings on the matter whenever the rotating presidency wants to appear to be doing something about the rule of law.[127] Not surprisingly, Poland has done nothing to address the concerns raised in the procedure.

So even though the Commission had come all that way through the various "recommendation" stages of the Rule of Law Framework, its efforts fizzled at the end without generating a unified front of condemnation from the Council. The PiS government was apparently emboldened by the fact that the Commission had deployed a set of tools that consisted of a mere dialogue punctuated by toothless scoldings. There were simply no sanctions anywhere in the mix.[128] Without deploying its power to bring infringements backed by the potential sanctions of penalty payments, the Commission could only cajole and rely on Poland's basic goodwill toward the EU, which seemed to be spectacularly missing. The Commission surely didn't work publicly to generate compliance. Had the Commission resorted to infringements, which it could have launched on its own and which would be assessed by the impartial Court of Justice instead of the political Council, it might have gotten farther in generating a serious threat of real costs for Poland in order to move the country toward restoration of the rule of law. But the Commission did not take this route for the first year and a half of the Polish assault on the judiciary, sticking instead with the Rule of Law Framework.

But then, in February 2018, the Court of Justice decided its landmark *Portuguese Judges* case, announcing explicitly that all Member States were obligated by the Treaties to maintain an independent judiciary.[129] This decision acted as an open invitation (or perhaps, a hard shove) to get the Commission to bring infringement actions to stop the damage to the Polish judiciary as it was being carried out in real time. Through this case, the ECJ signaled to the Commission that the independence of national courts was fundamental to the enforcement of EU law. As the Court helpfully elaborated, judicial independence "presupposes . . . that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or . . . instructions from any source whatsoever,

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[127] A list of the hearings conducted through February 2022 is provided in Pech & Bárd, *supra* note 14, at 40. Hearings were held in September and December 2019 before a long break meant that the next hearing was not until June 2021 and then another in February 2022. As this schedule makes clear, the General Affairs Council has not approached the task with great urgency nor, as of this writing, have they decided on the matter nearly five years after the Reasoned Opinion from the Commission reached them.

[128] The procedure under TEU art. 7(1), even if approved by the Parliament and the Council, would only result in a warning. Sanctions, including the removal of Poland's vote from the Council and/or the withholding of European funds, would only issue following the invocation of a different procedure under TEU art. 7(2) that would require a unanimous vote of all other Member States to establish a breach of TEU art. 2 values before sanctions could be levied under TEU art. 7(3). But Hungary and Poland had pledged to veto sanctions against each other, ensuring that neither one had anything to fear from an Article 7 process. I think that there may be a way around this by suspending them both at once, but my proposal is hotly contested. Kim Lane Scheppele, *EU Can Still Block Hungary's Veto on Polish Sanctions*, POLITICO.EU, Jan. 11, 2016, https://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions/.

[129] *Portuguese Judges*, EU:C:2018:117, ¶ 41.

and that it is thus protected against external interventions . . ."[130] The Commission was clearly being instructed to bring infringements to the Court which was waiting for them with open arms.

Taking the hint, the Commission launched an infringement action against Poland in March 2018 regarding the independence of the ordinary judiciary, challenging the law that had gone into effect the prior summer which lowered the judicial retirement age in the lower courts and featured a gender difference in retirement ages. The Commission challenged a particularly worrisome feature of the new retirement scheme, which was that the Minister of Justice – a member of the government – could extend the term of any judge who requested it, without having any formal criteria for deciding which judges would go and which judges would stay. The Commission took what the Court of Justice had offered them, and grounded its infringement on Article 19(1) as the legal basis for arguing that the premature and discretionary retirement of a swath of senior judges was unlawful.[131]

Not surprisingly, the Court agreed with the Commission. The Court found the question admissible because the affected Polish courts were not just national courts but also competent to rule on matters of EU law.[132] The Court found that Poland was in violation of Article 19(1) TEU because the independence of the judiciary requires "the necessary freedom of judges from all external intervention or pressure [which in turn] requires certain guarantees appropriate for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office."[133] In order to provide this guarantee, the system in place for dismissing judges must "prevent any risk of that disciplinary regime being used as a system of political control of the content of judicial decisions."[134] If a retirement age is put in place and exceptions to it are permitted, the Court argued, such extensions may not be discretionarily awarded by a political official. Because the power possessed by the Minister of Justice to extend judges' service beyond the new retirement age was exercised with no standards, it thus "give[s] rise to reasonable doubts . . . as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to any interests that may be the subject of argument before them."[135] As a result, the Court found that this discretionary power violated the principle of the irremovability of judges.[136] Poland was also found in violation of Article 157 TFEU and Articles 5(1)(a) and 9(1)(f) of Directive 2006/54 with regard to the gender discrimination claim in the lowering of the judicial retirement age.[137]

The Commission's first infringement action on the matter of judicial independence was confirmed by Court of Justice. But by the time the Commission

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[130] *Id.* ¶ 44.

[131] Comm'n. v. Poland, Case C-192/18, EU:C:2019:924, ¶ 87. [hereinafter *First Infringement*]. (Because I will now be discussing a sequence of infringement actions that are hard to distinguish because they presented overlapping challenges, I will refer to them in the order in which the Commission brought them. Hereinafter, this case will be called *First Infringement*).

[132] *Id.* ¶¶ 104-05

[133] *Id.* ¶ 112.

[134] *Id.* ¶ 114.

[135] *Id.* ¶ 124.

[136] *Id.* ¶ 125.

[137] *Id.* ¶¶ 78-84.

acted, the prematurely retired judges were long gone from the bench. In addition, fully 158 presidents and vice-presidents of the lower courts, including the leadership of 10 of the 11 courts of appeal, had already been fired and replaced even before the Commission filed its first case.[138] The court presidencies were particularly crucial given that Polish court presidents have substantial control over the judges on their courts and they also decide which judges hear particular cases.[139] In its infringement action on the law pertaining to the lower courts, however, the Commission ignored what was happening to court presidents and vice-presidents, and instead limited this infringement to the retirement age, its gender discrimination aspect and the discretionary extension of retired judges' terms.[140] Though of course the principle of the irremovability of judges would have applied equally strongly to the wholesale dismissal of court presidents and vice-presidents before the ends of their lawful terms, the Commission never challenged their removal. Because the Commission never raised the question, the Polish government was able to capture the presidencies of the key courts below the Supreme Court without any serious objections. As Pech and his coauthors noted, "No remedy has ever been provided for the judges who have been arbitrarily dismissed under this regime."[141]

The Commission's victory in this case – which was decided eventually in November 2019, more than two years after the removal of judges had already been accomplished – came too late to change facts on the ground because the affected judges had long since been replaced with judges of the government's choosing even before the Commission filed the case. The Commission had not learned from the Hungarian judicial retirement age case that moving quickly and asking for expedited review would be helpful.[142] The Commission had simply entered the fray on this first infringement too late and, even then, the Commission only challenged some of the

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[138] SADURSKI, *supra* note 109, at 116.

[139] *Id.* at 117.

[140] The ECtHR eventually ruled that the prematurely fired court vice-presidents had been denied their Convention rights, but too late to be useful in actually restoring them to office. *Broda & Bohara v. Poland*, CE:ECHR:2021:0629JUD002669118.

[141] Pech et al., *The EU's (In)Action*, *supra* note 26, at 13.

[142] Going the infringement route is not speedy. But back when the Commission launched that one lone infringement action against the Hungarian government for attacks on the judiciary, both the Commission and the Court acted quickly. The Commission criticized the law when it was passed in late 2011 and opened an infringement action as soon as the law went into effect in January 2012. European Commission Press Release IP/12/24, European Commission launches accelerated infringement proceedings against Hungary over the Independence of its Central Bank and Data Protection Authorities, as well as Over Measures affecting the Judiciary (Jan. 17, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24 . It then moved to the reasoned opinion in March and moved to refer the matter of judicial independence to the ECJ in April. European Commission Press Release IP/12/395, Hungary – Infringements: European Commission Satisfied With Changes to Central Bank Statute, But Refers Hungary to the Court of Justice on the Independence of the Data Protection Authority and Measures Affecting the Judiciary (Apr. 25, 2012), https://ec.europa.eu/commission/presscorner/detail/en/IP_12_395. The ECJ agreed with the Commission's request to expedite the case on July 13, 2012 and the Court issued its judgment on November 12, 2012. *Comm'n. v. Hungary*, EU:C:2012:687, ¶¶ 18-19. From start to finish, then the case took less than one year. Nonetheless, it was still too late. In the interim, the Hungarian government had speeded up the appointments of the replacement judges so that by the time the Commission tried to enforce the ECJ judgment, the prematurely retired judges had no jobs to return to. Halmai, *supra* note 44. The Commission should have learned from this experience, but didn't, that any case worthy of expedited review is probably also worthy of a request for interim measures.

premature removals. As a result, the principle of the irremovability of judges was announced when the primary beneficiaries of the irremovability of judges would be the new court presidents and other judges appointed by the PiS government. Under the Court's logic, it would now be problematic to dislodge *them* to reappoint their predecessors or – for that matter – anyone else.[143] So even though the "neo-judges" were appointed with a cloud over their heads because of the way other judges had been unlawfully pushed aside to make room for them and because they were appointed in a system controlled by the governing party, they are now the judges who are irremovable.

As this first infringement case growing out of the law signed by President Duda in summer 2017 wound its way through the Court of Justice, facts kept changing on the ground. The new laws on the KRS (judicial council) and the Supreme Court were promulgated in early 2018. The law on the KRS went into effect first. It dissolved the old KRS and removed all of its members, "despite their constitutionally guaranteed term of office (of four years)." [144] While the old KRS's membership featured a majority of judges elected by their fellow judges, the new KRS's membership was changed substantially so that now fully 23 of its 25 members are elected by politicians.[145] The neo-KRS had its first meeting in April 2018 and was, from that moment on a political rather than a legal institution.[146]

To this day, the Commission has never brought an infringement action that directly challenges the composition of this body, even though a politicized appointments process centrally affects the independence of the Polish judiciary as a whole and even though the Court of Justice has emphasized from the beginning of its foray into this field that judicial independence requires an appointments process that buffers courts from external influence.[147] The Commission was not spurred to act

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[143] The Court of Justice may be pressed to alter its case law in light of the wave of cases coming from the ECtHR finding that the judges placed by the new KRS on the ordinary courts or by parliamentary majorities to unlawfully emptied seats on the Constitutional Court are not lawfully appointed and therefore that all of their decisions infringe the Convention. *See, e.g, Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719 (finding that the Disciplinary Chamber of the Supreme Court did not constitute a "tribunal established by law" due to the "grave irregularities in the appointment of judges to" that body in violation of TEU art. 6(1)). *See also* Juszczyszyn v. Poland, app. no. 35599/20, CE:ECHR:2022:1006JUD003559920 (finding that the Disciplinary Chamber's composition violated TEU art. 6(1), adding that TEU art. 18 on the lawful restrictions on rights had been violated by this Chamber as well). *Xero Flor*, CE:ECHR:2021:0507JUD000490718 (finding that the Constitutional Court's composition was unlawful so its decisions violate the rights of those who are disadvantaged by the Court's decision). At the moment, there are dozens of communicated applications to Poland that raise the issue of the lawful composition of Polish courts in light of the irregular appointments of judges to these courts and it is pretty clear that the ECtHR will conclude in one case after the other that unlawfully constituted tribunals cannot make binding legal decisions. As these cases mount, the Court of Justice will eventually have to come to terms with the fact that one European court (the ECtHR) is finding that these national courts' decisions are not binding while the other European court (the ECJ) is acting as if these courts' decisions constitute business as usual.

[144] SADURSKI, *supra* note 109, at 102. There premature firings were successfully challenged at the European Court of Human Rights in *Grzęda v. Poland*, CE:ECHR:2022:0315JUD004357218.

[145] As Sadurski observed: "the parliamentary majority now enjoys full, unmediated and unconstrained power of appointment to the institution that appoints all Polish judges." SADURSKI, *supra* note 109, at 101.

[146] *Id.* at 104.

[147] *Portuguese Judges*, EU:C:2018:117, ¶ 44 defined independence from external influence: "The concept of independence presupposes, in particular, that the body concerned exercises its judicial

when the European Network on Councils of the Judiciary suspended the KRS's membership in September 2018 or even when the KRS was finally expelled in May 2020.[148] Nor was the Commission moved to act when a frustrated European Parliament demanded that the Commission bring an infringement over the political capture of KRS.[149]

Though the new law on the Supreme Court was also adopted in December 2017, it only took effect in April 2018, conveniently after the KRS's political capture. More than one-third of the sitting judges were to be removed from the Court under this law due to a new retirement age. As with the law on the retirement age of the judges of the lower courts, the Supreme Court judges who were prematurely retired could ask a political official – in this case, the President of the Republic – for permission to keep their jobs and he could discretionarily renew these judges (or not) with neither standards to guide him nor the requirement to give reasons. The European Commission – with its first infringement already pending before the ECJ on just this point – pressured Poland to modify this system of discretionary appointments. The Polish government agreed in May 2018 to require the President to seek the opinion of the KRS before a Supreme Court judge's term could be extended.[150] Of course, by May 2018, the KRS had been fully captured with sympathetic members installed by the governing party, so this did not represent a substantial check on the powers of the President. The Commission didn't seem to realize that it had won a toothless concession.

Beyond the new retirements, the law on the Supreme Court was designed to change the Court membership even more radically. The number of judges was increased from 93 to 120, with the new judges all being appointed by the new, packed KRS. Between the prematurely retired judges and the new judges, the new KRS was given the power to appoint fully 60% of the membership of the Court in just one year.[151] Because many sitting judges refused to apply for these new positions, considering them politically tainted, the law on the Supreme Court was

functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions." The unlawfulness of the composition of the KRS was eventually established through a reference case in which the Court of Justice laid out the conditions for judging whether an appointments process improperly tainted the resulting judges. Applying this decision, a chamber of the Polish Supreme Court (one of the uncaptured chambers at that point) applied the standards to the KRS, finding it improperly constituted. A.K. v. Krajowa Rada Sądownictwa, Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:982, ¶ 42 [hereinafter *A.K.*]. Because the government has sought to punish judges who have recognized this Supreme Court decision (about which, more below, *see infra* note 183), the decision of the Supreme Court has not been properly implemented and the KRS continues to appoint judges who will toe the party line.

[148] Press Release, European Network of Councils of the Judiciary [hereinafter ENCJ], ENCJ Suspends Polish National Judicial Council – KRS (Sept. 17, 2018), https://www.encj.eu/node/495; Press Release, ENCJ, ENCJ Executive Board Proposes to Expel KRS (May 27, 2020), https://www.encj.eu/node/556.

[149] *European Parliament Resolution of 17 September 2020 on the Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law* (2017/0360R(NLE)), ¶ ¶ 66, 68 (Sept 17, 2020), https://www.europarl.europa.eu/doceo/document/TA-9-2020-0225_EN.html.

[150] SADURSKI, *supra* note 109, at 106.

[151] *Id.* at 111.

amended to lower the standards so that not only judges, but also prosecutors, would be eligible.[152]

The law on the Supreme Court also created two new chambers within the Court. The first was the Disciplinary Chamber whose members would hear what would become a large increase in disciplinary actions brought against judges, many of whom either criticized the government's judicial "reforms" or attempted to enforce Union law in Poland. The second was the Extraordinary Chamber that would handle election challenges and have the power to reopen cases under a new "extraordinary complaint" procedure through which any final judgment going back into the 1990s (with a few exceptions, like divorce cases) could be redecided by new judges. The judges of the two new chambers would be paid 40% more than their other colleagues on the Supreme Court and all of the judges in these new chambers would be appointed by the new KRS.[153] Along with these reforms, the President of the Republic was given the power to name the President of the Supreme Court.

Even though the Commission had not yet received a judgment from the Court of Justice in the first infringement, the Commission opened a second infringement in July 2018. Duplicating its argument from the first infringement that the removal of judges due to a newly changed judicial retirement age violated the principle of judicial independence, this second infringement case was referred to the Court of Justice in September 2018.[154] This time, however, the Commission wisely also filed for interim measures at the time it filed the case. Interim measures were granted by the Court of Justice on a preliminary basis on October 19 (which was the same day that 27 new Supreme Court judges were formally appointed by the Justice Minister to replace the 27 judges forced into retirement so the interim measures happened just in the nick of time).[155] The order was finalized by the Court (Grand Chamber) in December 2018.[156] The interim measures order required Poland to freeze in place the situation of the judges as of April 2018 when the law took effect. Because many of the prematurely retired judges of the Supreme Court had refused to leave the bench in acts of civil disobedience even as they were being replaced and considered by the government as officially retired, there was still time to save them because they had not yet been successfully expelled from the Court.[157]

The Court of Justice decided the second infringement case in June 2019, only eight months after the case was filed but fully five months before it decided the first infringement case.[158] The Court may have decided the second infringement first

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[152] *Id.*

[153] *Id.* at 113.

[154] For the timeline, *see* European Comm'n Press Release STATEMENT/19/3376, European Comm'n Statement on the Judgment of the European Court of Justice on Poland's Supreme Court Law (June 24, 2019), https://ec.europa.eu/commission/presscorner/detail/en/statement_19_3376.

[155] Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶ 4.

[156] *Id.*

[157] SADURSKI, *supra* note 109, at 107-110.

[158] *Second Infringement*, EU:C:2019:531. One of the reasons why the Polish infringement actions are so confusing is that the Court of Justice did not decide them in the order in which they were filed, so the references within the final judgments of the Court cross-cut the initial filing dates and the order in which the offending laws were enacted. In addition, the first and second infringements raised the same issues about the lowering of the retirement age and the discretionary extension of judges' terms of office because they challenged two different laws in Poland that did the same thing for different courts. As a

because the dispute over the Supreme Court was ongoing and interim measures were in effect while the opportunity to change facts on the ground in the first infringement case was long since gone. Given that both cases involved a lowered retirement age and a discretionary extension of a judge's term beyond that, it should not be surprising that the first infringement case cites the second infringement case and repeats its reasoning both about the irremovability of judges[159] and about the unacceptability of discretionary extensions of judicial terms of office without standards or reasons.[160]

The Commission had argued that the nonconsensual removal of prematurely retired judges combined with the addition of many new judgeships on the Supreme Court "has rendered possible a profound and immediate change in that court's composition, infringing the principle of the irremovability of judges as a guarantee essential to their independence and, therefore, infringing the second subparagraph of Article 19(1) TEU"[161] and the Court agreed that the application of a new retirement age without a transitional period applicable immediately to sitting judges "raise[s] reasonable concerns as regards compliance with the principle of the irremovability of judges."[162] Those concerns were heightened when, as here, the President of the Republic was given the discretion to extend the terms of some judges and not others, which "reinforce[s] the impression that in fact [the law's] aim might be to exclude a pre-determined group of judges of the Sąd Najwyższy (Supreme Court)."[163] As with the first infringement action, the Court of Justice found that the lowered retirement age, immediately applicable to sitting judges, violated the principle of the irremovability of judges and that the discretionary extensions of prematurely retired judges' terms in the absence of either standards or reasons constituted a violation of judicial independence.[164]

Perhaps the primary difference between the two cases is that the second infringement case highlighted the effect that a loss of judicial independence in any Member State would have on the principle of mutual trust among Member States.[165]

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result, the reasoning was largely copy-pasted from the judgment in the second infringement action which was decided first into the first infringement action which was decided second. In short, the timeline of judgments from the Court gives a very different impression of the order in which things were happening on the ground. This will be even more spectacularly true when and if the fifth infringement on the Constitutional Tribunal will be referred to the Court of Justice late in 2022 or even in 2023, challenging the appointment to the bench of the judges who were unlawfully pushed onto the Tribunal in 2015 and 2016. The Commission launched the infringement only at the end of 2021. European Comm'n Press Release IP/21/7070, *supra* note 63. Throughout this Article, I will refer to the infringement actions regarding the independence of the judiciary in the order in which the Commission brought them.

[159] Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶¶ 25, 98-106.

[160] *Id.* ¶¶ 115-21.

[161] *Id.* ¶ 63.

[162] *Id.* ¶ 78.

[163] *Id.* ¶ 85.

[164] One striking aspect of this case is that the Court refused to accept the Polish government's rationale for enacting the law, strongly implying that the Polish government had lied to the Court. As Pech and Kochenov noted, "by emphasising repeatedly its 'serious doubts; regarding the genuine nature of the ruling coalition's 'reform,' as well as its 'doubts' regarding the 'true aims' of the 'reform' being challenged, the Court could not have made clearer its ire at this deliberate attempt to mislead it." Pech & Kochenov, *supra* note 4, at 73.

[165] *Second Infringement*, EU:C:2019:531, ¶¶ 42-48. The Court may have also leaned on mutual trust here having just decided Minister for Justice and Equality v. L.M., Case C-216/18 PPU, EU:C:2018:586,

Given that the judicial system of the EU "has as its keystone the preliminary ruling procedure provided for in Article 267 TFEU . . . [which] set[s] up a dialogue between . . . the Court of Justice and the courts and tribunals of the Member States,"[166] and given that "Member States are to provide remedies sufficient to ensure effective judicial protection for individuals in the fields covered by EU law, [it] is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields."[167] The Court established that judicial independence was necessary for mutual trust to prevail.

By the time the second infringement case was decided, it had already had an effect in Poland. After the Court's interim measures order, the Supreme Court itself had formally readmitted the prematurely retired judges to the bench.[168] Faced with both a *fait accompli* and this pending infringement action which wasn't going well for Poland (given the interim measures order), the Polish Parliament adopted a law in November 2018 that reversed the premature retirements. The Court of Justice might then have decided not to carry through to the judgment on the grounds that the problem no longer existed -- which was precisely what the Polish government had argued in this case. But the Court of Justice wisely decided the case anyway, perhaps understanding that once the threat of an infringement was dropped, the Polish government could reverse its anticipatory compliance without consequence. By issuing a judgment, the Court turned a potential rollback of anticipatory compliance into a violation of a Court decision, potentially subject to Article 260 TFEU sanctions. One might note that the concessions that the Commission wrested from Poland -- both to put some constraints on the President in discretionarily extending judges' terms and in ensuring that unlawfully removed judges stayed on the bench -- only occurred when the Commission was pressing actual infringements before the ECJ and not when it was issuing "recommendations" under the Rule of Law Framework. This demonstrates that the realistic threat of actual sanctions works better than toothless exhortations.

Just before the Juncker Commission's term ended and while Frans Timmermans was still holding the rule of law portfolio, the Commission launched one more infringement in April 2019, this time challenging the new Disciplinary Chamber of the Supreme Court, which had begun to punish judges "for the content of their judicial decisions […] includ[ing] decisions to refer questions to the Court of Justice."[169] In a sideways reference to the political capture of the KRS, the infringement announcement noted "the new disciplinary regime does not guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court which reviews decisions taken in disciplinary proceedings against judges. This

¶ 35 (a.k.a. "Celmer," named after the highly publicized national proceedings), in which the question of mutual trust in the context of the European Arrest Warrant had been raised.

[166] *Second Infringement*, EU:C:2019:531, ¶ 45.

[167] *Id*. ¶ 48.

[168] Maciej Taborowski & Pawel Marcisz, *The First Judgment of the ECJ Regarding a Breach of the Rule of Law in Poland*, VERFASSUNGSBLOG (May 29, 2019), https://verfassungsblog.de/the-first-judgment-of-the-ecj-regarding-a-breach-of-the-rule-of-law-in-poland/.

[169] European Comm'n Press Release IP/19/1957, Rule of Law: European Comm'n Launches Infringement Procedure to Protect Judges in Poland from Political Control (Apr. 3, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957.

Disciplinary Chamber is composed solely of new judges selected by the National Council for the Judiciary [KRS] whose judges-members are now appointed by the Polish parliament (Sejm)."[170] But when the new von der Leyen Commission finally referred the case to the Court of Justice, the Commission inexplicably failed to file immediately for interim measures to halt the ongoing disciplinary actions against sitting judges. So the disciplinary actions continued without challenge while the case was pending.[171] The Commission eventually did seek an interim measures order, granted in April 2020, fully a year after the initial proceedings had been launched.[172] In the end, however, neither the interim measures order nor the eventual judgment in the case itself in July 2021 actually succeeded in getting the Polish government to stop using the Disciplinary Chamber to punish judges.[173]

The Commission had acted more swiftly and decisively to deal with the rule of law crisis in Poland from 2016 through 2019 than at any other point in 12 years that judicial independence has been under direct attack. But even in its heyday of enforcement, Commission nonetheless allowed the Polish government to succeed in capturing the courts because its infringements were not comprehensive or numerous enough. These three infringement actions showed that the Commission had finally become active in using its classic enforcement powers and the Court agreed with Commission in each case. But the first infringement failed to challenge the widespread removal of lower court presidents, so the ability of the Polish government to fire court leadership down through the judicial system and to replace

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[170] *Id.*

[171] In testimony at the ECJ hearing on the matter of the Disciplinary Chamber in September 2020, Sylwia Gregorczyk-Abram and Michał Wawrykiewicz, attorneys representing one of the judges harassed through an endless disciplinary proceeding, explained that, at the time of their testimony, 55 judges had been referred for disciplinary procedures, at least 14 of whom had been charged with a disciplinary offense by enforcing a decision of the ECJ. Another 90 were called before the Disciplinary Chamber in "explanatory proceedings." Additional disciplinary proceedings were instituted against 1,200 judges who had signed a letter to the OSCE challenging the legal status of the Extraordinary Chamber of the Supreme Court. Sylwia Gregorczyk-Abram & Michał Wawrykiewicz, *We, in Poland, are Witnessing a Unique Revolution in Poland Against the Rule of Law*, RULE OF LAW IN POLAND: BLOG (Sept. 22, 2020), https://ruleoflaw.pl/we-in-poland-are-witnessing-a-unique-revolution-in-poland-against-the-rule-of-law/.

[172] Interim Measures Order, Comm'n v. Poland, Case C-791/19 R, EU:C:2020:277 [hereinafter Interim Measures Order, *Third Infringement*]. For an analysis of the Interim Measures decision, *see* Laurent Pech, *Protecting Polish Judges from Poland's Disciplinary "Star Chamber": Comm'n v. Poland (Interim Proceedings)*, 58 COMMON MRKT. L. REV. 137 (2021). But even when the interim measures order issued, the Disciplinary Chamber and the Polish government refused to recognize it. Disciplinary procedures against judges continued, then, even after the ECJ judgment finding the Disciplinary Chamber to be unlawful. For example, four judges were disciplined in early 2022 after they attended an event where former European Council President and former Polish Prime Minister Donald Tusk spoke. They had previously attended a convention organized by the Committee for the Defense of Democracy. They were then called up on disciplinary complaints before the Disciplinary Chamber, after the Court of Justice had found the continued operation of the Disciplinary Chamber unlawful. *Polish Judges Face Disciplinary Proceedings for Attending Event of Anti-Government NGO*, NOTES FROM POLAND: BLOG (Feb. 21, 2022), https://notesfrompoland.com/2022/02/21/polish-judges-face-disciplinary-proceedings-for-attending-event-of-anti-government-ngo/. Disciplinary proceedings only stopped when Poland agreed to close the Disciplinary Chamber and create a replacement tribunal in order to have its Recovery Plan and associated funding approved by the European Commission. *Poland Closes Judicial Disciplinary Chamber at Heart of Dispute with EU*, NOTES FROM POLAND: BLOG (July 15, 2022), https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[173] Comm'n v. Poland, Case C-791/19 R, EU:C:2021:596 [hereinafter *Third Infringement*].

independent judges with judges of their own choosing was allowed to proceed unchallenged. The first infringement was only brought after all the prematurely retired judges were already removed from office, limiting what the Commission could demand as compliance once the Court issued its judgment. Even after it won, the Commission took no additional steps to enforce this judgment.[174] The second infringement was brought while there was still time to preserve the original composition and terms of office of sitting Supreme Court judges and the immediate filing for interim measures stopped the destruction of the Supreme Court in part, but the second infringement ignored the fact that all of the new appointments to the Supreme Court – including the appointments to the new seats created by the expansion of the Court -- were made by a politically captured KRS, a body that surely failed to offer "sufficient guarantees of independence in relation to the legislature and the executive,"[175] as the Court would later say in the *A.K.* case which directly challenged the independence of the KRS through a preliminary reference. The third infringement primarily challenged the Disciplinary Chamber of the Court but the new Commission waited months after the case was filed with the Court of Justice to seek interim measures, so the cases against hundreds of judges in Poland were allowed to proceed unchecked and a number of judges were suspended or removed from the bench during that time. The new Commission has not insisted after it won its case that Poland comply with the Court of Justice decision by restoring the suspended and fired judges to their previous positions.[176] But even during those three active years when the Commission was most active as Frans Timmermans held the rule of law portfolio, however, the Commission never acted to preserve the independence of the Constitutional Tribunal as it was being captured[177] nor did it directly challenge the political composition of the KRS which was the original sin in the later destruction of the ordinary judiciary.[178]

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[174] For example, the Commission might have insisted that those prematurely retired judges whose terms were extended not be allowed to decide new cases involving EU law, given that their reappointments were politically tainted.

[175] *A.K.*, EU:C:2019:982, ¶ 140.

[176] Rather, the reverse is true. As one of the "milestones" agreed to by Poland and the Commission as part of Poland's Recovery Plan under the new Recovery and Resilience Facility, it is enough for the Polish government to create a new procedure to assess whether these unlawfully disciplined judges should be returned to the bench. A group of four associations representing European judges, including some of the affected judges from Poland, have since sued the Council to block its approval of the Commission's recommendations. Lili Bayer, *European Judges Sue Council over Polish Recovery Plan*, POLITICO.EU, Aug. 28, 2022, https://www.politico.eu/article/european-judges-sue-council-over-polish-recovery-plan/ [hereinafter Bayer, *European Judges Sue*].

[177] The Commission finally initiated an infringement proceeding pertaining to the independence of the Constitutional Tribunal in December 2021. But the Commission didn't do so until the Constitutional Tribunal had issued several rulings finding that the Polish Constitution prohibited the Polish government from honoring both Treaty provisions and decisions of the Court of Justice. European Comm'n Press Release IP/21/7070, *supra* note 63.

[178] The issue of the independence of the KRS was raised through a preliminary reference request and not by the Commission through infringement proceedings. The Court in the *A.K.* case, decided in November 2019, noted that the opinion of the KRS was decisive in the appointment of judges (¶ 137) and, therefore, that the independence of the KRS was indeed relevant to the question of whether its appointments would raise doubts about the independence of the courts to which its appointments were made (¶ 139). In this regard, the Court argued, the fact that the prior KRS was dissolved before the end of the lawful terms of its members and that the new KRS comprised 23 out of its 25 members elected by political authorities were relevant to that determination (¶ 142). The referring court would be justified in

So even when the Commission was most active and brought three infringements in three years, it was all too little, too late. While three infringements might seem like a lot of activity, we should not assess the Commission's actions in terms of the raw number of infringement it brought. Instead, we should assess the Commission's track record in light of the cases that it would have been legally warranted in bringing to preserve the independence of the Polish judiciary . That is where the Commission failed. And of course even when it was as active as it was ever going to get on the rule of law in this first decade of frontal assaults on national courts, the Commission brought not a single infringement action against Hungary for compromising the independence of its judiciary.

The change of guard at the Commission with the European elections of 2019 put an end to the short era of relatively aggressive Commission enforcement of the principle of the rule of law in Poland. Perhaps the new Commission learned a lesson from the political fate of Frans Timmermans. While Timmermans had been seriously considered as a potential Commission president, vetoes from Hungary and Poland blocked his election.[179] As one commentator noted at the time, "[Timmermans'] failure [to become Commission president] will certainly be seen as a victory for the argument that maintaining 'unity' in the union is the top political priority, ahead of treaty compliance on budgets or the rule of law."[180] Instead, a much less determined team – with Ursula von der Leyen as Commission president and the rule of law portfolio split between Vice President Vera Jourová and Commissioner Didier Reynders – came into office and de-prioritized the rule of law.

The third infringement already started by the outgoing Commission in April 2019 did move forward under the new Commission which, in the absence of a satisfactory response from Poland, referred the case to the Court of Justice in October 2019, requesting an expedited procedure. But while the Commission tried to speed up the process, the Court turned them down, given that "the sensitive and complex nature of those questions, which […] arise in the context of wide-ranging reforms in the field of justice in Poland, did not lend itself easily to the application of the expedited procedure."[181] The Court nonetheless agreed to grant the case priority treatment.[182] But the Commission failed to immediately ask for interim measures, as the previous Commission had done when a situation was deteriorating before its eyes and irreparable damage would be done between the filing of a case and the eventual

considering "the way in which that body exercises its constitutional responsibilities of ensuring the independence of the courts and of the judiciary […] in particular if it does so in a way which is capable of calling into question its independence in relation to the legislature and the executive" (¶ 144). *A.K.*, EU:C:2019:982, ¶¶ 137, 139, 142, 144. To this date, this understanding of the critical importance of the independence of judicial appointing bodies has not been interpreted by the Commission as invitation to file an infringement against the composition of the KRS, which continues to operate with the domination of political appointees and is still empowered to determine all of the judicial appointments in Poland.

[179] Dominika Sitnicka, *The Obsession with Timmermans*, RULE OF LAW IN POLAND: BLOG (July 23, 2019), https://ruleoflaw.pl/the-obsession-with-timmermans-anti-polish-a-tremendous-saboteur-the-european-gendarme/.

[180] Patryck Smith, *Poland and Hungary's Issue is with the EU, not Frans Timmermans*, IRISH TIMES, July 4, 2019, https://www.irishtimes.com/news/world/europe/poland-and-hungary-s-issue-is-with-the-eu-not-frans-timmermans-1.3945749.

[181] *Third Infringement*, EU:C:2021:596, ¶ 34.

[182] *Id.* ¶ 35.

judgment.[183] While the Commission dithered, the rule of law situation in Poland got worse as the Disciplinary Chamber continued to pursue judges whose judgments displeased the government.

In the meantime, however, a set of preliminary reference cases challenged the Disciplinary Chamber under an expedited procedure. [184] The cases arose out of the purging of judges under the laws that lowered the judicial retirement age. Judges who had asked to stay on and whose requests were refused by the Minister of Justice (for the lower courts) or the President (for the Supreme Court) had an available appeal of those decisions to none other than the newly constituted Disciplinary Chamber. The preliminary references inquired into the lawfulness of the Disciplinary Chamber, given that all of its members were appointed by the KRS, nearly all of whose members were elected directly by the Polish Parliament. Could the Disciplinary Chamber then be considered a "court or tribunal" as those terms are understood under Union law?

In November 2019, the Court of Justice in *A.K.* explained the features for the referring court to consider in deciding whether the Disciplinary Chamber was in fact an independent and impartial tribunal. These included:

> where the objective circumstances in which that court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it and, thus, may lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law. [185]

As the Court concluded: "It is for the referring court to determine, in the light of all the relevant factors established before it, whether that applies to a court such as the Disciplinary Chamber of the Sąd Najwyższy (Supreme Court)."[186]

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[183] In its defense, the Commission may have interpreted the Court's denial of an expedited procedure and the Court's reference to the "sensitive and complex nature of those questions" as meaning that the Commission was not likely to win on the merits, and therefore that a request for interim measures would have been denied. But in light of the Court's prior jurisprudence on judicial independence, it could be reasonably guessed – and of course the Court's eventual judgment in this case confirmed – that the Disciplinary Chamber would fail the test. Moreover Advocate General Tanchev's opinion had already been issued in *A.K.* in the summer before the Commission referred its Third Infringement to the Court of Justice. AG Tanchev had opined: "There are legitimate reasons to objectively doubt the independence of the Disciplinary Chamber in light of the role of the legislative authorities in electing the 15 judicial members of the NCJ [KRS] and the role of that body in selecting judges." Opinion of Advocate General Tanchev, A.K. v. Krajowa Rada Sądownictwa**,** Joined Cases C-585/18, C-624/18 & C-625/18, EU:C:2019:551, ¶ 137. Surely, the Commission could have leaned on that opinion in asking for interim measures.

[184] *A.K.*, EU:C:2019:982, ¶ 54.

[185] *Id.* at Operative Part.

[186] *Id.*

The Advocate General in this case, AG Tanchev, had concluded during the summer of 2019, before the Commission forwarded the third infringement to the Court of Justice, that the Disciplinary Chamber was not a court or tribunal within the meaning of Union law. [187] The Court itself laid out the criteria that the referring judge was to apply in making that determination while making it clear from its description of the KRS that it surely met those criteria. But given the way that the KRS and Disciplinary Chamber were described by both the Advocate General and the Court, the dubious legality of the KRS was not in doubt. The increased politicization of appointments through the KRS and the terms on which the Disciplinary Chamber was established with *only* judges appointed by the newly politicized KRS clearly made it reasonable for any referring judge to conclude that the Disciplinary Chamber was not a court or tribunal within the meaning of Union law and therefore that its continued operation would be unlawful.

After the ECJ's November 2019 judgment in the *A.K.* case, the Polish Supreme Court (through its not-yet-captured Labour and Social Insurance Chamber) ruled in December 2019 that the KRS "is not as currently constituted, an impartial body independent of the legislature and executive" and that the Disciplinary Chamber "cannot be regarded as a tribunal within the meaning of Article 47 of the Charter of Fundamental Rights . . ."[188] The Disciplinary Chamber judges refused to honor the judgment of the Polish Supreme Court, however, claiming that the "the impartiality and independence of the Disciplinary Chamber had not been called into questions by the judgment in *A. K."* and therefore that the Supreme Court's decision was "devoid of any rational basis."[189]

All this time, the third infringement – covering much the same ground as *A.K.* – was pending at the Court of Justice. Even though it was clear that the preliminary reference decision, promptly enforced by the Polish Supreme Court, had not succeeded in stopping the Disciplinary Chamber from punishing judges, the Commission still did not ask for interim measures. In December 2019, some of us wrote an open letter urging the Commission to urgently request interim measures because "Polish judges [were] being subject[ed] to harassment tactics in the form of multiple arbitrary disciplinary investigations, formal disciplinary proceedings and/or sanctions for applying EU law as interpreted by the ECJ or 'daring' to refer questions for a preliminary ruling to the Court of Justice."[190] The Commission finally filed for interim measures in January 2020.[191] The Court granted interim measures in April 2020,[192] issuing its final judgment in July 2021.[193]

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[187] Op. of Advoc. Gen., *A.K.*, EU:C:2019:551, ¶ 137.

[188] Interim Measures Order, *Third Infringement,* EU:C:2020:277, ¶¶ 19-20.

[189] *Id.* ¶ 24.

[190] Laurent Pech et al., *Open Letter to the President of the European Comm'n Regarding Poland's Disciplinary Regime for Judges and the Urgent Need for Interim Measures in Comm'n. v Poland* (C-791/19), VERFASSUNGSBLOG (Dec. 11, 2019), https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission/.

[191] *Third Infringement*, EU:C:2021:596, ¶ 36.

[192] Interim Measures Order, *Third Infringement,* EU:C:2020:277. In this application for interim measures, the Commission was supported by Belgium, Denmark, the Netherlands, Finland and Sweden.

[193] *Third Infringement*, EU:C:2021:596.

Because the Court had already telegraphed its reasoning on the Disciplinary Chamber in the *A.K.* case, its decision was not a surprise. But the Court's reasoning in the Polish cases was further bolstered by its April 2021 judgment in the *Repubblika* case which had established the principle of non-regression.[194] The non-regression principle means that 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."[195] Considering the establishment of a new Disciplinary Chamber in Poland, the Court of Justice noted in the third infringement that "the mere prospect, for judges of the Sąd Najwyższy (Supreme Court) and of the ordinary courts, of running the risk of disciplinary proceedings which could lead to the bringing of proceedings before a body whose independence is not guaranteed is likely to affect their own independence,"[196] especially when "the creation of that chamber, by the new Law on the Supreme Court, took place in the wider context of major reforms concerning the organisation of the judiciary in Poland."[197] Those reforms included the creation of the KRS, "body whose independence from the political authorities is questionable."[198] As a result:

> it must be held that, taken together, the particular context and objective circumstances in which the Disciplinary Chamber was created, the characteristics of that chamber, and the way in which its members were appointed are such as to give rise to reasonable doubts in the minds of individuals as to the imperviousness of that body to external factors, in particular the direct or indirect influence of the Polish legislature and executive, and its neutrality with respect to the interests before it and, thus, are likely to lead to that body's not being seen to be independent or impartial, which is likely to prejudice the trust which justice in a democratic society governed by the rule of law must inspire in those individuals. Such a development constitutes a reduction in the protection of the value of the rule of law for the purposes of the case-law of the Court . . .[199]

Finding that the structure, composition and many operating rules of the Disciplinary Chamber violated Article 19(1) TEU, the Court of Justice was no doubt influenced by the fact that judges were being hauled before the Disciplinary Chamber precisely because they either brought preliminary references to the ECJ or were attempting to enforce ECJ judgments.[200] In fact, the ECJ had already ruled in March 2020, in one of the preliminary reference cases growing out of a threatened disciplinary procedure against a judge who referred a question about his own independence to the Court of Justice, that such disciplinary actions "cannot […] be

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[194] *Repubblika v Il-Prim Ministru*, Case C-896/19, EU:C:2021:311, ¶¶ 63-65.
[195] *Third Infringement*, EU:C:2021:596, ¶ 51.
[196] *Id.* ¶ 82.
[197] *Id.* ¶ 88.
[198] *Id.* ¶ 110.
[199] *Id.* ¶ 112.
[200] *Id.* ¶¶ 117-18, 138, 154, 222-35.

permitted."[201] Given the flurry of preliminary reference cases that the Court had already decided in *A.K.* (laying out the standards for determining the independence of the Disciplinary Chamber), *Miasto Łowicz* (establishing in dicta the impermissibility of disciplinary retaliation against judges for filing preliminary references) and *Repubblika* (establishing that a Member State could not reform its institutions to provide *fewer* rule of law guarantees than when it entered the EU), the decision in the third infringement case fit those various puzzle pieces together to reach its judgment. While it's true some of the preliminary references relevant to this judgment were launched even before the Disciplinary Chamber was fully constituted and therefore it is not surprising that they were decided first, the Court of Justice may have deliberately delayed the decision in the third infringement, refusing an expedited procedure, to give itself time to create this jurisprudential infrastructure before deciding the case. The platform of an infringement action allowed the Court to definitively determine (as opposed to giving the national referring judges the tools to determine) that the Disciplinary Chamber as currently constituted was unlawful.

That said, after the *A.K.* case was decided by the ECJ, the Polish government doubled down in defense of the Disciplinary Chamber even while the third infringement was pending at the ECJ. In December 2019, after the Polish Supreme Court attempted to enforce the *A.K.* judgment by ruling that the Disciplinary Chamber was unlawfully constituted, the Polish Parliament passed a law that came to be known as the "Muzzle Law."[202] The law got its name because it:

> bars judges from ensuring observance of the right to a fair trial and from guaranteeing rights deriving from the EU Treaties, including effective judicial protection. The law also prevents judges from controlling the validity of judicial appointments and from criticizing authorities, at the risk of being sent for disciplinary action to the very chamber of the Supreme Court which has *already* been found to constitute an unlawful body by the Supreme Court itself following a ruling from the European Court of Justice.[203]

In the Muzzle Law, judges could be punished for making decisions in violation of Polish Law, which by now included decisions that followed Union law.

Instead of charging ahead with the same disciplinary procedures that had already gotten the Disciplinary Chamber into trouble, the Muzzle Law changed the role of the Disciplinary Chamber and added in a new role played by the

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[201] Miasto Łowicz & Prokurator Generalny, Joined Cases C-558/18 & C-563/18, EU:C:2020:234, ¶ 58. Because the underlying legal issue before the judge referring the case did not directly invoke EU law, the Court held that the questions sent by the referring judge were inadmissible. But in dicta, the Court made it abundantly clear that threats to punish judges for referring questions to the ECJ were unlawful.

[202] 2019. Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw [Law Amending the Law Relating to the Organisation of the Ordinary Courts, the Law on the Supreme Court and Certain Other Laws] (Pol.) [hereinafter Muzzle Law].

[203] Laurent Pech et al., *Open Letter to the President of the European Comm'n regarding Poland's 'Muzzle Law,'* VERFASSUNGSBLOG (Mar. 9, 2020), https://verfassungsblog.de/open-letter-to-the-president-of-the-european-commission-regarding-polands-muzzle-law/.

Extraordinary Chamber of the Supreme Court. [204] The Extraordinary Chamber was the second of the newly created Supreme Court chambers whose judges were also appointed exclusively by the new packed KRS. All questions about whether judges' decisions violated Polish law by, among other things, following Union law were to be sent to the Extraordinary Chamber for a determination of that legality question before the Disciplinary Chamber would be asked by the government to lift the judicial immunity of the offending judges and suspend them so that (fake) criminal charges could be brought against them.[205]

The Muzzle Law entered into force on February 14, 2020 but the Commission did not send a letter of formal notice initiating an infringement action challenging this law until two months later.[206] The Commission then engaged in a fruitless dialogue with the government of Poland hoping to persuade it to back down. As a result, the Commission waited a full year before referring the case to the Court of Justice, asking for interim measures only at the end of March 2021.[207]

In the meantime, a Karlsruhe District Court decided to refuse extradition of a Polish suspect under a European Arrest Warrant because, in the German court's view, the Muzzle Law created unbearable pressures on Polish judges so that they could not be assumed to be independent.[208] Other national judges, especially those from the Netherlands, began expressing doubts about the independence of the Polish judiciary once judges could be – and were already being – disciplined for enforcing Union law.[209] Back in Poland, fully 40 cases against judges had been opened on the basis of the Muzzle Law; 20 of them had already been examined by the Extraordinary Chamber and the number of new cases was speeding up.[210]

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[204] *Muzzle Law*, art. 26(2)-(4).

[205] For an explanation of the confusing Muzzle Law and the effect of the Court of Justice's interim measures order, *see* Laurent Pech, *Protecting Polish Judges from Political Control: A Brief Analysis of the ECJ's Infringement Ruling in Case C-791/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)*, VERFASSUNGSBLOG (July 20, 2021), https://verfassungsblog.de/protecting-polish-judges-from-political-control/.

[206] European Comm'n Press Release IP/20/772, Rule of Law: European Comm'n Launches Infringement Procedure to Safeguard the Independence of Judges in Poland (Apr. 29, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772 .

[207] European Comm'n Press Release IP/21/1524, Rule of Law: European Comm'n Refers Poland to the European Court of Justice to Protect Independence of Polish Judges and Asks for Interim Measures (Mar. 31, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524.

[208] The judgment was unpublished. For a summary, *see* Maximilian Steinbeis, *So This is What the European Way of Life Looks Like, Huh?*, VERFASSUNGSBLOG (Mar. 6, 2020), https://verfassungsblog.de/so-this-is-what-the-european-way-of-life-looks-like-huh/.

[209] John Morijn, *Discussing Imploding Polish Judicial Independence, European Arrest Warrants and Fair Trial in Luxembourg: Silver Linings to a Grim Day*?, RULE OF LAW IN POLAND: BLOG (Oct. 13, 2020), https://ruleoflaw.pl/cjeu-eaw-poland/.

[210] Order of the Vice-President of the Court, Comm'n. v. Poland, Case C-204/21 R, EU:C:2021:593, ¶ 119 [hereinafter First Order of the Vice President, *Fourth Infringement*]. The proceedings in Case C-204/21 will be hereinafter referred to as the Fourth Infringement because the core Commission complaint challenged the new law and therefore opened a new line of enforcement. But here, too, the proceedings are confusing. Because, in the view of the Commission, the Muzzle Law added to the violations it alleged in the Third Infringement proceeding by providing new grounds for disciplinary actions against judges, the Commission's request for interim measures in the Fourth Infringement case overlapped the interim measures sought at the same time under the Third Infringement (which had not yet resulted in a judgment), since the Third Infringement also sought to enjoin further disciplinary proceedings by the Disciplinary Chamber. Interim measures in the Third Infringement were granted in April 2020. Interim

Against this background, the Court granted the interim measures sought in the Fourth Infringement, noting that the mere fact that judges *could* be prosecuted under this law on the basis of a determination by "a body whose independence might not be guaranteed" could harm the independence of the entire judiciary while the case was pending.[211] The Court explained:

> [T]he mere existence of national provisions which would enable the disciplinary regime to be used as a system of political control of the content of judicial decisions is such as to give rise to doubts in the minds of individuals and the other Member States as to the independence of the national courts, which might well cause serious and irreparable damage.[212]

Alarmed, the Court not only ordered interim measures but also suspended operation of all of the provisions of the Muzzle Law that the Commission had sought to challenge.[213]

Back in Poland, the (packed) Polish Constitutional Tribunal reacted to these interim measures by ruling two weeks later on July 27, 2021 that Article 4(3) TEU combined with Article 279 TFEU was incompatible with the Polish Constitution, and that therefore the interim measures awarded by the ECJ were *ultra vires.*[214] Armed with this decision, the Polish government returned to the ECJ in August to demand that the interim measures be cancelled. But the Court, deciding in October 2021, refused to budge.[215]

The demand from the Polish government that interim measures be cancelled crossed paths in time with a new application for interim measures filed by the Commission in September 2021. Pointing to the fact that Poland had not complied

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Measures Order, *Third Infringement*, EU:C:2020:277. The Order granting interim measures in the Fourth Infringement, enjoining all of the challenged provisions of the Muzzle Law, issued in July 2021. First Order of the Vice President, *Fourth Infringement*, EU:C:2021:593, ¶ 121. It detailed a lengthy correspondence between the Commission and Poland from the time that the *A.K.* judgment issued in November 2019 and the Polish Supreme Court applied that judgment in December 2019 through to the retaliation by the government against the Supreme Court by pushing through the Muzzle Law in February 2020. In addition, the detailed correspondence covers the various stages of the Fourth Infringement as it was launched and proceeded through the various stages on the way to an ECJ referral. *Id.* ¶¶ 26-37. The Commission was clearly active during this period, but spent many months in fruitless correspondence when it might have moved more quickly to ask for interim measures in the Third Infringement case to back up the Polish courts that were trying to enforce Union law as explicated in the *A.K.* judgment. As it was, the gap between the start of retaliatory measures in Poland against the Supreme Court's decision domesticating the reasoning of the *A.K.* case and the Commission's request for interim measure to prevent the judges from being punished for enforcing Union law lasted fully one year and four months, with judges being hauled up before the Disciplinary Chamber that entire time. While the Commission was not, strictly speaking, doing nothing, it was engaged in a fruitless correspondence as the number of disciplinary proceedings was rising sharply. It could have tried to stop those disciplinary procedures by speeding up the Third Infringement and seeking interim measures as soon as it referred the case to the Court. As it was, the interim measures ordered to stop the disciplinary procedures against Polish judges issued only in April 2021.

[211] First Order of the Vice President, *Fourth Infringement*, EU:C:2021:593, ¶ 121.

[212] *Id.* ¶ 246.

[213] *Id.* at Operative Part.

[214] Order of the Vice President of the Court, Comm'n v. Poland, Case C-204/21 R-RAP, EU:C:2021:834 [hereinafter Second Order of the Vice President, *Fourth Infringement*].

[215] *Id.*

with the interim measures ordered in July to suspend application of the Muzzle Law and that Poland was asserting that the very interim measures order violated the Polish Constitution, the Commission urged the Court to levy "a daily penalty payment in an amount likely to encourage that Member State to give effect as soon as possible to the interim measures."[216] Responding forcefully to Poland's challenge to the Court's authority, the Vice-President of the Court ordered a €1 million daily penalty payment from the date of this new interim measures order on October 27, 2021 until the government of Poland complied with the first interim order.[217]

As of this writing, however, the Polish government refuses either to comply with the interim measures or to pay the fines.[218] And, as of this writing, neither opinion nor judgment have issued in the Fourth Infringement Case. Poland is refusing to acknowledge either interim measures order – the one that required it to suspend the Muzzle Law and the one that ordered €1 million per day penalty payments. In a burst of creativity, however, the Commission simply announced in June 2022 that it would deduct the past due penalty payments from the funds allocated for Poland under the EU budget.[219]

As the Muzzle Law dispute was escalating, the Commission brought its fifth infringement action against Poland in December 2021 for attacks on judicial independence.[220] This time, reacting to a string of decisions in which the (packed) Constitutional Tribunal found parts of the EU Treaties unconstitutional under Polish law, the Commission finally confronted the fact that the Constitutional Tribunal had been unconstitutionally captured early on in the campaign to subdue the judiciary and so could be counted on to support the government's views whenever it wanted to hide behind a court decision. Following on a decision of the European Court of Human Rights finding that the Polish Constitutional Tribunal was no longer a tribunal established by law when adjudicating in a formation in which even one of the individuals appointed irregularly,[221] the Commission made a parallel argument in Union law. Since filing that action, however, the Commission has slow-walked the case. Even though the Polish government was required to respond to the initial notice in two months and one could reasonably expect that it was not going to

[216] Order of the Vice-President of the Court, Comm'n v. Poland, Case C-204/21 R, EU:C:2021:878 [hereinafter Third Order of the Vice-President, *Fourth Infringement*].

[217] *Id.* ¶ 64.

[218] By mid-April 2022, the Polish government owed €160 million but was still refusing either to comply or to pay the fines. The Comm'n then began deducting some of these payments from the money that was allocated to Poland under the European budget. Aleksandra Krzysztoszek, *Poland Refuses to Pay Comm'n Fines, Total Continues to Rise*, EURACTIV, Apr. 13, 2022, https://www.euractiv.com /section/politics/short_news/poland-refuses-to-pay-commission-fines-total-continues-to-rise/.

[219] Zosia Wanat and Paola Tamma, *Brussels Ups the Ante in Rule-of-Law Dispute With Poland*, POLITICO.EU, Sept. 21, 2021, https://www.politico.eu/article/brussels-eu-increases-pressure-rule-of-law-dispute-poland/. I had urged this possibility on the Commission years ago but it was a controversial idea back then. Kim Lane Scheppele, *Enforcing the Basic Principles of EU Law Through Systemic Infringement Actions*, in REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 105 (Carlos Closa and Dimitry Kochenov eds., 2016) [hereinafter Scheppele, *Systemic Infringement Actions*].

[220] European Comm'n Press Release IP/21/7070, *supra* note 63.

[221] *Xero Flor*, CE:ECHR:2021:0507JUD000490718.

suddenly fix the problems, the Commission waited seven months before it advanced the case with a reasoned opinion.[222]

In the three years that the von der Leyen Commission has been confronted with rule of law problems, it has advanced one infringement begun by the prior Commission and launched two of its own. In the two cases that it has taken to the Court of Justice so far, it has failed to ask for interim measures in a timely way in the first case and waited a year to refer the case to the Court of Justice with the attendant damage caused by delay in the second case. These delays have allowed the destruction of the Polish judiciary to proceed apace while the Commission has dithered. Now, with the infringement on the Constitutional Tribunal, the Commission also seems to show no sense of urgency as the Constitutional Tribunal continues to issue judgments finding EU law incompatible with the Polish Constitution and therefore *ultra vires* in Poland. Over two Commissions, with the possible exception of the second infringement that in fact did prevent the premature retirement of judges at the Supreme Court, the infringement actions have had little discernible effect on the campaign by the Polish government to bring the courts under political control because they have not sought to challenge facts on the ground quickly enough.

While five infringements in seven years (four lodged so far with the ECJ) may seem like a great deal of activity from the Commission, we have seen how many aspects of the attacks on the Polish judiciary were never addressed by the cases the Commission has chosen to bring. In addition, the cases were often initiated or interim measures sought (if at all) only after the damage had been done in ways that would be hard to fix. Now the Polish government is in open rebellion against the Commission, refusing to pay the penalty payments assessed for its blatant refusal to honor decisions of the Court of Justice while the Commission deducts the penalty payments from Poland's EU funds.

One might think that the Commission would double-down on more infringements, attempt to enforce more of the cases it has won through Article 260 penalty payments or try to mobilize the Council for a new push on Article 7 TEU rather than tolerate open defiance. But the Commission's determination to hold Poland accountable for the enforcement of ECJ decisions has been sporadic at best, and it hasn't held.

By June 2022, after the Russian war on Ukraine brought hundreds of thousands of refugees to Poland and the Commission attempted to mobilize a united Europe against the Russian threat, the Commission decided to greenlight cash to Poland without insisting either that Poland comply with all ECJ decisions or that it catch up by paying its accumulated fines. The Commission agreed to approve Poland's Recovery Plan to start receiving money from the EU's Recovery Fund,[223] money that

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[222] *European Comm'n Continues its Infringement Procedure against Constitutional Tribunal with a Reasoned Opinion*, AGENCE EUROPE, July 15, 2022, https://agenceurope.eu/en/bulletin/article/12994/4.

[223] The "Recovery Plan for Europe" – also known as the NextGenerationEU fund – was constituted as part of the post-Brexit budget of the EU, financed through floating EU debt instruments for the first time and aimed at helping Member States recover from the financial shock of the Covid pandemic. *See Recovery Plan for Europe*, EUROPEAN COMM'N, https://ec.europa.eu/info/strategy/recovery-plan-europe_en. Member States were to submit plans for spending this money, to be approved by the

the Commission had previously withheld on rule of law grounds. In exchange for the money, the Commission required a set of "milestones" be met, which includes disbanding the Disciplinary Chamber of the Supreme Court and reviewing the cases that led to disciplining judges under the old system (without any guarantees that the fired and suspended judges be reinstated as the Court's decisions require).[224] But the Commission did not insist that Poland follow all decisions of the ECJ, nor that it address matters raised in pending infringement procedures, like the independence of the Constitutional Tribunal.[225] This made the Commission's deal with Poland to allegedly achieve rule of law compliance look less like legal enforcement and more like a hostage negotiation in which the Commission had been threatened by Poland.[226]

The Commission's agreement with Poland to exchange some reform for money generated a negative reaction. Fully five of the Commissioners went on the record as opposing the deal.[227] The European Parliament expressed its opposition as well.[228] Four European judges associations filed suit against the Council to block its approval of the Commission's recommendations on the Polish plan.[229]

At first, Poland looked like it might comply with these easy targets to try to keep the agreement on track. It disbanded its much-contested Disciplinary Chamber in June 2022 while setting up a new disciplinary body as it promised the Commission it would do. As soon as the new law passed in May 2022 making clear how this new disciplinary body would be selected, however, Commission President von der Leyen noted that the new law did not comply with the "milestones" that had been agreed.[230] The Polish government then said it would rather give up the Recovery Funds than

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Commission and Council before the money was to be disbursed. From the start, however, Hungary's and Poland's plans were challenged by the Commission given that neither country complied with rule of law targets built into the Regulation establishing the Recovery Fund. Eszter Zalan, *Rule-of-law Issues Still Hold Up Hungary-Poland Recovery Plans*, EUOBSERVER, Sept. 3, 2021, https://euobserver.com/rule-of-law/152803 ; European Parliament and Council Regulation (EU) 2021/241, Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021R0241.

[224] European Comm'n Press Release IP/22/3375, NextGenerationEU: European Comm'n Endorses Poland's €35.4 Billion Recovery and Resilience Plan (June 1, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3375.

[225] The Commission finally filed an infringement action challenging Poland's political capture of the Constitutional Tribunal in December 2021. European Comm'n Press Release IP/21/7070, *supra* note 63. But this occurred only after the European Court of Human Rights ruled that the Constitutional Tribunal was not a tribunal established by law, given the political influence in its composition. *Xero Flor*, CE:ECHR:2021:0507JUD000490718.

[226] Wojciech Kość, *Poland's Parliament Partially Rolls Back Judicial Changes to get EU Cash*, POLITICO.EU, May 26, 2022, https://www.politico.eu/article/poland-parliament-partially-rolls-back-judicial-changes-rule-of-law-eu-recovery-funds/.

[227] Lili Bayer, *Amid Comm'n Rebellion, von der Leyen Defends Polish Recovery Cash Plan*, POLITICO.EU, June 2, 2022, https://www.politico.eu/article/amid-commission-rebellion-von-der-leyen-defends-polish-recovery-cash-plan/.

[228] *European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (RRF)* (2022/2703(RSP)), 2022 O.J. (C 493) 10 (June 9, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.

[229] Lili Bayer, *European Judges Sue*, *supra* note 176.

[230] *New Polish Judicial Law Does Not Meet All Requirements to Unlock Funds, Says Eu Comm'n Chief*, NOTES FROM POLAND: BLOG (July 4, 2022), https://notesfrompoland.com/2022/07/04/new-polish-judicial-law-does-not-meet-all-requirements-to-unlock-funds-says-eu-commission-chief/.

walk back its judicial "reforms."[231] And then the Commission threatened to block Poland's Cohesion Funds due to Poland's continuing rule of law violations.[232]

Given the track record of the Commission in failing to play hardball on rule of law with rogue Member States, it will be surprising if the Commission refuses to trade superficial compliance for clearing a set of files,[233] something that Hungary is no doubt watching closely.[234] That said, only serious threats from the Commission with something important at stake seem to generate any response at all from rogue countries. The ability to generate change in backsliding Member States by threatening to withhold funds from them seems to be a new power that the Commission is just starting to use and, as of this writing, it is by no means clear that the Commission will have the spine to follow through on the threats that the law now permits it to make.

II. INVENTING NEW TOOLS

As we have seen, the Commission has either not used its power to bring infringement actions at all in the case of Hungarian attacks on judicial independence after 2012 or, when it has used this power in the case of Poland, the infringements have been too little, too late. Even when the Commission wins at the Court of Justice, it has not rigorously enforced the decisions it has gotten to move rogue Member States in the direction of restoring judicial independence. If the Commission has not used infringement actions effectively to address the rule of law crisis as it has evolved in Member States and not been actively enforcing the judgments of the Court of Justice that it has managed to get, what has it been doing? The short answer is: Inventing new tools.

Before the Kelemen and Pavone paper, it was possible to think that the Commission had not been very active in bringing infringements against Hungary and Poland because its interpretation of EU law was too conservative to allow it to spot the EU-law issues in backsliding democracies. But this denies the evidence, presented above, that the Court had already outlined the key elements of its judicial independence jurisprudence before Hungary and Poland started attacking their

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[231] *Poland Warns of Repercussions if Brussels Keeps Blocking Funds*, REUTERS, Aug. 9, 2022, https://www.reuters.com/world/europe/poland-warns-repercussions-if-brussels-keeps-blocking-funds-2022-08-09/.

[232] Sam Fleming et al., *Rule of Law Stand-Off Threatens New EU Funding to Poland*, FIN. TIMES, Oct. 16, 2022, https://www.ft.com/content/e9c718ba-cccd-4b6d-8b22-d3481623a3d1.

[233] My frequent coauthor, Laurent Pech, agrees. Laurent Pech, *Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time*, VERFASSUNGSBLOG (June 21, 2022), https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time.

[234] The Hungarian case for funding is more complicated because the Commission President's office under SG-RECOVER signs off on the Recovery Plans but the Budget Commissioner, working with DG-BUDGET, runs the process for enforcing the Conditionality Regulation which has been launched against Hungary. As a result, the two processes could in theory result in quite different conditions for distributing EU funds even though the Court of Justice has outlined a common set of standards for protecting judicial independence that should apply to both if the Commission is ensuring the uniform application of Union law.

courts. Still, one might imagine that the Commission wanted to wait for clearer signals.

With the Kelemen and Pavone evidence, however, another explanation for the Commission's timidity in bringing infringement cases to the Court of Justice seems more plausible. The Commission was not just failing to enforce EU law in backsliding democracies; it was failing to enforce EU law across the board. The problem wasn't that Poland and Hungary presented new problems that took a while for the Commission's legal service to get their minds around. The problem was that the Commission had a policy of non-confrontation against Member States in general. Confronting Member States over the organization of their own national institutions would have been a bridge too far.

That said, the Commission couldn't just ignore what was happening first in Hungary and then in Poland because it was too visible and too shocking. So they did what institutions under stress often do. They appear to do something without actually doing anything.[235] *Appearing to be doing something* is a strategy in which institutions under stress announce important values, look busy addressing the violations of those values, and yet in the end do not change anything at all because all that activity produces no result. This sort of behavior often appears when an institution is caught between audiences with conflicting demands. Not actually doing something about the problem pacifies one audience that wants to keep the status quo, while engaging in a lot of busy-work to appear to be doing something pacifies the audience that is demanding action. In the end, one audience gets the appearance of doing something and the other one gets the reality on the ground that nothing was done. Appearing to do something is a way of doing and not doing something at the same time.

Faced with Member States melting down as democracies in plain sight, the Commission could not fail to look like it was still the Guardian of the Treaties so it had to appear to be doing something about it. But faced with its determination not to alienate Member States with aggressive law enforcement, it didn't really want to press the rogue states too hard. So the Commission played for time by inventing new tools and hoping that the problem would disappear on its own.

What does *appearing to be doing something* look like? When the Orbán government began misbehaving, both Commission President José Manuel Barroso and Vice President Viviane Reding made numerous speeches criticizing Hungary. For example, in his State of the Union address in 2013, President Barroso stressed the increasing number of "threats to the legal and democratic fabric in some of our European states"[236] and called for new tools to fill the space between infringement

[235] I have elaborated this approach with regard to the US Supreme Court's decisions in the Guantanamo cases, calling it the "new judicial deference." There, the Court, faced with outrages that it could not ignore, issued judgments with dramatically quotable quotes that made it appear to be dealing with the problem, but in fact those decisions nothing changed on the ground – by design, because they provided no workable remedies for those affected. So the status quo remained. Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. LAW REV. 89 (2012).

[236] José Manuel Barroso, President, European Comm'n, State of the Union Address (Sept. 11, 2013), https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684.

actions and the "nuclear option" of collective sanctions made available by Article 7 TEU.

In fact, President Barroso's pessimism about infringement actions may have been justified by the Commission's early experience with infringements in Hungary. The Commission did bring two infringement actions to the Court of Justice against Hungary for its democratic backsliding just after the new constitution and its associated set of "cardinal" (that is, supermajority) laws came into effect in 2012. One infringement procedure, as we have seen, targeted the reduction of the judicial retirement age that enabled the replacement of many judges in important positions all at once, though the Commission brought the case as an example of age discrimination rather than as an attack on judicial independence.[237] The other targeted the fact that the Hungarian government had fired the data protection ombudsman, whose independence was supposed to be guaranteed under EU law.[238] While the Commission won both cases, nothing changed the facts on the ground since the prematurely retired judges and the fired data protection ombudsman were never reinstated. Instead their government-friendly replacements became entrenched and stood to benefit from the new protections awarded sitting judges and a new data commissioner. The Commission won on the law but it lost on the facts. The Commission may reasonably have thought that infringement actions might not actually fix things – so more tools were needed.

As President Barroso announced in his 2013 State of the Union address, the Commission would therefore create new tools to tackle the problem. By the time the Barroso Commission left office in 2014, the Commission had invented both the Rule of Law Framework and the Justice Scoreboard.

The Rule of Law Framework[239] provided a structure for the Commission's work in preparation for the activation of Article 7 TEU. Article 7 authorizes the Commission to propose to the Council and Parliament that they should either warn a Member State that it was in danger of breaching the values of Article 2 TEU through Article 7(1) TEU or determine that there had been a breach and apply sanctions through Article 7(2) and (3). But how was the Commission to prepare this proposal? The Rule of Law Framework, with its elaborate stages that mirrored the procedure for an infringement action (assessment, recommendation, reasoned opinion) structured the Commission's fact-finding and dialogue with the Member State to determine whether to urge the Council to invoke Article 7. But at the end of the dialogue, all the Commission could do was to recommend to the operative institutions under Article 7 – the Parliament and the Council – that they should act.

The Rule of Law Framework was obviously designed for Hungary since Poland had not yet become a problem at the time it was invented. But to this day, the Rule

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[237] *Comm'n v. Hungary*, EU:C:2012:687.

[238] *Comm'n v. Hungary*, EU:C:2014:237; Kim Lane Scheppele, *Making Infringement Procedures More Effective: A Comment on Comm'n v. Hungary*, VERFASSUNGSBLOG (Apr. 30, 2014), https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/.

[239] *Communication from the Comm'n to the European Parliament and the Council: A New EU Framework to Strengthen the Rule of Law*, COM (2014) 0158 final (Mar. 11, 2014), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014DC0158.

of Law Framework has never been invoked for Hungary. It was triggered for Poland at the start of 2016, however, and – as explained above – the Commission followed all of the steps over nearly two years, eventually recommending that the Council and Parliament invoke Article 7(1) TEU for Poland when all efforts at dialogue failed. But nothing has happened since in the Article 7 procedure and in the meantime important time was lost as the Polish government's efforts at capturing the judiciary became more multifaceted and entrenched. The fact that the Article 7 TEU procedure is broken because Member States won't discipline each other means that the Commission process leading to an Article 7 recommendation is unlikely to change much.

The Justice Scoreboard proceeded from the (in the end misguided) opinion that attacks on the judiciary could be objectively measured with neutral and quantitative tools.[240] The Scoreboard deploys a series of indicators designed to measure the efficiency, quality and independence of the judiciaries in the Member States, thereby consuming a lot of staff-hours in measurement for much of the year. The indicators do not track very well what we know from other sources about threats to the judiciary. For example, the indicators measure things like whether the national security agencies conduct background checks on judges as a measure of their independence (hint: if there are background checks, the judges are less independent).[241] But why would that be a better measure than whether a judge can be disciplined for her decisions, something that the Scoreboard does not measure and yet is actually being done in the rogue Member States?

Some problems are usefully highlighted with the Justice Scoreboard. For example, the Scoreboard measures the length of proceedings as one indicator of judicial quality.[242] In some Member States, justice comes unbearably slowly, and calling out the problem may well lead to a more well-functioning judiciary. On this measures, however, Croatia and Italy are the worst offenders while Hungary and Poland are very well-functioning. Of course, the shortest trials of all are in kangaroo courts where no evidence need be presented at all so it is always important to look behind the measure at the world it is counting.

Throughout the Justice Scoreboard measures, Poland and Hungary rarely appear as outliers. Yes, Hungary has the most expensive courts and the least legal aid.[243]

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[240] *EU Justice Scoreboard*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en. For an assessment, *see* András Jakab & Lando Kirchmair, *How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way*, 22 GERMAN L. J. 936 (2021), https://www.cambridge.org/core/journals/german-law-journal/article/how-to-develop-the-eu-justice-scoreboard-into-a-rule-of-law-index-using-an-existing-tool-in-the-eu-rule-of-law-crisis-in-a-more-efficient-way/77604F34839CDB9AA8853A3543B19A30.

[241] For the 2022 results, *see Communication from the Comm'n to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions: The 2022 EU Justice Scoreboard*, at 44, COM (2022) 234 final (May 19, 2022), https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf. Poland has no security service background checks, so all is well! And Hungary has them, but only for judges who handle national security cases, so that sounds sensible. Other countries, like Denmark, are much worse on this measure as all judges are checked.

[242] *Id.* at 11-12.

[243] *Id.* at 23-24.

And while Hungary and Poland both score on the low end of the "perception of judicial independence" measures across the EU, they are not the worst countries on most measures in the EU (an honor taken by Croatia with Slovakia and Bulgaria in hot pursuit).[244] One would never guess from reading through the Justice Scoreboard indicators that Polish and Hungarian courts were in special and imminent danger.

In the end, the Justice Scoreboard has not had much of an impact on the judicial independence debate in the Member States where judicial independence has been under the most serious threat because it simply does not measure the most important things that go wrong when judiciaries are falling victim to political capture. That doesn't mean that the Justice Scoreboard was misguided. The indicators measured by the Scoreboard just don't track the most serious problems on the ground in the present rule of law crisis. But it was another tool invented by the Commission to appear to be doing something and to tie up the bureaucracy in rule of law theater.

As the rule of law crisis worsened despite these new tools, the Commission again complained that it needed still more tools. The outgoing Juncker Commission also proposed two new tools for the toolbox. One was the Rule of Law Mechanism which "provides a process for an annual dialogue between the Commission, the Council and the European Parliament together with Member States as well as national parliaments, civil society and other stakeholders on the rule of law. The Rule of Law Report is the foundation of this new process."[245] So now the Commission prepares an annual Rule of Law Report from a wide variety of sources. It does this for every Member State every year as a response to the criticism that only certain rogue states were being singled out for double standards. Of course, in such an exercise, which analyzes exactly the same issues for every Member State, the big problems appear flattened in the formulaic approach that the Commission staff must take to make all of the reports sound standardized. And because the task is so huge, the Commission has had to prioritize certain issues over others so that not all aspects of the rule of law are covered each year.[246] The reports are useful for anyone who wants a narrative account of problems in particular Member States. But they were never attached to an action beyond the report itself. The Commission has strengthened the Rule of Law Reports by adding a recommendations section in 2022.[247] But because all Member States get these recommendations, the playing field of judicial independence looks more level than it is. In addition, the recommendations are rather general and do not take into account the national obstacles that have been erected to their realization. They also do not provide

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[244] *Id.* at 40-42.

[245] *Rule of Law Mechanism*, EUROPEAN COMM'N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en.

[246] For a critique of the first two editions of the annual Rule of Law Reports, *see* PECH & BÁRD, ARTICLE 2 TEU VALUES, *supra* note 14.

[247] European Comm'n Press Release IP/22/4467, Rule of Law Report 2022: Commission Issues Specific Recommendations to Member States (July 13, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467. For recommendations for 2022, *see Annex to the Communication from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 2022 Rule of Law Report*, COM (2022) 500 final (July 13, 2022), https://ec.europa.eu /info/sites/default/files/4_1_194542_comm_recomm_en.pdf.

suggestions for how to fix the identified problems. Or any consequences for just ignoring them.

For example, the 2022 recommendation to Hungary that it strengthen the National Judicial Council's powers relative to the president of the National Office for the Judiciary is right on target. But it does not take into account that this would now require a constitutional amendment because the relative strengths of the two bodies are set in a prior constitutional amendment that the Commission said nothing about in 2013. Given that the (packed) Hungarian Constitutional Court has reserved for itself the power to enforce the Fundamental Law over and above EU law, particularly with regard to anything about state structure, one can imagine how this will play out in Hungary. The 2022 recommendations to Poland say nothing whatsoever about the Disciplinary Chamber (including in its new and inadequate form),[248] the Muzzle Law or the packed Constitutional Tribunal, which means that they don't even track the infringements that the Commission has brought. Because neither Hungary nor Poland have ever done anything in this whole long rule of law saga without having serious sanctions in the balance, recommendations will not achieve anything by themselves unless they are attached to some sanctioning mechanism like conditioning the distribution of EU funds on compliance.

The annual Rule of Law Reports thus "appear to be doing something" but they lead to no required action of any kind. Here, too, they tie up immense amounts of staff time; they give NGOs who are screaming that the Commission should do something about the rule of law a place to go to complain; and they produce a rack of reports that can be endlessly quoted but that cannot compel change.[249]

The other new tool in the toolbox, proposed by the Juncker Commission, is the new Rule of Law Conditionality Regulation,[250] which gives the Commission the power to find that a Member State's rule of law problems so seriously affect the integrity of the institutions that allocate, spend and account for EU funds in that Member State that those funds would be at risk of being improperly spent if they were given to that Member State. While the Commission has long had a number of other mechanisms for cutting funds to Member States that it could use on its own (for example the Common Provisions Regulation[251] and the Financial Regulation[252]),

[248] The Polish government agreed to disband the original offending Disciplinary Chamber and replace it with a new one. But after examining the new proposal, Commissioner Vera Jourová announced that the change was insufficient to comply with the Commission's demands. Wojciech Kosc, *Poland's Tweaks to Judiciary Reforms Do Not Yet Meet EU Criteria, Says Jourova*, BNE INTELLINEWS , July 1, 2022, https://intellinews.com/poland-s-tweaks-to-judiciary-reforms-do-not-yet-meet-eu-criteria-says-jourova-249258/.

[249] For a thoughtful assessment of the first two years of Rule of Law Reports, *see* PECH & BÁRD, ARTICLE 2 TEU VALUES, *supra* note 14.

[250] European Parliament and Council Regulation 2020/2092/EU, On a General Regime of Conditionality for the Protection of the Union Budget, 2020 O.J. (L 433I) 1.

[251] European Parliament and Council Regulation 2021/1060/EU, Laying Down Common Provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and Financial Rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, 2021 O.J. (L 231) 159 [hereinafter CPR]. This CPR replaced a prior CPR that had applied to the 2014-2020 Multi-Annual Financial Framework funds.

the Commission apparently wanted political cover before it cut funds in advance and on a grander scale so the new Conditionality Regulation doesn't allow the Commission to do anything on its own without getting a qualified-majority-vote decision of the Council first. In its defense, the Commission might well have thought that the preexisting legal framework only allowed it to withhold funds and sanction financial misbehavior one project at a time. The Conditionality Regulation therefore makes clear that all funds could be cut if need be.[253]

But will the Conditionality Regulation actually be carried out? Recall that the Council is the body that has so far failed to act on the Article 7(1) recommendation of the Commission with regard to either Poland or Hungary so it may be hard to convince the Council to follow through on Commission recommendations, assuming that the Commission won't cave in and approve partial or purely cosmetic compliance by rogue Member States so that no recommendation actually goes to the Council. Rule of law advocates have also worried that, as with the Rule of Law Framework, the Commission may finally act only to have its recommendations modified or rejected at the Council.

The Conditionality Regulation was first proposed in 2018 but it was not enacted until December 2020, and only then with a cliffhanger ending in which Hungary and Poland threatened to hold the whole EU budget hostage until the other Member States dropped the Conditionality Regulation.[254] The European Council under Germany's leadership hammered out a compromise that included, among other things, an agreement with the Commission that the Regulation was not to be enforced until Hungary and Poland – which had both objected strenuously to the Regulation – have an opportunity to challenge it before the Court of Justice. This delayed by another year the effective enforcement of the Regulation, conveniently putting its earliest enforcement after the Hungarian parliamentary election in April 2022 so that the Prime Minister of Hungary did not have to face his voters with European sanctions on his shoulders. The Regulation came into effect on January 1, 2021 and the Court of Justice reached its decision that the Regulation was consistent with the Treaties on February 16, 2022.[255] Finally in April 2022, days after Viktor Orbán won reelection for a fourth consecutive term, the European Commission notified Hungary that it was invoking the Conditionality Regulation against it.[256]

As I write, the process is ongoing. The Commission has proposed to withhold funds from Hungary, funds that would be unfrozen if Hungary carries out a set promised reforms. At stake were €7.5 billion to be withheld from Hungary's

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[252] Parliament and Council Regulation 2018/1046/EU, On the Financial Rules Applicable to the General Budget of the Union, 2018 O.J. (L 193) 1.

[253] For a detailed argument to this effect, *see* KIM LANE SCHEPPELE ET AL., FREEZING ALL EU FUNDS, *supra* note 24.

[254] Kim Lane Scheppele et al., *Compromising the Rule of Law while Compromising ON the Rule of Law*, VERFASSUNGSBLOG (Dec. 13, 2020), https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

[255] *Hungary v. Parliament and Council*, EU:C:2022:97, ¶ 361; Republic of Poland v. Parliament and Council, Case C-157/21, EU:C:2022:98, ¶ 363.

[256] Vlad Makszimov, *Comm'n to Trigger Mechanism that Could See Hungary Lose EU Funds*, EURACTIV, Apr. 5, 2022, https://www.euractiv.com/section/politics/news/commission-to-trigger-mechanism-that-could-see-hungary-lose-eu-funds/.

cohesion funds if Hungary failed to meet the conditionalities.[257] While the deal covers a variety of anti-corruption initiatives, it requires that nothing be done with regard to judicial independence.

Of course, the Conditionality Regulation is not an infringement procedure, which the Commission could have brought at any time in the preceding decade, given that the Commission is now alleging that problems with procurement rules and procedures, the public prosecutor's office, and more are interfering with the proper spending of EU funds. Each one of those problems could have grounded an infringement action if the underlying action resulted in misspending EU funds; the set together could have been raised as a systemic infringement action.[258] Had the Commission acted earlier as each of these institutions was captured over the last 12 years, it might have been easier to roll back the changes before they became entrenched. But the Commission continues to be completely averse to bringing infringements against Hungary for its serial violations of EU law in the areas that affect its domestic governance. Even now, observers are concerned that we will see for Hungary what we have already seen with regard to Poland – which is that the Commission approves a plan to award the funds on the basis of a manifestly inadequate plan for compliance with the rule of law.

Throughout the decade of the 2010s, then, the Commission underutilized infringement actions and instead set about inventing a wide array of other "tools" for dealing with the rule of law problem, with most of those tools leading to reports, recommendations and no particular action. The Conditionality Regulation may be different because it is a procedure with real consequences at the end, but the proof will be in the pudding. Will the Commission and the Council actually cut funds to a Member State that no democracy-rating agency classifies as a democracy anymore? And will they cut *all* of the funds, as the Regulation logically requires if those funds are likely to be misspent? Will they insist that autocracy be rolled back and the rule of law restored in the rogue Member States under penalty of loss of EU funds? Until there are some serious consequences for undermining the rule of law, rogue governments will continue to find that autocracy has its payoffs.

III. WHAT IF THE GUARDIAN OF THE TREATIES IS MISSING IN ACTION? THE COURT AS SUPPLEMENTAL GUARDIAN

If the Commission is only sometimes enforcing EU law with infringement actions – and even then, too little, too late – and if the Commission is only appearing to be doing something by inventing new tools that have so far yielded few tangible results – then then who is acting as the Guardian of the Treaties? Of course it is an unprovable counterfactual to argue that aggressive enforcement of EU law by the Commission might have prevented the backsliding. But at least the basic principles of Article 2 TEU would have had a visible defender. Active and timely enforcement by the Commission might have deterred other states from going down the same road.

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[257] *Comm'n Proposal for a Council Implementing Decision on Measures for the Protection of the Union Budget against Breaches of the Principles of the Rule of Law in Hungary*, COM (2022) 485 final (Sept. 18, 2022), https://eur-lex.europa.eu/resource.html?uri=cellar:9473778e-372b-11ed-9c68-01aa75ed71a1.0001.02/DOC_1&format=PDF.

[258] Kim Lane Scheppele, *Systemic Infringement Actions*, *supra* note 219, at 107.

Watching EU Member States descend from democracy into autocracy with largely ineffective pushback over the last decade has raised serious questions about the future of EU values and the ability of EU institutions to require that Member States honor the founding principles of the Union. The Commission is tasked with ensuring that Union law is being applied across the Member States, but it has not fully embraced that role.

Obviously, though it would be very late in the game, the best thing for the rule of law in Europe would be for the Commission to finally rise to the challenge and do its job by bringing more aggressive and more systemic infringements against Member States that no longer honor the rule of law. The Court of Justice has clearly indicated that it believes that the rule of law crisis is existential and it is hard to imagine that the Court of Justice wouldn't welcome more cases in which it has the chance to define fundamental values further and explain how they can be legally enforced.

But switching back to aggressively using infringements again to address serious trouble in the EU would require a major rethink of the Commission's role which, for at least two decades now, has not prioritized the enforcement of EU law. Such a major change in direction doesn't seem to be in the cards, especially under this particular Commission which is not notable for engaging in confrontational politics or for standing strong either against bullies or in defense of values.[259] In fact, the Commission's recent appeasement of Poland by opening the door to the Recovery Fund while not insisting that all rule of law infringements be resolved is just the latest in a decade-long track-record in which the Commission has acted too late and not aggressively enough. The fact that the Commission now seems to be going down the same road with Hungary, agreeing to a package of reforms that are unlikely to do what they promise to avoid reaching the stage of the Conditionality Regulation where funding will actually be cut,[260] shows that the Commission is still willing to substitute appearances for reality. If the Commission (backed by the Council) agrees to greenlight Recovery Funds to Hungary or to Poland or, invoking the Conditionality Regulation, to cut anything less than *all* of the EU funds allocated to Hungary until Hungary actually changes facts on the ground to restore the rule of law, it will have missed its last, best chance to come to grips with the rule of law crisis in the EU.

So who, then, can enforce EU law if the Commission isn't up for the task? In writing the Treaties, the drafters installed a backup plan to Article 258 TFEU in Article 259 TFEU. Under Article 259 TFEU, a Member State can launch an infringement against another Member State, using much the same procedure as Article 258 TFEU outlines for the Commission. The main difference between Article

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[259] Roger Daniel Kelemen, *Appeasement, ad Infinitum*, 29 MAASTRICHT J. EUR. & COMP. L. 177 (2022), https://journals.sagepub.com/doi/pdf/10.1177/1023263X221097648 .

[260] Gabór Mészáros & Kim Lane Scheppele, *How* NOT *to be an Independent Agency: The Hungarian Integrity Authority*, VERFASSUNGSBLOG (Oct. 6, 2022), https://verfassungsblog.de/how-not-to-be-an-independent-agency/; Kim Lane Scheppele & Gábor Mészáros, *Corrupting the Anti-Corruption Program: Hungary's Offering to the EU, Part II*, VERFASSUNGSBLOG (Oct. 12, 2022), https://verfassungsblog.de/corrupting-the-anti-corruption-program/; Kim Lane Scheppele et al., *Useless and Maybe Unconstitutional*, VERFASSUNGSBLOG (Oct. 26, 2022), https://verfassungsblog.de/useless-and-maybe-unconstitutional/.

258 and Article 259 infringement actions is that the Article 259 actions must make a stop at the Commission on the way to the Court of Justice to see if the Commission wants to join and convert the Article 259 action to an Article 258 procedure. While there have not been many Article 259 invocations over the course of Union history, there have been some. But because the meritorious cases have by and large been joined by the Commission and then appear before the Court as Article 258 cases, only the grudge match or somewhat crazy cases have been left to appear publicly as Article 259 cases. As a result, Article 259 cases have gotten a bad rap.[261]

Perhaps because of its dodgy reputation but perhaps also because Member States don't want to start conflicts with each other, [262] Article 259 has not been used to defend the rule of law in the last decade. No Member State – either alone or in concert with others -- has been willing to invoke it to challenge rogue states since the rule of law crisis started even though the Member State that launches an Article 259 infringement does not have to prove that it has been harmed or meet other difficult standing requirements. As we have seen with the Council, which also routinely fails to act in these matters by dropping the few balls that the Commission has pitched to them, Member States just won't defend the rule of law in other states, even if they are willing to uphold the rule of law at home.

The European Parliament has actually been the best of the European political institutions in calling out rule of law problems as they have occurred over the past decade. The Parliament has consistently been on top of developments in Hungary and Poland, having given a comprehensive warning to Hungary in 2013[263] before finally triggering Article 7(1) for Hungary in September 2018,[264] and then following up with a tough assessment in 2022.[265] The Parliament also voted to support the Commission's recommendation on the invocation of Article 7(1) for Poland,[266] and it has also been actively pushing the Commission for years to use the tools it has.[267]

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[261] Dimitry Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool*, 7 HAGUE J. ON THE RULE OF L. 153 (2015); Guillermo Íñiguez, *The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis*, 23 GERMAN L. J. 1104 (2022).

[262] Note the similarity between this provision and Article 33 of the European Convention on Human Rights which allows High Contracting Parties to bring other High Contracting Parties to the ECtHR. The power for some states to enforce the law against others has not notably been used much in that venue either. *See generally* Isabella Risini, *The Inter-State Application under the European Convention on Human Rights, in* 125 INTERNATIONAL STUDIES IN HUMAN RIGHTS 28 (2018). Given Russia's recent wars on its neighbors, however, the number of inter-state cases has been increasing and that was even before Russia started the 2022 war in Ukraine. Elif Erken & Claire Loven, *The Recent Rise in ECtHR Inter-State Cases in Perspectiv*e, ECHR BLOG (Jan. 22 2021), https://www.echrblog.com/2021/01/guest-post-recent-rise-in-ecthr-inter.html. That said, these new cases are brought primarily by aggrieved High Contracting Parties against states that have injured them, not High Contracting Parties defending rights in the abstract.

[263] *European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary* (2012/2130(INI)), 2016 O.J. (C 75) 9 (July 3, 2013).

[264] *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded* (2017/2131(INL)), 2019 O.J. (C 433) 66 (Sept. 12, 2018).

[265] *European Parliament Resolution* (2018/0902R(NLE)), *supra* note 40.

[266] *European Parliament Resolution* (2018/2541(RSP)), *supra* note 126.

[267] Just to take a couple of the most recent examples, the Parliament passed a resolution in March 2022 urging the Commission to apply the Conditionality Regulation to both Hungary and Poland, noting

But the Parliament has little formal power under the Treaties to engage in enforcement of EU law. It can cajole, deplore, insist and condemn, but it doesn't have the power to create binding rule of law standards or to ensure their compliance. That's why I have focused in this Article on the institutions that are on the frontlines of enforcement.

Given that the Commission has failed to effectively enforce EU law and the Member States (whether alone or in the Council) have not stepped in to fill the gap, who is left as the Guardian of the Treaties with the power to enforce EU law? In my view, the Court of Justice is the only defender of the values of the European Union that has shown itself to be willing and able to insist that Member States comply with EU law. Since the start of the rule of law crisis, the Court of Justice has been the most reliable enforcement institution, both defending and expanding EU law to reach the behavior of the rogue states. While it hasn't been perfect, the Court of Justice has been in practice the primary Guardian of the Treaties on duty for the last decade.[268]

In those instances where the Commission has (occasionally) brought infringements on the matter of judicial independence, the Court has not only leapt at every opportunity that the Commission has given it but it has also strongly suggested new lines of argument that the Commission might use to bring the Court more cases. For example, when the Commission was foundering in its use of the Rule of Law Framework with Poland, the Court threw the Commission a lifeline in the *Portuguese Judges*[269] case, quite explicitly inviting the infringements that the Commission finally brought. The Court has repeatedly defended an independent judiciary, including granting interim measures whenever asked so that judges were not punished or dismissed while their cases were pending.[270] The Court has strongly objected to the creation of a politicized disciplinary system for judges[271] and it granted interim measures preventing the politically packed Disciplinary Chamber in Poland from continuing to discipline judges in advance of a judgment.[272] The Court has also granted interim measures seeking a halt to the operation of the Polish Muzzle Law[273] and awarded penalty payments when the government refused.[274] One hopes the Court of Justice will also reach the question of the political composition of

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that "it is high time for the Commission to fulfil its duties as the guardian of the Treaties and to instantly react to the ongoing severe violations of the principles of the rule of law in some Member States." *European Parliament Resolution of 10 March 2022 on the Rule of Law and the Consequences of the ECJ Ruling* (2022/2535(RSP)), at Recommendation 2, 2022/2535 (RSP), O.J. (C 347) 168 (Mar. 10, 2022). And the European Parliament passed a resolution in June 2022 seriously questioning the deal that the European Commission made in order to free Recovery Funds to Poland and insisting on the observance of the rule of law conditions before the money is disbursed. *European Parliament Resolution of 9 June 2022 on the Rule of Law and the Potential Approval of the Polish National Recovery Plan (RRF)* (2022/2703(RSP)), at Recommendation 11, 2022 O.J. (C 493) 10 (June 9, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0240_EN.html.

[268] *See generally* PECH & KOCHENOV, *Respect for the Rule of Law*, *supra* note 4.

[269] *Portuguese Judges*, EU:C:2018:117, ¶¶ 41-45.

[270] *First Infringement*, EU:C:2019:924, ¶¶ 113-14; *Second Infringement*, EU:C:2019:531, ¶¶ 74-77. Interim measures were granted in Interim Measures Order, *Second Infringement*, EU:C:2018:1021, ¶¶ 117-18.

[271] *Third Infringement*, EU:C:2021:596, ¶ 66.

[272] Interim Measures Order, *Third Infringement*, EU:C:2020:277, ¶ 114.

[273] Second Order of the Vice-President, *Fourth Infringement*, EU:C:2021:834, ¶ 26.

[274] Third Order of the Vice-President, *Fourth Infringement*, EU:C:2021:878.

the Polish Constitutional Tribunal in the fifth Polish infringement procedure even though the Commission is slow-walking the case.[275]

But the Court of Justice can do nothing with infringements that the Commission has not brought. And the Commission has not brought a single judicial independence case for more than a decade in Hungary. In addition, it has missed many crucial issues affecting judicial independence in Poland. Given what the Commission has offered the Court as a platform for action, the Court has done what it can, but it cannot fix the substantial rule of law problems that remain unflagged by the Commission.

Of course, the Court is a reactive institution. It cannot initiate cases, but can only act when cases are brought to it. And herein lies the problem. If the Commission is the primary source of big structural cases for the Court that would allow the Court to examine the systemic problems within a Member State and provide structural remedies to fix the problems, and if the Commission is not acting to defend the rule of law as aggressively as it should, what's the Court to do? The Court now needs to be more creative to fill in where the Commission has left holes in the rule of law.

Fortunately, the Commission is not the only source of cases. National judges are trying to fill the gaps left by the Commission's inaction. Over the last half dozen years or so, we've seen many national judges in rogue states sending references to the Court of Justice identifying different broken pieces of the rule of law puzzle for repair.[276] In some cases, the Court has already used these reference cases to make big structural points that provide a good launching pad for future legal actions that can push states toward compliance with EU values.[277] But in other cases, the Court

[275] European Comm'n Press Release IP/21/7070, *supra* note 63. Of course, the Commission cannot ask for interim measures until it sends the case to the Court of Justice. But the infringement was launched nearly nine months after the Constitutional Tribunal started nullifying decisions of the ECJ by finding the Polish Constitution supreme over the Treaty provisions cited by the Court of Justice. Eight months out from the launching of the infringement, the Commission moved the case to the "reasoned opinion" stage. This is not moving with all deliberate speed. After nearly two years, Commission had not yet gotten to the stage where it *could* ask for interim measures. And then, if the recent track record of the Commission is any guide, it was not clear this Commission would ask for them.

[276] As of June 2022, Polish courts had brought at least 40 preliminary reference cases dealing with judicial independence, of which 16 remained to be answered by the Court. Calculations by Laurent Pech, slides on file with the author. The Hungarian judges have been slower to bring these cases, not least because the *Kúria* has ruled that challenging the basic structure of national courts before the ECJ is unlawful under Hungarian law, a point at issue in the *I.S.*, EU:C:2021:949. While the Court of Justice forcefully addressed this issue, the Hungarian government has since moved to tighten control over the judiciary so that judges might reasonably fear that they can still be disciplined for challenging the judicial "reforms" – if not through formal disciplinary procedures, then at least through being confined to non-controversial cases that would not allow them to raise such questions. *See generally* Scheppele, *Translation*, *supra* note 56.

[277] *See* A.B., Case C-824/18, EU:C:2021:153, ¶¶ 53, 106-07 (in which the Court of Justice decided that, while the case did not meet the criteria for being expedited, the case would be given priority, and then explained that TFEU art. 267 combined with TEU art. 4(3)is violated when national rules are changed to prevent national judges from sending preliminary references to the Court of Justice). *See also A.K.*, EU:C:2019:982. Both cases cast substantial doubt on the legal composition of the KRS under Union law, even though the Commission did not directly challenge the KRS in an infringement.

answers these questions narrowly and misses the chance to think structurally about how to solve rule of law problems when individual judges ask them to do so.[278]

One place where the Court of Justice could do better is in European Arrest Warrant (EAW) cases. In the EAW cases that implicate judicial independence, the executing judge is confronted with the request to send a suspect back to a court that is part of a judicial system under concerted political attack. In the *Celmer* case,[279] for example, an Irish judge asked the Court of Justice about a European Arrest Warrant request from Poland, after the Commission had published its reasoned proposal in December 2017 triggering the Article 7(1) process by arguing that the Polish judiciary was under attack and had already lost much of its independence. Under the *Aranyosi & Calderaru* test that foreshadowed *Celmer* and under pressure from the growing jurisprudence on extradition at the European Court of Human Rights, the Court of Justice had already found that sending a suspect back to a requesting jurisdiction didn't have to be automatic.[280] Instead a judge could inquire into whether *that particular suspect* would be treated in violation of his Charter rights if he were sent to the questionable country. The inquiry was to take place in two steps – first finding that there might be a general threat to the integrity of the judiciary (or prison system if the issue were about detention) and then finding that the applicant's case specifically raised a targeted warning that the *particular applicant* would risk a violation of his rights if returned.

Given the chance to say that some structural deficiencies in the judiciary as a whole might be sufficient to put all extradition requests under a cloud so that the second step would not be necessary because not practicable, the Court stuck by its two-step test. As I said critically at the time:

> But when the *whole judiciary* is the problematic institution, then a case-by-case assessment doesn't work. If the courts are compromised so that one cannot reliably tell which judges are independent and which are operating under political tutelage, then arbitrariness can sneak in anywhere in the system, including at the point at which the judge must reliably promise that a sought person would have his rights respected upon delivery to the compromised state. [281]

If national judges in rogue states must pledge that they are independent when they are not, how can we know that the replies they give are not coerced? And if the receiving judge is independent and honestly says so, how can we know that the court to which the receiving judge's case might be appealed is similarly independent? When the entire judiciary is under political pressure, answers given by individual

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[278] For example, the European Arrest Warrant cases and *I.S.*, EU:C:2021:949. For an analysis of the EAW cases, *see* Thomas Wahl, *CJEU: No Carte Blanche to Refuse EAWs from Poland*, EUCRIM, Apr. 14, 2022, https://eucrim.eu/news/cjeu-no-carte-blanche-to-refuse-eaws-from-poland/. For an analysis of *I.S.*, *see generally* Scheppele, *Translation*, *supra* note 56.

[279] *L.M.*, EU:C:2018:586.

[280] Aranyosi & Calderaru, Joined Cases C-404/15 & C-659-15, EU:C:2016:198.

[281] Kim Lane Scheppele, *Rule of Law Retail and Rule of Law Wholesale: The ECJ's (Alarming) Celmer Decision*, VERFASSUNGSBLOG (July 28, 2018), https://verfassungsblog.de/rule-of-law-retail-and-rule-of-law-wholesale-the-ecjs-alarming-celmer-decision/ [hereinafter Scheppele, *Celmer*].

judges to the individualized requests that sending judges are not obligated to ask are not reliable.

Even as the Court of Justice's own jurisprudence bears witness to the compromised state of the Polish judiciary by the way it has ruled in the infringement cases, however, it has not loosened the *Celmer* test for returns to compromised judiciaries. Instead, it has doubled down on the two-step test in ways that fail to recognize how deeply problematic these cases are.[282]

That said, European Arrest Warrant cases do pose some serious issues that would have to be resolved if sending courts generally refused EAW requests from judges in compromised judicial systems. The inability to return defendants or prisoners to the state seeking them might lead to releasing them in another Member State that had no reason to try or detain them. The alleged criminals from rogue states might then be able to act with impunity, which is surely something that the Court of Justice would want to avoid.

Which is the greater evil: Returning defendants to a Member State that will not reliably honor their criminal procedure rights or allowing potentially guilty defendants to go free because the relevant jurisdiction for trying the crime has been compromised by political attacks on its courts? A rights-first framework would probably favor impunity over EU-sanctioned rights violations, implicating the EU because the sending court has contributed to the potential rights violations by underestimating the risks in rogue member states given the myopia of the two-step test. It may be relatively unproblematic to grant impunity in one case but harder hold that position if the number of cases mounts. Generalized impunity risks a different sort of breakdown in the rule of law because criminal law goes unenforced. If a Member State has a compromised judiciary and others will not honor their European Arrest Warrant requests, criminals only have to flee over the border into another Member States to be free from prosecution.

Because EU law rights to be tried by an impartial and independent court are at stake, however, there should be EU law remedies. Mutual trust underpins the European Arrest Warrant system, but if the conditions for mutual trust are lacking, then the EAW's presumptions crumble. This is why the independence of the judiciary is central to the rule of law and why preserving it should have been the EU institutions' priority all along. But if the EU institutions have failed to prevent the collapse of judicial independence in one or more Member States, then what?

A reading of the Framework Decision creating the EAW[283] shows that there may be a space between impunity and violation of the right to an independent and impartial tribunal. Automatic release of a suspect not returned under an EAW is not

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[282] L & P, Joined Cases C-354/20 PPU & C-412/20, EU:C:2020:1033; X & Y v. Openbaar Ministerie, Joined Cases C-562/21 PPU and C-563/21 PPU, EU:C:2022:100. For a critique of the latter judgment, *see* Febe Inghelbrecht, *Avoiding the Elephant in the Room Once Again: CJEU Confirms and Specifies the Application of Restrictive Two-Step Test to European Arrest Warrants from Poland*, VERFASSUNGSBLOG (Feb. 25, 2022), https://verfassungsblog.de/avoiding-the-elephant-in-the-room-once-again/.

[283] European Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures between Member States, art. 2, 2002 O.J. (L 190) 1, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32002F0584 [hereinafter EAW Framework Decision].

required. Some Member States' criminal procedure rules already allow their domestic courts to try cases in which the defendant is apprehended or simply present in the jurisdiction even if the crime were committed in another jurisdiction.[284] For the sorts of serious crimes listed in the European Arrest Warrant Framework Decision that could give rise to an EAW request, there would probably be a close equivalent in the country of apprehension so that the defendant would be eligible for prosecution in the apprehending state on the same charges.[285] Rather than condone impunity, the case could be transferred to the state that apprehended the suspect.

How would this transfer of jurisdiction to the apprehending state be squared with the legal framework for the EAW? Already the Framework Decision permits the executing court to keep the requested person in detention while the case is being considered.[286] The Framework Decision also contains rules for the judge to use in deciding between jurisdictions if multiple jurisdictions have requested the presence of the suspect for trial. Suppose an executing judge were to notify her own government that Union law requires her to not send a suspect back to a rogue Member State and then request that the case be formally transferred to her own apprehending state instead. If her state agrees, then the executing judge can decide between the requesting jurisdiction and her own jurisdiction to determine which should handle the case. Given the situation in the requesting jurisdiction, her own jurisdiction would almost surely be preferred.

In short, impunity is not the only option if executing judges refuse to send defendants back to requesting states that have compromised their courts within the existing framework of the EAW. The Court of Justice could therefore eliminate the two-step test for EAW returns to those Member States in which the judiciary has already been politically compromised without encouraging impunity. Perhaps the Court of Justice could even suggest that the apprehending Member State take jurisdiction once a national judge has made the determination that the person cannot be extradited to a rogue state. But even if assuming jurisdiction for criminal prosecution in these cases cannot be required on the part of an apprehending Member State, the EU might encourage such responsible behavior by making

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[284] For example, the German Criminal Procedure Code establishes that jurisdictional requirements for a criminal proceeding may be established in either the venue where the crime was committed or the venue where the indicted individual habitually resides or the venue in which the indicted person was apprehended. Strafprozeßordnung [StPO] [Code of Criminal Procedure], §§ 7-9, https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0032 (Ger.). For an example outside the EAW framework in which Germany tried and convicted a Syrian national for torture of Syrians inside Syria on the basis of the mere presence of the defendant and the witnesses in Germany, *see generally* Deborah Amos, *In a Landmark Case, a German Court Convicts an Ex-Syrian Officer of Torture*, NAT. PUB. RADIO, Jan. 13, 2022, https://www.npr.org/2022/01/13/1072416672/germany-syria-torture-trial-crimes-against-humanity-verdict. Similarly, the Dutch Code of Criminal Procedure also provides for jurisdiction not just where the offense was committed, but also where the suspect lives or where the suspect currently is located. Chapter 2, § 2(1), Sv, https://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf (unofficial translation) (Neth.).

[285] This list of specific crimes to which the Framework Decision would apply was itself no doubt a way to block the objections raised on the basis of double criminality. As a result, the crimes for which EAWs can be sought are most likely to be those that are already subject to criminal sanctions in all of the Member States.

[286] *EAW Framework Decision*, *supra* note 283, at art. 12.

available the resources of Eurojust or Europol to assist with the investigation and prosecution of such crimes to take pressures off already-stretched national systems. It would take some work to create a parallel system of prosecution within the national legal systems of other Member States to handle the cases in which rogue states could not responsibly try suspects, but one can already see the outlines of such a system in existing national and European law.

EAW and transfer cases are not the only ones where the Court of Justice is faced with individual reference cases that require working out how to fix (or to work around) judiciaries whose independence has come under attack. National judges, particularly those in Poland, have been very active in engaging in self-help precisely because the Commission's infringements have not addressed the political pressures that these judges face. Some of the self-help cases have come to the Court of Justice from judges under pressure who ask about their own or their colleagues' compromised situation and seek a Court of Justice opinion as a shield to blunt attacks at home. But here, too, the Court has also not always defended national judges' independence as it might have because the Court has been locked into a rigid jurisprudence about what it is and is not allowed to do in reference cases. Because that lock is of the Court's own making, it could pick that lock for specific cases where judicial independence is at stake.

Reference cases that directly address the independence of the judiciary provide the Court with an opportunity to make up for the lack of cases coming from the Commission. We have already seen some cases in which a national judge has herself been disciplined or subjected to overt pressure and the referring judge (not the one who has been disciplined) asks the Court of Justice about the case before her in which the aggrieved national judge is the affected party. Perhaps the most important of these cases is *A.K.*, discussed above,[287] in which the Court of Justice assessed the role of the Polish judicial council (KRS) in appointing judges to the new Disciplinary Chamber of the Supreme Court. As the Court ruled, the political composition of the KRS could give rise to the appearance or reality of political influence in the process of naming all of the judges to this new chamber, and the Court gave standards to the national judge to determine whether new chamber could be seen as independent given the way it was composed. But it was clear from the judgment and from the application of that judgment by the national judge that the Disciplinary Chamber could not be regarded as independent because the KRS itself had been politically compromised. Though the Court of Justice later confirmed this judgment in the Third Infringement,[288] the groundwork for that judgment was laid in the preliminary reference case.

This was not the only case in which the Court of Justice used a preliminary reference procedure to make a structural argument about the independence of the judiciary. In the *A.B.* case out of Poland,[289] the moving parties in the national court had been denied judgeships in the Polish courts because the politically packed KRS refused to appoint them. While judicial review of the KRS decisions had once existed in Polish law, it been withdrawn in the new legislation. The referring judge

[287] *A.K.*, EU:C:2019:982.
[288] *Third Infringement*, EU:C:2021:596.
[289] *A.B.*, EU:C:2021:153.

then asked the Court of Justice, among other things, whether the influence of the national executive on the political composition of the KRS was consistent with EU law, given that its decisions were not subject to judicial review. The Court of Justice gave the case priority treatment[290] and explained that, because the KRS certification was decisive in the judicial appointment process but there was no meaningful judicial appeal of KRS decisions, the KRS itself must satisfy the standards of independence that are mandated for ordinary courts. These factors led the Court of Justice to conclude that if the referring judge were to find that the law establishing the new KRS failed to provide adequate remedies to applicant judges, then the referring judge should disapply the national provisions in question.

This decision effectively declared the KRS to be an unlawful appointment body for courts unless it remained free of external influence or unless its decisions were open to review by properly constituted independent courts. These are large structural issues reached through the mechanism of a preliminary reference, and they illustrate that the Court of Justice can do big things in what look like small cases. Of course, strictly speaking by the nature of references, the Court of Justice could not itself find the Polish arrangements contrary to Union law but it could give such clear and explicit instructions to the national judge that the national judge would have virtually no choice but to find violations of Union law by national authorities.

The collection of a set of preliminary reference cases joined under the heading of *W.B.*[291] provides another example of how the Court can reach structural issues through preliminary references. Here, the Polish Minister of Justice had seconded a number of judges without standards or reasons so that they now sat on particularly sensitive criminal cases. Expanding the reasoning of the W.Z.[292] case to reach the problem of arbitrary secondment, the Court explained that "compliance with the requirement of independence means that the rules governing the secondment of judges must provide the necessary guarantees of independence and impartiality in order to prevent any risk of that secondment being used as a means of exerting political control over the content of judicial decisions."[293] This ammunition allowed the national judge to order a halt to arbitrary secondment as a general practice.

Unfortunately, the Court of Justice does not always take advantage of preliminary references to make clear statements about what judicial independence requires. For example, the recent *I.S.* case out of Hungary involved a national judge who had gotten into trouble with the Hungarian government for being a member of the National Judicial Council when the NJC had challenged the president of the National Office of the Judiciary and recommended to the Parliament that she be dismissed. The judge was then the subject of retaliatory harassment, so he sent a reference to the Court of Justice asking whether having an irregularly appointed president of the court above him who held disciplinary powers over him interfered with his own independence. In addition, he asked whether judges' low salaries,

[290] *Id.* ¶ 53. Priority treatment is an interesting development in the Court of Justice, used for cases that need to be decided quickly because the situation complained about is deteriorating in real time but where the case in question does not meet the Court's established rules about expedited procedures.

[291] *W.B.*, EU:C:2021:931.

[292] *W.Ż.*, EU:C:2021:798.

[293] *W.B.*, EU:C:2021:931, ¶ 73.

supplemented only by discretionary bonuses awarded by the same irregularly appointed judge, constituted a threat to judicial independence. The prosecutor – a government loyalist – appealed the referring judge's stay of the case pending a decision from Luxembourg by going straight to the *Kúria*, where he questioned the propriety of the referring judge making the reference at all. The *Kúria* found that the referring judge's questions to Luxembourg were irrelevant to the case before him and were also illegal under Hungarian law which states that preliminary references may not call into question the Hungarian constitutional order, including the structure of the judiciary. Having been found to have violated Hungarian law by sending a preliminary reference, the referring judge was then subjected to a disciplinary procedure brought by the irregularly appointed judge above him – the very judge complained against in the initial reference! The Court of Justice found that it was unlawful both for the national supreme court to foreclose references by answering the questions themselves and also for a disciplinary procedure to be initiated against a referring judge for making a reference that – in the view of the national supreme court -- violated EU law. These rulings were brave and clear – and put the Hungarian government on notice that it should not mess with the reference procedure.

But the Court of Justice refused to answer the questions about the irregularly appointed superior as well as about the discretionary salary bonuses as being too far removed from the question before the referring judge in the specific case at hand. According to the Court, answering these questions was not strictly relevant to the case, which narrowly required the judge to assess whether a translation given to a criminal defendant was adequate. As I said in my analysis of this case:

> [C]onsider where the refusal to answer those two questions left the referring judge. What judge would be willing to withstand immense domestic political pressures to rule in a way that the government might disfavor if that decision could be simply overruled by the court above him, headed by an irregular appointee whose political sentiments were on full display in this case? If displeasing the government also causes one's already-low salary to be disqualified from receiving discretionary bonuses, how likely is a judge to keep making fruitless decisions that will be overturned immediately when the government doesn't like them and can punish him financially? In short, if politics infuses the appointment of the referring judge's superiors as well as the discretionary determination of his salary, what judge would still fight to rule as EU law requires against a government that wants a different result? What's the point of being brave for one fleeting moment if nothing you do will stand and you suffer personally besides? [294]

[294] Scheppele, *Translation*, *supra* note 56, at 1123. I might note that the absence of cases about judicial independence in Hungary brought since the *Kúria* made this judgment might be taken as evidence of the chilling effect that the *Kúria* decision generated even though the ECJ judgment found it must be disapplied. Hungarian judges still bring many reference cases in cases where the government has no particular dog in the fight, but few deal with the structure of Hungarian public institutions, since those are the reference questions barred by Hungarian law.

In the *I.S.* case, the Court of Justice missed the opportunity to opine on some features of the Hungarian judiciary that threaten judges when they attempt to apply EU law properly. Between the political supervision from superior courts and the use of discretionary salary allotments to keep judges in line, who would stand up for EU law when it is clear that the government doesn't want the judge to do so? The Hungarian government has not made secret its disdain for the primacy of EU law when it might provide a basis for challenging the concentration of power in the hands of the prime minister or when it challenges his culture war appeals.[295] Those who have been appointed to top judicial positions in Hungary are well known for their hostility to EU law.[296] Judges get the message. So when a judge is brave enough to send a message in a bottle to Luxembourg seeking a ruling on questions of judicial independence, and the message is sent back in the bottle unopened, it is very discouraging for the referring judge – and for all of the others who realize that Luxembourg will not back them up. Hungarian judges will keep sending references to Luxembourg, but not on these hot-button issues that will get judges in trouble back home.

The difference between the reference cases in which the Court has acted boldly (for example *A.B.* and *A.K.)* and the cases in which the court has not addressed all of the structural issues posed to it (for example, *I.S.*) may be accounted for by the different postures in which the questions arose in the two sets of cases. The Polish reference cases in which the ECJ has ruled expansively involved judges as parties in the cases that the referring judges had before them, while the Hungarian *I.S.* case involved the judge asking about his own independence as he decided on a case involving a totally different area of EU law (guarantees of adequate translation in criminal matters). At least the *I.S.* case got father with the Court than the otherwise structurally similar case out of Poland, *Miasto Łowicz*,[297] which also featured disciplinary procedures being brought against the referring judge. In *Miasto Łowicz*, however, the underlying case before the referring judge did not raise a question of EU law so the Court's disapproval of disciplinary actions brought against judges for the content of their decisions appeared in *dicta* only. In the *I.S.* case, the underlying case did involve EU law, so the Court answered the questions about local authorities trying to thwart or punish references. But the Court did not go farther into the

[295] Gábor Halmai quotes Prime Minister Viktor Orbán's reaction to the decision of the Constitutional Court finding that the Hungarian Constitution trumped EU Law: "I threw my hat in the air when the Constitutional Court ruled that the government has the right and obligation to stand up for Hungary's constitutional identity. This means that the cabinet cannot support a decision made in Brussels that violates Hungary's sovereignty," adding that the Court decision is good news for "all those who do not want to see the country occupied." Gábor Halmai, *The Hungarian Constitutional Court and Constitutional Identity*, VERFASSUNGSBLOG, Jan. 1, 2017, https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/.

[296] The new *Kúria* president, András Zsolt Varga, has said that "Article 2 of the TEU, together with Article 7 threatens the member states that do not respect the undefined principle of the rule of law. [B]y elevating the abstract principle of the rule of law to normative rank, a gate was opened which might not be possible to close again. It created a device that can be used unlimitedly by the bodies of the European Union. The power is vested ultimately to the ECJ, a court that is *per definitionem* beyond political (i.e. democratic) control." Accordingly, "the rule of law can become an arbitrary means of discipline due to its content which is not delimited." HUNGARIAN HELSINKI COMMITTEE, AN ILLIBERAL CHIEF JUSTICE, Jan. 7, 2021 https://helsinki.hu/en/an-illiberal-chief-justice/.

[297] *Miasto Łowicz & Prokurator Generalny*, EU:C:2020:234.

organization of the national legal system that made sitting judges dependent on irregularly appointed superiors.

The Court has also refused to answer structural questions about judicial independence in other cases. In the *W.B.* case out of Poland, the Court boldly condemned the secondment of judges to sit on criminal cases without standards or reasons as it defended judicial independence in the case, but the referring court had asked other questions too. As in *I.S.* where the referring judge wanted the Court of Justice to opine on the irregularity of appointments in the appeals court, the referring judge in *W.B.* inquired whether appeals of criminal convictions to a court in which at least one of the judges had been appointed by the politically captured KRS could be given full legal effect.[298] The Court decided that the question was "hypothetical"[299] because an appeal had not yet been brought, and therefore the question did not have to be answered. Of course, the prevalence of KRS-appointed judges throughout the Polish judiciary is precisely why its independence is under such threat, but the Court of Justice avoided addressing the legality of these politically tainted appointments in this case. A similar reticence in identifying the KRS as the root of most problems in the Polish judiciary has not affected the European Court of Human Rights, however, which has by now repeatedly found that courts containing judges appointed by that overtly political body do not constitute "tribunals established by law."[300] The Court of Justice, however, has been loath to reach that conclusion and so has just avoided the question.

Perhaps even more dramatically, in *M.F. v. J.M.*,[301] another case out of Poland, the Court was asked a series of questions about the new appointment procedures for judges in Poland and the extent to which national courts had the power under EU law to review these appointments to ensure that they were validly made. In the course of changing the structure of the judiciary, the Polish government transferred the power to review appointments for validity from the ordinary courts (which still contain independent judges) to the politically packed Disciplinary Chamber of the Supreme Court. The referring judge asked the Court of Justice a series of questions probing whether ordinary courts had the power to review judicial appointments under EU law because EU law required independent courts and the independence of such courts could only be determined by examining the validity of judicial appointments. The Court found all the questions inadmissible because they went "beyond the scope of the duties of the Court."[302] Once again, the Court sidestepped a crucial issue in the Polish judicial reforms, which was whether these new Supreme Court chambers, entirely filled with politically appointed judges, could take on core functions related to the supervision and discipline of the judiciary.

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[298] *W.B.*, EU:C:2021:931, ¶ 91.

[299] *Id.* ¶ 93.

[300] The ECtHR found that the Disciplinary Chamber of the Polish Supreme Court and Extraordinary Chamber of the Polish Supreme Court were not independent and impartial tribunals established by law due to the presence of judges appointed by the politically tainted National Judicial Council. See *Advance Pharma v. Poland*, CE:ECHR:2022:0203JUD000146920; *Reczkowicz v. Poland*, CE:ECHR:2021:0722JUD004344719; *Dolińska-Ficek & Ozimek v. Poland*, CE:ECHR:2021:1108JUD004986819.

[301] *M.F. v. J.M.*, Case C-508/19, EU:C:2022:201.

[302] *Id.* ¶ 82.

What accounts for the Court's different approach in these varied cases? Sometimes, the Court dives in and makes a bold decision about the way national judiciaries must be structured to meet the tests of Union law. Sometimes, the Court pulls its punches and won't address key cases. Perhaps this is judicial diplomacy, with the Court of Justice picking its battles. But it could also be because the reference cases that the Court of Justice is likely to get from Member States' judiciaries that are being attacked in different ways are likely to be different. Many of the actions taken by Polish authorities were unconstitutional under Polish law, even if the packed Constitutional Tribunal didn't say so.[303] Judges are fired, disciplined, and given no avenues to appeal adverse rulings in their personnel cases. They are barred from sending references and disciplined for enforcing EU law. In addition, the Polish authorities, as we have seen, fired judges *en masse* and launched disciplinary procedures against dissenting judges. Many individual Polish judges, therefore, have had something concrete to complain about in the way that they have been personally treated because they were affirmatively abused. Hence the references to the Court of Justice in which the referring judge is raising questions about the way his colleagues – the parties to the cases before him – have been treated. Where the party to the case before the referring judge is another judge who has been directly mistreated, the Court of Justice has generally stepped in.

The pressures on judges in Hungary are more subtle. After initially firing 274 judges by suddenly lowering the retirement age, the Hungarian government has by and large left sitting judges in place, simply capturing (by law) the system for appointing new ones. The Hungarian government has dealt with the still-independent judges by not raising their salaries, by overruling their opinions and by ensuring that they don't get cases that the government cares about in the first place. It would be hard for Hungarian judges to launch cases under domestic law of the sort that the judges have brought in Poland because there is no underlying right to the things they have been deprived of as their courts were captured. Can Hungarian judge claim a right to an increased salary as a matter of law? Or a right to not have decisions overruled? Or a right to get important cases assigned to her? These are matters that cannot be made the subject of a lawsuit from which a reference question could be generated challenging the political stranglehold on the Hungarian judiciary. Judge Csaba Vasvári in Hungary, who brought the *I.S.* case, was briefly the subject of a disciplinary procedure and the Court of Justice had no trouble reaching that. But the government, seeing the publicity this caused, shut down the disciplinary procedure in his case before the case came to the Court of Justice – and then the Hungarian government claimed "no harm, no foul" at the Court of Justice when the case was adjudicated there. (And, by the way, the Commission agreed.) It was fortunate that the Court of Justice realized it needed to write a judgment on this question anyway.

Thankfully, there are few disciplinary procedures actually brought against Hungarian judges. Instead, they are sidelined, overruled or simply given few cases to decide. They are paid too little, not promoted and sometimes given no work to do at all. The judges brought in as presidents of their courts ensure potentially dissident

[303] Adam Ploszka, *It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutiona*l. 15 HAGUE J RULE L. 51 (2022), https://doi.org/10.1007/s40803-022-00174-w.

judges are kept away from matters of interest to the government. They are treated badly by omission, so to speak. It's what they *do not* get (cases, salaries, promotions) that punishes them, and these omissions cannot be complained against as a matter of right. But still, the courts are captured because the government has been able to install pliant judges through a politically comprised procedure into all of the key positions in the system so that any case the government cares about can always find its way to a friendly judge. The Polish government may have bulldozed its way through the judiciary to generate compliant judges but the Hungarian government established a friendly corridor through the judicial process to ensure that it never loses cases that it and its allies care about. Both systems are compromised, but the judges in those systems have different things to complain about when their independent institutions are captured.

The way that the judiciary has been compromised in Hungary, then, may not lend itself to the sorts of references that the Court of Justice has seen fit to use as platforms for making structural decisions to support judicial independence in the Polish cases. Individual judges don't have domestic law bases in Hungary for bringing these challenges to the ways they are being treated. But that doesn't mean that the judiciary isn't being compromised. The consequences for the rule of law when independent judges are sidelined by omission are still dire. If the Commission isn't bringing infringements and the Court of Justice is turning away references that might allow it to reach some of these serious rule of law questions that affect the independence of national judiciaries because they come up sideways in cases whose central question is about something else, then the Treaties indeed have no Guardian.

Under these extraordinary circumstances in which the rule of law is under serious threat from more than one Member State and rule of law rot shows signs of spreading, the Court of Justice should change its approach if it hopes to avoid a situation in which the mutual trust that underlies the common European project is undermined. If mutual trust can no longer be relied upon because EU law is underenforced when there are egregious and persistent breaches, then the very ties that bind the EU Member States together start to unravel. While we have not yet seen a mass non-recognition of judgments from the compromised judiciaries, there are other signals that mutual trust is unraveling. Norway has refused to provide its EEA funds to Poland or to cooperate with the Polish judiciary,[304] while the European Network on Councils of the Judiciary has expelled Poland's KRS from membership in the organization.[305] The Global Alliance of National Human Rights Institutions recently demoted the Hungarian human rights ombudsman to non-voting status.[306] While being able to register for joint judicial training courses or participating in transnational networks may not be guaranteed under Union law, refusal of entry of certain Member State institutions to these once-common activities are symptoms that

[304] Eirik Holmøyvik, *For Norway It's Official: The Rule of Law is No More in Poland*, VERFASSUNGSBLOG (Feb. 29, 2020), https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/.

[305] Press Release, ENCJ, ENCJ Votes to Expel Polish Council for the Judiciary (Oct. 28, 2021), https://www.encj.eu/node/605.

[306] GLOBAL ALLIANCE OF NATIONAL HUMAN RIGHTS INSTITUTIONS, REPORT AND RECOMMENDATIONS OF THE VIRTUAL SESSION OF THE SUB-COMMITTEE ON ACCREDITATION (SCA) 41-47 (2022), https://www.ohchr.org/sites/default/files/2022-04/SCA-Report-March-2022_E.pdf.

something serious is going wrong. These symbolic exclusions are desperately signaling that all is not well – though they fall short of simply breaking with the principle enshrined in Article 4(3) TEU that "the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties." But if these signals are not taken as warning signs that the system of mutual respect is seriously challenged, more dire consequences for the Union will follow.

The distinctive feature of the EU as compared with other international organizations is that its Member States give up self-help as a remedy for dealing with breaches of the Treaties that constitute the organization because the Treaties themselves contain robust measures for enforcing the Treaties' terms.[307] But if ensuring compliance with EU law becomes a matter of self-help by the Member States who believe that EU law should be enforced but who see that the Treaty mechanisms for enforcing EU law are not working, then it becomes rational for Member States to withdraw unilaterally from intergovernmental cooperation when they spot rule of law violations that the EU institutions are taking inadequate steps to fix. In short, without centralized enforcement of EU law, mutual trust fails and self-help emerges. Such a collapse would mean the end of the EU as we have known it. The rule of law crisis is truly an existential matter.

Given where we are after more than a decade of Commission reluctance to strictly enforce the rule of law, the Court may be the last line of defense. To step up to the responsibility of being Guardian of the Treaties, the Court will therefore need to figure out how to protect EU values in reference cases brought by national judges in situations where the Court may be tempted to wait either for infringements to provide the platform for more structural rulings or for specific judges to be harmed in cognizable ways so that the questions come to the Court on the backs of directly affected parties. In this regard, the *I.S.* case is a good example of the problem. In Hungary, judges don't have easy ways to get their own cases before courts to serve as the platform for a preliminary references, so some of the crucial questions will come up sideways, like the problem of the irregular appointment of court presidents. Those who are irregularly appointed have nothing to complain about and those who didn't get the promotion to court president have no right to the promotion against which to complain. Of course, it is relevant to the matter before the referring judge that his decision can be appealed to a court in which a politically selected and irregularly appointed president presides. But the Court of Justice has taken the view that, until the matter actually arises – the appeal to the improper judge, for example – it can say nothing about the matter. But when the case goes up on appeal to the improper judge, then how does the reference get to the Court? The improper court president surely won't send it and the judges who are assigned to handle the appeal of a delicate case will have no incentive to challenge it either, so this particular problem simply falls between the cracks. The Court of Justice should ask itself how else the particular questions that referring judges send them can be raised, if not in the instant procedure. And, if there is no other obvious way that the question can get to the Court, the Court may have to stretch its conception of what can be done in a

[307] William Phelan, *What is Sui Generis about the European Union? Costly International Cooperation in a Self-Contained Regime*, 14 INT. STUD. REV. 367 (2012).

preliminary reference procedure to answer the questions that are crucial for the independence of the judiciary.

The Court can therefore rise to the challenge of being the Guardian of the Treaties by broadening what it means for a question to be "necessary" for the national judge to know in order to make a ruling in a specific case. National judges should know that the courts above them will not politicize the cases that they have decided or deprive the parties of their EU law rights. They should be reassured that the judges with whom they sit in panels or who control the process for reviewing their decisions on appeal have not been appointed in order to undermine the uniform application of Union law. National judges should know that the constitutional courts at the peaks of their legal systems remain committed to the principle of EU law primacy and do not invent novel constitutional identity claims as a way of avoiding the application of EU law. National judges should be able to retain a measure of self-governance in order to preserve their own independence from political officials. Those topics may not be the facts at issue in the cases before the referring judge, but the referring judge needs to know that the broader judiciary of which she is a part is committed to honoring Union law before she can reliably decide cases involving Union law.

Unless the Court of Justice realizes that the national judges calling for help really cannot decide the cases before them without having more confidence that their judiciaries comply with the Union principle of judicial independence, then the referring judge may not be able to decide properly on an asylum case when the government has campaigned against migration, demonized migrants and is itself flouting EU law. The referring judge may not be able to properly decide a competition case in which a government oligarch stands to lose or a case involving the corruption of EU funds that implicates a member of the prime minister's family. Unless the Court of Justice understands the daily working conditions of judges in compromised legal systems as relevant to the decisions in the cases before those judges, the Court of Justice will not stretch to reach the very real problems in politically battered judiciaries that are at the heart of ensuring the rule of law.

As judicial independence has come under attack, national judges themselves are engaging in self-help and sending reference cases to the Court of Justice. But the Court of Justice is telling national judges all too often in, for example, European Arrest Warrant cases, to ascertain whether the particular court to which the particular defendant will be transferred is particularly problematic[308] when the problem is that the particular court to which the defendant maybe transferred sits in a larger system in which politics can influence any case of interest to the government. The Court of Justice is also telling national judges that it can say nothing about a court elsewhere in the system if that court doesn't have this particular case before it at the moment. The Court of Justice is not only telling referring judges not to rise to the defense of independent courts in Member States that are threatening those courts, but telling them to avert their eyes from these systemic attacks on courts other than their own at home.[309] In cases in which national judges are sending references that are cries for

[308] *See, e.g. X & Y v. Openbaar Ministerie*, EU:C:2022:100.
[309] Scheppele, *Celmer*, *supra* note 281.

help from the judge under political duress, the Court of Justice should take seriously the proposition that the referring judge really does need to know whether she can be protected from the adverse consequences that will come from deciding a case against the national government's wishes.

There are some signs, in a set of cases out of Romania, however, that the Court is starting to broaden its sense of what questions are relevant to the case before a referring judge. For example, in *R.S.*[310] the referring judge was caught between a rock and a hard place when the Romanian Constitutional Court ruled that national legislation, once judged constitutional as a natter of domestic law, could not be reviewed again by a national judge to determine its compatiblity with EU law. Asking the Court of Justice whether a referring judge could be barred from performing her essential Union law functions by examining all law relevant to the case before her, the referring judge could probably guess what she would be told. Of course, she had to be able to apply Union law, even on topics that were covered by and contrary to the domestic constitution, as was the procedure for investigation in the case. What made the case unusual, however, was that the referring judge wanted to examine the procedure through which investigation into judicial misconduct was carried out, since the allegation in the case before the referring judge was that the judges who heard the underlying criminal case had themselves committed an abuse of their office. In providing guidance about those disciplinary procedures, the Court said, "the fact that a judicial decision contains a possible error in the interpretation and application of national and EU law, or in the assessment of the facts and the appraisal of the evidence, cannot in itself trigger the disciplinary liability of the judge concerned."[311] Even the mere prospect of being disciplined for the content of a decision interfered with judicial independence, announced the Court.[312] So while this case bears some similarities to *I.S.* and *Miasto Łowicz* in condemning disciplinary proceedings carried out against national judges who apply Union law, the case reaches a bit farther in giving the national judge the green light to expand her field of vision in the domestic case to examine not just the allegations raised by the case, but also how the investigation leading up to the proof offered in the case was carried out. In short, the Court and the referring judge together figured out how to get the Court to review the disciplinary procedures that applied to judges in Romania.

This case followed on the spectacular decision in *Eurobox Promotion,*[313] in which the Court had already freed national judges from following decisions of the Romanian Constitutional Court where following those decisions would result in the systematic inability of the ordinary courts to hear in a timely manner cases involving corruption. As in *I.S.* and *Miasto Łowicz*, judges could be punished for putting their obligations to apply Union law above national law, in this case, decisions of the Constitutional Court. Here, the Court raised the issue that the Constitutional Court was constituted in a different manner than ordinary courts, with a much larger political influence in the selection process for those judges. But the Court ultimately

[310] R.S., Case C-430/21, EU:C:2022:99.
[311] *Id.* ¶ 84.
[312] *Id.* ¶ 90.
[313] *Euro Box Promotion & Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034.

chose not to go down the road of finding the Constitutional Court was improperly constituted and instead settled for the less controversial argument that punishing judges for the content of their decisions ran contrary to Union law. The decision, however, put the Constitutional Court on notice that where its decisions interfered with the application of Union law in Romania, the ordinary courts could lean on Union law to ignore them. Both *Eurobox Promotion* and *R.S.* saw the Court moving toward pronouncing on courts and procedures that were not directly before the referring judges, but which were – to so speak – lurking in the background of the cases. Perhaps this shows that the Court is trying to find ways to get at the larger problems of judicial independence through questions asked in preliminary references.

As we have seen in this Article, the Commission has generally failed to protect judicial independence because it has not vigorously enforced Union law, so the national judges are resorting to self-help because they still have faith in the Court of Justice. But if the Court of Justice dismisses those questions raised collaterally to direct EU law disputes as irrelevant to the substantive issues in the case before the referring judges, then these pressured national judges have nowhere else to go. If the Commission won't bring enough infringements in a timely enough way to ensure that judiciaries remain independent – and then the ECJ won't respond to references that deal with these structural problems in the only way that the national judges can raise them – all doors are closed to the judges who seek help in enforcing Union law without bringing terrible consequences upon themselves and those whose Union rights they seek to enforce. There may be signs, however, that the Court of Justice is trying to address the pressures felt by national judges to ensure their continued independence, as Union law requires.

The Court of Justice should consider itself a parallel Guardian of the Treaties as it ensures that EU law is enforced uniformly across the Union. If, in the absence of infringement cases, national judges take a huge risk by going directly to the Court to attempt to protect their own independence, the Court should not turn those judges away or leave them to face their vindictive governments alone. The Court should back up those judges who are struggling to defend judicial independence by invoking EU law and broadening its sense of what is relevant to decide in reference cases. If the Court of Justice does not try to protect judges who have reached out to the Court for assistance, however, there will be no reason for references to keep coming.

The Court of Justice surely knows by now that the Commission has not been effective in preventing the destruction of judicial independence in two Member States. The Commission has simply not brought enough and well-enough-targeted infringements when judiciaries came under attack. Of course, the Commission should step up and bring more infringements, even at this late date, pressing them with the urgency they require. But if the Commission will not do that, references may provide the Court with the only chance it will have to defend core EU values. If the Court of Justice is to guard the Treaties, especially when the Commission has failed to do so, it may have to use the imperfect vehicle of preliminary references to do the job.

POSTSCRIPT:

THE COMMISSION FINALLY ACTS[314]

March 2023

The timeline traced in "Treaties Without a Guardian" ended in October 2022 when this article was sent off for publication. But between that date and publication of the article in March 2023, the Commission took a great leap forward in defending the rule of law.

In late 2022, the Commission suddenly revealed, though very quietly, that it was withholding nearly €30 billion of funds from Hungary and more than €110 billion in funds from Poland.[315] Neither Member State will receive those funds until they demonstrate progress in restoring the rule of law. After more than a decade in which the Commission consistently did too little, too late, the Commission ended 2022 with a Big Bang defense of Article 2 TEU values.

How did this happen? And how did it happen so quickly? Nothing in the EU is really fast, so what happened at the end of 2022 was actually the intersection of several different processes that had inched forward behind the scenes in slow motion for years. But the impact has been massive. Both Hungary and Poland now face the fact that they will receive none of the money allocated to them through the Cohesion Funds nor any of the money allocated to them through the Recovery and Resilience Fund unless they strengthen judicial independence, among other things. The eye-popping totals being withheld from both Member States were created through the focused operation of three different newly passed Regulations that were brought to bear all at once on the same set of problems.

The Conditionality Regulation, finally passed in December 2020, gave the Commission and Council the explicit power to withhold funds to Member States whose rule of law violations create a risk that EU funds allocated to that country would go astray. The Regulation, after being blessed by the Court of Justice in February 2022, was triggered by the Commission against Hungary in April 2022.[316] The Commission rather narrowly targeted 65% of three streams of money that were part of the Cohesion Funds, arguing that the dependence of these funds on flawed procurement processes and weak accountability mechanisms put those funds at

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[314] This postscript draws from Kim Lane Scheppele and John Morijn, *What Price Rule of Law*. Forthcoming in THE RULE OF LAW IN THE EU: CRISIS AND SOLUTIONS (Swedish Institute for European Policy Studies, 2023), https://www.sieps.se/en/seminars/upcoming-seminars/the-rule-of-law-in-the-eu-crisis-and-solutions/.

[315] The large difference in withholdings between the two countries does not measure the relative seriousness of the violations but instead reflects the relative size of the funding authorizations and therefore how much money was available to suspend. Poland has the largest absolute amount of EU funds allocated to it, while Hungary has the largest per capita amount so both sets of cuts are significant in the national budgets. For the size of the Cohesion Funds alone in the current 2021-2027 EU budget, see European Commission, Cohesion Open Data Platform, https://cohesiondata.ec.europa.eu/countries/PL/21-27 for Poland and https://cohesiondata.ec.europa.eu/countries/HU/21-27 for Hungary.

[316] *Supra*. at notes 250-257.

risk.[317] To receive the money, Hungary would be required to enact and enforce an anti-corruption program that created independent oversight of the public procurement process, monitored conflicts of interest, reduced the number of single-bid public contracts and strengthened the prosecution of corruption crimes. After the Hungarian government passed a series of laws that formally addressed many of these requirements in fall 2022,[318] the Commission found that these reforms fell short of establishing a truly independent set of institutions and procedures for fighting corruption.[319] The Council approved the Commission's final recommendation that these three funding streams be frozen on December 20, 2022 but cut only 55% of the allocated funds instead of the 65% that the Commission recommended because Hungary had done something positive to respond to the criticism.[320]

That said, the amounts of money that were at stake after all of the effort spent enacting the Conditionality Regulation were rather small in the context of the overall EU budget (€6.3 billion to one Member State).[321] In addition, the conditions Hungary was required to meet to receive the money did not remedy what many observers thought was the most important challenge to the rule of law – namely, the attacks on judicial independence. Even with all of these issues, however, the fact that any funds were withheld from a Member State for violating basic principles of the rule of law was a major accomplishment after the Commission had done too little, too late for too many years.

As the proposal to suspend funds to Hungary under the Conditionality Regulation was moving through all of the stages of the process outlined in that law, the Resilience and Recovery Regulation (RFF) emerged as another tool that the EU institutions could use to bring rogue Member States back to the rule of law through fiscal pressure. The RFF established a large fund of money that was paid for by floating EU debt instruments and that was allocated to the Member States to help jump-start their economies after the damage caused by the Covid pandemic.[322] Each Member State was charged with producing a Recovery Plan specifying how it would spend the money on the priorities outlined in the governing Regulation. But buried in the Regulation's text was the requirement that that each Member State comply with

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[317] *Supra*. at note 257.

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

[319] *Communication from the Comm'n to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget.* COMM (2022) 687 final (Nov. 30, 2022), https://commission.europa.eu/system/files/2022-12/COM_2022_687_1_EN_ACT_part1_v5.pdf

[320] *Council Implementing Decision (EU) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary*, OJ L 325/94 (Dec. 15, 2022). [Hereinafter Council Conditionality Implementing Decision.]

[321] Council of the EU Press Release, Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary (Dec. 12, 2022) https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

[322] European Parliament and Council Regulation (EU) 2021/241, Establishing the Recovery and Resilience Facility, 2021 O.J. (L 57) 17, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32021R0241.

"country-specific recommendations" in spending these funds.[323] Country-specific recommendations are issued as the result of the annual European Semester assessment, which monitors whether EU Member States' macroeconomic and fiscal policies comply with the measures that were put in place after the financial crisis in 2008-2009 to prevent another European economic meltdown.[324] European Semester assessments had covered topics like the sustainability of debt burdens and mismatches between the labor force and available jobs. But for a few years now, the European Commission had been inserting into these country-specific recommendations measures related to judicial independence. In 2019, the Commission first recommended – and the Council adopted the recommendation – that Hungary take action to strengthen judicial independence[325] even though the Commission had not filed a single infringement about judicial independence in Hungary since 2012. In 2020, the Commission added – and the Council adopted -- strengthening judicial independence to Poland's list of country-specific recommendations.[326] When the Recovery Regulation conditioned receipt of the funds on compliance with country-specific recommendations, these little land mines that the Commission had planted in this annual technical assessment were poised to explode.

The Commission's use of the RRF to withhold allocated funds for rule of law conditionality was first on display with regard to Poland, when the Commission approved Poland's plan for using the recovery money in June 2022, but attached "milestones" that had to be met before Poland would actually receive the funds.[327] The milestones included reforms to the judiciary to make it more independent as the country-specific recommendations had required, but critics – including five of the Commissioners themselves – immediately attacked the formulation of these milestones for failing to require that Poland honor all of the decisions of the European Court of Justice that mandated changes to Poland's judiciary.[328] Four European umbrella organizations of judges brought an action of annulment in the General Court first against the Council for approving Poland's Recovery Plan with these milestones, and then against the Commission for having designed these

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[323] *Id.* at Article 17(3).

[324] Council of the European Union, The European Semester Explained, https://www.consilium.europa.eu/en/policies/european-semester/ .

[325] Council of the European Union, *Recommendation for a Council Recommendation on the 2019 National Reform Programme of Hungary and delivering a Council opinion on the 2019 Convergence Programme of Hungary, 9942/19 - COM(2019) 517 final* (July 8, 2019), https://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf

[326] Council of the European Union, *Recommendation for a Council Recommendation on the 2020 National Reform Programme of Poland and delivering a Council opinion on the 2020 Convergence Programme of Poland*, ST 8194/20 - COM(2020) 521 final (June 8, 2020), https://data.consilium.europa.eu/doc/document/ST-8440-2020-INIT/en/pdf.

[327] *Supra.* at notes 223-224.

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

inadequate milestones in the first place.[329] Chastened, the Commission then appeared to get tougher on Poland, rejecting various attempts by Poland in summer and fall 2022 to pass reforms in order to unlock the money, reforms that in the view of nearly all observers did not adequately respond to the criticisms.[330] So far, the Commission has held the line and insisted on more sweeping reforms. Poland has been denied access to all €35.4 billion allocated to it under the Recovery Fund so far for failure to comply with these country-specific recommendations built into the Recovery Plan.

In the same December 2022 meeting in which the Council froze some of Hungary's Cohesion Funds under the Conditionality Regulation, the Council also approved Hungary's Recovery Plan – also with milestones that had to be met before the funds would actually be disbursed.[331] Perhaps in response to the flak it had received for approving the Polish plan without addressing all of the ECJ judgments pertaining to judicial independence, the Commission in its recommendation to the Council on Hungary made the release of funds conditional on a set of detailed and substantial changes to the Hungarian judiciary. The milestones also included a copy-paste of the requirements for an anti-corruption program that had been previously attached to the Conditionality Regulation procedure. Through the use of the Recovery Regulation and its requirement that country-specific recommendations be honored in the spending of these funds, all of Hungary's €5.8 billion would be frozen until judicial independence was restored and an anti-corruption program successfully installed in Hungary.

Weeks after the Council had approved Hungary's conditions for receiving the Recovery Fund and froze more funds under the Conditionality Regulation, and as most of Brussels and its observers were readying themselves for the Christmas holiday by no longer paying attention to the news, Reuters published a small story that largely went unnoticed.[332] The Commission had announced it would withhold a whopping €22 billion in Cohesion Funds to Hungary due to concerns over fair trial rights because there had been a failure to ensure judicial independence as well as out of concern about intrusions into academic freedom, threats to LGBTIQ+ rights and the failure to ensure the right to asylum for migrants. Suddenly Hungary was facing not just the €6.3 billion cut under the Conditionality Regulation and the €5.8 billion under the Recovery Regulation, but now an additional €15.7 billion in frozen Cohesion Funds above and beyond those already cut under the Conditionality

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

[330] *Poland closes judicial disciplinary chamber at heart of dispute with EU*, NOTES FROM POLAND (July 15, 2022), https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[331] *Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary*, Interinstitutional File: 2022/0414 (NLE) (Dec. 5, 2022), <https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf> and ANNEX <https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf>.

[332] Kate Abnett & Jan Strupczewski, *EU Holds Back All Of Hungary's Cohesion Funds Over Rights Concerns*, REUTERS, Dec. 22, 2022, https://www.reuters.com/world/europe/eu-holds-back-all-hungarys-cohesion-funds-over-rights-concerns-2022-12-22/ .

Regulation. The total? €27.8 billion of EU funds were frozen until Hungary took adequate steps to restore judicial independence, with the biggest bang coming from the Commission's announcement on December 22, 2022.

Of course, the Commission had to have a legal basis for what it did. Unnoticed by most observers[333] as it was going through the legislative process, the Common Provisions Regulation (CPR) was undergoing changes. Renewed with each EU budget cycle, the CPR provides the detailed terms and conditions for spending EU funds.[334] Added to the CPR in this budget cycle was Article 9.1[335] which made the spending of EU funds subject to the "horizontal principle" of respect for the Charter of Fundamental Rights. This was a new and sweeping conditionality hard-wired into the law that controls the spending of many lines of EU funds.

All of the funds covered by the CPR are subject to a Partnership Agreement negotiated between each Member State and the Commission that specifies how the funds are to be spent. The EU-Hungarian Partnership Agreement was published on 22 December 2022,[336] providing the basis for that pre-Christmas Reuters news story. The Agreement covers €22 billion in 11 national programs – and all of those funds are now frozen pending Hungary's compliance with the Charter of Fundamental Rights. The affected rights flagged in the Agreement include fair trial rights under Art. 47 CFR, which are harmed by the lack of judicial independence. As a result, the Commission copy-pasted the same conditions that were formulated for the RRF into the Partnership Agreement. In addition, the Commission has withheld monies under some of these funding streams pending a) the repeal of the 'child protection law' that infringes LGBT+ equality rights under Article 21(1) CFR[337] b) the restoration of academic freedom by changing the politicized boards of trustees of the newly

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[333] But noticed by John Morijn, *The July 2020 Special European Council, the EU budget(s) and the Rule of Law: Reading the European Council Conclusions in their Legal and Policy Context*, EU LAW LIVE (July 23, 2020) <https://eulawlive.com/op-ed-the-july-2020-special-european-council-the-eu-budgets-and-the-rule-of-law-reading-the-european-council-conclusions-in-their-legal-and-policy-context-by-john-morijn/#≥

[334] The EU funds covered by the CPR include the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, the European Maritime, Fisheries and Aquaculture Fund, the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy. CPR, *supra.* note 251, Art. 1(1).

[335] *Id.* at Art. 9(1): "Member States and the Commission shall ensure respect for fundamental rights and compliance with the Charter of Fundamental Rights of the European Union in the implementation of the Funds."

[336] *Commission Implementing Decision of 22.12.2022 approving the partnership Agreement with Hungary*, C(2022) 10002 final, at: https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)10002&lang=en . The Commission also helpfully published a summary. EU Cohesion Policy 2021–2027: Investing in a fair climate and digital transition while strengthening Hungary's administrative capacity, transparency and prevention of corruption (2022) <https://commission.europa.eu/system/files/2023-01/partnership-agreement-hungary-2021-2027.pdf≥.

[337] The law in question is the subject of an infringement procedure by the Commission against Hungary, which the Commission announced it would refer to the Court of Justice on July 15, 2022. European Comm'n Press Release IP/22/2689, Commission refers Hungary to the Court of Justice of the EU over violation of LGBTIQ rights (July 15, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2689 . The case was finally submitted to the Court of Justice only in December, however, where it was registered as Case C-769/22.

privatized universities[338] under Article 13 CFR and c) compliance with the right to asylum under Article 18 CFR which the ECJ has repeatedly found that Hungary violates.[339] As a result, Hungary is facing the suspension of more money under the Partnership Agreement and its CPR conditionalities than through the total withholdings under the Conditionality Regulation and RRF combined.

Poland seems to be getting a parallel treatment from the Commission but the suspensions, their amounts and their rationales are murkier.[340] Poland signed a – not yet released[341] -- Partnership Agreement with the EU on June 30, 2022,[342] in which the CFR conditionalities were limited to concerns about gender equality under Article 23 CFR and the rights of persons with disabilities under Article 21(1) CFR, with no mention of judicial independence under Article 47 CFR. Press reports in October, however, suggested that the Commission was withholding all of the funds subject to the Partnership Agreement after Poland had failed to carry out promised judicial reforms.[343] Though those press reports do not mention the legal basis for this action, one might extrapolate from the Hungarian Partnership Agreement and accompanying implementing decisions on various EU funds and guess that the Commission invoked Article 47 CFR as a horizontal condition on all of the funds covered by that agreement. What seems to be the case is that the Commission is withholding about €75 billion in Cohesion Funds all told[344] Poland acknowledges itself that it is not in compliance with the Charter and the Commission has indicated for the Just Transition Fund (one stream of the Cohesion Funds) that it is withholding the money in this program until Poland complies with the Charter.[345] And again, there may be even more funds withheld under other funding streams that

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[338] This conditionality was first laid down in the Council Conditionality Implementing Decision. *Supra* note 320, Article 2(2) in which the Council proclaims that "no legal commitments shall be entered into with any public interest trust." These public interest trusts are private law foundations created under Hungarian law as vehicles into which public Hungarian universities were transferred, thus privatizing them. The University of Debrecen, one of the affected universities, has filed an action for annulment in the General Court challenging its inclusion on this blacklist. Debreceni Egyetem v. Council, Case T-115/23.

[339] European Comm'n Press Release IP/21/5801, Migration: Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment (Nov. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5801

[340] Wojciech Kosc, *European Commission Reportedly to Withhold Most of Poland's Cohesion Funds for Rule of Law Failures*, BNE INTELLINEWS, Oct. 17, 2022, <https://intellinews.com/european-commission-reportedly-to-withhold-most-of-poland-s-cohesion-funds-for-rule-of-law-failures-259574/>.

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

[342] European Comm'n Press Release IP/22/4223, EU Cohesion Policy: Commission Adopts €76.5 billion Partnership Agreement with Poland for 2021–2027 (2022), https://ec.europa.eu/commission /presscorner/detail/en/ip_22_4223> .

[343] Kosc, *supra* note 340.

[344] Zoltan Simon, *How EU is Withholding Funding to Try to Rein In Hungary, Poland*, WASHINGTON POST, Jan. 2, 2023, <https://www.washingtonpost.com/business/how-eu-is-withholding-funding-to-try-to-rein-in-hungary-poland/2022/12/30/ba3641fc-8818-11ed-b5ac-411280b122ef_story.html>

[345] European Comm'n Press Release IP/22/7413, EU Cohesion Policy: €3.85 billion for a just transition toward climate neutral economy in five Polish regions (Dec. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7413. This press release explains that funds are being withheld because Poland is not in compliance with the Charter as required by the CPR, but it doesn't explain precisely which Charter provisions Poland is violating.

are not visible because the implementing decisions for Poland, although many are listed in the register of documents as having been published in December 2022, have not so far been released by the Commission.[346]

Poland has taken an additional hit to its EU funds because the Commission has been deducting from Poland's EU funding streams €1.5 million per day in fines for Poland's continuing violation of decisions of the Court of Justice.[347] The amount owed is now approaching €500 million.

Taking all of these various conditionalities and withholdings together, it now appears that nearly €30 billion of Hungary's EU funds are on hold while Poland is not receiving €110 billion that it expected. Instead, the flow of all of these funds has been made contingent on substantial rule of law reforms, with the largest amounts conditional on restoring judicial independence. As we have seen, the Commission has not been notably successful in nudging the EU's rogue Member States toward the rule of law with the other techniques it has used over the last decade, but this Big Bang conditionality is of a very different type and magnitude. Already we have seen Poland scramble to appear to roll back some of its judicial "reforms"[348] in summer 2022 and Hungary pushed through an anti-corruption program in fall 2022.[349] In both cases, the Commission said that the reforms were not sufficient.[350] Now Hungary has designed a new judicial reform program for enactment in spring 2023 that Hungarian NGOs have already found wanting.[351] But this is more action in the general direction of compliance than we have seen from either Hungary or Poland in the whole sad saga of their slides toward autocracy.

The Commission's great leap forward in defending the rule of law resulted from a surprisingly bold series of moves that built up slowly behind the scenes and then burst out all at once. After all of the expressions of concern, cajoling, bargaining and threatening to enforce the law, the Commission has finally realized that taking away rogue states' access to EU money may have the biggest effect of all. Now that the

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[346] Evidence of the existence of this batch of documents can be found here: https://tinyurl.com/yv6ans23 .

[347] Poland has been ordered to pay €1 million/day for refusal to close the disciplinary chamber for judges and €500,000/day for refusal to close a coalmine that has depleted groundwater and caused dangerous levels of air and water pollution on Poland's border with the Czech Republic and Germany. Jennifer Rankin, *EU to Withhold Funds from Poland over Unpaid Fine*, GUARDIAN, Feb. 8, 2022, <https://www.theguardian.com/world/2022/feb/08/eu-to-withhold-funds-from-poland-over-unpaid-fine-coal-mine>.

[348] *Poland closes judicial disciplinary chamber at heart of dispute with EU*, NOTES FROM POLAND, July 15, 2022, https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/.

[349] See my series of blogposts on the anti-corruption program, *supra.* at note 318.

[350] For Poland, *see* Kristie Bluett, Jasmine D. Cameron & Scott Cullinane, *Poland's Judicial Reform Falls Short of EU Expectations, Complicating Cooperation Against Russia*, JUST SECURITY (Oct. 3, 2022), https://www.justsecurity.org/83324/polands-judicial-reform-falls-short-of-eu-expectations-complicating-cooperation-against-russia/. For Hungary, *see Protecting Hungary from Itself: The Limitations of Forcing Compliance*, INTERNATIONAL IDEA (Dec. 15, 2022), https://www.idea.int/blog/protecting-hungary-itself-limitations-forcing-compliance .

[351] Amnesty International, Eötvös Károly Institute & Hungarian Helsinki Committee, ASSESSMENT OF THE GOVERNMENT'S DRAFT PROPOSAL ON THE AMENDMENT OF CERTAIN LAWS ON JUSTICE RELATED TO THE HUNGARIAN RECOVERY AND RESILIENCE PLAN (Feb. 3, 2023), <https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/2023judicial_package_assessment_AIHU_EKINT_HHC.pdf.

Commission has taken this big leap, however, it will need to be patient to ensure that the changes that Hungary and Poland make are real and substantial before it releases the money. It will need to be firm and insist on evidence of real effects. After having come this far, this is no time for the Commission to be satisfied with merely cosmetic compliance. Maybe, the Commission will resume its role as Guardian of the Treaties after all.

WREAKING THE WRONGS: BALANCING RIGHTS AND THE PUBLIC INTEREST THE EU WAY

Takis Tridimas[1]

1. INTRODUCTION

Constitutional courts engage in balancing conflicting rights, principles, and interests. This balancing exercise raises profound questions about the separation of powers and the proper limits of the judicial province. A distinct feature of the post-Second World War European constitutionalism is that such balancing is not the

[1] Professor of European Law, King's College London and Professor and Nancy A. Patterson Distinguished Scholar, Pennsylvania State University. My thanks to Elise Muir and José Antonio Gutierrez-Fons for valuable comments in earlier drafts. 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). All errors remain mine.

exclusive province of national courts but is also performed by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). When balancing takes place at a supra-national level, the judicial exercise acquires added dimensions of complexity. The ECJ, in particular, has the delicate task of overseeing the political bargain established by the EU Treaties which is incomplete, vigorously dynamic, and unstable. The Treaties together with the Charter and the general principles of law outline both an economic and a political constitution. The contours of the former are broadly delineated by the social market economy model.[2] The latter is defined by commitment to liberal democratic ideals which, whilst proclaiming representative democracy as the defining system of government, recognize limits to majoritarianism through commitment to respect fundamental rights.

This paper attempts to explore selected issues concerning the balancing exercise carried out by the ECJ. After introducing briefly the constitutional role of the ECJ, it defines the universe of conflicts that arise in EU law and seeks to provide a typology of conflicts. It then attempts to identify some of the factors that the ECJ takes, or should take, into account in resolving them, and delves into a discussion of each of them. These issues are directly relevant to the rule of law discourse. An appreciation of how a legal system understands the rule of law cannot be obtained without examining, inter alia, how its supreme court applies constitutional principles to concrete situations and balances opposing objectives and rights. Furthermore, the ECJ follows a substantive rather than a procedural version of the rule of law. Even before the introduction of the Charter, it had long recognised that EU and State action must observe fundamental rights as general principles of law.[3] Post-Charter, it refers to some of its provisions as being mere illustrations of general principles.[4] In a Sophoclean universe, the ECJ sides firmly with Antigone not with Creon, in that it seeks to uphold not merely procedural but also substantive constraints to authority. Thus, to determine how the Court understands the rule of law, one needs to venture beyond an examination of core principles and process standards. An inquiry into the

[2] *See* Treaty on European Union, art. 3(3), Jan. 3, 2020, 2016 O.J. (C 202) 13 [hereinafter TEU]. The term 'social market economy' is not defined in the Treaties. It refers broadly to a commitment to a market economy, i.e. the laws of supply and demand as principal allocators of resources, but one which recognizes that the state has an important role to play as the guarantor of economic and social order, accommodating social objectives, e.g. social welfare or high employment. The model is far from static, allowing for different ordering *inter tempore* and among the Member States. The EU may prioritise economic and social objectives differently from time to time and from sector to sector. The confluence of economic and social objectives also allows the coexistence of different models of capitalism at Member State level. For a discussion, *see*, *e.g.*, Norman Barry, *The Social Market Economy*, *in* LIBERALISM AND THE ECONOMIC ORDER 1, 1-25 (Ellen Paul et al. eds.,1993).

[3] *See*, *e.g.*, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case C-11/70, EU:C:1970:114; Les Verts v. Parliament, Case C-294/83, EU:C:1986:166; Schmidberger v. Austria, Case C-112/00, EU:C:2003:333.

[4] *See*, *e.g.*, Glatzel v. Freistaat Bayern, Case C-356/12, EU:C:2014:350, ¶ 43 (referring to the principle of equality); Léger v. Ministre des Affaires Sociales, de la Santé et des Droits des Femmes, Case C-528/13, EU:C:2015:288, ¶ 48 (concerning non-discrimination on the grounds of sexual orientation); Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen VZW and Others v. Vlaamse Regering (Animal Slaughter Case), Case C-336/19, EU:C:2020:1031, ¶ 85 (regarding religious equality); Minister for Justice and Equality (Deficiencies in the System of Justice), Case C-216/18 PPU, EU:C:2018:586, ¶50 (concerning the right to judicial protection) [hereinafter *L.M.*]; H. N. v. Minister for Justice, Equality and Law Reform, Case C-604/12, EU:C:2014:302 (regarding the right to good administration).

taxonomy of conflicts and the factors to be taken into account in resolving them becomes particularly important in the context of the Court's adherence to general principles-based reasoning.

2. THE SHIFTING INTEGRATION PARADIGM AND THE CONSTITUTIONAL NATURE OF THE ECJ'S JURISDICTION

The ECJ has increasingly assumed the role of a constitutional court. It is no accident that the majority of the most important judgments delivered in the last twenty or so years have not related to the internal market, the traditional paradigm of integration, but involved fundamental rights, i.e. civil liberties and social rights, and general principles of EU law.[5]

The reasons why the ECJ has assumed that role are many. Its constitutional function is, to a degree, self-generated. From an early stage, through bold rulings, it projected itself as the generator of constitutional doctrine. But it is owing mostly to other factors. It is the Member States who have vested the EU, and consequently the Court, with a role in vast areas of decision-making. The broadening of EU competences through successive Treaty amendments and the proliferation of EU laws leave virtually no area of national law unaffected. The expansion of EU presence in the area of freedom, security and justice and economic and monetary union has been particularly significant in this respect. The internal market is no longer the only gravitational force but one constellation in a multi-polar regulatory universe. Happenstance has also been a major factor: the world evolves, crises arise, and new problems emerge. The last twenty years have been turbulent. A series of crises have led the EU to take action in a way which is haphazard, incomplete and sometimes unprincipled. The ECJ has been drawn into ensuing controversies and has fallen upon it to try and accommodate resulting mutations of EU law within the bounds of constitutional integrity. The incomplete character of the bargain and the *ad hoc* character of EU intervention favours reliance on values and principles, which the Court has sought to articulate in the exercise of its function to ensure that in the interpretation and application of the Treaties the law is observed.[6]

In contemporary EU law, constitutional clashes may be said to occur in the backdrop of three developments: First, the proliferation of EU rights, mostly as a result of the Charter acquiring binding force and the adoption of many legislative measures in diverse areas of economic and social regulation. Secondly, the enhanced prominence of EU structural principles, namely principles which define the constitutional identity of the EU,[7] such as autonomy,[8] mutual trust,[9] effectiveness,[10]

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[5] What are the 'most important' judgments is, of course, open to question and opinions may differ. They can be determined by reference to quantitative or qualitative criteria or a mix of them, such as, the court formation that hears the case, the number of subsequent judgments referring to a judgment, the novelty of the ruling, or the way the ruling affects precedent. A relevant consideration may also be the Court's own perception of the importance of the judgment, which is manifested by whether it is discussed in the Court's annual report. Here, the terms most important judgments refer to those introducing new points of law or advancing existing case law.

[6] *See* TEU art. 19(1).

[7] For a valuable discussion of structural principles in a specific field, *see* Marise Cremona, *Structural Principles and their Role in EU External Relations Law*, *in* STRUCTURAL PRINCIPLES IN EU EXTERNAL RELATIONS LAW 3, 3-29 (Marise Cremona ed., 2018).

and, more recently, solidarity.[11] Thirdly, reliance on the values of Article 2 TEU as overarching legal principles. Starting with the *Portuguese Judges* case,[12] Article 2 TEU has been recognised normative effect going beyond that expressly recognized by the references made to it in Articles 7 and 49 TEU.

The values of Article 2 are legally material in a number of respects. First, they have a strong signalling and interpretational force, 'forming part of the very identity of the Union'.[13] Secondly, they have been used as one of the building blocks in the articulation of a distinct model of EU law autonomy. This understands the exclusivity of the ECJ jurisdiction widely and imposes limitations on the competence of the Union and the Member States to conclude international agreements.[14] In this respect, Article 2 enhances the blocking effect of EU law although it is, in fact, difficult to find a direct link between Article 2 and the outcomes reached by the Court in applying the principle of autonomy.

Thirdly, the rule of law as an Article 2 value, in combination with Article 19(1) TEU, has been used to impose obligations on Member States regarding their system of governance, especially judicial independence.[15] Here, commitment to Article 2 creates governance expectations that permeate the national legal system and apply beyond the material scope of the Charter. The normative effect of Article 2 lies primarily in its empowering role. The judicial independence principles pronounced by the Court are based on the twin pillars of Articles 2 and 19. The former empowers the latter but its role is more than supportive, both provisions being on an equal footing and conjointly generating obligations. Although the Court has not dealt with this issue, on the basis of the case law, it may be said that Article 2 has relative normative autonomy. Although it may not be easy to envisage a situation where a breach of Article 2 does not entail also a breach of another provision of the Treaties, the violation of Article 2 may be conceived as an autonomous one and not merely as derivative of the violation of another EU law provision. It could thus be envisaged that, in an enforcement action under Article 258 TFEU, the Court may make a

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[8] *Se,e e.g.*, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Case C-2/13, EU:C:2014:2454 [hereinafter *ECHR*]; Slovak Republic v. Achmea, Case C-284/16, EU:C:2018:158.

[9] *See, e.g.*, *L.M.*, EU:C:2018:586.

[10] *See, e.g.*, Reference for Preliminary Ruling, Taricco and Others, Case C-105/14, EU:C:2015:555; Reference for Preliminary Ruling, M.A.S. and M.B., Case C-42/17, EU:C:2017:936.

[11] *See* Germany v. Poland and Comm'n (OPAL Pipeline Case), Case C-848/19 P, EU:C:2021:598, ¶ 38 (in relation to energy); Hungary v. Parliament and Council (Conditionality Case), Case C-156/21, EU:C:2022:97, ¶ 129 (in relation to the EU budget) [hereinafter *Hungary Conditionality Case*]. *See also* Poland v. Council (Conditionality Case), Case C-157/21, EU:C:2022:98.

[12] Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, Case C-64/16, EU:C:2018:117 [hereinafter *Portuguese Judges*].

[13] Hungary v Parliament and Council C-156/21, ECLI:EU:C:2022:97, ¶ 232; Poland v. Parliament and Council, Case C-157/21, EU:C:2022:98, ¶ 264. *See also infra*, note 14.

[14] *ECHR*, EU:C:2014:2454; Achmea, Case C-284/16, EU:C:2018:158.

[15] *See, e.g., L.M.*, EU:C:2018:586; A.K. and Others, Joined Cases C-585/18, C-624/18 & C-625/1, EU:C:2019:982; Repubblika v. Il-Prim Ministru, Case C-896/19, EU:C:2021:311; Refererence for a Preliminary Ruling, Eurobox Promotion and Others, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 & C-840/19, EU:C:2021:1034; *Hungary Conditionality Case*, EU:C:2022:97.

finding that a national law or practice is in breach of another provision of the Treaties and also of Article 2.[16]

3. THE CONFLICTS UNIVERSE

The conflicts universe is complex and diverse. Two general categories can be distinguished without them being exhaustive: conflicts between a fundamental right and a public interest objective and conflicts between two or more competing fundamental rights. This distinction is helpful for the purposes of systematization but it is important to stress that it is porous and relative. It would be misleading to suggest that there is a clear-cut distinction between the public sphere, encapsulated in the first category, and the private sphere, encapsulated in the second. The public interest can be conceived as the aggregate of citizen entitlements that the state is charged to safeguard. Also, the public interest, as incorporated in a given statute, will likely reflect the balance of competing private groups and their respective power to influence the law-making process. Thus, reference to the public interest as a force vis-à-vis which a private right needs to be balanced may not capture the nuanced character of the balancing exercise which may defy a strict public - private dichotomy.[17] Similarly, where the juxtaposition is between two competing constitutional rights, it does not pertain solely to the private sphere. The duty to respect the rights of others, as a limitation on one's right, is in itself a form of heeding collective choices. Furthermore, where the conflict is between an EU right and a juxtaposing right protected by national law, the latter is protected by a state measure, e.g. the constitution or statute, so the balancing will not be between rights in the abstract but between an EU right and a state act protecting a competing right.

The categories identified should not therefore be understood as being absolute or impermeable. This applies also to any sub-groups of each category that will be identified below. The bottom line is that conflicts are often multi-dimensional and one and the same litigation may involve more than one conflict categories.[18]

3.1. Conflicts between a fundamental right and a public interest objective

Within a domestic legal order, such conflicts are part and parcel of constitutional adjudication and may occur, for example, between the right to due process and the fight against terrorism. In EU law, several permutations may arise depending on the respective source of the right and the countervailing public interest. An EU fundamental right may conflict with the public interest as defined by EU law or with a national public interest. The converse juxtaposition may occur where a

[16] For this possibility in relation to the Charter, see below.

[17] Note also that non state actors may have quasi regulatory powers or be entrusted with the exercise of powers traditionally granted to state authorities or act as gate-keepers in balancing conflicting rights. The latter is particularly evident in the Digital Services Act, *see Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services*, COM (2020) 825 final (Dec. 15, 2020) as adopted by European Parliament Resolution (COM (2020) 0825 – C9-0418/2020 – 2020/0361 (COD)) (Jul. 5, 2020). These factors further undermine the public-private distinction.

[18] For recent examples, *see, e.g.*, Ref. Prelim. Rlg., *Eurobox*, EU:C:2021:1034; *Animal Slaughter Case*, EU:C:2020:1031; A. v. Veselības Ministrija (Jehovah's Witness Case), Case C-243/19, EU:C:2020:872.

fundamental right as recognised by national law conflicts with the EU public interest.[19] We will examine briefly each of these cases.

3.1.1 Conflicts between fundamental rights recognised by EU law and the EU public interest

Such a conflict typically arises where an EU measure is challenged as being incompatible with EU fundamental rights. The dispute pertains to the legality of an EU act and, since national courts may not invalidate EU measures,[20] the ECJ has complete jurisdictional control as to the outcome. Successful challenges are statistically rare but they do occur. In recent years, the ECJ has found EU measures to run counter to the right to judicial protection and the rights of defence,[21] the right to personal data,[22] and the principle of non-discrimination.[23] These areas are characterised by judicial activism even though a selective one. The protection of an EU right may not necessarily take the form of annulment. It can also take the form of a broad interpretation of the Treaties, or the Charter or a general principle of law.[24] An extensive interpretation of primary law dispositions may have a significant foreclosure effect in that it precludes the EU legislature or the Member States from following a different interpretation or at least constrains legislative options.[25]

Conflicts of this category occur in the plane of EU law and, at least overtly, no national law considerations come into play. The focus is on balancing an EU public interest vis-à-vis a fundamental right guaranteed by EU law. However, even in these

[19] The remaining category, namely conflicts between a national public interest and fundamental rights recognised by national law is a matter of national law and, at least directly, does not have an EU dimension. It may do so indirectly to the extent that the interpretation of national law may be informed by EU law developments even in areas where national law does not fall within the scope of EU law. This may occur, for example, in order to avoid reverse discrimination, i.e. the case where purely internal situations are treated less favourably than cross-border situations or national rights receive less protection than EU rights under domestic law.

[20] *See* Reference for Preliminary Ruling, Foto-Frost v. Hauptzollamt Lübeck-Ost, Case 314/85, EU:C:1987:452, ¶ 1.

[21] For examples in the field of sanctions, *see, e.g.*, Kadi & Al Barakaat International Foundation v. Council and Comm'n (Kadi I), Joined Cases C-402/05 P & C-415/05 P, EU:C:2008:461, ¶ 352; Comm'n et al. V. Kadi (Kadi II), Joined Cases C-584/10 P, C-593/10 P & C-595/10 P, EU:C:2013:518, ¶ 103; Rotenberg v. Council, Case T-720/14, EU:T:2016:689, ¶ 188.

[22] Reference for Preliminary Ruling, Digital Rights Ireland Ltd v. Minister for Communications, Joined Cases C-293/12 & C-594/12, EU:C:2014:238; Reference for Preliminary Ruling, Maximillian Schrems v. Data Protection Commissioner (Schrems I), Case C-362/14, EU:C:2015:650, ¶ 106; Reference for Preliminary Ruling, Data Protection Commissioner v. Facebook Ireland Limited and Schrems (Schrems II), Case C-311/18, EU:C:2020:559, ¶ 203.

[23] Reference for Preliminary Ruling, Association Belge des Consommateurs Test-Achats v. Conseil des Ministres, Case C-236/09, EU:C:2011:100, ¶ 34.

[24] Reference for Preliminary Ruling, PJSC Rosneft Oil Company v. Her Majesty's Treasury and Others, Case C-72/15, EU:C:2017:236, ¶ 158.

[25] For an extensive interpretation of the principle of equality, *see* Reference for Preliminary Ruling, Sturgeon and Others v. Condor Flugdienst GmbH, Joined Cases C-402/07 & C-432/07, EU:C:2009:716, ¶ 60. A foreclosure effect may also occur where the ECJ interprets EU legislation not as creating new rights but giving effect to primary law rights. *See* Reference for Preliminary Ruling, Mangold v. Helm, Case C-144/04, EU:C:2005:709, ¶ 74; Reference for Preliminary Ruling, Stadt Wuppertal v. Bauer, Joined Cases C-569/16 & C-570/16, EU:C:2018:871, ¶ 86. Still, the extent of foreclosure effect and the options available to the EU legislature to reform the law in the future will need to be determined on a case by case basis.

cases, the dispute is not mono-dimensional. Both national interests and foreign relations aspects may be involved.[26] If the issue of validity of EU law arises in a preliminary reference, the background to the dispute and the question of validity is defined by national law and involves a national court. The Member States may well be involved as litigants. Also, the recognition of an EU right may be informed by considerations of national law. The enquiry may address, for example, either overtly or by implication, the question whether the laws of Member States recognize a similar right.[27]

3.1.2 Conflicts between fundamental rights recognised by EU law and a national interest

This is the archetypal conflict in EU law and the locus where the integration game is primarily played out. The dialogue typically takes place through the preliminary reference procedure.[28] This category juxtaposes supra-national rights with domestic democratic choices and, as such, it has added political sensitivity. As the remit of EU law has expanded beyond the internal market, an increasing number of contestations between EU rights and national objectives do not involve economic rights arising from the four freedoms but civil liberties and social rights. The advent of citizenship, rich legislative activity in the area of freedom security and justice, the EU economic governance, and the rule of law crisis, have provided fruitful grounds for disputes in this area.

3.1.3 Conflicts between fundamental rights recognised by national law and EU objectives

The converse juxtaposition may arise where a fundamental right as recognised by national law clashes with the EU public interest. *Meloni*[29] and the *Taricco – MAS* litigation[30] provide prominent examples. In recent years, such conflicts have been the result of the resurgence of structural principles, especially effectiveness, mutual trust, and autonomy. Structural principles may come into conflict with, or condition, substantive ones. A prime example is provided by the principle of mutual trust which both in asylum law and the field of the European Arrest Warrant (EAW) may come into a trajectory of conflict with the protection of fundamental rights.[31] Similarly, the

[26] *See, e.g.,* Ref. Prelim. Rlg., *Schrems I*, EU:C:2015:650, ¶102*;* Ref. Prelim. Rlg., *Schrems II*, EU:C:2020:559, ¶68; Parliament v Council, Joined Cases 317/04 and C-318/04, ECLI:EU:C:2006:346; *Kadi I*, EU:C:2008:461, ¶ 142; Venezuela v. Council, Case C-872/19 P, EU:C:2021:507.

[27] *See, e.g.*, D. & Kingdom of Sweden v. Council, Joined Cases C-122/99 P & C-125/99 P, EU:C:2001:304, ¶ 26; Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709, ¶ 74.

[28] For a recent study on the degree of deference accorded to the Member States, *see* JAN ZGLINSKI, EUROPE'S PASSIVE VIRTUES: DEFERENCE TO NATIONAL AUTHORITIES IN EU FREE MOVEMENT LAW (2020).

[29] Reference for Preliminary Ruling, Melloni v. Ministerio Fiscal, Case C-399/11, ECLI:EU:C:2013:107, ¶ 49.

[30] Ref Prelim. Rlg., *Taricco*, EU:C:2015:555, ¶ 52-53; Ref. Prelim. Rlg., *M.A.S.*, EU:C:2017:936, ¶ 46-47.

[31] *See, e.g.*, Reference for Preliminary Ruling, N.S. v. Secretary of State for the Home Department, Joined Cases C-411/10 & C-493/10, EU:C:2011:865, ¶ 40; Reference for Preliminary Ruling, Jawo v. Bundesrepublik Deutschland, Case C-163/17, EU:C:2019:218, ¶ 87 (pertaining to conflicts between mutual trust and the need to avoid inhuman and degrading treatment of asylum seekers); Reference for Preliminary Ruling, Aranyosi & Caldararu v. Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 & C-659/15 PPU, EU:C:2016:198, ¶ 74; *L.M.*, EU:C:2018:586, ¶ 72 (pertaining to the conditions under

principle of autonomy conditions the right to judicial protection by limiting recourse to alternative judicial fora.[32] Furthermore, effectiveness is not only an attribute of rights but also an attribute of EU obligations which may come into conflict with national fundamental rights guarantees.[33] The net result of the resurgence of structural principles is that the application of EU law may lead to a lower protection of fundamental rights than that demanded by the national law of a Member State.

3.2 Conflicts between fundamental rights inter se

Constitutional rights, whether in the form of Charter rights or general principles of law, may point to opposite directions. Such conflicts are a well-established feature of national constitutional law as, for example, when the freedom of expression comes into conflict with the right to privacy. They may be managed at different levels. The constitution itself may recognize certain rights but not others or may draw, expressly or by implication, some form of ranking. Legislation may also seek to reconcile them by concretising and providing for exceptions. Prioritization and balancing are standard features of constitutional adjudication.

Although some of the rights protected by the Charter are understood to be absolute,[34] EU written law tends to shy away from express ranking of rights. Nonetheless, there is judicial ranking. The case law provides strong indications that the right to judicial protection stands at the very apex of the constitutional edifice.[35]

According to the case law, where rights compete with each other, a fair balance must be reached. Normative basis for this can be found in Article 52(1) of the Charter which states that rights may be limited to accommodate the rights of others. This balancing exercise has become more complex as integration has advanced. In some respects, this complexity exists irrespective of EU law. New rights emerge which may compete with established ones. Changes in the economy, new challenges such as climate change, social and cultural evolution, and technological advances create new trajectories of conflict. In other respects, the complexity is specific to EU

which the surrendering state may refuse to execute a European arrest warrant on grounds of breach of fundamental rights).

[32] *ECHR*, EU:C:2014:2454 (where the ECJ found that the draft treaty governing the accession of the EU to the Council of Europe interfered with the system of judicial protection established by the EU treaties); Reference for Preliminary Ruling, Slovak Republic v. Achmea BV, Case C-284/16, EU:C:2018:158, ¶ 59-60 (where the ECJ found that arbitration clauses in bilateral investment treaties between Member States are precluded by the principle of autonomy).

[33] *See, e.g.*, Ref. Prelim. Rlg., *Taricco*, EU:C:2015:555, ¶ 53-54; Ref. Prelim. Rlg., *M.A.S.*, EU:C:2017:936, ¶ 46-47 (conflict between, on the one hand, the need to provide effective penalties against fraud affecting the EU financial interests and, on the other hand, the principle of non-retroactivity of criminal statutes and the principle that the rules governing criminal liability must be sufficiently precise); Ref. Prelim. Rlg., *Eurobox*, EU:C:2021:1034, ¶ 215 (conflict between, on the one hand, the need to take effective measures to counter fraud against the EU budget and, on the other hand, rules guaranteeing the independence of the judiciary).

[34] These include at least human dignity (Article 1), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery (Article 5(1)). In relation to the latter, see Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) OJ 2007, C 303/17 at C 303/18. Note however that even in relation to absolute rights, the scope of application of the right and its substantive content, and therefore the recognition of possible limitations, is a matter of judicial interpretation which also entails balancing.

[35] *See infra*, notes 52 et seq. and accompanying text.

law. The expansion of EU competence, the growth of Union legislation, and the proliferation of EU constitutional rights has resulted in the EU embracing a wider spectrum of rights and the ensuing need to compromise them. The Charter, being all embracing, protects a variety of principles, rights and freedoms which may be contradictory and priority may need to be given to one or other of them in specific circumstances. Also, EU measures increasingly cover diverse aspects of economic life and may protect opposing interests. Such statutory conflicts are often concretisations of tensions between clashing constitutional rights. In terms of political power, the colonization of rights and state imperatives by EU law has made the weighing game more horizontal, i.e. between competing EU rights and less vertical, i.e. between competing EU and national rights.[36] The ECJ has stressed that an assessment must be carried out in accordance with the need to reconcile the opposing rights and strike a fair balance between them.[37] That duty is imposed on both the national authorities when they implement or apply a directive and the courts in interpreting the measures in issue.[38] In general, rules which foreclose balancing are unlikely to find judicial favour.[39] The gradual shift towards a more horizontal juxtaposition of conflicting EU interests, however, need not mean less involvement of national courts. The latter may also perform that balancing subject to oversight by the ECJ whose optimal intervention is one of providing guidance to the national courts rather than prescribing outcomes in preliminary references.

Fair balance requires that the essence of each of the competing rights must be respected. It does not mean that the assessment starts from a position of complete equality among the juxtaposing rights. As stated above, the right to judicial protection stands at the apex, being the gateway for the exercise of virtually every other right.[40] The right to personal data enjoys an elevated rank. In *Google Spain*[41] the Court gave priority to that right and the right to private and family life over freedom of expression. Even where the scales are tilted in favour of one of the rights, the outcome will depend on considering all the facts and the nuances of the case. Even weaker rights may take precedence on the specific facts. It is unlikely that ranking itself, such as it might exist, would provide a definitive resolution. The bargain remains as incomplete as when a right needs to be balanced vis-à-vis the public interest.

Such horizontal conflicts may also take place between free movement rights, on the one hand, and civil liberties or social rights, on the other. *Schmidberger*[42] and

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[36] *See, e.g.*, Reference for Preliminary Ruling, Deutsches Weintor eG v. Land Rheinland-Pfalz, Case C-544/10, EU:C:2012:526, ¶ 54; Reference for Preliminary Ruling, Sky Österreich GmbH v. Österreichischer Rundfunk, Case C-283/11, EU:C:2013:28, ¶¶ 58-60.

[37] *See, e.g.*, Reference for Preliminary Ruling, Productores de Música de España (Promusicae) v. Telefónica de España, Case C-275/06, EU:C:2008:54, ¶¶ 65-66; Ref. Prelim. Rlg., *Deutsches Weintor*, EU:C:2012:526, ¶ 47.

[38] *Productores de Música de España (Promusicae)*, Case C-275/06, EU:C:2008:54, ¶ 68.

[39] *See* Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v. Administración del Estado, Joined Cases C-468/10 & C-469/10, EU:C:2011:777.

[40] See *Les Verts v Parliament*, C-294/83, ECLI:EU:C:1986:166, ¶ 23; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84, EU:C:1986:206, ¶¶ 17-19.

[41] Google Spain v. AEPD, Case C-131/12, EU:C:2014:317.

[42] Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich, Case C-112/00, EU:C:2003:333.

Omega[43] stand out as gestures of reconciliation with the national constitutional traditions. The latter, especially, illustrates a nation-state friendly view of integration: EU law does not dictate a uniform view of public policy and the integration paradigm can accommodate different balancing outcomes at national level.[44]

4. BALANCING FACTORS: WHAT FACTORS DOES THE ECJ TAKE INTO ACCOUNT IN RESOLVING CONFLICTS?

In resolving conflicts between countervailing interests or rights, the Court may take into account a number of factors. These factors, and the relative weight attached to each, may differ depending on a number of parameters. Although this is not an exhaustive list, the following factors may play a role in the judicial assessment:

1) The importance of the right at stake;

2) The extent to which the right has been the subject of legislative elaboration;

3) The seriousness and extent of its restriction;

4) Whether the restriction emanates from EU or national law;

5) The importance of the countervailing public interest or the countervailing right at stake;

6) Process considerations;

7) The perceived degree of consensus among the laws of the Member States on the issue at stake;

The above factors may also play a role in deciding whether, in a preliminary reference, the Court will reach an outcome itself or leave a matter to be decided by the national court. We will examine them briefly in turn.

1) The importance of the right in the EU normative hierarchy

Other things being equal, the level of constitutional tolerance is in inverse proportion to the ranking of the right in the normative hierarchy. In EU law, there is no tiered scrutiny as understood in US constitutional law. The ECJ itself rarely addresses the level of scrutiny that it applies, although there is more openness in recent years.[45] Nonetheless, it is reasonable to expect that the importance of a right will have an influence on the level of scrutiny that the ECJ will be prepared to exercise. The right to judicial protection, gender equality, non-discrimination irrespective of race or ethnic origin, and the right to personal data appear to be at the apex, although this list should not be treated as exclusive. As stated earlier,[46] some

[43] Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, Case C-36/02, EU:C:2004:614, ¶ ¶ 37, 41 [hereinafter *Omega*].

[44] *Compare* International Transport Workers Federation & Finnish Seamen's Union v. Viking Line ABP, Case C-438/05, EU:C:2007:772; Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, Case C-341/05, EU:C:2007:809.

[45] *See, e.g.*, Digital Rights Ireland, Joined Cases C-293/12 & C-594/12, EU:C:2014:238, ¶ 47.

[46] Supra, n. 34 and accompanying text.

Charter rights are viewed as absolute: these will also deserve the highest level of scrutiny. The importance of the right will thus affect whether it will trump an EU or a national measure. It may also affect whether, in preliminary references, the ECJ will leave the balancing to the national court. In relation to key or new rights, the Court may wish to provide leadership setting a standard throughout the Union. It is no accident that, in many cases pertaining to civil liberties, the ECJ has provided not just guidance to the national court but a ready-made solution as to the effect of the right in issue in the national proceedings.[47]

Also, where two fundamental rights are in a trajectory of conflict and one of them is higher ranking, one would expect that such priority would influence the balancing exercise. Nonetheless, ranking is but one of the factors in the assessment and by no means conclusive as to the result. Thus, the right to judicial protection stands at the top of the edifice but cannot authorise a disproportionate interference with the right to property. An example of the fair balance approach is provided by *Scarlet Extended SA*.[48] A management company representing composers brought proceedings against Scarlet, an internet service provider (ISP), arguing that internet users using its services were downloading works illegally. It sought an injunction requiring Scarlet to install a mechanism making it impossible for its customers to have access to musical files without permission. The Court found that such an injunction would be incompatible with EU law. It reasoned, inter alia, that such an injunction would result in a serious infringement of the ISP's freedom to conduct its business under Article 16 of the Charter. Although the right to intellectual property is protected by Article 17(2) of the Charter, granting the injunction would not strike a fair balance between the protection of copyright and the SPI's protection of the right to trade. Furthermore, the injunction would infringe the fundamental rights of the ISP's customers, namely their right to protection of their personal data and their freedom to receive and impart information which are guaranteed by Articles 8 and 11 of the Charter.

The issue of prioritisation arises, more generally, in relation to Treaty provisions. Although all provisions included in the TEU and TFEU, in principle, have the same formal rank,[49] some of them are in substance more important than others in defining the EU blueprint. Notably, starting with Opinion 2/13,[50] the ECJ sought to articulate the salient features of the integration paradigm with a view to defining the autonomy of EU law. This provides a sense of prioritization which may also influence the level of judicial scrutiny. More generally, the heightened importance of some Treaty provisions has the following legal value: 'lesser' provisions must be interpreted in the light of the more important ones; and an amendment to a key Treaty provision should not be made surreptitiously by amending a 'lesser' one. There is, in other words, a presumption that a fundamental

[47] *See, e.g., Schmidberger*, EU:C:2003:333; *Omega*, EU:C:2004:614; Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709; *Portuguese Judges*, EU:C:2018:117; Takis Tridimas, *Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction*, 9 INT'L J. OF CON. LAW 737 (2011).

[48] Scarlet Extended SA v. SABAM, Case C-70/10, EU:C:2011:771.

[49] Differences in formal rank are recognized by the fact that the TEU provides for simplified revision procedures under which certain Treaty provisions can be amended without the need to follow all the steps that apply under the ordinary revision process. *See* TEU art. 48.

[50] *ECHR*, EU:C:2014:2454.

Treaty principle could not be abrogated or restricted except with the clearest of languages.[51]

The right to judicial protection stands at the apex of EU fundamental rights. In no other area has the Court been more active. Some components of it, i.e. judicial independence, are part of the very essence of the rule of law as an EU value.[52] The case law places emphasis on the confirmatory function of Article 47 of the Charter:[53] it reaffirms but does not create a fundamental principle of law which had already been established by the Court.[54] It may be said that the salient features of that right are the following.

It is universal, in that it is enjoyed by anyone subject to EU law and, in relation to third countries, at least some aspects of it are not subject to reciprocity.[55] It is bifurcated, in that it is guaranteed by both the CJEU and the national courts which together are said, albeit optimistically, to guarantee a complete system of remedies.[56] It has reached an almost supra-constitutional status, in that the ECJ has engaged in a procrustean interpretation of the Treaties to accommodate it, departing from its text for this purpose more than it has done for any other. It may result in the availability of a procedure even in cases where it appears to be excluded by the Treaties,[57] the extension of judicial review to acts whose judicial control the Treaties place beyond the Court's jurisdiction,[58] or the extension of standing to parties beyond those stated in Treaty text.[59] Finally, it is conceived within a distinct EU constitutional design which is premised on the autonomy of EU law and the exclusivity of the jurisdiction

[51] Support for this proposition can be derived from Opinion 1/91 [1991] ECR I-6079, where the ECJ appeared to suggest that the Member States may not amend the system of judicial protection provided in the Treaties by amending Article 238 EEC (now Article 272 TFEU) which relates to association agreements. It seems that such an amendment can only be made by express revision of the Treaty provisions that govern the ECJ. Creation of the European Economic Area, Document 61991CV0001, EU:C:1991:490, ¶¶ 71-72 [hereinafter *EEC*]. *See also Kadi I*, EU:C:2008:461, ¶¶ 303-04 (where the Court held that Article 307 EC (now Article 351 TFEU), which provides for respect of commitments undertaken by Member States under international law prior to joining the EU, could not curtail the Court's jurisdiction to review the compatibility of EU law with fundamental rights). The TEU also recognizes a form of express prioritization by providing that some provisions but not others are subject to a simplified amendment process. *See* TEU art. 48.

[52] *See, e.g., L.M.*, EU:C:2018:586, ¶ 48; *Portuguese Judges*, EU:C:2018:117, ¶ 36 and ¶ ¶ 41-43.

[53] *See, e.g.*, The Queen, on the Application of PJSC Rosneft Oil Company v. Her Majesty's Treasury, Case C-72/15, EU:C:2017:236, ¶ 73; Chartry v. État Belge, Case C-457/09, EU:C:2011:101, ¶ 25; Masdar v. Comm'n, Case C-47/07 P, EU:C:2008:726, ¶ 50.

[54] *Kadi I*, EU:C:2008:461, ¶ 335; Unibet (London) Ltd. And Unibet (International) Ltd. v. Justitiekanslern, Case C-432/05, EU:C:2007:163; Johnston v. Chief Constable of the Royal Ulster Constablery, Case 222/84, EU:C:1986:206, ¶¶ 18-19.

[55] *Venezuela*, EU:C:2021:507, ¶ 52.

[56] *See, e.g.*, Les Verts, EU:C:1986:166, ¶ 23; Inuit Tapiriit Kanatami and Others v. European Parliament and Council, Case C-583/11 P, ¶ 92, EU:C:2013:625.

[57] *See, e.g.*, Rosneft, Case C-72/15, EU:C:2017:236 (holding that, irrespective of the terms of Article 275(2) TFEU, the ECJ has jurisdiction to examine the validity of restrictive measures imposed on individuals on a reference for a preliminary ruling and not only on a direct action under Article 263(4) TFEU).

[58] *See* Les Verts, EU:C:1986:166; *see also* H. v. Council, Case C-455/14 P, EU:C:2016:569, ¶ 30 (holding that a decision of the EU Police Mission in Bosnia-Herzegovina to redeploy personnel seconded by a Member State and not by the EU was amenable to judicial review even though it had been taken on a CFSP legal basis).

[59] *See* Parliament v. Council (Chernobyl Case), Case C-70/88, EU:C:1991:373.

of the ECJ. This may in fact limit rather than expand its ambit. *Achmea*[60] held that investor-state arbitration clauses in intra-EU BITs are incompatible with EU law. In *Komstroy*,[61] the foreclosure effect of EU law was expanded. Member States may not allow any *inter se* disputes relating to the interpretation or application of EU law to be submitted to any investment arbitration tribunal set up by an international treaty, including mixed agreements concluded with third countries. Essentially, the right to judicial protection stands at the apex of EU law but it is conditioned by the EU integration project.

Outcomes reached in the case law suggest that the principle of non discrimination and the right to personal data also enjoy enhanced status. Quantitatively, reliance on those rights enjoys more success than reliance on others fundamental rights. *Test Achat*[62] and *Google Spain*[63] provide testament to that. Also, as *Mangold*[64] and *Bauer*[65] testify, some social rights may take centre stage. By contrast, freedom of religion, whilst recognised as fundamental rights, appear to be more relative.[66]

Notably, where a case concerns both the compatibility of a national measure with a fundamental freedom of movement and with an overlapping Charter right, the judicial enquiry is conflated and the standard of scrutiny appears to be the same. The case law here has evolved. In *SEGRO*,[67] the Court found Hungarian law which abolished acquired rights of usufruct over agricultural land to be in breach of the free movement of capital. Once it made the finding that the law could not be justified either by overriding reasons in the public interest or on the basis of Article 65 TFEU, it considered it unnecessary to examine whether it also violated Article 17 (right to property) and Article 47 (right to a fair trial) of the Charter.[68] In more recent case law, the Court has taken a different view making separate fundings that a measure is incompatible both with the free movement of capital and rights enshrined in the Charter.[69] This has an important signalling effect. It increases the resonance of the Charter and stresses that a Member State is in breach not only of economic freedoms but also civil liberties. However, in the above cases, the establishment of an independent violation of a Charter right was not preceded by a separate proportionality analysis. Once it was established that the national measure was not justified as a restriction on the free movement of capital, the finding that there was a

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[60] *Achmea*, EU:C:2018:158.

[61] République de Moldavie v. Komstroy LLC, Case C-741/19, EU:C:2021:655.

[62] Association Belge des Consommateurs Test-Achats ASBL and Others v. Conseil de Ministres, Case C-236/09,
EU:C:2011:100.

[63] Op.cit. supra, n.41.

[64] Ref. Prelim. Rlg., *Mangold*, EU:C:2005:709 (pertaining to the prohibition of discrimination on grounds of age).

[65] *Bauer*, EU:C:2018:871 (pertaining to the right to annual leave).

[66] *Centraal Israëlitisch Consistorie van België, Unie Moskeeën Antwerpen VZW and Others v Vlaamse Regering*, Case C-336/19, ECLI:EU:C:2020:1031.

[67] SEGRO, Joined Cases C-52/16 & C-113/16, EU:C:2018:157.

[68] SEGRO, op.cit, supra, ¶ 128.

[69] *See* Comm'n v. Hungary (Rights of Usufruct Over Agricultural Land), Case C-235/17, EU:C:2019:432 (finding a breach of both Article 63 TFEU and Article 19 of the Charter); Comm'n v. Hungary (Transparency Case), Case C-78/18, EU:C:2020:476 (finding a breach of both Article 63 TFEU and Articles 7, 8 and 12 of the Charter).

breach of the Charter ensued on the strength of the same analysis: proportionality as a constitutional principle for the protection of the individual and as a market integration principle go hand in hand. On the same vain, it was held in *Pfleger*[70] that where a national restriction on inter-state trade fails the test of proportionality and is therefore found to be in breach of the free movement of services, it is also an impermissible restriction on Article 15 (freedom to conduct a business) and Article 17 (right to property) of the Charter. The reverse is also true. Where a restriction is found to be justified by an express derogation to a fundamental freedom or an imperative requirement in the national interest, it is also proportionate under Articles 15 and 17 of the Charter.[71] *Pfleger*, however, does not mean that the standard of proportionality is always uniform. It does not exclude the possibility that the standard of protection might be higher under free movement that it is under the Charter. It is possible that a national measure which *per se* is not a disproportionate restriction on the freedom to conduct a business may nonetheless be a disproportionate restriction on access to the market, for example, because it may favour local suppliers.

2) Legislative elaboration

Whether the right exists merely at the constitutional plane or has been articulated by EU legislation is a relevant factor in many respects. It is of relevance when the ECJ assesses the compatibility of a national measure with EU law. Where EU legislation exists, assessment of national law does not occur by reference to a general principle, a Charter right or a Treaty provision but by reference to a specific legislative text.[72] The greater the degree of specificity of the right and the restrictions imposed on it, the less the margin of discretion left to the Member States. Primacy and pre-emption take over. Nonetheless, the underlying primary law right that the EU legislation operationalises is still relevant since the legislation must be read in its light. The judicial inquiry therefore is likely to contain two steps although they may be implicit. First, the EU legislation must be interpreted in the light of the primary EU law right in issue; then the national measure has to be assessed in the light of the EU legislation thus interpreted.[73]

The existence of legislation is also important from the point of view of legitimacy. If the EU legislature has spoken, this means that the Member States have exercised a collective choice having considered the issues involved, and the outcome enjoys, such as they are, the democratic credentials of the legislative process. The legitimating function of legislative designation is illustrated by *Mangold*[74] and *Bauer*.[75] Both cases were striking for attributing horizontal effect to the general principles and the Charter respectively and for viewing directives as the mere

[70] Pfleger and Others, Case C-390/12, EU:C:2014:281, ¶¶ 57-60.

[71] *See* Opinion of Advocate General Sharpston, Pfleger and Others, EU:C:2013:747, ¶¶ 69-70.

[72] In the same vein, a Member State may not rely on a Treaty provision derogating from a fundamental freedom to protect an interest insofar as the interest has been protected by EU legislation: *see, e.g,* Reference for Preliminary Ruling, The Queen v. Ministry of Agriculture, Fisheries and Food (Lomas), Case C-5/94, EU:C:1996:205.

[73] *See, e.g.,* A v. Veselības Ministrija, (jehovah's Witness Case), Case C-243/19, EU:C:2020:872.

[74] Ref. Prelim. Rlg., *Mangold,* EU:C:2005:709.

[75] *Bauer*, EU:C:2018:871.

concretization of pre-existing constitutional rights. Nonetheless, in both cases the Court gave legal effect to an outcome that had already been endorsed by the legislature and not merely a vague constitutional right. Although methodologically unpersuasive, the Court's reasoning in both cases illustrates the legitimating effect of legislating. In more general terms, the relationship between constitutional rights and legislation in EU law remains problematic.[76] The ECJ does not hesitate to supplement legislation on the basis of general principles[77] or even amend it in the light of the putative objectives of the legislature in circumstances where they are far from clear or even contradict the legislative outcome.[78]

It will be noted, however, that the adoption of legislation does not necessarily work to the advantage of fundamental rights. The concretization of the bargain may lead the ECJ to take a narrower view of their scope or content. *Dano*[79] and *Alimanovich*[80] provide testament to that approach signalling retreat from previous case law in the field of social rights in the context of free movement.

The existence of EU legislation may also be relevant in determining whether a national right may trump an EU interest. In *M.A.S.*,[81] retreating from its earlier ruling in *Taricco*,[82] the Court held that the principle that the rules on criminal liability must be sufficiently precise, which is guaranteed by Article 49(1) of the Charter, meant that a rule of national criminal procedure could not be disapplied by a national court even if its application resulted in fraud against EU finances not been pursued effectively. It would be for the national legislature to take the necessary measures.[83] In the absence of such measures, the certainty of criminal laws could not be sacrificed in the interests of fighting fraud against the EU budget. In reaching that conclusion, the Court took into account that, at the material time, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU. Italy was thus free to consider that those rules form part of substantive criminal law, and were thereby subject to the principle that offences and penalties must be defined by law.[84] The implication of the Court's reasoning is that, if the EU had validly adopted a regulation in that area, any conflicting provisions by Italian law would need to be set aside by a domestic court.[85]

3) The seriousness and extent of the restriction

Other things being equal, the level of constitutional tolerance is also in inverse proportion to the seriousness of the restriction on the right in issue. In this context, Article 52(1) of the Charter, in line with the constitutional traditions of many

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[76] For as full discussion, *see* Elise Muir, *The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges*, 51 COMMON MKT. L. R. 219 (2014).

[77] *Sturgeon*, EU:C:2009:716.

[78] See *Association Belge des Consommateurs Test-Achats*, EU:C:2011:100.

[79] Reference for Preliminary Ruling, Dano v. Jobcenter Leipzig, Case C-333/13, EU:C:2014:2358.

[80] Reference for Preliminary Ruling, Jobcenter Berlin Neukölln v. Alimanovich and Others, Case C-67/14, EU:C:2015:210.

[81] *M.A.S.*, EU:C:2017:936.

[82] *Taricco*, EU:C:2015:555.

[83] *M.A.S.*, EU:C:2017:936, ¶ 60.

[84] *Id*. ¶ 45.

[85] *Compare Eurobox*, EU:C:2021:1034, ¶ 209 (distinguishing *M.A.S.*).

Member States, draws a distinction between the essence and the periphery of rights. Whilst intrusions on the essence are beyond balancing, restrictions on the non-essential elements are subject to proportionality review. The concept of essence, however, is highly elusive. Whilst the distinction is logical, in practice it is extremely difficult to draw. This, in turn, limits the functionality of 'essence' as a judicial tool.[86]

Subject to the protection of essence, a serious interference would call for a higher level of justification. Conceptually, it may be said that a more serious interference does not entail a higher level of scrutiny. The latter depends on the importance of the right affected rather than the intensity of restriction. On this understanding, the Court may find a measure to be unacceptable not because it applies a higher level of scrutiny but because the interference is more serious and lacks justification. Nonetheless, in practice, the distinction is very difficult to draw.[87] Balancing takes place through the application of proportionality which is understood to entail a three-part test:[88] first, it must be established whether the measure is suitable to achieve a legitimate aim (test of suitability); secondly, whether the measure is necessary to achieve that aim, namely, whether there are other less restrictive means capable of producing the same result (the least restrictive alternative test); and thirdly, even if there are no less restrictive means, it must be established that the measure does not have an excessive effect on the applicant's interests (proportionality *stricto sensu*). Under the third test, the authority may be required to adopt a less restrictive measure even if the latter is less effective in attaining the objective in question.[89] *Stricto sensu* proportionality is a head-on balancing act where two competing interests are weighted. However, its relationship with 'essence' remains conceptually problematic. The assumption is that there are core elements of the right which are beyond balancing; but also that there are interferences with non-core elements which are too excessive and thus cannot be tolerated even though they do not affect the essence. This is a valid logical construction but asks too much from the court. In the context of dispute resolution, the essential elements of a right cannot be determined in *abstracto* but only by reference to the severity of the specific restriction claimed. The two elements are, in fact, impossible to separate so that, in practice, the force of the restriction serves as an important determinant of the definition of the right. A court has to provide a concrete solution to specific facts avoiding as much as possible general pronouncements. Thus, in most cases, it makes sense to resolve the case on the basis of whether the restriction is excessive rather than on fine conceptual definitions of the elements of a right.

Also, the *stricto sensu* proportionality test must be seen in context. First, it is conditioned, like the other tests of proportionality, by the applicable level of

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[86] For a rare case where the ECJ found breach of essence, *see Schrems I*, EU:C:2015:650. For a wider discussion of the issue, *see* P. Takis Tridimas and Giulia Gentile, *The Essence of Right: An Unreliable Boundary?* 20 GER. L. J. 794 (2019).

[87] AGET Iraklis v. Minster of Labour, Case C-201/15, EU:C:2016:972, ¶ 99.

[88] Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, *in* 13 YEARBOOK OF EUROPEAN LAW 105, 113 (1993).

[89] *See* Opinion of Advocate General Maduro, Ahokainen and Leppik, Case C-434/04, EU:C:2006:462, ¶ 26.

scrutiny. Where the EU legislature enjoys broad discretion, *stricto sensu* proportionality is limited to assessing whether the contested measure leads to disadvantages which are manifestly disproportionate to the aims pursued.[90] Secondly, the second and third tests of proportionality are often inextricably linked and their separation may not be able to capture the essence of the judicial enquiry. Thirdly, the difficulty with balancing is that the interests in issue may well exist in different plains in a way that makes their juxtaposition non amenable to an objective rational analysis: how is it possible to measure the need to ensure protection of public security or public health vis-à-vis commercial freedom or the right to judicial protection? Nonetheless, it is difficult to see how balancing can be avoided. Although it may be carried out under different guises, in constitutional adjudication, and indeed more generally in law,[91] balancing is omnipresent and a necessary element of rights review. In general, whilst Advocates General are more willing to separate the three aspects of proportionality,[92] the ECJ tends to structure its analysis under the twin principles of suitability and necessity without separating between the second and the third test of proportionality, thus leaving itself more discretion. Nonetheless, in more recent case law relating to the Charter, the analysis has become more structured addressing separately each limb of proportionality.[93]

The importance attached to *stricto sensu* proportionality depends on the level of judicial scrutiny and on whether the measure stems from the EU or a national decision maker. Where the Court assesses the proportionality of an EU measure in the field of economic regulation where the EU has broad discretion, it applies a manifest error test which allows limited scope for a *stricto sensu* proportionality analysis. In particular, in relation to the objective of public health, it has been held that it takes precedence over economic interests[94] and may justify even substantial negative economic consequences for certain economic operators.[95] According to Øe AG, this essentially means that the other elements of proportionality absorb the *stricto sensu* test. Once a measure intended to protect public health has passed the first and the second elements of proportionality, it necessarily complies with the third test as far as commercial interests are concerned.[96]

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[90] See Reference for Preliminary Ruling, Opinion of Advocate General Øe, Swedish Match v. Secretary of State for Health, Case C-151/17, EU:C:2018:241, ¶ 84; Gauweiler and Others v. Deutscher Bundestag, Case C-62/14, EU:C:2015:400, ¶ 91.

[91] Robert Alexy, *On Balancing and Subsumption: A Structural Comparison*, 16 RATIO JURIS 433, 436 (2003).

[92] *See, e.g.,* The Queen v. The Minister for Agriculture, Fisheries and Food and the Secretary of State for Health, Case C-331/88, EU:C:1990:391 [hereinafter *FEDESA*]; *Leppik*, EU:C:2006:462; Opinion of Advocate General Jääskinen, Novo Nordisk AS v. Ravimiamet, Case C-249/09, EU:C:2010:616; *Swedish Match*, EU:C:2018:241. By implication, *see also* Opinion of Advocate General Sharpston, Volker und Markus Schecke GbR, Joined Cases C-92/09 & C-93/09, EU:C:2010:353, ¶120.

[93] *See, e.g.*, Schwarz v. Stadt Bochum, Case C-291/12, EU:C:2013:670, ¶ 64 (which gave a clean bill of health to the storage of fingerprints in passports under Council Regulation No 2252/2004). For an early example where the Court annulled an EU measure on the basis of the *stricto sensu* proportionality test, *see* Bela-Mühle v. Grows-Farm (Skimmed Milk Case), Case C-114/76, EU:C:1977:116, ¶ 7.

[94] *See* Artegodan v. Comm'n, Case C-221/10 P, EU:C:2012:216, ¶ 99.

[95] *See Swedish Match*, EU:C:2018:241, ¶ 54. *See also Nelson and Others*, Joined Cases C-581/10 & C-629/10, EU:C:2012:657, ¶ 81.

[96] *See Swedish Match*, EU:C:2018:241, ¶ 87.

The systemic or otherwise character of the restriction on a right may also be a relevant factor. The case law does not define the term 'systemic'. It may be taken to refer to a deficiency in the protection of rights which derives from intrinsic weaknesses in the system of justice,[97] and has a generalized rather than ad hoc character. The characterisation of a deficiency as systemic may be relevant in many respects. First, it becomes material in tempering the application of mutual trust in the context of freedom, security and justice.[98] Secondly, a restriction or violation of a right that can be characterized as systemic is more likely to be considered as serious and thus less likely to be tolerated. Thirdly, it becomes important in activating the application of Article 19(1) TEU, and thus bringing within the jurisdictional control of the CJEU, national measures which do not fall within the scope of EU law in the traditional sense. In the *Portuguese Judges* case,[99] the ECJ breathed independent meaning to Article 19(1) and elevated it to an overarching principle linked to Article 2 TEU, holding that the two provisions taken together impose obligations which are autonomous in the sense that they go beyond the reach of the Charter. Although the Court did not use the term systemic, *Portuguese Judges* is first and foremost about institutional powers and government structures and not about substantive rights in concrete situations. The Court essentially held that the values of the Union entail certain institutional guarantees, including judicial independence. National laws must protect those guarantees in relation to judicial institutions which in *abstracto* may apply EU law.

It will be noted that not every restriction of an important right is a severe restriction. In *Eurobox*,[100] the Romanian Constitutional Court had quashed convictions of a number of high officials for fraud against EU finances on the ground that they had been made by judicial panels that had been improperly constituted: under a law passed in 2004, all five members of the panel ought to have been selected by the drawing of lots but, in the cases in issue, only four members had been so selected. Also, under Romanian law, the judicial panels ought to have been composed of specialist judges but some were not. According to the Constitutional Court, these violations entailed the absolute nullity of the convictions. That court also decided that its decision was applicable to pending cases and cases which had been ruled upon, in so far as there was still time for individuals to exercise extraordinary legal remedies. The result of that approach was that a number of prosecutions for the misfeasance of EU funds were likely to be barred.

The ECJ held that the decisions of the Constitutional Court might create a systemic risk of serious fraud affecting the EU's financial interests going unpunished. If the national court determined that such a risk indeed existed, the penalties provided for in national law to counter such offences could not be regarded

[97] *See* R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department, [2014] UKSC 12, [52], [66].

[98] *See, e.g.*, N.S. v. Secretary of State for the Home Department, Joined Cases C-411/10 & C-493/10, EU:C:2011:865, ¶ 106; *L.M.*, EU:C:2018:586, ¶ 79; Abubacarr Jawo v. Bundesrepublik Deutschland, Case C-163/17, EU:C:2019:218, ¶ 90; Ref. Prelim. Rlg., *Aranyosi and Căldăraru*, EU:C:2016:198, ¶ 104.

[99] *See Portuguese Judges*, EU:C:2018:117, ¶ 32.

[100] *See Eurobox*, EU:C:2021:1034.

as effective and would be incompatible with EU law.[101] The ECJ accepted that the irregular composition of a judicial panel would entail an infringement of Article 47 of the Charter but, in the cases in issue, the infringements were minor: it did not appear that there was 'a manifest breach of a fundamental rule of Romania's judicial system', such as to call into question the fact that the panels hearing cases were not tribunal 'previously established by law'.[102] The judgment might appear to relativize the independence of the judiciary going against the grain of the ECJ's powerful rule of law jurisprudence. However, it has to be seen in the context of the legal and factual background of the cases in issue, the undertakings given by Romania upon accession to provide effective prosecution of corruption, and the underlying tensions between the Romanian High Court of Cassation that made the reference and the Constitutional Court.

4) Whether the restriction emanates from EU or national law

A relevant consideration is the EU or national origin of the measure. Where the Court assesses the compatibility of an EU policy measure, it will strike it down only if it is 'manifestly inappropriate'.[103] This test delineates what the Court perceives to be the limits of judicial function with regard to review of measures involving choices in areas where the EU institutions have wide discretion. It applies virtually in all fields where economic, social or political choices are to be made, including, for example, agriculture and fisheries,[104] transport,[105] social policy,[106] health protection,[107] measures to combat fraud against EU finances,[108] customs and the common commercial policy,[109] and foreign relations such as the decision whether to adopt economic sanctions and the general rules governing the sanctions regime.[110] It has also been applied to monetary policy measures[111] and the EU's asylum policy.[112]

By contrast, as a general rule, national decision makers do not benefit from such deference. The reason is that, when they act within the scope of EU law, they do not act as primary legislature and are constrained by the applicable EU rules. The difference in the standard of review evinces the different roles of proportionality. Where it is invoked as a ground for review of EU policy measures, the principle fulfils a dual objective. First, it seeks to protect the rights of the individual *vis-à-vis*

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[101] *Id.* ¶ 203.

[102] *Id.* ¶ 207.

[103] *See, e.g.*, *FEDESA*, EU:C:1990:391, ¶ 14; The Queen, on the Application of Vodafone Ltd. and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Case C-58/08, EU:C:2010:321, ¶ 52.

[104] *See, e.g.*, *FEDESA*, EU:C:1990:391, ¶¶ 12-18; AJD Tuna Ltd. v. Direttur tal-Agrikoltura u s-Sajd and Avukat Generali, Case C-221/09, EU:C:2011:153, ¶ 81.

[105] *See* Omega Air and Others, Joined Cases C-27 & C-122/00, EU:C:2002:161, ¶ 63.

[106] *See* United Kingdom v. Council, Case C-84/94, EU:C:1996:431, ¶ 58.

[107] *See, e.g.*, The Queen v. Secretary of State for Health, Case C-491/01, EU:C:2002:741, ¶ 126.

[108] *See* Comm'n v. ECB, Case C-11/00, EU:C:2003:395, ¶ 157.

[109] *See* Chabo v. Hauptzollampt Hamburg-Hafen, Case C-213/09, EU:C:2010:716, ¶ 31.

[110] *See* Melli Bank Plc v. Council, Joined Cases T-246 & T-332/08, EU:T:2009:266, ¶ 45; *affirmed in* Bank Melli Iran v. Council, Case C-548/09P, EU:C:2011:735.

[111] *See, e.g.*, *Gauweiler*, EU:C:2015:400, ¶¶ 91-92; Weiss and Others, Case C-493/17, EU:C:2018:1000, ¶ 24.

[112] *See* Slovak Republic and Hungary v. Council, Joined Cases C-643/15 & C-647/15, EU:C:2017:631, ¶¶ 207-08.

public intervention. Secondly, under Article 5(4) TEU, it also serves to protect the powers of the Member States vis-à-vis unwarranted EU centralization. In both roles, the standard of review appears to be the same and searches for a manifest error. The reasons which justify deference are the separation of powers and a pro-integration bias which is said to be grounded on the objectives and the provisions of the Treaties. In some respects, any doubting of EU competence, appears to be viewed by the ECJ as an existentialist threat. By contrast, where proportionality is invoked to challenge the compatibility with EU law of national measures affecting one of the fundamental freedoms, the Court is called upon to balance an EU *vis-à-vis* a national interest. The first role of proportionality outlined above, namely to protect the individual *vis-à-vis* public authorities, is traditionally less prominent and has a somewhat collateral character. The principle is applied primarily as a market integration mechanism and, as a general rule, the intensity of review is much stronger.

The difference in the standard of scrutiny is illustrated by contrasting the approach of the Court to restrictions on free movement imposed by national measures and such restrictions imposed by EU measures. Where EU measures restrict fundamental freedoms, the Court is more readily prepared to defer to the discretion of the EU institutions.[113] Indeed, there does not appear to be any case where an EU measure has been annulled for breach for the Treaty provisions on free movement. The difference in the standard of review is evident, for example, in the field of public health. EU interventions to protect it benefit from the manifestly inappropriate test.[114] By contrast, Member State measures which restrict the free movement of goods on grounds of national health receive closer scrutiny.[115] The reason is that national measures, by the very reason of their effects on market integration, have traditionally been viewed as suspect. National law makers are preoccupied with pursuing the national interest and more susceptible to succumbing to protecting in state interests. Even if they do not intend to pursue protectionism, any negative effects of policy making on out of state interests are unlikely to be a matter of concern. By contrast, in the case of EU action, there are both objectives-based and institutional safeguards. The very goal of the EU is to dismantle barriers to inter-state trade so any restriction that EU law imposes on free movement benefits

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[113] *See e.g.*, Pfeifer & Langen GmbH & Co. KG v. Bundesanstalt für Landwirtschaft und Ernährung, Case C-51/14, EU:C:2015:380, ¶¶ 37-38; The Queen on the Application of Alliance for Natural Health and Nutri-

link Ltd. v Secretary of State for Health, Joined Cases C-154 & C-155/04, EU:C:2005:449, ¶ 130; Meyhui NV v. Schott Zwiesel Glaswerke AG, Case C-51/93, EU:C:1994:312, ¶¶ 19-20. *Compare with* Fietje, Case 27/80, EU:C:1980:293, ¶ 15; Piageme and Others v. BVBA Peeters,

Case C-369/89, EU:C:1991:256, ¶ 17; Safety Hi-Tech Srl. v. S & T Srl., Case C-284/95, EU:C:1998:352, ¶ 62.

[114] *See e.g., FEDESA*, EU:C:1990:391; Jippes and Others v. van Landbouw, Natuurbeheer en Visserij, Case C-189/01, EU:C:2001:420; The Queen v. Secretary of State for Health (British American Tobacco), Case C-491/01, EU:C:2002:741; Portugal v. Comm'n, Case C-365/99, EU:C:2001:410. In *Jippes*, the Court held that in assessing the proportionality of a health protection measure, the criterion to be applied is not whether the measure in question was 'the only one or the best one possible' but whether it was manifestly inappropriate. *Jippes*, EU:C:2001:420, ¶ 83 (*affirmed by* Agrana Zucker GmbH v. Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, Case C-309/10, EU:C:2011:531, ¶ 44).

[115] *See, e.g.*, De Peijper, Case C-104/75, EU:C:1976:67; Comm'n v. United Kingdom (UHT Milk), Case 124/81, EU:C:1983:30.

from a presumption that the law intends to achieve as much liberalisation as possible. Also, all Member States have had the opportunity to have an input in law-making. The EU law makers are thus presumed to have taken into account the EU interest as a whole and any externalities caused by the measure.

It is doubtful whether such sharp distinction would be merited in relation to the application of the Charter. Both Union institutions and Member States should, in principle, be subject to the same accountability standard in relation to respect for fundamental rights. This is for a number of reasons. First, the concentration of more powers at EU level makes judicial vigilance necessary. In particular, EU competence in the field of freedom security and justice, including criminal law, empowers the Union to affect not only economic liberties but core aspects of civil rights.[116] Secondly, the main purpose of the Charter was to ensure that the EU institutions are constrained by a written catalogue of rights and thus mirror national constitutional safeguards. This is not to say that the Charter should not apply on Member States when they act within the scope of EU law. It rather recognizes that Member States had already been subject to fundamental rights safeguards provided by the national constitutions and the ECHR. Even if the EU institutions are not viewed as the primary addressees of the Charter, they are at the very least co-addressees on an equal footing with national governments. Thirdly, in contrast to restrictions on free movement, the EU law making process and the applicable institutional safeguards cannot be trusted to internalize fundamental rights externalities, at least not to the same extent as ones on free trade. It is not doubted that there is a genuine effort to take into account fundamental rights concerns in EU policy making. However, in contrast to free trade, they feature less as an objective and more as a constraint on reaching regulatory goals. They need to be balanced with a host of other interests, and the EU and the national interest may be aligned in seeking to restrict them e.g. to fight terrorism.

5) The importance of the countervailing public interest or the countervailing right at stake

It is evident that, in assessing the compatibility of a restriction with a right, consideration will be given to the interests that it seeks to pursue. The TFEU provides for a number of grounds which may justify restrictions on free movement.[117] These have been supplemented by judge-made derogations, the so called mandatory requirements or imperative reasons in the public interest. There is however no evidence that the case law will necessarily rank those interests differently in terms of the intensity of review. In general, it would not be correct to say that the level of scrutiny applied depends on the ground of derogation invoked. Each ground seeks to protect distinct interests although, inevitably, there is

[116] *See, e.g., Digital Rights Ireland*, EU:C:2014:238; *Tele2 Sverige AV v.* Post-Och Telestyrelsen, Joined Cases C-203/15 & C-698/15, EU:C:2016:970; *L.M.*, EU:C:2018:586 ; and the extensive economic sanctions case law starting with *Kadi I*, EU:C:2008:461.

[117] *See* Treaty on the Functioning of the European Union, art. 36, 45(3), 52, and 62, Oct. 26, 2012, 2012 O.J. (C 326) 1. Public security is also recognised as a ground of derogation from the free movement of capital: *see* TFEU art. 65(1)(b).

overlap.[118] All grounds of derogation listed in Article 36 TFEU, as exceptions from the fundamental freedoms are to be interpreted restrictively.[119] One would expect that deference would be greater if the national measure pursues goals which are an integral part of the EU objectives, e.g. public health or environmental protection. The Court will also take into account whether the measure has protectionist objectives or whether, irrespective of its objectives, it produces serious detrimental effects on inter-state trade. Thus, a measure which is protectionist of national economic or professional interests will receive little sympathy,[120] whilst a measure which has limited effect on inter-state trade will be easier to justify.[121] The subject-matter of the measure is also relevant. Thus, in the field of lotteries and gaming the ECJ has followed a hands-off approach recognising the diversity of national cultures.[122]

In a similar vein, Article 52(1) of the Charter requires as one of the conditions that must be satisfied for a limitation on a right to be legal that it must be necessary and genuinely meet objectives of general interest recognized by the Union (or the need to protect the rights and freedoms of others). There is no express ranking of general interest objectives. Each of them has to be assessed in the light of its specific attributes and the context of the case. The *Kadi* line of case law[123] testifies that, even in areas of high political sensitivity where public security is at stake, the ECJ does not favour executive unilateralism. Perhaps, the first judicial reaction to the War in Ukraine might suggest an approach more accommodating to the EU institutions.[124]

The more severe the impact on the rights of the individual, the greater the importance of the public interest needs to be to justify the measure.[125] The link between the severity of rights interference and the importance of the aim pursued was made clear in *Ministerio Fiscal*[126] in relation to the protection of the right to personal data. As the Court put it, a serious interference with that right can only be justified for the investigation and prosecution of serious criminal offences. By contrast, when access to personal data does not entail a serious interference, it is capable of being justified by the objective of investigating criminal offences generally. *Ministerio Fiscal* is distinct in that the ECJ, unusually, limited the types of objectives which could justify a restriction. A serious interference with the right to personal data could be justified in the interest of preventing serious crime. By

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[118] *See, e.g.,* Van Gennip BVBA and Others, Case C-137/17, EU:C:2018:771 (where the ECJ justified the requirement to hold authorization to purchase pyrotechnics both on grounds of public policy and public security); Cullet v. Leclerc, Case C-231/83, EU:C:1985:29 (invoking those two grounds).

[119] *See, e.g.,* Comm'n v. United Kingdom, Case C-124/81, EU:C:1983:30, ¶ 13.

[120] Deutscher Apothekerverband eV v. 0800 DocMorris NV, Case C-322/01, EU:C:2003:664.

[121] *See* Aragonesa de Publicidad Exterior SA and Publivía SAE v Departamento de Sanidad y Seguridad Social de la Generalitat de Cataluña, Joined Cases C-1/90 & C-176/90, EU:C:1991:327, ¶ 17.

[122] *See, e.g.,* Sporting Exchange Ltd. v. Minister van Justitie, Case C-203/08, EU:C:2010:307; Placanica and Others, Joined Cases C-338/04, C-359/04 & C-360/04; Liga Portuguesa de Futebol Profissional and Bwin International Ltd. v. Departamento de Jogos da Santa Casa da Misericórdia de Lisboa, Case C-42/07, EU:C:2009:519.

[123] *See Kadi I,* EU:C:2008:461; *Kadi II,* EU:C:2013:518.

[124] RT France v. Council, Case T-125/22, EU:T:2022:483.

[125] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 102 (2002).

[126] Ministerio Fiscal, Case C-207/16, EU:C:2018:788, ¶¶ 56-57.

contrast, as a matter of principle, it could not be justified in the interest of preventing non-serious crime and no balancing was required in that respect.

A discussion on balancing inevitably brings to the fore the national identity clause of Article 4(2), under which the EU is to respect the national identities of the Member States, inherent in their political and constitutional fundamental structures. To what extent is that clause a suitable instrument to trump EU rights or, more generally, limit the imposition of obligations on Member States? Article 4(2) requires the EU to respect certain essential state functions and defer to the way a Member State organizes internally the allocation of power among its authorities.[127] It imposes limitations on both the scope and the intensity of EU action and serves as a boundary but is ring fencing effect is limited. It may inform the interpretation of Treaty provisions and the general principles of law both in relation to their scope of application and their substantive content. It may thus provide an important weighing factor in assessing the proportionality of a national restriction on free movement where it is imposed to protect a constitutional value.[128] It does not, however, operate as a limit to the primacy of EU law. A Member State may not invoke it to avoid observance of EU fundamental rights or justify disrespect for the values of Article 2 TEU.[129] The national identity clause is intended to form part of the integration outlook as it emerges from a systematic interpretation of the Treaties rather than be exogenous, or an alternative, to it. Indeed, the case law suggests that it has had little influence in tempering the application of general principles of law and has not led to a broad interpretation of Treaty derogations.[130] The rule of law conditionality cases suggest that Article 4(2) takes effect within a tree of normative hierarchy recognizing as its apex Article 2 which defines the 'very identity of the European Union as a common legal order'.[131] Compliance with the essence of Article 2 values is the minimum obligation of membership that cannot be questioned on the basis of respect for national identity. The judgments however do not indicate an unduly restrictive interpretation of Article 4(2). It is in fact difficult to see how the arguments of Hungary and Poland could have succeeded without compromising fundamental premises of the integration model.[132]

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[127] *See, e.g.*, Digibet Ltd. and Gert Albers v. Westdeutsche Lotterie GmbH & Co. OHG, Case C-156/13, EU:C:2014:1756, ¶ 34; Remondis GmbH & Co. KG Region Nord v. Region Hannover, Case C-51/15, EU:C:2016:985.

[128] *See, e.g.*, Sayn-Wittgenstein v. Landeshauptmann von Wien, Case C-208/09, EU:C:2010:806, ¶ 92. *Compare with* Bogendorff von Wolffersdorff v. Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe, Case C-438/14, EU:C:2016:401; *Omega*, EU:C:2004:614.

[129] For a discussion of abuses of the national identity clause by national courts, *see* Oreste Pollicino, *Metaphors and Identity Based Narrative in Constitutional Adjudication: When Judicial Dominance Matters*, IACL-IADC BLOG, (Feb. 27, 2019), https://blog-iacl-aidc.org/2019-posts/2019/2/27/metaphors-and-identity-based-narrative-in-constitutional-adjudication-when-judicial-dominance-matters.

[130] *See, e.g.*, Coman and Others, Case C-673/16, EU:C:2018:385.

[131] Hungary v. Parliament and Council, Case C-620/18, EU:C:2020:1001, ¶¶ 127, 232; Poland v. Parliament and Council, Case C-401/19, EU:C:2022:297, ¶¶ 145, 264.

[132] In *Hungary v Parliament and Council*, Hungary argued that the mechanism introduced by the rule of law conditionality regulation infringed Article 4(2) on the grounds that it permitted the Commission to control the compatibility of national laws and practices with EU law even where they fell outside the scope of EU law and the obligation to protect national identities, rule of law conditions must be assessed differently in each Member State. *Hungary v. Parliament and Council*, EU:C:2020:1001, ¶¶

A countervailing national interest recognised by EU law does not provide a *carte blanche* to the Member States. Attention has focused in recent years on the reservation clause of Article 72 TFEU which states that the powers of the EU in the area of freedom security and justice 'shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.' The basic conclusions that derive from the case law in relation to that provision may be summarised as follows. As a derogation clause, it must be interpreted narrowly.[133] Measures for the maintenance of law and order do not fall entirely outside the remit of EU law. Article 72 does not confer on Member States the power to depart from EU law provisions merely by relying on the interest of law and order and internal security without proving that it is necessary to have recourse to the derogation in order to exercise its responsibilities in those areas.[134] The ECJ has refused the invitation to interpret Article 72 as authorising Member States to set aside EU measures,[135] or abrogate asylum rights.[136] The state powers protected therein are subject to a proportionality analysis and have to be seen in the context of EU measures that balance the need to maintain law and order and protect internal security with other objectives rather than superimposed on them.

6) Process considerations

What is the relative weight of substantive and procedural considerations in reviewing the compatibility of EU and national measures with EU law? Process is a *sine qua non* for any polity that claims to respect the rule of law. It also defines consent within the integration through law narrative: not all Member State may be committed to the same end but they are all committed to the same political structures and processes, which, as the EU legal order has evolved, have reached a level of high complexity and unusual sophistication. Legitimacy is defined to a large extent by reference to these processes[137] which, to some extent, replace national constitutional guarantees.[138]

Although in judicial review process considerations play a particularly important role, their significance is calibrated depending on a number of factors. Suffice it to make here the following observations.

202, 211, 222. For the Court's reasoning, *see id.*, ¶¶ 226 et seq. *Compare with Poland v. Parliament and Council*, EU:C:2022:297, ¶¶ 267-68.

[133] *See e.g.*, Comm'n v. Poland and Others (Temporary Mechanism for the Relocation of Applicants for International Protection), Joined Cases C-715/17, C-718/17 & C-719/17, EU:C:2020:257, ¶ 144.

[134] *Id.* ¶ 152.

[135] *See, e.g., id.* (Council relocation decisions following the migration crisis of 2015); NW v. Landespolizeidirektion Steiermark ,Joined Cases C-368/20 & C-369/20, EU:C:2022:298 (the Schengen Borders Code); WM v. Stadt Frankfurt am Main, Case C-18/19, EU:C:2020:511 (Return Directive).

[136] M.A. v. Valstybés Sienos Apsaugos Tarnyba, Case C-72/22 PPU, EU:C:2022:505.

[137] These include, for example, the procedures for adopting legislative and other acts and appointing members of the EU institutions, and, in the judicial plane, the preliminary reference procedure.

[138] This is, of course, not to deny the importance of the Article 2 TEU substantive values in the integration paradigm.

In those areas where the EU institutions enjoy ample discretion, process requirements assume 'even more fundamental significance'.[139] The idea is that where the Treaties give EU institutions ample discretion to make choices, the Court's power to review their merits is limited but this should, in turn, be compensated by strict adherence to process. The manifest error test does not apply to procedural requirements and in relation to them the standard of scrutiny, although not uniform, tends to be higher. Process requirements include the obligation for the enacting authority to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of reasons.[140] The juxtaposition between process and merits review reveals in some respects the civil – common law divide. In *Technische Universität München*,[141] which proved influential in the development of the law, the strengthening of process rights was the Court's response to calls by the referring German court for a thorough substantive review of the Commission's decision-making powers.

The truth however is that process and substance are closely intertwined. For one thing, the former shapes the latter. For another, the conceptualization of process requirements is driven by underlying tenets that often rely on substantive preferences. The requirement of reasoning, although in form purely procedural, if applied strictly, may unravel the decision-making process in a way that expresses substantive preferences. The distinction between giving reasons and giving good reasons is very thin.[142] The close connection between substance and process is evident in *Gauweiler*, where as part of the proportionality inquiry the CJEU examined closely the ECB's statement of reasons.[143] Proportionality review merged with process review. In any event, the distinction is relative: what one legal system may view as process, another may view as substance.[144]

An area where the CJEU has applied a high level of process scrutiny is the imposition of economic sanctions on individuals.[145] At different times, the EU has made extensive use of sanctions, among others, against Iran, Syria and Russia, non-state actors associated with the governments of those states, and person suspected of being associated with terrorism. Although the Court will not review the expediency of sanctions, which is a political question, the circumstances under which they are imposed on specific individuals is subject to judicial review. Economic sanctions are not criminal in nature and therefore the panoply of criminal due process is not available. Nonetheless, the CJEU has held that the imposition of freezing on individuals must respect the rights of defence and must be supported by a statement of reasons. Sanctions are subject to review of legality which in principle it has to be

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[139] *See* Crédit Agricole SA v. ECB, Case T-576/18 EU:T:2020:304, ¶ 31; Organisation des Modjahedines du Peuple d'Iran v. Council, Case T-228/02, EU:T:2006:384, ¶ 154.

[140] *See, e.g.*, *Gauweiler*, EU:C:2015:400, ¶ 69; *Weiss*, EU:C:2018:1000, ¶ 30; Technische Universität München v. Hauptzollampt München-Mitte, Case C-269/90, EU:C:1991:438, ¶ 14 [hereinafter *TUM*].

[141] *TUM*, EU:C:1991:438.

[142] *See* Martin Shapiro, *The Giving Reasons Requirement*, 1992 UNIV. OF CHICAGO LEGAL F. 179, 192 (1992). For a distinction, *see Rotenberg*, EU:T:2016:689.

[143] See *Gauweiler*, EU:C:2015:400.

[144] *See Taricco*, EU:C:2015:555; *M.A.S.*, EU:C:2017:936.

[145] Legal basis for the imposition of restrictive measures, including economic sanctions, on individuals is provided by Article 215(2) TFEU.

'full review'.[146] Although it is not the Court's task to substitute its own assessment of what is appropriate for that of the competent EU institution, it will not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it.[147]

Where the CJEU reviews the compatibility of a national measure with EU law, in some respects, process may be less important. Whether a measure was adopted by the national parliament, and thus benefits from a high level of legitimacy, or the executive or an institutionally independent national authority does not appear to affect the standard of scrutiny in carrying out proportionality review. In *Mangold*,[148] the Court found German law to be in breach of the general principle of non discrimination on grounds of age, exercising a high level of scrutiny, despite the fact that the German parliament had exercised a clear and rational choice. Under *Factortame*,[149] liability for breach of EU law is a universal principle and attaches also to acts of the legislature. Primacy is process blind in that it does not matter whether the offending measure is adopted by the national parliament or a lower level of authority or whether it has impeccable process credentials. In some cases, EU procedural expectations may even interfere with conceptions of democracy at national level and preciously held constitutional principles.[150]

This is not to say however that process at the national level is irrelevant. The general principles of EU law impose procedural expectations on state action going beyond express requirements imposed in the Treaties. In *Heylens*[151] the Court held that, to be compatible with the Treaties, a decision refusing a free movement right must be accompanied by reasoning. The *Beer case*[152] made it clear that a restriction on the free movement of goods can only be tolerated if it is accompanied by the right to judicial review: the economic constitution goes hand in hand with the substantive constitution. Process considerations may influence the Court's assessment of proportionality. In the *Animal Slaughter case*,[153] in finding the Flemish decree to be compatible with the freedom of religion, the CJEU took into account the fact that it had been adopted following wide consultation.

7) The degree of consensus among the laws of the Member States

Judicial balancing may be influenced by the perceived degree of consensus among the laws of the Member States. Such consensus may be a relevant consideration in deciding whether a premise is recognised as a general principle of

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[146] *Kadi II*, EU:C:2013:518, ¶ 132.

[147] *Id.* ¶ 142.

[148] *Mangold*, EU:C:2005:709.

[149] Brasserie du Pêcheur SA v. Bundesrepublik Deutschland (Factortame), Joined Cases C-46/93 & C-48/93, EU:C:1996:79.

[150] *See* R (HS2 Action Alliance Ltd.) v. Secretary of State for Transport [2014] UKSC 3 (Supreme Court of the United Kingdom expressing criticism in relation to the ECJ's interpretation of the Impact Assessment Directive).

[151] UNECTEF v. Heylens and Others, Case C-222/86, EU:C:1987:442.

[152] Comm'n v. Germany (German Beer Case), Case C-178/84, EU:C:1987:126.

[153] *Animal Slaughter Case*, EU:C:2020:1031.

EU law; whether a national solution is found to be compatible with the Treaties; or whether the matter is left to the national court to decide. The first case where the expression 'constitutional traditions common to the Member States' appeared was *Internationale Handelsgesellschaft* where the Court referred, in general, to the protection of fundamental rights.[154] It has since accepted that a variety of principles stem from the common constitutional traditions, including, the principle of effective judicial protection and effective remedies,[155] equal treatment irrespective of age,[156] the right to freedom of conscience and religion,[157] and the principle of fiscal legality.[158] Such judicial pronouncements tend to have the character of an assumption rather than a conclusion that results from a painstaking comparative law analysis. They also operate at a level of abstraction that enable the Court to reach outcomes that are not path dependent on national law.

The expression constitutional traditions common to the Member States received Treaty endorsement by the Maastricht Treaty.[159] The truth is that the Court does not systematically engage in consensus seeking. It appears that where it comes to important constitutional matters, it prefers to lead than to follow. A criticism which has been levelled against the EU judiciary is that it does not take comparative law sufficiently seriously. For example, in the first generation of cases establishing the liability of Member States in damages,[160] the Court referred to the laws of the Member States with a view to articulating the conditions of liability, but did not make a serious attempt to derive truly common principles from the national legal systems regarding the right to reparation.[161] In *Mangold* the Court invoked the constitutional traditions common to the Member States to establish a general principle of non discrimination on grounds of age whilst in fact the national constitutions provided scant support for this.[162] Still, the reference to the common constitutional traditions in Article 6(3) cannot be understood as an expectation that the ECJ should conduct a thorough comparative analysis of all national laws or constitutions. In most cases, that would be as impractical as it would be unnecessary. Despite its resources, it would be very difficult for the Court to do so and its analysis would open itself to criticism by national law experts. It is also doubtful whether such an exercise would dictate a solution. It is impossible to second guess how a

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[154] *Internationale Handelsgesellschaft*, EU:C:1970:114, ¶ 4.

[155] *See, e.g., Johnston*, EU:C:1986:206, ¶ 18; *Deficiencies in the System of Justice*, Case C-216/18 PPU, EU:C:2018:586, ¶ 100.

[156] *Mangold*, EU:C:2005:709, ¶ 74.

[157] Bougnaoui and ADDH v. Micropole SA, Case C-188/15, EU:C:2017:204, ¶ 29.

[158] Związek Gmin Zagłębia Miedziowego w Polkowicach v. Szef Krajowej Administracji Skarbowej, Case C-566/17, EU:C:2019:390, ¶ 39. Reference to the common constitutional traditions has also been made in the negative sense, i.e. to deny that a principle can be derived from them. *See* Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland, Case C-279/09, EU:C:2010:811, ¶ 44 (the right of legal persons to receive legal aid); Opinion of Advocate General Sharpston, Czech Republic v. Parliament and Council, Case C-482/17, EU:C:2019:321, ¶ 104 (right to possess guns).

[159] *See* TEU art. 6(3).

[160] *See Factortame*, EU:C:1996:79, note 100; Ref. Prelim. Rlg., *Lomas*, EU:C:1996:205; Dillenkofer and Others v. Bundesrepublik Deutschland, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, EU:C:1996:375 .

[161] For a critique, *see* Walter van Gerven, *Taking Article 215 EC Seriously, in* NEW DIRECTIONS IN EUROPEAN PUBLIC LAW 35, 47 (Jack Beatson and Takis Tridimas eds., 1998).

[162] Ref. Prelim, Rlg., *Mangold*, EU:C:2005:709.

national constitutional court would decide similar facts. Counting, i.e. looking at all national laws and trying to establish a majority, cannot be the solution.[163] The purpose of the exercise is to provide value continuity and ultimately judicial legitimacy in view of the principle of primacy. Roaming into national laws can only be selective. Recourse to general principles of law is intended to anchor judicial solutions to common values rather than make EU law a prisoner of the past. Furthermore, there are serious conceptual difficulties: the meaning of the common constitutional traditions is notoriously difficult to define.

CONCLUSIONS

The rule of law forms the foundation of the EU and is the overarching value of Article 2 TEU. An understanding of how the Court of Justice applies it, however, can only be obtained by looking more closely at the way it manages conflicts between countervailing rights and interests. The present paper sought to provide a taxonomy of such conflicts and examine some of the factors which the Court takes into account in resolving them. Given that the EU polity structures political power at different levels, it is inevitable that most conflicts that reach the Court involve multi-dimensional balancing. The EU judiciary has to engage in a composite conciliation exercise drawing a balance between two competing interests and also, at the same time, deciding whether that balance, or how much of it, has to be settled at EU level or be left to the discretion of national institutional actors. The judicial inquiry will take on board a number of criteria but the relative weight of each will depend on several factors. Dispute resolution entails an anthropomorphic conception of justice and an inevitable degree of anarchy. This is not a mechanical exercise but a judicial assessment steeped into a process of rationalization and positivism: as Oliver Wendell Holmes famously put it, the life of the law is experience, not logic.[164]

[163] In many cases, advocates general engage in comparative analyses. *See, e.g.,* Opinion of Advocate General Sharpston, Simpson v. Council, Joined Cases C-542/18 RX-II & C-543/18 RX-II, EU:C:2019:977, ¶¶ 98 et seq. Note also that now the reports of the Research and Documentation Department of the Court, which examine how specific legal questions are treated in the laws of the Member States, are made publicly available.

[164] *See* Anonymous [Oliver Holmes, Jr.], *Book Notices*, 14 AM. L. REV. 233, 234 (1880).

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

Monica Claes[*]

INTRODUCTION

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

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

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[1] RALPH DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE (1990).

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

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

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

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

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

[4] WOJCIECH SADURSKI, POLAND'S CONSTITUTIONAL BREAKDOWN (2019).

[5] *European Commission Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, COM (2017) 835 final (Dec. 20, 2017); *European Parliament Resolution of 12 September 2018 on a Proposal Calling on the Council to Determine, Pursuant to Article 7(1) of the Treaty on European Union, the Existence of a Clear Risk of a Serious Breach by Hungary of the Values on which the Union is Founded* (2017/2131(INL)), 2019 O.J. (C 433) 66 (Sept. 12, 2018).

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

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

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

[9] *See, e.g.*, Roger Daniel Kelemen, *Appeasement, ad infinitum*, 29 MAASTRICHT J. OF EUR. AND COMPAR. L. 177 (2022); Petry Bárd and Dimitry Kochenov, *War as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening*, 27 EUR. L. J. 39, 43-44 (2022); Laurent Pech et al., *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)action*, 13 HAGUE J. ON THE RULE OF LAW 1 (2021); Petra Bárd, *In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law*, 27 EUR. L. J. 185 (2022); Dimitry Kochenov and Laurent Pech, *Better Late Than Never? On the European Commission's Rule of Law*

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

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

THE DIAGNOSIS: WHAT CHALLENGE IS THE EU FACING?

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

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

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

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

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

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

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

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

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

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

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

[15] *See e.g.*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., PROTECTING CIVIC SPACE IN THE EU (2021).

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

[17] IVAN KRASTEV AND STEPHEN HOLMES, THE LIGHT THAT FAILED: WHY THE WEST IS LOSING THE FIGHT FOR DEMOCRACY (2019).

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

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

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

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

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

[20] On the 2022 Hungarian elections, *see, e.g.*, Kim Lane Scheppele, *How Viktor Orbán Wins*, 33 J. OF DEMOCRACY 45 (2022).

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

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

[23] *See, e.g.*, HOW DEMOCRACIES DIE, *supra* note 19.

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

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

RULE OF LAW AND RULE OF LAW CULTURE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[30] *Not Confronting Authoritarian Governments*, *supra* note 9.

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

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

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

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

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

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

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

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

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

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

[37] Comm'n v. Poland (Independence of the Supreme Court), Case C-619/18, EU:C:2019:531;

[38] Comm'n v. Poland (Independence of Ordinary Courts), Case C-192/18, EU:C:2019:924.

[39] *Poland*, EU:C:2021:596.

[40] Comm'n v. Poland (Application for Interim Measures), Case C-204/21 R, EU:C:2021:878.

[41] *Respond to Populism*, *supra* note 16.

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

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

[44] *See, e.g.*, *Lex CEU*, EU:C:2020:792.

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

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

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

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

FOSTERING A RULE OF LAW CULTURE INVOLVING NATIONAL ACTORS

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

[45] *Miasto Lowizc,* EU:C:2020:234; Order of the Court, S.A.D. Maler und Anstreicher, Case C-256/19, EU:C:2020:523.

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

[47] *W.Z.*, EU:C:2021:798, ¶¶ 78-79.

[48] *Infringement Actions 2.0, supra* note 8, at 52.

[49] *See also A Blueprint for Action, supra* note 24.

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

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

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

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

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

[53] *European Democracy Action Plan*, *supra* note _.

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

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

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

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

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

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

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

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

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[57] *Commission Proposal for a Regulation of the Parliament and the Council Establishing a Common Framework for Media Services in the Internal Market (European Media Freedom Act) and Amending Directive 2010/13/EU*, COM (2022) 457 final (Sept. 16, 2022); *Commission Recommendation (EU) 2022/1634 of 16 September 2021 on Internal Safeguards for Editorial Independence and Ownership Transparency in the Media Sector*, C (2022) 6536 final (Sept. 16, 2021).

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

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

CONCLUSION

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

THE EU EXTERNAL ACTION AS MANDATE TO UPHOLD THE RULE OF LAW OUTSIDE *AND* INSIDE THE UNION

Christophe Hillion[*]

1. INTRODUCTION

The European Union has been entrusted by its Member States to uphold the rule of law not only internally,[1] but also in its interactions with the wider world. In the

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[1] See other contributions in this Special Issue.

latter context specifically, the EU Treaties envisage the observance of the rule of law both *as a central objective* of the Union's external action, and as *a structural principle* governing the way in which this action is conducted.[2]

This paper asks how these two distinct yet interconnected functions are legally articulated and pursued, in an attempt to assess to what extent the EU may be seen and trusted as a guardian of the rule of law, notably by the outside world. It does so by examining the particulars of what is referred to as the Treaty-based *EU external rule of law mandate*. It then discusses some of the legal tools which the Union has deployed to carry it out, as well as those which third states may invoke to hold the Union to account.

Based on that analysis, the paper suggests that for the Union to fulfil its mandate, it must not only promote and uphold the rule of law coherently, in all its external policies. But it must also, if not primarily, observe it (and be seen to observe it) in the way it operates, both in its institutional framework and in (all) its Member States, and indeed be held accountable in case of failure. As the Union often requires from its partners that they respect the rule of law as a precondition for establishing, maintaining, and deepening their cooperation, they in turn may legitimately expect that the Union consistently adhere to it too. This entails that it meets its own commitments towards them, including by securing commensurate observance of the rule law within its system.

External scrutiny of the EU's performance has indeed been growing in view of the deterioration of the rule of law in several Member States.[3] The way in which the Union's institutions (and other Member States) react to this phenomenon will determine how much authority it yields as guardian of the rule of law in general,[4] and in relation to the wider world in particular. Failing to reverse the internal rule of law recession, the Union not only runs the risk of losing its credibility as promoter of the rule of law, and as a force for good.[5] More practically, it will also be unable to

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[2] On the notion of structural principles, see M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Bloomsbury, 2018), and on the rule of law as structural principle, see chapter 9 by I. Vianello, "the Rule of Law as a Relational Principle Structuring the Union's Action Towards its External Partners".

[3] Vidar Helgesen, "Hungary's journey back into the past", *Financial Times*, 28 August 2014, available at <https://www.ft.com/content/2234f99a-2942-11e4-8b81-00144feabdc0> ; "Poland angers US by rushing through media law amid concerns over press freedom", *The Guardian*, 18 Dec. 2021 <https://www.theguardian.com/world/2021/dec/18/poland-angers-us-by-rushing-through-media-law-amid-concerns-over-press-freedom >.

[4] See e.g. Rostane Mehdi, "Heurs et malheurs de l'Etat de droit, l'Union au défi d'une crise essentielle", (2022) 657 *Revue de l'Union européenne*, p. 240; Tomasz Tadeusz Koncewicz, *L'Etat de Droit supranational comme premier principe de l'espace public européen – Une union toujours plus étroite entre les peoples d'Europe mise à l'épreuve?* (Fondation Jean Monnet pour l'Europe, Collection débats et documents. No 22, octobre 2021); Wojciech Sadurski, *Poland's constitutional breakdown* (OUP, 2019); Antonina Bakardjieva Engelbrekt, Andreas Moberg, Joakim Nergelius (eds), *Rule of Law in the EU: 30 Years After the Fall of the Berlin Wall* (Bloomsbury, 2021); Werner Schroeder, "The European Union and the Rule of Law – State of Affairs and Ways of Strengthening" in Werner Schroeder (ed.) *Strengthening the rule of law in Europe* (Hart, 2019), p. 3; Laurent Pech & Kim Scheppele, "Illiberalism Within: Rule of Law Backsliding in the EU", (2017) 19 *CYELS* p. 3.

[5] On this point, see also e.g. Yuliya Kaspiarovich and Ramses A Wessel, "The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor", in Elaine Fahey and Isabella Mancini (Eds.), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Routledge 2022), p. 92-106

meet its international obligations,[6] thereby weakening the "rules-based international order" it otherwise advocates,[7] and on which its existence, and influence rest. Ultimately, it will devalue the very significance of the principles it advocates, and on which it is otherwise founded, at a time they are being brutally battered in Europe,[8] and globally.[9]

In sum, the Member States' consistent compliance with the rule of law is as essential to the EU external action, as it is to the functioning of the single market or the area of freedom security and justice. The EU external action thereby bolsters the normative basis for the EU actively to enforce the rule of law within its midst.

To substantiate these contentions, the paper discusses the two functions between the rule of law and the EU external action in turn. It first considers the rule of law as the latter's *telos* and some of the means through which the Union (both institutions and Member States) has pursued it. Second, it examines the rule of law as the *modus operandi* of the EU external action, which binds institutions and Member States, and how third states may hold the EU to account, including by judicial means.

2. RULE OF LAW AS *TELOS* OF EU EXTERNAL ACTION

EU primary law establishes an elaborate mandate for the Union to uphold and promote the rule of law in, and through its external action (2.1). EU institutions have carried out that mandate through a variety of tools, whose piecemeal deployment raises a question of consistency between mandate and delivery (2.2).

2.1. Constitutional mandate

Article 3(5) TEU foresees that in its relations with the wider world, the EU "shall uphold and promote its values". According to Article 2 TEU, one of these values is the rule of law. This prescription constitutes a specific external facet of the EU's general mandate to promote its values set out in paragraph 1 of the same Article ("The Union's aim is to promote … its values"), and which is further reiterated in Article 13(1) TEU (EU institutions "shall aim to promote [the Union's] values"). [10] Located in the general provisions of the TEU that govern the Union's external action, Article 21(1) TEU further stipulates that this action "*shall be guided by the principles which have inspired [the EU's] own creation, development and*

[6] See in this sense, Case C-66/18, *Commission v Hungary (Lex CEU)*, ECLI:EU:C:2020:792.

[7] See EEAS, *A strategic compass for Security and Defence* (2022) < https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en > which mentions that objective several times. See also: European Commission, *Trade Policy Review - An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final, p. 4.

[8] Ewa Łętowska, "La guerre en Ukraine et l'Etat de droit" (2022) 657 *Revue de l'Union européenne*, p. 263.

[9] "States Must Uphold Rule of Law, Fundamental Freedoms When Responding to Global Emergencies, Speakers Stress, as Sixth Committee Continues Debate on Principle", <https://reliefweb.int/report/world/states-must-uphold-rule-law-fundamental-freedoms-when-responding-global-emergencies-speakers-stress-sixth-committee-continues-debate-principle>; "The global assault on rule of law", <https://www.ibanet.org/The-global-assault-on-rule-of-law > ; "The Global Rule of Law Recession Continues", <https://worldjusticeproject.org/rule-of-law-index/ >.

[10] On the EU mandate to promote the rule of law, see e.g. Christophe Hillion, *Overseeing the rule of law in the European Union Legal mandate and means* in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), pp. 59-81.

enlargement, *and which it seeks to advance in the wider world* [including]: democracy, *the rule of law*, the universality and indivisibility of human rights and fundamental freedoms, … and respect for the principles of the United Nations Charter and international law" (emphases added).

An umbilical connection is thus established, and a normative continuum required, between the Union's own foundations and those of its external action. This is a particular expression of the imperative of consistency stipulated in Article 21(3) TEU, between the EU internal and external policies, and reiterated in Article 7 TFEU.[11]

Formulated in binding terms, the overarching EU rule of law mandate is intended to permeate the exercise of *all* its (external) competences.[12] Article 21(3) TEU thus foresees that the EU "shall respect the principles and pursue the objectives [including the rule of law]… in the development and implementation of the different areas of [its] external action … and of the external aspects of its other policies". Article 205 TFEU further insists on that imperative mainstreaming when stipulating that the EU external action based on the TFEU "shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union" that establish the "General Provisions on the Union's External Action". Thus EU trade, development, migration policies, as well as the external facets of other Union's competences, shall all pursue the overarching EU rule of law promotion objective.[13] Importantly, Article 23 TEU applies the same grammar to the Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP): it "shall [too] be guided by the principles, (…) pursue the objectives of, and be conducted in accordance with, the general provisions laid down in [the same] Chapter 1", including Article 21 TEU. Though subject to "specific *rules and procedures*" (emphasis added),[14] the "development and implementation" of the CFSP is determined by the *same objectives*, including the promotion of the rule of law, as any other EU competence, it is guided by the *same principles*, and should be conducted in accordance *with the same general provisions*.[15] In other words, and in

[11] On the importance of the principle of consistency, see *Case* C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, ¶128; Case C-263/14, *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435, ¶72.

[12] See also: Marise Cremona, "Values in Foreign Policy", Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Orders: Policy interconnections between the EU and the rest of the world* (Hart Publishing, 2011), p. 275.; Till Patrick Holterbus, "The Legal Dimensions of Rule of Law Promotion in EU Foreign Policy – EU Treaty Imperatives and Rule of Law Conditionality in the Foreign Trade and Development Nexus", in Till Patrick Holterbus (ed.), *The Law Behind the Rule of Law Transfer* (Nomos, 2019), p. 73. On the importance of foreign policy objectives in constitutions, including that of the EU, see Joris Larik, *Foreign Policy Objectives in European Constitutional Law* (OUP, 2016).

[13] For an illustration see, for instance, in Opinion 2/15 *re: EU-Singapore Agreement*, ECLI:EU:C:2017:376; ¶¶ 143-145. Other provisions reiterate the notion that each external action based on the TFEU must take these principles into account: e.g. Article 207(1) TFEU in the specific case of the Common Commercial Policy, Article 208 TFEU in connection with the development policy, Article 212(1) TFEU as regards the EU "economic, financial and technical cooperation with third countries".

[14] Article 24(1)TEU.

[15] On the specificity of the CFSP and its limits, see e.g. Geert de Baere, *Constitutional principles of EU external relations* (OUP, 2008); Graham Butler, *Constitutional Limits of the EU's Common Foreign and Security Policy* (University of Copenhagen, 2016).

these respects at least, the CFSP is not distinct from any other EU (external) policy/competence.[16]

Incidentally, while buttressing the general requirement of coherence in the EU external action,[17] the formulation of the mainstreaming clauses of Articles 205 TFEU and 23 TEU also captures the separate, yet related constitutional functions which the rule of law is deemed to fulfil therein.[18] Respect for the rule of law is envisaged not only as a *foundation* ("principle") and a *finalité* (an "objective"), of a prescriptive nature, for the overall external action of the EU. This notion finds another expression in Article 21(3) TEU which requires the Union to "define and pursue common policies and actions, and ... work for *a high degree of cooperation in all fields of international relations, in order to*: (a) *safeguard its values*… (b) *consolidate and support ... the rule of law*" (emphasis added). But the latter also constitutes a *structural principle* that governs the overall operation of the composite system carrying out that action ("shall be conducted in accordance with" as per Articles 23 TEU and 205 TFEU), which itself involves both the EU institutional framework, including the Court of Justice, and the Member States. In short, the rule of law is envisaged as *telos*, *modus operandi*, and *conditio sine qua non* for a Treaty-compliant EU external action.

While generalising the defence of the rule of law, the EU mandate nevertheless involves a degree of differentiation in the way in which it is to be carried out. According to Article 8 TEU, "[t]he Union shall develop *a special relationship* with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, *founded on the values of the Union*" (emphasis added). The TEU thereby comprises a specific legal basis for the Union to project, apply, and defend its rule of law alongside other values, in relation to a particular group of states ("neighbouring countries"), to found and structure a broader common political area.[19] In connection to that specific mandate, Article 49 TEU links a state's

[16] Case C-263/14, *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435. On the importance of this constitutional requirements for the CFSP, see discussion in section 3.1.

[17] Further see e.g. Isabelle Bosse-Platière, *L'article 3 du traité UE : Recherche sur une exigence de cohérence de l'action extérieure de l'Union européenne* (Bruylant, 2014), Simon Duke, "Consistency, coherence and European Union external action: the path to Lisbon and beyond", in Panos Koutrakos (ed.), *European Foreign Policy* (Elgar, 2011), p. 15; Marise Cremona, "Coherence in European Union foreign relations law" in Panos Koutrakos (ed.), *European Foreign Policy* (Elgar, 2011), p. 55; Christophe Hillion, "*Tous pour un, Un pour tous!* Coherence in the External relations of the European Union" in M. Cremona (ed.), *Developments in EU External Relations Law*, Collected Courses of the Academy of European Law, (Oxford University press, 2008) p. 10.,

[18] More on this: Werner Schroeder, "an active EU rule of law policy" in Allan Rosas, Pekka Pohjankoski, Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart, forthcoming); Christophe Hillion, *Overseeing the rule of law in the European Union Legal mandate and means* in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP, 2016), pp. 59-81;

[19] Article 8 TEU could thus provide the constitutional foundation for the EU to engage in the development of the European Political Community mooted in the wake of Russia's invasion of Ukraine; see European Council Conclusions, 23-24 June 2022. Further on Article 8 TEU: Marise Cremona and Niamh Nic Shuibhne, "Integration, Membership and the EU Neighbourhood", (2022) 59 (Special Issue) *Common Market Law Review* p. 155, Christophe Hillion, "Anatomy of EU norms export towards the neighbourhood – the impact of Article 8 TEU", in Peter van Elsuwege and Roman Petrov (eds.) *Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union - Towards a Common Regulatory Space?* (Routledge, 2014) p. 13.

eligibility for EU membership to its respect for, and promotion of the Union's founding values, including the rule of law.

Elaborate and multi-dimensional, if slightly confusing considering the diversity of its Treaty formulations [viz. the EU shall "uphold and promote", "consolidate and safeguard" and be "guided by" the rule of law in its external action, it should also "seek to advance [it] in the wider world" as one of its "values", as well as a "principle" that has been central to the EU own existence and development], the EU external rule of law mandate calls for an equally multidimensional operationalisation, and in turn a coherent, systemic approach to be carried out effectively. The next sections examine different means the EU and Member States have deployed to promote and uphold the rule of law outside the EU. The discussion will subsequently turn to exploring (some of) the legal means available to ensure that, both in its "development and implementation", the EU external action is "conducted in accordance with" the rule of law.

2.2. Incremental and eclectic rule of law promotion

EU institutions have carried out the Union's external rule of law promotion mandate in various ways. In addition to a general advocacy, the EU has occasionally reacted to third states' assaults on the rule of law. It has also promoted certain standards in the context of specific foreign policy initiatives, in the pursuit of other objectives and interests. While this development partly reflects the methodology of rule of law promotion carried out by other global protagonists,[20] it also comes from the change in the (external) attributions of the EU, and out of necessity in consideration of global and regional (geo)political developments. At the same time, internal rule of law regressions, and the EU's own reactions thereto, have influenced its ability to carry out its external rule of law mandate. A feedback loop appears to operate between the internal and external facets: while the instruments which the EU has deployed towards the wider world have, at least to some extent, foreshadowed the articulation of mechanisms to safeguard the rule of law internally, the latter have in turn inspired further articulation of the EU external rule of law policy.

The following discussion will give some examples of devices the EU has developed,[21] both to illustrate their variety in terms of content and purpose, and the incremental move they embody towards a more substantial EU external rule of law policy. It will also probe their congruence with the overall EU mandate to promote and uphold the rule of law, recalled above.

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[20] See, e.g.: Amichai Magen, *The rule of law and its promotion abroad: three problems of scope* [2009] Stan. J. I. L. 51; Amichai Magen and Leonardo Morlino, 'Hybrid Regimes, the Rule of Law, and External Influence on Domestic Change' in Amichai Magen and Leonardo Morlino (eds) International Actors, Democratization, and the Rule of Law (Routledge, 2009).

[21] For a general appraisal, see e.g. Laurent Pech, "Rule of Law as a guiding principle of the EU's external action", *CLEER Working Papers* 2012/3; from the same author: "Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law", in Dimitry Kochenov and Fabian Amtenbrink, *The European Union's Shaping of the International Legal Order* (CUP 2013), p. 108; Geert de Baere, "European Integration and the Rule of Law in Foreign Policy" in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (OUP, 2012) p. 354; see also, Holterbus, op. cit.

2.2.1. Conditionality and sanctions

2.2.1.a The essential elements clause

A traditional device of EU rule of law promotion is the so-called *essential elements clause* which the Union (and Member States) has often included in its external agreements.[22] For example, Article 2 of the Association Agreement between the EU and Ukraine foresees that:

Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the European Convention on Human Rights and Fundamental Freedoms, and *respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement* (emphasis added). [23]

Labelling respect for the rule of law as "essential element" of an agreement entails that, in principle, one party may suspend the application of the agreement,[24] should it consider that the other party has breached the rule of law.[25] The suspension may occur without prior consultation in derogation from the usual requirements of public international law. Alongside the parties' observance of democratic principles and fundamental rights, respect for the rule of law is thus envisaged as a precondition for the continuation (and development) of the relationship between them. Equivalent clauses have featured in different types of EU agreements, including association,[26] development cooperation[27] and partnership agreements.[28]

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[22] Further on such clauses and their operationalisation, see e.g. Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005), Mielle Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (2001, Intersentia); Barbara Brandtner and Allan Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 *European Journal of International Law* p. 468.

[23] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, O*J L 161, 29.5.2014, p. 3–2137*. Further on this agreement, see Guillaume Van Der Loo, *The EU-Ukraine Association Agreement and Deep and Comprehensive Free Trade Area - A New Legal Instrument for EU Integration Without Membership* (Brill, 2016); Guillaume Van der Loo, P. Van Elsuwege and R. Petrov, "The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument", *EUI Working Papers*, Law 2014/09.

[24] See in this sense: Case C-268/94 *Portugal v. Council*, ECLI:EU:C:1996:461.

[25] In the case of the EU-Ukraine Association agreement, see Article 478(2)(b).

[26] See e.g. Article 2 of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, *OJ L 84, 20.3.2004, p. 13–197*.

[27] The Cotonou Agreement (EU-ACP) is a case in point: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, *OJ L 317, 15.12.2000, p. 3–353*, see further on this agreement: Holterbus, op. cit.; Andreas Moberg, "The Condition of Conditionality – Closing in on 20 Years of Conditionality Clauses in ACP-EU Relations", (2015) 60 *Law and Development, Scandinavian Studies in Law* p. 275.

[28] See Article 1 of Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and the Republic of the Philippines, of the other part, *OJ L 343, 22.12.2017, p. 3–32.*

Even the post-Brexit EU-UK Trade and Cooperation Agreement does, albeit in its preamble rather than in the main part of the agreement, as is usually the case in other agreements. [29]

Although the inclusion of essential element clauses became systematic from the 1990s,[30] the specific reference to the rule of law as a *distinct* essential element, alongside human rights and democracy, is a more recent phenomenon. It does not mean that the rule of law was considered less important. Rather the earlier formulation(s) of essential elements clauses reflected a more general trend whereby the rule of law was subsumed under human rights and democracy.[31] A case in point is the Charter of Paris for a New Europe which the essential elements clause inserted in EU agreements with European neighbours have often cross-referred to, as a source of democratic principles, human rights and fundamental freedoms to be respected by the parties.[32]

While late and still unsystematic, the inclusion of the rule of law as distinct "essential element" (and indeed as distinct "principle", and subsequently "value" in EU parlance)[33] has involved a degree of substantive indeterminacy. Contrary to mentions of democracy and human rights, respect for the rule of law has not, at least not always, cross-referred to specific (external) sources, let alone include specific standards.[34] Problematic in itself in terms of legal certainty,[35] the absence of

[29] Pt. 1 of the Preamble of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *OJ L 149, 30.4.2021, p. 10–2539.*

[30] See European Council, *Declaration on Human Rights*, Annex V, Presidency Conclusions, June 1991, paragraph 11; European Commission, *The inclusion of respect for democratic principles and human rights agreements between the Community and third countries*, COM(95) 216.

[31] See, for instance, *Article 2* Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, *OJ L 327, 28.11.1997, p. 3–69;* Article 2 of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part, *Official Journal L 276, 28/10/2000 pp. 45–79.*

[32] OSCE, *Charter of Paris for a New Europe*, 21 November 1990 < https://www.osce.org/mc/39516 >.

[33] Other notions have been referred to in EU official documents, foreshadowing the emergence of the rule of law narrative: "compliance with the law" was thus mentioned alongside the principles of democracy and human rights in paragraph 5 of the Preamble of the 1986 Single European Act (*OJ L 169, 29.6.1987, p. 1*), the 1991 European Council *Declaration on Human Rights* (mentioned above) mentioned "the principle of primacy of the law"; "the rule of law" then appeared in the preamble (para. 3) of the 1992 Treaty on European Union (Maastricht), as one of the principles to which the Parties are attached, alongside those of liberty, democracy and respect for human rights and fundamental freedoms. It is only in the 1996 TEU (Amsterdam) that the rule of law features in the main body of the Treaty (Article 6 TEU) as one of the founding principles of the EU, common to the Member States. Further on the genealogy of the rule of law, See e.g. Laurent Pech, "The Rule of law" in Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU law* (OUP, 2021), p. 307.

[34] See Article 2 of the EU-Ukraine agreement mentioned above. *Cf*. Article 2 of the Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia does relate the rule of law to external sources when foreseeing that "1. Respect for the democratic principles, *the rule of law*, human rights and fundamental freedoms, *as enshrined in particular in the UN Charter, the OSCE Helsinki Final Act and the Charter of Paris for a New Europe of 1990, as well as other relevant human rights instruments such as the UN Universal Declaration on Human Rights and the European Convention*

elements to operationalise the parties' essential obligation to respect the rule of law is all the more remarkable since the latter is envisaged not only as an essential element of the agreement, but also as "the basis of the domestic and external policies of the Parties".[36] In principle therefore, it constitutes a general standard against which the parties assess each other's general conduct, beyond the context of the application of the agreement, for the purpose of determining the latter's continuation and evolution.

Admittedly, the provisions underpinning the EU rule of law promotion mandate suggest that it is in principle the same rule of law that is to be observed within the EU, and the one which it promotes externally. This is also what the formula "basis of the *domestic and external* policies" (emphasis added) points to. The challenge is that the rule of law as EU value has itself suffered from a degree of substantive ambiguity, and indeed contestation within the Union, [37] even if that alleged ambiguity is being reduced.[38] Moreover, practice suggests that the internal-external parallelism does not always operate. Some EU agreements do occasionally refer to non-EU sources, such as the UN Charter or OSCE documents. While such cross-referencing may well reflect the significance of those documents as inspiration for the EU internal articulation of the rule of law, the fact that they are mentioned in some EU agreements but not in others, or that their formulation differs from one essential element clause to the other, muddies the definition of the rule of law being promoted. It also begs the question of whether the EU applies variable standards and prescriptions depending on the partner involved, and if so, whether this differentiation is consistently applied, considering the terms of the Treaty mandate.[39]

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on Human Rights, shall form the basis of the domestic and external policies of the Parties and constitute an essential element of this Agreement" (emphasis added), *OJ L 23, 26.1.2018, p. 4–466.*

[35] On legal certainty as an element of the rule of law, see e.g. Anna Gamper, "Legal Certainty", in Werner Schroeder (ed.) *Strengthening the rule of law in Europe* (Hart, 2019), p. 80.

[36] Respect for democratic principles, human rights and fundamental freedoms occasionally feature as basis of the domestic and external policies of the parties too; e.g. Art 2 EU-Armenia agreement, mentioned above.

[37] See e.g. the arguments of the Polish and Hungarian governments in *Case* C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 *and Case* C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

[38] *See e.g. EU Council, Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law*, General Affairs Council meeting, Brussels, 16 Dec. 2014; COREPER; *Ensuring the respect for the rule of law - Dialogue and exchange of views*, Brussels, 9 Nov. 2015; European Commission, *A new EU framework to strengthen the Rule of Law*, COM(2014)158 final. Further on the vagueness v clarity of Article 2 TEU: see e.g. Dimitrios Spieker, *EU Values before the Court of Justice. Foundations, Potential, Risks* (OUP, 2023, forthcoming), Marcus Klamert and Dimitry Kochenov, "Article 2 TEU" in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary* (OUP, 2023), Available at SSRN: https://ssrn.com/abstract= ; Laurent Pech, "The Rule of Law as a Well-Established and Well-Defined Principle of EU Law" (2022) 14 *Hague Journal on the Rule of Law* p.107; Inge Govaere, "Promoting the Rule of Law in EU External Relations: A Conceptual Framework", College of Europe, *Research Papers in Law*, 3/2022; Werner Schroeder, "The Rule of Law As a Value in the Sense of Article 2 TEU: What Does it Mean and Imply?", in Armin Von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer, 2021), p. 105; Lucia Rossi, "La valeur juridique des valeurs. L'article 2 TUE : relations avec d'autres dispositions de droit primaire de l'UE et remèdes juridictionnels' (2020) 56 *Revue Trimestrielle de Droit Européen* p. 639.

[39] For instance, the formulation of the essential clauses included respectively in the above-mentioned EU-Ukraine Association Agreement (Article 2) and in the EU-Moldova Association Agreement (Article

2.2.1.b Uses and effects of the essential elements clause

In practice, the EU rule of law promotion through essential elements clauses has remained proclamatory and general, rather than operative and targeted. The activation of the suspension mechanism in reaction to non-observance has been sporadic at best. Relied on several times in the context of the EU development agreement with ACP countries (the co-called Cotonou Agreement),[40] which indeed contains a more elaborate essential element clause,[41] it has rarely been used in the context of other EU agreements. Tellingly, the clause has still not been invoked, let alone triggered, in the context of the EU Partnership and Cooperation Agreement with the Russian Federation[42] despite the latter's successive annexations of several parts of Ukraine since 2014 in blatant violation of international law, and of the different norms to which the Agreement's essential clause refers.[43] The EU has instead relied on a security provision of the PCA to make the adoption of its unilateral sanctions in reaction to the invasion(s) legally possible, while maintaining the Agreement in force.[44] By contrast, the EU suspended the ratification of an equivalent PCA with Belarus in the 1990s, following the regime's repression of political opposition and human rights violations.[45]

Outside the framework of bilateral agreements, the EU has occasionally made use of *restrictive measures* (a.k.a "sanctions") in reaction to the regression of the rule of law in third states.[46] For example, the EU adopted such sanctions against Venezuela in consideration of the "continuing deterioration of democracy, the rule of law and human rights" in the country.[47] The Union also reacted to the "continuing deterioration of the rule of law" in the Republic of the Maldives by imposing targeted restrictive measures "against persons and entities responsible for

2, Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, *OJ L 260, 30.8.2014, p. 4–738) differ even if the two countries belong to the same category of neighbouring European states, and as such covered in principle by the same EU policy framework.*

[40] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, *OJ L 317, 15.12.2000, p. 3–353.* See in particular, Articles 9 and 96 of the Agreement.

[41] See European Commission/High representative of the Union for Foreign Affairs and Security Policy, *Evaluation of the Cotonou Partnership Agreement*, SWD(2016) 250 < https://international-partnerships.ec.europa.eu/system/files/2019-09/evaluation-post-cotonou_en.pdf > (p. 38), further see Holterbus, op. cit.; Moberg, op. cit.

[42] Partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, *OJ L 327, 28.11.1997, p. 3–69.*

[43] It was not affected either by Russia's military campaign in Georgia in 2008, let alone by Russia's Constitutional Court 2016 decision that rulings of the European Court of Human Rights would not be implemented if in contradiction with Russia's constitution.

[44] Under Article 99 of the PCA, see in this respect, Case C-72/15, *Rosneft*, ECLI:EU:C:2017:236.

[45] See e.g. Giselle Bosse and Elena Korosteleva-Polglase, "Changing Belarus? The Limits of EU Governance in Eastern Europe and the Promise of Partnership", (2009) 44 *Cooperation and Conflict*, p. 143.

[46] Further on the EU use of sanctions, see General Secretariat of the Council, Sanctions Guidelines – update, 4 May 2018: <https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>

[47] Preamble, pt. 1, Council Regulation (EU) 2017/2063 of 13 November 2017 concerning restrictive measures in view of the situation in Venezuela, *OJ L 295, 14.11.2017, p. 21–37.*

undermining the rule of law".[48] Similar targeted sanctions were established "against natural persons responsible for undermining democracy or the rule of law in Lebanon".[49]

As with essential elements clauses however, the deployment of EU sanctions specifically in response to rule of law violations, has been more selective than systematic.[50] More EU sanctions have been enacted in reaction to fundamental rights violations, or to fight terrorism.[51] It should be noted that the adoption of EU restrictive measures traditionally involves the adoption of CFSP decision by the Council, which requires unanimous support of the Member States.[52] In other words, the EU reaction to the deterioration of the rule of law may be held back by one single government.[53]

To be sure, not all third states with which the Union has negotiated international agreements have been receptive to its rule of law promotion, and particularly to the standard inclusion of an essential element clause to that effect. The latter was resisted by several EU partners, eventually preventing the conclusion of an EU bilateral agreement with them. Australia and New Zealand are cases in point, [54] one

[48] Council Decision (CFSP) 2018/1006 of 16 July 2018 concerning restrictive measures in view of the situation in the Republic of Maldives, *OJ L 180, 17.7.2018, p. 24–28. Repealed since:* Council Decision (CFSP) 2019/993 of 17 June 2019 repealing Decision (CFSP) 2018/1006 concerning restrictive measures in view of the situation in the Republic of Maldives; *OJ L 160, 18.6.2019, p. 25–25*

[49] Preamble, Council Decision (CFSP) 2021/1277 of 30 July 2021 concerning restrictive measures in view of the situation in Lebanon; *OJ L 277I , 2.8.2021, p. 16–23.*

[50] On the use of EU sanctions more generally, see e.g. Allan Rosas, "Is the EU a Human Rights Organisation", *CLEER Working Papers* 2011/1 < https://www.asser.nl/media/1624/cleer-wp-2011-1-rosas.pdf >, further on EU sanctions, see Christina Eckes, *The law and practice of EU sanctions*, in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2017) p. 206.

[51] The EU has indeed established specific horizontal sanctions regimes targeting: serious human rights violations (Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses, *OJ L 410I, 7.12.2020, p. 13–19)* , terrorism (Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism (*OJ L 344, 28.12.2001, p. 93*). cyber-attacks (Council Decision (CFSP) 2020/1127 of 30 July 2020 amending Decision (CFSP) 2019/797 concerning restrictive measures against cyber-attacks threatening the Union or its Member States, *OJ L 246, 30.7.2020, p. 12–17)* , the proliferation and the use of chemical weapons Council Decision (CFSP) 2018/1544 of 15 October 2018 concerning restrictive measures against the proliferation and use of chemical weapons, *OJ L 259, 16.10.2018, p. 25–30),* but not with respect to violations of the rule of law in particular.

[52] Though it may be wondered whether such a CFSP decision could be adopted with some Member States abstaining, in line with Article 31(1)2nd subpara. TEU (so-called "constructive abstention").

[53] The Hungarian government's obstructive postures concerning the adoption of sanctions against the Russia Federation in the wake of its invasion of Ukraine is a case in point: <https://www.reuters.com/world/europe/hungary-holds-up-eu-sanctions-package-overpatriarch-kirill-diplomats-2022-06-01/>; <https://hungarytoday.hu/viktor-orban-hungariangovernment-oil-embargo-agreement-eu-russian-sanctions/>. The government has also challenged existing sanctions on the basis of a "national consultation" <https://abouthungary.hu/blog/here-are-the-questions-from-hungarys-next-consultation-on-brussels-failed-sanctions>. https://www.politico.eu/article/germany-annalena-baerbock-hungary-europe-play-poker-aid-ukraine/>. See: Mitchel O. Orenstein and Daniel Kelemen, "Trojan Horses in EU Foreign Policy" (2017) 55 *JCMS* p. 87.

[54] Opting instead for a political document in the form of a "Joint Declaration on EU-Australia Relations", signed In Luxembourg on 26 June 1997. Bull. EU 6-1997. point 1.4.103. On the reluctance of third states towards the EU inclusion of standard essential clauses, see Vaughne Miller, "The Human Rights Clause in the EU's External Agreements" (2004) House of Commons Research Papers 04/33 <

of the arguments being that the EU has no value lessons to give to such countries. Its inclusion in the *preamble* of the EU-UK TCA, rather than in its operational part partly stems from the same argument, and suggests that the prominence and potency of the essential element clause in a relationship is indeed a matter of negotiations. The EU itself does not always seem to prioritise the promotion of the rule of law over other interests it may have with the country at hand, or simply lacks the leverage to impose it. Hence, the EU-China 2020 Strategic Agenda for Cooperation did not mention the rule of law even once. The 16-page EU-China Strategic Outlook, which the Commission and the High Representative prepared in 2019, mentioned it only in passing, while the EU-China Summit Joint statement of the same year did not refer to it at all.[55] A degree of transactionalism thus seems to infuse the way in which the EU carries out its external rule of law promotion mandate.[56]

2.2.1.c Positive conditionality

Alongside negative conditionality and occasional sanctions, the EU has also promoted the rule of law through supportive measures (positive conditionality). While reducing, or suspending EU support in case of deterioration of the rule of law is still envisaged, EU instruments typically encompass positive financial and/or trade incentives, or technical support, to encourage a state to respect the rule of law.[57] One example is the 2021 Regulation establishing the *Neighbourhood, Development and International Cooperation Instrument – Global Europe* (NDICI), which foresees that:

The general objectives of the Instrument are to: (a) *uphold and promote the Union's values, principles and fundamental interests worldwide, in order to pursue the objectives and principles of the Union's external action, as laid down in Article 3(5) and Articles 8 and 21 TEU*, thus contributing to the reduction and, in the long term, the eradication of poverty, to *consolidating, supporting and promoting democracy, the rule of law* and respect for human rights, sustainable development and the fight against climate change and addressing irregular migration and forced displacement, including their root causes (emphasis added).[58]

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https://researchbriefings.files.parliament.uk/documents/RP04-33/RP04-33.pdf >, see also e.g. Brandtner and Rosas, op. cit.

[55] Brussels, 9 April 2019. In the same vein, see the Council Press Release "Delivering results by standing firm on EU interests and values" of 30 December 2020, that followed the meeting of EU and China leaders. Despite its ambitious heading, the document hardly contained references to EU values: https://www.consilium.europa.eu/media/47718/press-release.pdf.

[56] The EU approach to China has allegedly evolved since the adoption of the EU horizontal sanction regimes targeting serious human rights violations (op. cit): see Frank Hoffmeister, "Strategic Autonomy in the European Union's External Relations Law" (2023) 60 *CMLRev* (forthcoming).

[57] See for instance the so-called "System of Generalised Preferences" (GSP): Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008; *OJ L 303, 31.10.2012, p. 1–82. Further Holterbus, op. cit.* See also Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 establishing the Citizens, Equality, Rights and Values Programme and repealing Regulation (EU) No 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) No 390/2014; *OJ L 156, 5.5.2021, p. 1–20*

[58] Article 3(1) ("Objectives of the Instrument"), Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, *OJ L 209, 14.6.2021, p. 1–78.*

Despite its slightly tautological formulation, the Regulation is conceived as a general instrument for the promotion of the rule of law as one of the Union's *values*, and thus as an end in itself, in line with the general Treaty prescriptions - indeed explicitly recalled in the mission statement.

Yet, as it has been the case of some essential element clauses, the Regulation does not systematically treat the rule of law as a distinct item alongside human rights and democracy, but rather incorporates it therein, partly contributing to the lingering indeterminacy evoked above, and the limitations in terms of operationalisation and effectiveness of the promotion.[59] Annex III of the Regulation which establishes "areas of intervention" for thematic programmes thus comprises a section devoted to "human rights and democracy", under which support of the rule of law is mentioned, in general terms.

Promoted as a value, the observance of the rule of law is also envisaged as a *means* to achieving a patchwork of purposes, reflecting that the instrument is designed to cover different types of countries and EU relations therewith. While contributing to "developing, supporting, consolidating and protecting democracy", the rule of law is also instrumental to: fighting poverty and to stimulating economic development, and combatting climate change,[60] which are all aims that feature in the long list of EU external objectives set out in Article 21(2) TEU, without clear prioritisation.

The preamble of the Regulation indeed stipulates that: "[a]s the respect for democracy, human rights and the rule of law is *essential for sound financial management and effective Union funding* as referred to in the Financial Regulation, *assistance could be suspended in the event of degradation in democracy, human rights or the rule of law in third countries*" (emphasis added). Though EU financial support is deemed to incentivize observance of the rule of law to consolidate democracy, regression therefrom may conversely entail suspension of EU support not only because the deterioration in the respect of values should in itself be sanctioned, but also to preserve the "sound financial management and effective Union funding". Formulated more bluntly, the NDICI regulation thereby mirrors the functional connection which the 2020 EU Conditionality Regulation established internally between the rule of law and the defence of the EU financial interests. This

[59] According to that section 1: "Developing, supporting, consolidating and protecting democracy, addressing all aspects of democratic governance, including reinforcing political pluralism, representation, and accountability, reinforcing democracy at all levels, enhancing citizen and civil society participation, supporting credible, inclusive and transparent electoral processes as well as supporting citizen capacity in monitoring democratic and electoral systems, through the support to domestic citizen election observation organisations and their regional networks. Democracy shall be strengthened by upholding the main pillars of democratic systems, democratic norms and principles, free, independent and pluralistic media, both online and offline, internet freedom, the fight against censorship, accountable and inclusive institutions, including parliaments and political parties, and the fight against corruption. *Union assistance shall support civil society action in strengthening the rule of law, promoting the independence of the judiciary and of the legislature, supporting and evaluating legal and institutional reforms and their implementation, monitoring democratic and electoral systems and promoting access to affordable justice for all, including to effective and accessible complaint and redress mechanisms at national and local level*" (emphasis added).

[60] The connection between the rule of law and other objectives reflects practices of international rule of law promotion more generally. See Magen, op.cit.

encapsulates the continuum between the internal and external conceptions of the rule of law.[61] Indeed, the interpretation and application of one instrument could well colour the way the other is activated too. [62]

2.2.2. Targeted export of standards

In addition to promoting and upholding the rule of law in general terms through conditionality mechanisms and restrictive measures, the EU has progressively engaged in targeted export of specific rule of law standards. For example, the EU has occasionally been involved in the design (and operation) of third states' justice and law-enforcement systems based on (more or less) specific canons of legal protection, as part of the country's political transition.

Somewhat paradoxically considering its institutional specificity, and in particular the limited judicial control over the exercise of that competence,[63] the CFSP/CSDP has been used by the EU to set up rule of law compliant judicial and law enforcement systems abroad. The 2008 *Rule of Law Mission in Kosovo* (EULEX KOSOVO) is a case in point.[64] According to its mission statement, the EU civilian operation was mandated to "assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in *further developing and strengthening an independent multi-ethnic justice system* and multi-ethnic police and customs service, *ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices*" (emphases added).[65] To that effect, the EU mission was tasked to monitor, mentor and advise Kosovo's authorities, while "retaining certain executive responsibilities", [66] in particular "to ensure the maintenance and promotion of the rule of law, public order and security",[67] acting in accordance with "international standards concerning human rights and gender mainstreaming".[68] An earlier EU Rule of Law Mission was established in relation to Georgia "to assist the new government in its efforts to bring local standards with regard to rule of law closer to international and EU standards".[69]

The EU has also exported specific standards of judicial protection through external agreements based on, and in support to, EU CSDP operations. Thus, the

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[61] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I , 22.12.2020, p. 1–10*.

[62] See in this regard the Court of Justice rulings in *Case* C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 *and Case* C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98, and the activation of the General Conditionality mechanism against Hungary: see Press release "Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary" 12 December 2022: < https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/ >

[63] See discussion under section 3.1.

[64] Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, *OJ L 42, 16.2.2008, pp. 92-98.*

[65] Article 2, Council Joint Action, EULEX KOSOVO.

[66] Ibid.

[67] Article 3 (h), Council Joint Action, EULEX KOSOVO.

[68] Article 3 (i), Council Joint Action, EULEX KOSOVO.

[69] Preamble, pt. 3, Council Joint Action 2004/523/CFSP on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS; *OJ L 228, 29.6.2004, p. 21*.

2011 CFSP Agreement between the European Union and the Republic of Mauritius ("on the conditions of transfer of suspected pirates and associated seized property from the European Union-led naval force to the Republic of Mauritius and on the conditions of suspected pirates after transfer")[70] includes a specific provision concerning the "*Treatment, prosecution and trial of transferred persons*". Article 4 of the Agreement enumerates obligations binding Mauritius authorities to provide some legal protection to persons intercepted and transferred by the EU-led naval force (EUNAVFOR/*Atalanta*).[71] The list includes the duty to ensure that any transferred person be brought promptly before a judge or other officer, be entitled to trial within a reasonable time, and to a fair and public hearing by a competent, independent and impartial tribunal established by law, while being presumed innocent until proved guilty according to law. The same provision requires that transferred persons be entitled to various minimum guarantees, including that of being informed promptly and in detail in a language which he understands of the nature and cause of the charge against him, of having adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choice.[72]

The above CFSP instruments indicate that the general ambition of the EU to promote the rule of law in relation to the wider world finds different expressions in its various external policies, including on the basis of the CFSP in line with Article 23 TEU. The agreement with Mauritius is particularly detailed in its enunciation of the standards of legal protection the other party has to observe. That said, it also indicates that the nature and form of the rule of law promotion it encapsulates are primarily determined by the EU specific foreign policy goals at hand, which those standards are then meant to help attain. It is indeed noticeable that the agreement does not contain the essential element clause discussed above.

Interpreting a similar arrangement concluded between the EU and Tanzania,[73] the Court of Justice held that it "constitutes an *instrument* whereby the European

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

[71] Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *OJ L 301, 12.11.2008, p. 33–37*.

[72] Article 4 of the EU-Mauritius Agreement. Paragraph 6 includes additional minimum guarantees, e.g. (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choice; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) to examine, or have examined, all evidence against him, including affidavits of witnesses who conducted the arrest, and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) not to be compelled to testify against himself or to confess guilt. 7. Any transferred person convicted of a crime shall be permitted to have the right to his conviction and sentence reviewed by, or appealed to, a higher tribunal in accordance with the law of Mauritius."

[73] Agreement between the European Union and the United Republic of Tanzania on the conditions of transfer of suspected pirates and associated seized property from the European Union-led Naval Force to the United Republic of Tanzania, OJ 2014 L108/3. Similar arrangements have also been agreed with other countries from the region: Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of

Union pursues the objectives of [CSDP] Operation Atalanta, namely to preserve international peace and security, *in particular by making it possible to ensure that the perpetrators of acts of piracy do not go unpunished*" (emphasis added), "to *render … prosecutions more effective* by ensuring the transfer of the persons concerned to the United Republic of Tanzania *precisely when the Member State with jurisdiction cannot or will not exercise jurisdiction*" (emphasis added), adding that "were there to be no such operation [Atalanta], that agreement would be devoid of purpose". To be sure, the Court of Justice refuted the contention that the agreement was an instrument of judicial cooperation, as argued by the European Parliament to contest the legal basis of the Council decision to conclude it.[74]

Through this type of agreements (e.g. with Mauritius and Tanzania), the Union in effect outsources to the partner's law enforcement authorities the task of prosecuting the individuals whom its mission may intercept and subsequently transfer to those authorities,[75] in accordance with basic standards of legal protection. By the same token, the EU also subcontracts the responsibility of providing legal protection in relation to the measures Member States take under EU mandate. The intercepted and transferred persons do not benefit from judicial protection under EU rule of law standards,[76] which according to Article 47 of the Union's Charter of Fundamental Rights, entails that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal. Instead, the person transferred by the EU shall be treated humanely "in accordance international human rights obligations".[77] In the same vein, the activities of EULEX Kosovo to fulfil its rule of law mission are to be compliant with "international standards concerning human rights", rather than EU standards. While exporting some norms of legal protection might correspond to the EU rule of law mandate examined above, also in terms of graduating its promotion, those instruments in effect permit the EU and its Member States not to have to fulfil some of their obligations deriving from Article 21 and 23 TEU.[78]

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piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, OJ 2009 L 79/49; Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer, OJ 2009 L 315/35.

[74] Case C-263/14, *Parliament v Council (Tanzania)* ECLI:EU:C:2016:435.

[75] As was already envisaged in Article 12 of Council Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *op. cit.*

[76] Article 3 of the Agreement stipulates that "Any transferred person shall be treated humanely and in accordance with international human rights obligations, embodied in the Constitution of Mauritius, including the prohibition of torture and cruel, inhumane and degrading treatment or punishment, the prohibition of arbitrary detention and in accordance with the requirement to have a fair trial."

[77] Article 4(1) of the Agreement, which otherwise refers to "International Human Rights Law, including the 1966 International Covenant on Civil and Political Rights, and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", in its preamble.

[78] See discussion on EU and Member States' obligations to develop and implement the EU external action in accordance with the Rule of Law, in section 3 below.

2.2.3. Emerging policy?

A more comprehensive and articulate EU projection of rule of law standards has materialised in the context of the EU (on-going) eastward enlargement, which reflects the more prescriptive rule of law mandate the TEU establishes in relation to the Union's neighbours.[79] Following the 1993 meeting of the European Council in Copenhagen and its agreement on the so-called "Copenhagen criteria" for accession, and through the ensuing EU "pre-accession strategy",[80] EU institutions and Member States have actively engaged with candidate states to assist them in meeting essential membership requirements, including in particular their respect for the rule of law. The latter's prominence has steadily increased, particularly since Bulgaria and Romania acceded to the Union, and against the backdrop of constitutional recession in several Member States. Meeting the elaborated rule of law requirement has indeed become one of the "fundamentals of the accession process": it is a conditio sine qua non for the opening of membership negotiations, and for their advancement.[81]

The EU enlargement process has in effect prompted the elaboration of an EU external rule of law toolkit. In particular, EU institutions and Member States have enunciated *standards* by reference to internal and external sources,[82] which candidate countries must fulfil as condition for accession, and developed *techniques* of monitoring of compliance therewith, and of redress in case of regression.[83] The notion of "reversibility" of the accession process has become more prominent in the EU methodology and discourse. [84] Respect for the rule of law is not only viewed and operationalised as EU founding value to which candidates have to adhere in line with Article 49(1) TEU. It is also as a structural requirement to ensure their effective

[79] See discussion in section 2.1.

[80] E.g. Marc Maresceau, "Pre-accession", in Marise Cremona, *EU enlargement* (OUP, 2003), p. 9; Christophe Hillion, "EU enlargement" in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (OUP, 2011) p. 187.

[81] See e.g. European Commission, *Enhancing the accession process - A credible EU perspective for the Western Balkans*, COM(2020) 57 final; European Commission, *2022 Communication on EU Enlargement Policy*, COM(2022) 528; EU Council: *Enlargement and Stabilisation and Association Process – Council conclusions*; 13 December 2022; <https://www.consilium.europa.eu/media/60797/st15935-en22.pdf >

[82] E.g. by reference to Council of Europe sources, including the ECHR, reports of the Venice Commission and GRECO, and OSCE sources. See European Commission, *2022 Communication on EU Enlargement Policy*, COM(2022) 528; and the references contained therein. Further: Ivan Damjanovski, Christophe Hillion and Denis Preshova, "Uniformity and differentiation in the fundamentals of EU membership - The EU Rule of Law Acquis in the Pre- and Post-accession Contexts" (2020) *EU IDEA Research Papers*, No. 4 < https://euidea.eu/wp-content/uploads/2020/06/euidea_rp_4.pdf >

[83] Further Andi Hoxhaj, "The EU Rule of Law Initiative Towards the Western Balkans", (2021) 13 *Hague Journal on the Rule of Law* p. 143; Lisa Louwerse, Eva Kassoti, "Revisiting the European Commission's Approach Towards the Rule of Law in Enlargement" (2019) 11 *Hague J Rule Law* p. 223; Lisa Louwerse, "Mind the gap: issues of legality in the EU's conceptualisation of the rule of law in its enlargement policy", (2019) 15 *Croatian Yearbook of European Law and Policy* p. 27, e.g. Ronald Janse, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", (2019) 17 *I.CON*, p. 43.

[84] European Commission, *Enhancing the Accession Process*, op. cit. : "decisions to halt or even reverse the process should be informed by the annual assessment by the Commission in its enlargement package on the overall balance in accession negotiations and the extent to which fundamental reforms, in particular on the rule of law are being implemented" (p. 5).

fulfilment of other core membership prerequisites, especially the full application of the EU *acquis*.

Importantly, the progressive articulation of an EU rule of law *policy* towards the candidate countries has been encouraged and regularly endorsed, both in principle and contents, by all the Member States.[85] They have thereby incrementally codified an EU customary law of membership that comprises more elaborate rule of law tools, and which has subsequently become of relevance to address regressions within the EU too. Substantive references and methodologies which the EU (and its Member States) has deployed to ascertain that candidates for accession respect the rule of law effectively to operate as Member State, are indeed appearing in instruments aimed at ensuring compliance internally as well.

While the mechanisms enshrined in Article 7 TEU were conceived out of fear of post-accession reversion in terms of compliance with EU founding principles,[86] the Cooperation and Verification Mechanism (CVM) applied to Bulgaria and Romania since they entered the Union,[87] foreshadowed the incremental internalisation of the EU pre-accession toolbox. Based on their Accession Treaty with EU Member States, the CVM Decision established a specific post-accession mechanism whereby the EU has continued to monitor the two Member States' to ensure that they comply with the rule of law standards associated with membership.[88] The CVM has involved the establishment of benchmarks, and subsequent regular reports from the European Commission on the states' progress in e.g. reforming their judicial systems in the light of those benchmarks.[89] Such monitoring, which has not prevented setbacks in

[85] Christophe Hillion, "The creeping nationalisation of the EU enlargement policy"; (2010) *Swedish Institute for European Policy Studies*, Report 6/2010.

< www.sieps.se/en/publikationer/the-creeping-nationalisation-of-the-eu-enlargement-policy-20106 >

[86] Wojciech Sadurski, "Adding Bite to a Bark: The Story of Article 7, EU Enlargement and Jorg Haider" (2010) *Col. J.Eur. L.* 385, Clemens Ladenburger and Pierre Rabourdin, "La constitutionalisation des valeurs de l'Union – commentaires sur la genèse des articles 2 et 7 du Traité sur l'Union européenne", (2022) 657 *Revue de l'Union européenne*, p. 231. See also: Dimitry Kochenov, "Article 7 TEU: A Commentary on a Much Talked-about "Dead" Provision" (2018) 38 *Polish Yearbook of International Law*, p. 165; Leonard Besselink, The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2016) p. 128; Bojan Bugarič, 'Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism', in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) p. 82.

[87] See e.g. Milada Anna Vachudova and Aneta Spendzharova, "The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession" (2012) *SIEPS European Policy Analysis*, 2012:1, p. 1.

[88] E.g. Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, p. 56). The Court of Justice found in *Asociaţia 'Forumul Judecătorilor din România'* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393); that the CVM Decision, and the benchmarks it contains "are intended to ensure that Romania complies with the value of the rule of law, set out in Article 2 TEU, and are binding on it" (para 178). The Court also held that those benchmarks "are formulated in clear and precise terms and are not subject to any conditions, and they therefore have direct effect" (paragraphs 249 and 250). See also: Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034; Case C-430/21, *RS*, ECLI:EU:C:2022:99.

[89] See e.g. European Commission, *Report to the European Parliament and the Council on progress in Romania under the cooperation and verification mechanism*, COM (2022) 664.

the functioning of e.g. the Romanian judiciary,[90] has indeed been partly overtaken and generalised since, based on the Annual Rule of Law Cycle covering all Member States, and the Conditionality Regulation for the protection of the EU budget.[91]

Out of necessity, given the rule of law regression unfolding in several Member States, conditionality mechanisms, periodical Commission assessments through e.g. the Annual Rule of Law Review, and a regular rule of law "dialogue" in the Council, are partly emulating the pre-accession apparatus – and some of its imperfections[92] - to try and secure continuing observance of the rule of law within the Union too.[93] Such a development gives a concrete expression to the coherence the EU Treaties require between the internal and external promotion of the rule of law, and specifically between accession conditions and membership obligations.

The case law of the European Court of Justice has bolstered the apparent feedback effect of the pre-accession rule of law policy, potentially calling for a more systematic pre-accession monitoring. The principle of "non-regression", which the Court coined in its *Repubblika* ruling,[94] confirms that the rule of law standards which a candidate state achieved to be allowed to accede, can subsequently be used as yardsticks to assess whether it continues to observe the rule of law qua Member State, as a condition to enjoy all the rights associated with membership.[95] The Court's decision further articulates Article 21 TEU's requirement of coherence between the principles founding the Union's existence and development, and those underpinning its external action, including the rule of law, and the interlinked internal (membership) and external (pre-accession) safeguard thereof which the EU has to guarantee on that basis. While still abstract at this stage, the principle of non-regression could indeed prompt further elucidation of common rule of law standards, applicable both inside and outside the Union, to operationalise that principle.

The on-going development of the internal rule of law toolkit,[96] and the related case law of the Court, have in turn inspired further articulation of the rule of law the

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[90] See in this sense, Case C-430/21, *RS*, ECLI:EU:C:2022:99.

[91] See Commission's 2022 Report on Romania, op. cit. pp. 1-2.

[92] See e.g. the early critique by Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer, 2008) cf. Ronald Janse, "Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement", (2019) 17 *I.CON*, p. 43.

[93] See European Commission, *Rule of Law Report - The rule of law situation in the European Union*, COM(2022) 500 final; More on this innovation, see Didier Reynders, "Respect de l'Etat de droit dans l'Union: outils et perspectives", *Revue de l'Union européenne* No 657, April 2022, p. 201; Renáta Uitz, "The Rule of Law in the EU: crisis, differentiation, conditionality" (2022) 7 *European Papers* p. 929; Petra Bard and Laurent Pech, "The Commission 2021 Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values" (Report, European Parliament. 21 February 2022). see also Hoxhaj, op.cit.

[94] Case C-896/19 *Repubblika*, EU:C:2021:311. See further Adam Lazowski, "Strengthening the rule of law and the EU pre-accession policy: *Repubblika v. Il-Prim Ministru* : case C-896/19" (2022) 59 *Common Market Law Review* p. 1803; Mathieu Leloup, Dimitry Kochenov and Aleksejs Dimitrovs, "Non-regression: opening the door to solving the 'Copenhagen Dilemma'? All the eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*" (2021) *RECONNECT Working Paper* (Leuven) No. 15.

[95] Case C-896/19 *Repubblika*, EU:C:2021:311.

[96] See other contributions in this Issue; and also: Reynders, op. cit., Daniel R. Kelemen, "The European Union's failure to address the autocracy crisis: MacGyver, Rube Goldberg, and Europe's unused tools" (2022) *Journal of European Integration* p. 1.

EU promotes abroad. Starting with the candidate states,[97] the EU enlargement methodology, including the accession negotiations, has incorporated new elements of the evolving EU rule of law acquis, as articulated by the Court of Justice.[98] It may be hoped that such development could prompt further consistency and scrupulousness in the overall EU approach to the rule of law. To be sure, the observance thereof, now as one of the "fundamentals of the accession process",[99] will require a more systematic and rigorous application than it presently is to be credible. Thus, despite the well-documented deterioration of the rule of law in Serbia, a candidate for membership, the EU Member States have not fundamentally altered the pace of their accession negotiations with the applicant.[100] By contrast, they long failed to open accession negotiations with the Republic of North Macedonia, despite the latter repeatedly fulfilling the preliminary rule of law conditions, as acknowledged by the European Commission.[101]

The lingering inconsistency in the application of the pre-accession standards,[102] specifically articulated to uphold the rule of law, which this episode alone illustrates, impinges on the effectiveness of the principled ever-stricter conditionality, and questions its raison d'être. More dangerously, it relativizes the significance of the rule of law both as EU founding value, prerequisite for membership and principle of the EU external action, and diminishes the credibility of the EU to uphold it. That the EU should be more scrupulous in the application of its pre-accession conditionality is not only critical in the longer term to ensure post-enlargement adhesion to its values, it is also imperious considering that its overall approach has inspired its rule of law promotion further afield, in line with the prescriptions of Article 21(1) TEU.

Foreshadowing the mandate of Article 8 TEU, the EU has employed pre-accession-like (soft law) instruments, in the context of the so-called European Neighbourhood Policy, [103] also to promote the rule of law and in particular to spell

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[97] Damjanovski, Hillion and Preshova, "Uniformity and differentiation in the fundamentals of EU membership, op. cit.

[98] See, in particular, the case law related to the principle of judicial independence, e.g. Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, Case 585/18 *A.K. and others* ECLI:EU:C:2019:982, Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:53; C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924; C-791/20, *Commission v Poland*, ECLI:EU:C:2021:596. For an analysis of this fast developing case law see, e.g. Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Report 2021:3.

[99] European Commission, *Enhancing the accession process* – op. cit.

[100] See EU Council, Conclusions on Enlargement and Stabilisation and Association Process, 13 December 2022 <https://www.consilium.europa.eu/media/60797/st15935-en22.pdf > The Commission, and particularly the Commissioner in charge of Enlargement, have also been criticised for their leniency: < https://euobserver.com/world/156620 >

[101] < https://euobserver.com/opinion/155491?utm_source=euobs&utm_medium=email >

[102] Marc Maresceau, "The EU Pre-Accession Strategies: a Political and Legal Analysis", in Marc Maresceau and Erwann Lannon (eds) The EUs Enlargement and Mediterranean Strategies - A Comparative Analysis (Palgrave, 2001), p. 3.

[103] See e.g. Joint Communication, *A new response to a changing neighbourhood*, COM (2011) 303 final, p. 14. Further: Marise Cremona and Niamh Nic Shuibhne "Integration, membership, and the EU neighbourhood" (2022) 59 *Common Market Law Review* (Special Issue), p. 155; Olga Burlyuk and Peter Van Elsuwege, "Exporting the rule of law to the EU's Eastern Neighbourhood: reconciling coherence and

out priorities for neighbouring countries to reform their judiciary, as prerequisite to deepen their relationship with the Union.[104] Specific "domestic reforms" provisions have also been included in EU agreements with some of its neighbours, whereby the parties must cooperate with a view to "developing, consolidating and increasing the stability and effectiveness of democratic institutions and the rule of law (…) making further progress on judicial and legal reform, so as to secure the independence, quality and efficiency of the judiciary, the prosecution and law enforcement; strengthening the administrative capacity and guaranteeing the impartiality and effectiveness of law-enforcement bodies; (…) ensuring effectiveness in the fight against corruption".[105]

While the rule of law is still envisaged as the basis of their internal and external policies as required by essential elements clauses, the parties are thus increasingly expected to cooperate in specific rule of law related areas to make that principle a reality, potentially prompting further articulation of common standards, whose observance might in turn lay the grounds for closer links.[106] The EU partners' ambition to deepen their cooperation with the EU, for instance in the field of justice and home affairs, indeed depends on their performance as regards the rule of law, and in turn of the EU's own credibility in this terrain.[107] The eventual mutual confidence in the parties' rule of law standards may indeed open the possibility for the relationship also to involve mechanisms of deeper cooperation, such as mutual recognition of e.g. the parties' judicial decisions. The EU relationship with other

differentiation", in Sara Poli (ed.) *The European Neighbourhood Policy – Values and Principles* (Routledge, 2016), p. 167; Narine Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Hart Publishing, 2014); B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy. A Paradigm for Coherence* (Routledge, London 2012) Christophe Hillion, "The EU's Neighbourhood Policy towards Eastern Europe" in Alan Dashwood & Marc Maresceau (eds), *Law and Practice of EU External Relations – Salient Features of a Changing Landscape* (CUP, 2008) p. 309; 20; Marise Cremona and Christophe Hillion, "*L'Union fait la force?* Potential and limits of the European Neighbourhood Policy as an integrated EU foreign and security policy", *European University Institute Law Working Paper* No 39/2006: cadmus.iue.it/dspace/bitstream/1814/6419/1/LAW-2006-39.pdf

[104] Action Plans adopted in the context of the European Neighbourhood Policy can be found here: <https://www.eeas.europa.eu/eeas/enp-action-plans_en>. For a recent articulation of the Rule of law promotion in relation to the neighbours, see e.g. European Commission, *Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Association Council established under the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, on the adoption of the EU-Georgia Association Agenda*, COM (2022) 103.

[105] Article 4 of the Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, *OJ L 23, 26.1.2018, p. 4–466*. The EU-Ukraine Association Agreement (op. cit) contains a similar provision (Article 6: "dialogue and cooperation on domestic reform"), although crafted in softer and vaguer terms.

[106] E.g. for the purpose of increasing mobility, by way of visa liberalisation, See e.g. Olga Burlyuk and Peter Van Elsuwege, op. cit.

[107] Article 14 of the EU- Ukraine Association Agreement foresees that "In their cooperation on justice, freedom and security, the Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation will, in particular, aim at strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption. Respect for human rights and fundamental freedoms will guide all cooperation on justice, freedom and security"

neighbouring states like Iceland and Norway is a case in point.[108] As will be discussed below, it then entails that the EU too is trustworthy in terms of observance of the rule of law.[109]

2.2.4. Discrepancy between mandate and delivery?

The above - admittedly highly selective - account of the EU external rule of law toolbox illustrates that, in line with the terms of the Treaty-based mandate discussed above, its promotion is permeating different EU external policies, including the CFSP. Upholding and promoting the rule of law in the EU relations with the wider world takes different forms, e.g. conditionality, both negative (e.g. potential sanctions in reaction to third states' breaches of the rule of law), and positive (encouraging third states to certain a behaviour through various incentives or as a condition to deepen the relationship with the EU, including accession).

The EU external rule of law promotion has also encompassed a degree of variation, if not scalability, in the way in which the Union fulfils its mandate, which partly reflects the differentiation prescribed by the EU Treaty provisions. A cursory look at various instruments shows several formulations of the rule of law promotion, from very general to very specific. It varies not only in substance, but also in methodology, both in terms of advocacy techniques, progress and compliance monitoring, and sanction in case of regression. Conceptually superficial in some essential clauses, as if to pay lip service to the general EU value promotion mandate, respect for the rule of law becomes a potent and articulate precondition if the relations (are to) involve a higher degree of actual or potential integration of third states with the EU legal order. Whether or not the country is a beneficiary of financial support, and/or covered by the EU development policy also determines the terms of the rule of law being promoted, and the way it is promoted.

While the EU rule of law mandate has been set out to encompass a level of differentiation in the way it is to be carried out in consideration of the political covenant underlying the relationship,[110] some expressions of that differentiation seemingly depart from the Treaty terms and logic.

Practice displays a degree of instrumentalization of the rule of law, whereby the terms of its promotion are a function of the aims it is set out to achieve. Various instruments involve the enunciation of articulate standards, promoted through targeted tools and tailored to attain the objectives of the foreign (and security) policy frameworks in which they are embedded. The EU financial instrument (NDICI), and the CFSP agreements with Mauritius/Tanzania typify the phenomenon. While the pre-accession strategy involves a more comprehensive, articulate and systematic projection of rule of law standards, it is functional too, at least partly. Though aimed

[108] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 339, 21.12.2007, p. 3–41*, Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

[109] See discussion under section 3.2.

[110] Further on the notion of political covenant, see Alessandro Petti, *EU Neighbourhood law: Wider Europe and the extended EU's legal space* (Hart Publishing, forthcoming).

at entrenching the rule of law as a value in the constitutional fabric of the acceding state, it is also, perhaps primarily, about ensuring that the candidate is practically able to operate as full Member State in the EU legal order.

Moreover, the promotion of the rule of law also appears politicised. Practice indicates that tools used in relation to similar types of partners (e.g. neighbouring states) do differ in the way they are crafted. Or, while they may be similarly crafted and embedded in the same policy framework in relation to similar types of countries, they are nevertheless applied differently from one country to the other. The diverse handling of rule of law deteriorations in different third states from the same region, including candidate states, which in principle involve the most active and demanding EU rule of law policy, is telling. At the same time, some relationships hardly include any rule of law promotion dimension. Beyond the nature of the links which the EU maintains and intends to have with a third state, Member States' interests in relation to that state,[111] as well as the latter's aspirations towards the EU, its (geo)political clout, and its receptiveness to the EU demands, appear to determine the rule of law dimension of the relationship, its function therein, and its application. In sum, not all third states are equal before the EU rule of law promotion, and some countries are indeed more equal than others.

In practice, the rule of law has not been approached and promoted *only* as an (independent) founding *value* of the EU, the cornerstone of its constitutional order[112] that it seeks to advance also to the wider world, starting with the countries from the EU's vicinity. A siloed, transactional and unsystematic promotion of the rule of law also surfaces, that does not fit neatly with the EU constitutional mandate recalled above, and the imperative of coherence it encompasses, as determinant of the EU authority as guardian of the rule of law. [113]

The on-going articulation of rule law standards and monitoring mechanisms, triggered in part by the internal deterioration in this terrain, and in turn by new necessities in the context of accession preparations, ought to contribute in the longer run to a more systematised, coherent and thus authoritative external rule of law action too. The Court of Justice's articulation of a principle of "non-regression", and the notion that respect for the rule of law as EU value is a precondition for Member States to enjoy the full benefits of membership, might help buttressing the normative significance the Treaties attribute to the rule of law, with potentially positive knock-on effect on its external promotion, notably in terms of Union's credibility.

That said, the latter is also dependent on both institutions and its Member States themselves being scrupulous *compliers* therewith *in the conduct of the EU external action*. However sophisticated in their design, and consistent in their deployment,

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[111] Vuk Vuksanovic, "France has become Serbia's new best friend in the EU", 12/2/2021, <https://www.euronews.com/my-europe/2021/02/12/france-has-become-serbia-s-new-best-friend-in-the-eu-view>

[112] See e.g. Case *H* v *Council and Others*, C-455/14 P, EU:C:2016:569.

[113] Note that, contrary to Article 3(5) TEU, the European Commission's 2022 Trade Policy Review mentions interests before values, see: *An Open, Sustainable and Assertive Trade Policy*, COM (2021) 66 final, p. 4. The same holds true in the Council Press Release "Delivering results by standing firm on EU interests and values" following the EU-China leaders meeting of 2020, op. cit.

tools to promote and uphold the rule of law externally are worthless if instruments to enforce it internally are (structurally) deficient.

3. RULE OF LAW AS *MODUS OPERANDI* OF EU EXTERNAL ACTION

As alluded to above, Articles 23 TEU and 205 TFEU foresee that the EU external action of the Union should be "conducted in accordance with" the general provisions governing it, which are enshrined in particular in Article 21 TEU. Paragraph 3 of the latter provision stipulates that the "Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2". The rule of law is one of such principles, while its consolidation and support is envisaged as one the objectives to be pursued. Read together those provisions require that the EU external action be conducted in accordance with the rule of law. Article 21(3) TEU further foresees that the Union shall respect those principles "in the development and implementation of the different areas of the Union's external action". Thus that obligation binds not only the Union's institutions (3.1.), but also its Member States, considering that in the composite EU system of external action, as in many areas of EU law, "implementation" is predominantly their responsibility (3.2.). That EU institutions and Member States should conduct the EU external action in accordance with the rule of law, and be accountable for it, is indeed essential for the EU authority to promote it towards the wider world.

3.1. EU institutions' conduct

EU primary law comprises several provisions which, by design or in effect, help secure that EU institutions respect the rule of law in general, and in the conduct of the Union's external action, in particular.

As recalled above, the EU institutional framework "shall aim to promote [the Union's] values".[114] The European Commission plays an important role in this context, in that it shall "ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] oversee the application of Union law under the control of the Court of Justice". But it is indeed the Court that ultimately "ensure[s] that in the interpretation and application of th[e] Treaty the law is observed".[115]

As emphasised by the Treaty, "the [Union] is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter".[116] Based on that general mandate, European judges have been called upon to verify that EU external instruments, both contractual (i.e. EU international agreements) and autonomous (i.e. EU unilateral measures), are adopted in conformity with EU primary law, comprising relevant EU procedural requirements and the institutional balance they embody,[117] EU

[114] Article 13(1) TEU.

[115] Article 19 TEU. Also in view of Article 344 TFEU, as interpreted by the Court in e.g. Opinion 2/13 *re: EU Accession to the ECHR (II)* ECLI:EU:C:2014:2454.

[116] Case C-294/83, *Les Verts*, ECLI:EU:C:1986:166.

[117] Particularly in the context of the EU treaty-making procedure set out in Article 218 TFEU (see e.g.; Case C-275/20, *Commission v Council (Agreement with Korea)*, ECLI:EU:C:2022:142; Case C-244/17, *Commission* v *Council (Agreement with Kazakhstan)*, EU:C:2018:662, Case C-658/11,

fundamental rights as enshrined e.g. in the Charter of Fundamental Rights,[118] and international norms binding the Union.[119]

The Treaty of Lisbon has generally enlarged the Court of Justice's jurisdiction, and thus the rule of law in the EU. An important development in this respect is the reviewability of acts of the European Council, which remains to be exercised to its full potential.[120] Yet, the most-eye catching innovation Lisbon introduced in terms of judicial control was the extension to the Court's jurisdiction to the CFSP, although within equivocally defined limits. Where those boundaries of judicial review are eventually set is of central relevance for a discussion on whether the EU external action is conducted in accordance with the rule of law, as required by the general provisions discussed above.

3.1.1. A Constitutional puzzle

In its present dispensation, Article 24(1) TEU, included in the Treaty chapter governing the CFSP, stipulates that: "The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union."

Reiterating that the Court has no jurisdiction over the CFSP in its first paragraph, Article 275(2) TFEU then foresees that "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the [TEU]."

Parliament v *Council (Agreement with Mauritius)*, EU:C:2014:2025, Case C-130/10, *European Parliament v Council (Smart Sanctions)* ECLI:EU:C:2012:472). Further on the case law relating to the principle of institutional balance in EU external relations, see e.g. Heliskoski, The procedural law of international agreements: A thematic journey through Article 218 TFEU" (2020) 57 *Common Market Law Review* p. 79; Panos Koutrakos, "Institutional balance and sincere cooperation in treaty-making under EU law" (2019) 68 *International & Comparative Law Quarterly*, p. 1; Christophe Hillion, "Conferral, cooperation and balance in the institutional framework of the EU external action" in Marise Cremona (ed) *Structural principles in EU external relations law* (Hart Publishing, 2018), p. 117.

[118] For instance, the Court has exercised full judicial control over the lawfulness of EU restrictive measures against natural or legal persons to make sure "that they are founded on solid basis", confirming and building upon the case law emerging prior to the Lisbon Treaty (see e.g., Case T-723/20, *Prigozhin*, ECLI:EU:T:2022:317, and pre-Lisbon: Joined Cases C-593/10 P and C-595/10 P *Commission and Others* v *Kadi*, C-584/10 P, EU:C:2013:518;

[119] See e.g. Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118.

[120] A jurisdiction which the Court still has to exercise to its full extent, as suggested by the infamous case concerning the EU-Turkey statement: Case T-192/16, *NF* v *European Council*, EU:T:2017:128 and Joined Cases C-208/17 P to C-210/17 P *NF*, ECLI:EU:C:2018:705. See also T-180/20, *Sharpston* v *Council and Conference of the Representatives of the Governments of the Member States*, EU:T:2020:473, and Case C-684/20 P, *Council and Conference of the Representatives of the Governments of the Member States* ECLI:EU:C:2021:486.

As "[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law",[121] these provisions do create an uncertainty as to whether the external action of the Union can at all be conducted in conformity with it, as otherwise required by the Treaties. On the one hand, the Member States' acknowledgement of the CJEU's jurisdiction over (certain) CFSP decisions indicates that, though traditionally governed by distinct rules and procedures, the CFSP is no longer immune from judicial review at EU level, and that it too is subject to the rule of law in the Union's constitutional order.[122] Such a recognition is indeed congruent with the constitutional mandate of the Court set out in Article 19 TEU, while giving a concrete institutional expression to the requirements set out in Articles 21 and 23 TEU.

On the other hand, the principle that the Court's jurisdiction remains excluded challenges that consistency. The ensuing ambiguity is not only problematic in terms of legal certainty, which incidentally is a component of the rule of law.[123] More significantly, the Treaty formulation of the CFSP-jurisdiction also introduces a fundamental tension, if not contradiction between on the one hand, the hardening of the rule of law imperative both as an objective and constitutional requirement in the external action of the Union and, on the other hand, an institutional obstruction to its effective observance.

That tension compromises the Union's ability to carry out its external rule of law mandate. For how can it credibly promote and uphold the rule of law, and conduct its external action in accordance therewith, which presupposes effective judicial review, if its constitutional charter in principle excludes this review in relation to an entire a policy area, viz. the CFSP, defined by the Treaty as "cover[ing] all areas of foreign policy and all questions relating to the Union's security"?[124] Is it conceivable that, for example, the EU rule of law mission EULEX KOSOVO, whose raison d'être is to assist the authorities of Kosovo to establish a rule of law compliant judicial system and to exercise some limited executive tasks, takes measures which, in principle, cannot be contested before EU courts on the ground that they are adopted by a CFSP/CSDP-based entity?[125] How can the EU convincingly export standards of judicial protection through CFSP Agreements with e.g. Mauritius or Tanzania, if in principle those very standards are inapplicable to test the legality of such agreements themselves, or the measures taken by the CSDP mission they are deemed to supplement?[126]

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[121] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, see also C-72/15, EU:C:2017:236, *Rosneft*, ¶73.

[122] On the specificity of the CFSP, and its limits see e.g. Geert de Baere, *Constitutional principles of EU external relations* (OUP, 2008); Graham Butler, *Constitutional Limits of the EU's Common Foreign and Security Policy* (University of Copenhagen, 2016); Piet Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Europa law Publishing, 2005).

[123] See European Commission, *A new EU Framework to strengthen the Rule of Law*, Annex I: *The Rule of law as a foundational principle of the Union*, COM(2014) 158.

[124] Article 24(1) TEU.

[125] On issues raised by this mission, see the analysis by the Venice Commission: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)051-e

[126] See discussion under section 2.2. above.

In observing that "certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice", the Court's Opinion 2/13 on the envisaged EU accession to the European Convention of Human Rights (ECHR) was an admission that the EU constitutional order indeed fails to provide effective judicial review in relation to CFSP measures – while by contrast, such review could have been provided in the context of the ECHR but, in the view of the Court of Justice, at the expense of the autonomy of the EU legal order, which rendered the envisaged EU accession to the ECHR incompatible with the EU Treaties.[127] The Court however noted "that [it] ha[d] not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of those provisions",[128] thus keeping the possibility through such definition to solve the constitutional puzzle.

Indeed, unless the Court's limited CFSP jurisdiction is construed broadly, and/or unless it accepts that judicial review of CFSP decisions falling outside its jurisdiction is effectively carried out at Member State's level,[129] or at international level,[130] the EU Treaties would themselves prevent the EU external action from being conducted in accordance with the rule of law, while prescribing it at the same time. It would in turn undermine the EU authority to promote the rule of law externally, and thus to fulfil its constitutional mandate. Incidentally, it would also point to another inconsistency by inhibiting the EU ability to carry out its constitutional mandate to accede to the ECHR set out in Article 6(2) TEU.

3.1.2. Resolving the contradiction in the name of the rule of law?

Since its seminal, if contested, Opinion 2/13, the Court of Justice has seemingly attempted to overcome the Treaty-based contradiction.[131] As a starting point, the Court (rightly) framed the provisions of Article 24(1) TEU and Article 275(2) TFEU as a *derogation* from "the rule of general jurisdiction which Article 19 TEU confers

[127] Opinion 2/13 *re: EU Accession to the ECHR (II)* ECLI:EU:C:2014:2454.

[128] Opinion 2/13, ¶251.

[129] Opinion 1/09 *re: Unified Patent Court* EU:C:2011:123. Further, see e.g. Christophe Hillion, "Decentralised integration? The protection of fundamental rights in EU Common Foreign and Security Policy" (2016) 1 *European Papers* p. 55.

[130] See e.g. Stian Øby Johansen, "Accountability Mechanisms for Human Rights Violations by CSDP Missions: Available and Sufficient?" (2017) 66 *International and Comparative Law Quarterly* p. 181, Frederik Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Intersentia 2010) Christophe Hillion and Ramses Wessel, "The Good, the Bad and the Ugly: Three Levels of Judicial Control over the CFSP" in Steven Blockmans and Panos Koutrakos (eds.), *Research Handbook on EU Common Foreign and Security Policy* (Edward Elgar Publishing, 2017) p. 65.

[131] For extensive analysis of this case law, see among others: Peter van Elsuwege, "Judicial review and the common foreign and security policy: limits to the gap-filling role of the Court of Justice", (2021) 58 *Common Market Law Review* p. 1731; Joni Heliskoski, "Made in Luxembourg: The fabrication of the law on jurisdiction of the Court of Justice of the European Union in the field of the Common Foreign and Security Policy" (2018) 2 *Europe and the World: A Law Review*; "Judicial Review in the EU's Common Foreign and Security Policy", (2018) 67 *ICLQ* (2018), p. 1; Marise Cremona, "Effective judicial review is of the essence of the rule of law: Challenging Common Foreign and Security Policy measures before the Court of Justice" (2017) 2 *European Papers* p. 671; Sara Poli, "The Common Foreign and Security Policy after Rosneft: Still imperfect but gradually subject to the rule of law", (2017) 54 *Common Market Law Review* p. 1799; Graham Butler, "The Coming of Age of the Court's Jurisdiction in the Common and Foreign and Security Policy", (2017)13 *EuConst* p. 673.

on the Court to ensure that in the interpretation and application of the Treaties the law is observed and they *must, therefore, be interpreted narrowly*" (emphasis added).[132] This general proposition subsequently determined the Court's overall interpretation of the different aspects of its jurisdiction over the CFSP.

First, the Court has considered that CFSP acts whose application interacted with other EU law rules would remain within its general jurisdiction. The exclusion enshrined in Article 24(1) TEU and Article 275(2) TFEU "cannot be considered to be so extensive as to exclude the Court's jurisdiction to interpret and apply the provisions of the Financial Regulation with regard to public procurement" applicable in the context of a CSDP Mission – in casu EULEX KOSOVO.[133] Nor can it "be considered to be so extensive as to exclude the jurisdiction of the EU judicature to review acts of staff management [in the context of CSDP operation] relating to staff members seconded by the Member States the purpose of which is to meet the needs of that mission at theatre level, when the EU judicature has, in any event, jurisdiction to review such acts where they concern staff members seconded by the EU institutions".[134]

The CFSP context within which other EU substantive rules apply does not, therefore, have the effect of disactivating the general jurisdiction which the Court exercises in relation to the latter. The same holds true whenever EU (non-CFSP) procedural rules are involved. Thus, the Court held that the negotiation and conclusion of CFSP agreements on the basis of Article 218 TFEU would be subject to its general control. In the *Mauritius* case for instance, concerning the CFSP agreement evoked above, the Court held that "it cannot be argued that the scope of the limitation, by way of derogation, on the Court's jurisdiction envisaged in (…) Article 24(1) TEU and in Article 275 TFEU goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted".[135]

Second, the Court of Justice has seemingly conceived of the CFSP derogatory judicial regime as an exclusion of certain CFSP acts from its review - exclusion which itself ought to be understood restrictively - but not as a limitation of available legal remedies for that purpose. Referring to the "complete system of legal remedies and procedures designed to ensure judicial review of the legality of [EU] acts", the Court thus held that the legality control envisaged in Article 275(2) of CFSP acts establishing restrictive measures, would not be limited to annulment proceedings under Article 263(4) TFEU, but would also encompass the validity control through the preliminary ruling procedure:

Since the purpose of the procedure that enables the Court to give preliminary rulings is to ensure that in the interpretation and application of the Treaties the law is observed, in accordance with the duty assigned to the Court under Article 19(1) TEU, it would be contrary to the objectives of that provision and to the principle of

[132] See Case C-658/11*Parliament* v *Council (Mauritius)*, EU:C:2014:2025.
[133] Case C-439/13 P *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753.
[134] Case C-455/14 P, *H* v *Council and Others*, EU:C:2016:569.
[135] Case C-658/11 *Parliament* v *Council (Mauritius)*, EU:C:2014:2025, ¶73.

effective judicial protection to adopt a strict interpretation of the jurisdiction conferred on the Court by the second paragraph of Article 275 TFEU, to which reference is made by Article 24(1) TEU.[136]

In the same perspective, the European judges found that "the principle of effective judicial protection of persons or entities subject to restrictive measures requires, in order for such protection to be complete, that the Court of Justice of the European Union be able to rule on an action for damages brought by such persons or entities seeking damages for the harm caused by the restrictive measures taken in CFSP Decisions."[137]

In its rulings, the Court of Justice has defined its CFSP-related judicial control in a purposive manner. It has explicitly referred to the rule of law imperative as an EU founding value (invoking Article 2 TEU), which presupposes effective judicial protection (mentioning Article 47 Charter of Fundamental Rights as further support) and that the Court, in view of its own role in the EU institutional framework (Article 19 TEU), must secure as far as possible, also in consideration of the constitutional requirements that constrain the conduct of the EU external action (referring to Articles 21 and 23 TEU).

While it has established that it could provide preliminary rulings concerning the *validity* of certain CFSP measures in view of the "duty assigned to [it] under Article 19(1) TEU",[138] the Court also suggests that, if implicitly permitted, it is also willing to perform its *interpretative* function in relation to CFSP acts too. Hence, it did provide an interpretation of the founding CFSP Joint Action that established EULEX KOSOVO when asked by a national court, in the context of the preliminary ruling procedure of Article 267 TFEU. Since the parties involved had not questioned the admissibility of the request considering its limited jurisdiction over CFSP acts, the Court did not either, although it could have done so of its own motion,[139] as the Advocate General did in his Opinion.[140] The ruling thereby extended what the Court had already acknowledged in *Rosneft*,[141] namely that it could already exercise its interpretative functions in the context of its CFSP-related jurisdiction,[142] for the purpose of monitoring compliance with Article 40 TEU.[143]

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[136] Case C-72/15 *Rosneft*, ECLI:EU:C:2017:236, ¶75.

[137] Case C-134/19 P, *Bank Refah Kargaran v. Council and Commission*, EU:C:2020:793, ¶43.

[138] Case C-72/15 *Rosneft*, ¶75.

[139] Case C-439/13 P, *Elitaliana* v *Eulex Kosovo*, EU:C:2015:753; Case C-134/19 P, *Bank Refah Kargaran* v *Council* EU:C:2020:793.

[140] Case C-283/20, *CO v Commission, EEAS, Council and EULEX KOSOVO*, ECLI:EU:C:2022:126.

[141] See *Rosneft*, ¶¶62-63. In pending case C-351/22, the Court of Justice has been asked again to provide a preliminary ruling on the interpretation of Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

[142] The interpretative function of the Court in relation to the CFSP is also necessary, and indeed exercised in cases of conflict of legal basis more generally: See e.g. Cases C-130/10, *European Parliament v Council* (*Smart sanctions)*, Case C-244/17, *Commission* v *Council (Agreement with Kazakhstan)*, EU:C:2018:662. The Court has also interpreted Treaty provisions concerning the CFSP in sanction cases, see e.g. Case T-125/22 *RT* in which the General Court of the EU provided an elaborate interpretation of e.g. Article 29 TEU (¶49).

[143] Further on the Court interpretative functions in relation to the CFSP, see e.g Christophe Hillion, "A Powerless Court? The European Court of Justice and the EU Common Foreign and Security Policy" in

Third, and in connection to the previous point, the Court has articulated a broad conception of *standing* under Article 263(4) TFEU as applicable in the context of Article 275(2) TFEU. A significant development in this regard, is the recognition that third states may, qua "legal persons", challenge the legality of CFSP acts that are covered by the latter provision. The Court thus allowed Venezuela to contest the legality of restrictive measures which, as mentioned above, the EU had adopted in reaction to the Venezuelan authorities' assaults on the rule of law.[144] As in earlier cases, the Court invoked Articles 2, 21 and 23 TFEU and interpreted "the fourth paragraph of Article 263 TFEU in the light of the principles of effective judicial review and the rule of law". It found that "a third State should have standing to bring proceedings, as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied",[145] e.g. "direct and individual concern". The Court also underscored that the "obligations of the European Union to ensure respect for the rule of law cannot in any way be made subject to a condition of reciprocity as regards relations between the European Union and third States".[146]

This brief account of the case law suggests that the Court of the Justice has been construing the different terms of its CFSP related judicial control in ways to meet the requirements of Articles 2, 21 and 23 TEU. Given that "[t]he very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law",[147] the Court has progressively been extending the operation of the complete system of legal remedies developed in the pre-Lisbon Community context, to the CFSP terrain. To that effect, and to preserve the "coherence of the system of judicial protection provided for by EU law", it has been willing to address what it has occasionally characterised as a "lacuna in the judicial protection of the natural or legal persons concerned",[148] thus emulating the gap-filling function it has performed before in e.g. *Les Verts*, in the name of the rule of law.[149] As will be discussed later, the Court of Justice may have indeed opened an important route to increase the EU's accountability towards third states,[150] which is an important component of a rule-of-law- compliant external action.

The Court appears incrementally to address the CFSP-specific issues it had alluded to in its Opinion 2/13 as obstacle to the EU accession to the ECHR. More generally, the case law partly helps resolve the constitutional tension inherent in the Treaty provisions, and contributes to ensuring that the EU external action may indeed be conducted in accordance with the rule of law.

Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law - Constitutional Challenges* (Hart Publishing, 2014) p. 47.

[144] See discussion in section 2.2.1., above.

[145] Case C-872/19P, *Venezuela v Council*, ECLI:EU:C:2021:507, ¶50.

[146] *Venezuela v Council*, ¶52.

[147] *H* v *Council and Others*, C-455/14 P, EU:C:2016:569, ¶41.

[148] *Bank Refah Kargaran*, ¶39.

[149] Case C-294/83, *Les Verts*, ECLI:EU:C:1986:166, ¶23.

[150] See Section 3.2.3., below.

Cases are pending that will provide further opportunities for the Court to articulate that jurisprudence further.[151] One remaining, and important, interrogation in this regard concerns the notion of "decisions providing for restrictive measures against natural or legal persons" mentioned of Article 275(2) TFEU, and thus the question of what acts fall outside the Court's CFSP-related jurisdiction. The case law has already indicated that certain CFSP acts are not covered by the Court's derogatory jurisdiction wherever they relate to other aspects of EU law which as a consequence brings them within the Court's general jurisdiction. What remains unclear therefore is the category of acts to which the Court drew attention in its Opinion 2/13 that are covered neither by the general jurisdiction of the Court, nor by the one established by Article 275(2) TFEU.

Indeed, the notion of "decisions providing for restrictive measures against natural or legal persons" for the purpose of Article 275(2) TFEU remains ambiguous. Oddly, the expression "restrictive measures" does not feature in the TEU CFSP chapter itself. It only appears in Article 215(2) TFEU (and Article 275(2) TFEU) which is the legal basis for the adoption of *non-CFSP* economic and financial restrictive measures implementing the initial CFSP "decision", and thus measures that are covered by the general jurisdiction of the Court of Justice.[152] While such CFSP "decisions" having restrictive effect may lead to such subsequent Article 215(2) measures, others do not because they do not economic and/or financial operationalisation, e.g. visa or travel restrictions, as opposed to restrictions of access to EU capital markets. This is the whole purpose of Article 275(2) TFEU to allow the Court to review the legality of those CFSP acts.

CFSP "decisions providing for restrictive measures against natural or legal persons" are generally enacted on the basis of Article 29 TEU, according to which "[t]he Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature".[153] This is a broadly defined power, which leaves the Council with a wide discretion as to the form and substance of such decisions. Practice indeed shows that the restrictive element of such decisions for natural or legal persons may vary considerably in its form, and may evolve in consideration of the particular circumstances in which they are enacted, and ensuing needs they are designed to fulfil. The recent EU instruments adopted in reaction to the Russian aggression against Ukraine, for instance the temporary prohibition of broadcasting activities of certain Russia media outlets, are cases in point.[154] So were the then novel EU measures at hand in the *Kadi* saga, in the wake

[151] E.g. Case C–29/22, *KS & KD v. Council & Ors.*, which is an appeal of GC decision in Case T–771/20, *KS & KD v. Council & Ors*., ECLI:EU:T:2021:798

[152] *Rosneft*, ¶106.

[153] See General Secretariat of the Council, *Sanctions Guidelines – update*, 4 May 2018, op. cit, pt. 7.

[154] See, in particular Council Decision (CFSP) 2022/351 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ L 60, 2.3.2022 p. 5* and Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine *OJ L 65, 2.3.2022, p. 1*. And the subsequent decision of the General Court of the EU about the legality of those measures in Case T- Case T-125/22 *RT v France*, ECLI:EU:T:2022:483 – which has been appealed: Case C-620/22 *RT France v Council* (pending). A detailed list of EU restrictive measures in the context of the Russian invasion of Ukraine is available here: https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/sanctions-adopted-following-russias-military-aggression-against-

of the 9/11 attacks.[155] The notion of CFSP decisions for the purpose of Article 275(2) TFEU cannot therefore be interpreted restrictively, and certainly not in the light of "traditional" restrictive measures such as freezing of assets. It would otherwise run the risk of ossifying the Court's CFSP control and make it unfit for purpose. It would indeed depart from its past willingness to adapt its judicial control to developments of new EU restrictive practices, by reference to the notion that the Union is "a community based on the rule of law".[156]

Moreover, there is no indication that the Court' jurisdiction under Article 275(2) TFEU should be limited to CFSP decisions adopted on Article 29 TEU. It would otherwise mean that measures adopted in the context a CFSP mission based on a Council decision, which are restrictive in terms of individuals rights, e.g. physical interceptions of individuals abroad and subsequent transfer to a third states' authorities for prosecution, as in the context of the *Atalanta* mission evoked above,[157] would fall outside the Court review. Such a difference of treatment regarding access to EU legal protection based on the legal basis of the CFSP act finds no basis in the Treaty. It would also be paradoxical, and problematic in terms of "the necessary coherence of the system of protection provided for by EU law",[158] as it would entail that CFSP measures that are most restrictive in terms of individual rights and freedoms, would escape judicial control.[159]

Such a narrow understanding of the notion of CFSP "decisions" for the purpose of Article 275(2) TFEU could indeed open the possibility for the EU Council to craft certain CFSP acts, or establish entities adopting such acts, that restrict individuals' rights and freedoms, in a way that shields those acts from judicial review under Article 275(2) TFEU. Such an approach would sit uncomfortably with the very rationale behind the Court's CFSP-related jurisdiction the latter provision introduced, in addition to the control the Court can otherwise exercise over Article 215 TFEU measures, namely to secure effective judicial protection and the rule of law, in relation to those CFSP measures that restrict legal and natural persons' rights.

The ruling of the Court in the CFSP-related case *SatCen* may provide support for a purposive and more rule-of-law-friendly conception of the type of CFSP

ukraine_en >. For an analysis of those measures, see Frank Hoffmeister, "Strategic Autonomy in the European Union's External Relations Law" (2023) 60 *CMLRev* (forthcoming).

[155] Joined Cases C-402/05 P and C-415/05 P, *Kadi v Council*, ECLI:EU:C:2008:461.

[156] *Kadi*, ¶316, see also ¶¶81 and 281.

[157] See Article 2(d), Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, op. cit. see also Council Decision (CFSP) 2020/2188 of 22 December 2020 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, *OJ L 435, 23.12.2020, p. 74–78.*

[158] *Bank Refah Kargaran*, ¶39; *Rosneft*, ¶78.

[159] Recall that in Joined Cases C-478/11 P to C-482/11 P, *Gbagbo and Others v Council*, EU:C:2013:258, ¶57, the Court of Justice underlined that "as regards measures adopted on the basis of provisions relating to the Common Foreign and Security Policy (…) it is the individual nature of those measures which, in accordance with the second paragraph of Article 275 TFEU and the fourth paragraph of Article 263 TFEU, *permits access to the Courts of the European Union*" (emphasis added).

decisions the Court may review under Article 275(2) TFEU,[160] in line with the existing CFSP-related case law. The Court thus found that

> The objective of an action for annulment is to ensure observance of the law in the interpretation and application of the FEU Treaty and it would therefore be inconsistent with that objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article 288 TFEU (...)
>
> Therefore, all acts adopted by the institutions, bodies, offices or agencies of the European Union, whatever their nature or form, which are intended to produce binding legal effects such as to affect the applicant's interests by bringing about a distinct change in his or her legal position, may be the subject of an action for annulment (emphasis added).

Different types of CFSP measures, whether adopted on the basis of Article 29 TEU or not, whether enacted by the Council, or by a body empowered by a Council CFSP act, may "affect the (…) interests" [of a natural or legal person] by bringing about a distinct change in his or her legal positions".[161] It is thus the demonstration of these effects on a person's interests, that should determine whether such CFSP measures fall within the scope of the Court's judicial control under Article 275(2) TFEU or not, rather than their formal belonging to a predetermined category of CFSP measures which that provision does not specify. This approach, which follows the established case law of the Court of Justice regarding Article 263(4) TFEU to which Article 275(2) TFEU refers, would correspond to the Treaty-based rule of law requirement, the imperatives of effective judicial protection and the "coherence of the system of judicial protection provided for by EU law",[162] which has thus far underpinned the Court CFSP-related jurisdiction.[163]

3.1.3 The jury's still out

In sum, the Treaty of Lisbon endeavoured to strengthen the rule of law in the development and implementation of the EU external action, notably by extending the jurisdiction of the European Court of Justice over the latter. The ambiguous terms of the extension however lay bare an inconsistency in the Treaty-makers' intention regarding the significance the rule of law is to play in the EU relation towards the wider world. The fundamental tension they have introduced in the EU constitutional charter indeed taints the authenticity of the EU (external) mandate. The Court's case law has articulated ways partly to overcome the conundrum, thus engraining the rule of law as modus operandi of the EU external action, as generally required by the EU Treaties including in its CFSP dimension. The case law in turn contributes to preserving the credibility of the EU in promoting and upholding the rule of law

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[160] Case C-14/19 P, *SatCen*, ECLI:EU:C:2020:492.

[161] In *Venezuela* the Court talked about acts of the EU that adversely affect a person or entity's rights or interests, see Case C-872/19 P, *Venezuela*, ECLI:EU:C:2021:507, ¶50.

[162] *Bank Refah Kargaran*, ¶39; *Rosneft*, ¶78.

[163] This approach should also apply beyond the context of CFSP, and in particular in relation to such acts as that at issue in Case T-192/16, *NF* v *European Council*, EU:T:2017:128 and Joined Cases C-208/17 P to C-210/17 P *NF*, ECLI:EU:C:2018:705.

abroad,[164] hence partly compensating for some of the policy incoherencies evoked in the first section of this discussion, which have impaired its authority.

This case law has occasionally been criticised. It has been recalled that the Court is equally subject to the principle of institutional balance enshrined in Article 13(2) TEU, [165] which it has the task to guarantee including in relation to itself, particularly when exercising its gap-filling function.[166] The Court cannot be seen to circumvent the rule established by Article 275(2) TFEU, however ambiguous, or indeed to empty it from its substance without raising a rule of law issue. Yet, the Court cannot be seen to adopt a narrow view of the instruction it has been given under Article 19 TEU either. This latter must be considered both in itself, as well as in conjunction with the general tasks of the EU institutional framework to which the Court belongs, as per Article 13(1) TEU, and in turn with the mandate of the Union in relation to the wider world, as stipulated in e.g. Article 21 TEU.

On that basis, and in view of the strategic importance of the EU defence of the rule of law on the international plane, it is arguably the task of the Court of Justice to circumscribe, as much as possible, the rule of lawlessness that the provisions of Article 24(1) TEU and Article 275(1) TFEU maintain in principle, and to secure that the principles of the EU external action are effectively observed in the CFSP area too, as mandated by e.g. Article 23 TEU. It is indeed the duty of the Court also to practice sincere cooperation with other institutions, under Article 13(2) TEU, to ensure that the Union fulfils its tasks, and that it does so coherently, in line with Articles 13(1) TEU and 21(3) TEU. This arguably includes the duty to find ways to permit the EU to accede to the ECHR as instructed by Article 6(2) TEU, which the case law arguably may now facilitate.

Preventing lawlessness at EU level is all the more imperative at a time when the Court otherwise actively engages to secure that the rule of law is applied by Member States,[167] which is another prerequisite for the Union to fulfil its external rule of law mandate.

3.2. Member States' conduct

A rule of law–compliant EU external action requires not only that Union's institutions respect it when developing and implementing all EU external policies, under the control of the Court of Justice. It also presupposes equivalent observance

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[164] Though the Court's decision in Joined Cases C-208/17 P to C-210/17 P *NF*, ECLI:EU:C:2018:705 reveals the limits of its ability and willingness to limit the rule of lawlessness in the EU constitutional order.

[165] See AG Wahl opinion in *H v Council* (Case C-455/14 P, ECLI:EU:C:2016:212) who otherwise suggested at paragraph 49 of his opinion that "[w]hether such a system is compatible with the principle that the EU is founded on the rule of law is, in the context of the present proceedings, of no relevance. That system is, in fact, the result of a conscious choice made by the drafters of the Treaties, which decided not to grant the CJEU general and absolute jurisdiction over the whole of the EU Treaties. The Court may not, accordingly, interpret the rules set out in the Treaties to widen its jurisdiction beyond the letter of those rules or to create new remedies not provided therein".

[166] See Peter Van Elsuwege, "Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice", (2021) 58 *Common Market Law Review* p. 1731.

[167] Joseph Weiler, "Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law" in Closa & Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, op. cit., p. 313.

by the Member States. In law and in fact, the EU cannot conduct its external action in accordance with the rule of law if its Member States do not observe it too.

Being a composite structure, the EU legally and practically depends on its national authorities to implement its external policies, and thus to fulfil its international commitments. This is the case even in areas where the EU enjoys exclusive competence. While the Union alone commits itself towards the wider world in such areas, and in principle assumes sole responsibility to fulfil its ensuing obligations, it is nevertheless reliant on national administrations to meet these commitments, e.g. Member States' customs authorities to implement if the EU external trade policy. The Union is dependent on its States' courts as EU courts,[168] effectively to protect the rights which the Union's external agreements may generate for third country nationals, particularly within the EU legal order. In short, the Treaty-based obligation whereby the EU shall conduct its external action in accordance with the rule of law equally binds the Member States.

The EU external *promotion* of the rule of law, discussed earlier, would be self-defeating if Member States could depart from it at will. Moreover, they are bound to act in coherence with the EU external mandate they themselves established as EU primary-law-makers. Not only must they comply with obligations deriving from EU (external relations) law in general, but that they must also act in ways that support the fulfilment of EU objectives and tasks, in line with their obligation of sincere cooperation.[169] Whether implementing EU (external) measures, or acting in areas where the Union itself has not (yet) acted, and even in areas where it has no competence to act, Member States' respect for the rule of law or lack thereof, determines the Union's own authority in this terrain, its ability to function as a legal order,[170] and its capacity to fulfil its Treaty-based mandate. Whether in the context of EU law or outside it, Member States' conduct cannot be entirely detached from the fact that they are part of the Union. In the eyes of the wider world, they always *are* the EU. Their behaviour affects, positively or negatively, the credibility and reputation of the Union they constitute.[171]

In this general perspective, any deterioration of the rule of law in a Member State negatively affects the EU's external action as a whole. While undermining its authority to advocate the rule of law on the international level and to influence developments abroad, it also practically hampers the Union's aptitude to preserve the rights of third states and their nationals, and so to fulfil its international obligations, in effect impeding its capacity to act as subject of international law, in line with the latter's fundamental principles.[172] The ensuing damage to the EU trustworthiness may diminish its partners' eagerness to commit themselves towards the Union, in turn crippling the latter's ability to pursue its objectives on the global stage, which relies on multilateral cooperation and partnerships (as per Article 21 TEU), and to

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[168] Case C-64/16, *Associação Sindical dos Juízes Portugueses,* ECLI:EU:C:2018:117,¶ 32, Opinion 1/09, *Unified Patent Court*, EU:C:2011:123.

[169] Article 4(3) TEU.

[170] See Opinion 2/13 *re: EU Accession to the ECHR (II)* ECLI:EU:C:2014:2454.

[171] Case C-620/16 *Commission v Germany (COTIF)* ECLI:EU:C:2019:256.

[172] Case C-66/18 *Commission v Hungary* (*Lex CEU)* ECLI:EU:C:2020:792.

exercise the external competences which Member States have conferred upon it to that effect.

Incidentally, a Member State's breach of the rule of law potentially affects its peers' rights under EU external agreements, and their own position in relation to the wider world. Member States too may suffer the consequences of the misconduct of one of them, in that they may equally be impacted by third states' countervailing measures against the EU, but also in terms of their own international reputation.

In sum, without respect for the rule of law by all Member States, the EU becomes dysfunctional internally,[173] distrusted and thus handicapped internationally. Their consistent observance of the rule of law is therefore a prerequisite for the EU to fulfil its own overarching mandate in this regard and, in particular, to *conduct* its external action in line with the rule of law. Such a dependency reinforces the normative basis for the EU actively to safeguard the rule of law at the national level too.

3.2.1. Member State's obligations to respect the rule of law

The Treaties include several iterations of Member States' obligation to respect the rule of law, which have relevance for the EU external action in general, and for its complex external rule of law mandate in particular.

Fundamentally,[174] respect for the rule of law is a condition for a state to *become*, and to *remain* a full-fledge Member State of the EU. Article 49 TEU, as discussed above, and Article 7 TEU make it clear that Union membership is contingent on a state's continued respect for, and promotion of, the values enshrined in Article 2 TEU, including the rule of law. The Court of Justice further articulated the terms of that quid pro quo in the following way: "the European Union is composed of States which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, which respect those values and which undertake to promote them", adding that "*compliance by a Member State with th*[ose] *values* […] *is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State"* (emphasis added).[175]

As a particular "application of the Treaties", the external action of the EU engenders rights for the Member States (in terms of e.g. trade and economic opportunities and rights in the wider world), which they enjoy thanks to their EU membership.[176] The benefit of those rights then presupposes for each Member State that it fulfils a twofold obligation associated with membership, as regard EU values in general and the rule of law in particular: an obligation of result (respect),[177] as

[173] See e.g. European Commission, *Strengthening the rule of law within the Union A blueprint for action*, COM(2019) 343.

[174] See section 2.1.

[175] Case C-896/19 *Repubblika*, EU:C:2021:311, para 63; *Commission* v *Poland (Disciplinary regime for judges)*, C-791/19, EU:C:2021:596; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *SC Euro Box Promotion*, ECLI:EU:C:2021:1034.

[176] As typified by the consequences of Brexit for the United Kingdom: https://commonslibrary.parliament.uk/research-briefings/cbp-9314/

[177] Case 157/21, *Poland v Council and Parliament*, ECLI:EU:C:2022:98, para 169.

well as an obligation of conduct (promote). This dual duty finds a specific expression in Articles 21 and 23 TEU, and Article 205 TFEU.

Member States' adherence to the terms of the basic social contract encapsulated in its EU membership[178] is not only essential to ensure their (and their citizens') equality before Union law.[179] It is also of significance for the wider world, and in particular for the EU's partners. Presumably, they interact with the EU with the expectation that any agreement they conclude with it will be effectively implemented in line with the principles of international law, and thus on the assumption that the Member States that compose the Union, on the basis of the above conditions for membership, will comply with ensuing obligations. To be sure, the EU may not rely on the provisions of its internal law, including that of its Member States, as justification for failure to comply with its international commitments.[180]

What the Union is, the principles that underpin its existence and membership, which it otherwise advocates externally, and its ability to defend them,[181] are arguably among the elements that third states also take account of when negotiating with and committing themselves towards the EU (and its Member States). These elements are constitutive of the Union's identity on the international plane;[182] they determine its reliability as a legal order and trustworthiness as subject of international law, in terms of its ability to secure full compliance with its commitments, including through effective legal protection against internal breaches. It is indeed on the assumption that any new Member States do meet the Union's membership requirements, that third states consent to the extension of the geographical scope of application of their agreements with the EU, following the latter's enlargement. They assume that, being accepted by its peers means that the new Member State fulfilled the accession criteria, that it will fully comply with EU law, including its external agreements, and that the Union will appropriately react in case it does not.[183]

Proscribed to preserve the integrity of the EU constitutional order,[184] regression of the rule of law in a Member State has negative implications not only for the Union and other Member States. It may equally upset the internal implementation of EU agreements and thus affect the external action of the Union too. EU partners therefore have an equivalent interest in the EU preventing and, if need be, addressing any such regression so as to protect their own rights and those of their nationals in relation to the EU. A lack of action to that effect on the Union's side would risk

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[178] As recalled in Case C-896/19 *Repubblika*, EU:C:2021:311.

[179] Article 4(2) TEU, see further: Koen Lenaerts, "*No Member State is More Equal than Others: The Primacy of EU law and the Principle of the Equality of the Member States before the Treaties", VerfBlog*, 2020/10/08, <https://verfassungsblog.de/no-member-state-is-more-equal-than-others/>; Lucia Rossi, "The Principle of Equality Among Member States of the European Union" in Lucia Rossi and Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer, 2017), p. 3.

[180] Case C-66/18, *Commission v Hungary (Lex CEU)*, ECLI:EU:C:2020:792.

[181] See C*ase* C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 *(*¶ 1*27) and Case* C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98 (¶ 145).

[182] Ibid.

[183] All the more so since, as discussed in section 2, the treaty provisions and the ensuing practice involve a stronger normative and practical rule of law-promotion mechanisms in relation to the neighbourhood and, more specifically in the enlargement policy.

[184] C-896/19 *Repubblika*, EU:C:2021:311. See discussion in Section 2.2. above.

jeopardising not only its external relationships, but also its external reputation more generally. If the regression concerns a new(er) Member State more specifically, affected EU partners could indeed be led to reconsider their acceptance of the new member's inclusion within the scope of their agreement(s) with the EU, while becoming more circumspect when asked to endorse the implications of future enlargements of the Union.[185]

While a precondition to enjoy all the benefits of membership, including those deriving from the EU external action, Member States' obligation to respect the rule of law also finds specific expressions in the latter context. One such expression is Article 216(2) TFEU which foresees that agreements concluded by the EU are binding on Member States and EU institutions. EU external agreements form "an integral part of EU law",[186] so that situations falling within their scope are, in principle, "situations governed by EU law".[187] Member States must therefore comply with the obligations deriving from all EU external agreements as a matter of EU law,[188] the way they otherwise do in relation to EU primary law, or regulations, directives and decisions, in line with Article 288 TFEU,[189] and in accordance with the principle of primacy of EU law, more generally.[190]

To paraphrase the Court's dictum in *ASJP*, the provision of Article 216(2) TFEU (as that of Article 288 TFEU) arguably "gives concrete expression to the value of the rule of law stated in Article 2 TEU",[191] and to the deriving principles of the EU external action enshrined in Article 21 TEU, mainstreamed through the provisions of Articles 23 TEU and 205 TFEU. Member States' compliance with EU external agreements is indispensable for the Union itself to fulfil its international obligations, including the basic principle of pacta sunt servanda, and thus to ensure that its external action is conducted in accordance with the rule of law.

In particular, national authorities, including courts, must ensure that EU external agreements are implemented, and that rights which stem directly therefrom (and more generally from the EU constitutional order, such as fundamental rights) are effectively protected, if need be, in cooperation with the Court of Justice.[192] Fulfilment of the obligation stemming from Article 216(2) TFEU also entails that

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[185] Third states may thereby influence the enlargement of the EU: if they consider that a candidate state does not meet the basic requirement of membership, they could oppose its inclusion in the agreement they have with the EU. This is particularly true for parties to agreements like the EEA which contains an elaborate accession procedure (viz. Article 128 EEA).

[186] Case 181/73, *Haegeman*, EU:C:1974:41, ¶¶ 5 and 6, Case C-366/10, *Air Transport Association of America and Others*, EU:C:2011:864, and Opinion 1/17 *re: EU-Canada CET Agreement*, EU:C:2019:341, ¶117,

[187] Opinion 1/17 *re: EU-Canada CET Agreement*, EU:C:2019:341 ; Case C-897/19 *Ruska Federacija v IN*, ECLI:EU:C:2020:262.

[188] Case 181/73, *Haegeman*, EU:C:1974:41, Case 13/00, *Commission v Ireland*, XXX

[189] Koen Lenaerts, 'Droit international et monisme de l'ordre juridique de l'Union', *Revue de la Faculté de droit de l'Université de Liège*, No 4, Larcier, Brussels, 2010, pp. 505 to 519.

[190] See e.g. Case C-430/21, *RS*, ECLI:EU:C:2022:99; Case C-817/19, *Ligue des Droits Humains*, ECLI:EU:C:2022:491; Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *PM and others*, ECLI:EU:C:2021:1034.

[191] Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117,¶ 32.

[192] Case C-63/99, *Gloszczuk*, EU:C:2001:488, Case C-171/01*Wählergruppe Gemeinsam*, EU:C:2003:260; Case C-265/03, *Simutenkov*, EU:C:2005:213 ; Case C-97/05, *Gattoussi*, EU:C:2006:780; Case C-464/14, *SECIL*, ECLI:EU:C:2016:896.

Member States comply with their structural obligations under Article 19(1) TEU, and deriving from Article 47 CFR:[193] they must provide remedies sufficient to ensure effective legal protection of the rights that derive from EU external agreements.[194]

Hence, Russian professional football player Mr Simutenkov might have been continuously discriminated against by his Spanish employer in Tenerife in breach of the provisions of the EU-Russia Partnership and Cooperation Agreement,[195] while the Icelandic national I.N. might have been surrendered to the Russian Federation by the Croatian authorities in violation of the EEA agreement and the EU Charter of Fundamental Rights (CFR),[196] had the Spanish and Croatian courts, respectively, lacked the independence and impartiality[197] to provide effective legal protection of the rights deriving from the respective EU agreements binding Spain and Croatia, as Member States. The situations of those two individuals would indeed have been precarious, had they tried to invoke those rights today before Polish and/or Hungarian courts, or to obtain a preliminary ruling from the Court of Justice on the potential invocability of the provisions of the EU agreements at hand.[198]

3.2.2. EU obligation to enforce

Being bound by EU external agreements, the Union's institutions and Member States must deploy available enforcement tools to address breaches of the rule of law that jeopardize the effective application of those agreements. A diligent recourse to those tools is critical to ensure that the EU conducts its external action in line with the rule of law, as required by the provisions of e.g. Articles 21, 23 TEU and 205 TFEU. While it would damage the EU's credibility in that terrain, failure to act decisively may also, as will be discussed later, open the possibility for interested third parties themselves to react to, and challenge the EU prevarication.

In line with Article 17 TEU, it is primarily the task of the European Commission, under the control of the Court of Justice, to oversee the application of Union's external agreements, if need be by activating the infringement procedure set out in Article 258 TFEU.[199] It is by tackling a Member State's defective compliance with EU external commitments that the Commission guarantees that the Union

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

[194] Acknowledging that not all agreements entail such individual rights, see e.g. Case C-149/96 *Portugal v Council*, ECLI:EU:C:1999:574, C-308/06, *Intertanko and Others* (EU:C:2008:312).

[195] *Simutenkov*, Case C-265/03, EU:C:2005:213, ¶ 21.

[196] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262. See further, Halvard Haukeland Fredriksen and Christophe Hillion, "The 'special relationship' between the EU and the EEA EFTA States – free movement of EEA citizens in an extended area of freedom, security and justice" (2021) 58 *Common Market Law Review* p. 851.

[197] See Case 585/18 *A.K. and others*, ECLI:EU:C:2019:982.

[198] See e.g. case C-585/18, C-624/18 and C-625/18 *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, EU:C:2019:982, case C-619/18, *Commission* v *Poland (Independence of the Supreme Court)*, EU:C:2019:531, C-357/19, C-379/19, case C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others*, EU:C:2021:103; In Case C-430/21, *RS*, ECLI:EU:C:2022:99.

[199] Case C-13/00, *Commission* v *Ireland*, EU:C:2002:184. See also in this sense : Déclaration conjointe de Jean-Yves Le Drian, Ministre des Affaires étrangères et de Heiko Maas, Ministre des Affaires étrangères de l'Allemagne (9 octobre 2021) ; https://www.diplomatie.gouv.fr/fr/dossiers-pays/pologne/evenements/article/pologne-declaration-conjointe-de-jean-yves-le-drian-ministre-des-affaires

fulfils its international obligations, pre-empts disputes with EU partners, and prevents the Union's international liability being engaged.[200] In this task, the Commission must not only ensure that Member States' domestic rules are substantively compliant with obligations deriving from EU external obligations, it must also ascertain that national structures are such as to guarantee effective implementation of the EU external policies, including by way of providing effective protection of the rights potentially deriving therefrom (in line with Article 19(1) TEU and Article 47 CFR). Moreover, the Commission must tackle Member States' (mis)conducts that impede the EU's ability to carry out its tasks and fulfil its objectives, e.g. behaviour that harms the effectiveness of its international action, or hampers its credibility and reputation on the international scene, in breach of their obligation of sincere cooperation enshrined in Article 4(3) TEU.[201]

Considering the distinctive preventive approach permeating the law of EU external action,[202] a pro-active EU approach may indeed be warranted "to forestall complications [for the Union] which would result from [such] legal disputes"[203] provoked by a Member State's breach of the rule of law. The Commission as guardian of the Treaties ought to engage early and actively to prevent the internal erosion of the rule of law from "provoke[ing] serious difficulties, not only in the internal EU context, but also in that of international relations, and (…) give rise to adverse consequences for all interested parties, including third countries".[204] Other institutions, including the Court of Justice, must indeed assist the Commission in this respect, in line with their duty to practice sincere cooperation set out in Article 13(2) TEU.

Alongside the Commission, each Member State holds a responsibility to ensure that the others comply with EU external commitments, and with the rule of law particularly in the conduct of the EU external action. [205] They may indeed activate the inter-state infringement procedure of Article 259 TFEU, especially if the Commission does not act as systematically as desirable.[206] That same responsibility,

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[200] Case C-66/18, *Commission v Hungary (CEU lex)*, ECLI:EU:C:2020:792.

[201] Case C-620/16, *Commission v Germany (COTIF II)*, ECLI:EU:C:2019:256.

[202] Consider in this sense the Opinion Procedure under Article 218(11) TFEU and the so-called "*AETR* effect" based on the Court's ruling in Case 22/70, *Commission v Council*, ECLI:EU:C:1971:32. For an analysis, see e.g. Merijn Chamon, "Implied exclusive powers in the ECJ'S post-Lisbon jurisprudence: The continued development of the *ERTA* doctrine" (2018) 55 *Common Market Law Review* p. 1101.

[203] See Opinion 1/75 *re: Local Cost Standard*, EU:C:1975:145, Opinion 1/09 *re: Unified Patent Court*, EU:C:2011:123.

[204] Opinion 1/20 *re: Energy Charter Treaty*, ECLI:EU:C:2022:485, Opinion 1/19 *re : Istanbul Convention*, EU:C:2021:832.

[205] See in this sense, Council of the EU: *Conclusions of the Council of the European Union and the Member States meeting within the Council on Ensuring Respect for the Rule of Law*, General Affairs Council meeting, Brussels, 16 Dec. 2014.

[206] See: Dimitry Kochenov, "Biting Intergovernmentalism: the case for the reinvention of article 259 TFEU to make it a viable rule of law enforcement tool", (2015) 7 *Hague Journal on the Rule of Law*, p. 153. See also the resolution of the Dutch House of Representatives urging the government to explore the possibility to bring Poland to before the European Court of Justice (Tweede Kamer, "Motie van het lid Groothuizen c.s. over onderzoek om Polen voor het Europese Hof van Justitie te dagen", November 16, 2020). For an explanation, see Luuk Molthof, Nienke van Heukelingen, Giulia Cretti, "Exploring avenues in the EU's rule of law crisis - What role for the Netherlands?" *Clingendael Policy Brief*, August 2021: <https://www.

and interest in preserving its reputation in relation to the wider world, ought also to frame each Member State's approach towards other mechanisms to help enforce the rule of law in the EU, including Article 7 TEU, or internal conditionality mechanisms, in the sense of encouraging their effective use.[207] Those intra-EU rule of law mechanisms do have a particular function to ensure that the EU upholds the rule of law in general, and in the conduct of its external action in particular.

The vertical and horizontal monitoring and enforcement mechanisms thus recalled arguably apply irrespective of the EU external competence being exercised. With respect to EU external agreements in particular, Member States' obligations deriving from Article 216(2) TFEU, and those of Article 19(1) TEU, are formulated in general terms, and are not deemed to vary depending on whether the agreement relates to the CFSP or the non-CFSP aspects of the EU external action. [208] Like Article 218 TFEU setting out the EU treaty-making procedure, Article 216 TFEU "is of general application and is therefore intended to apply, in principle, to all international agreements negotiated and concluded by the European Union in all fields of its activity, including the CFSP".[209] This in turn means that "it cannot be argued that the scope of the limitation, by way of derogation, on the Court's jurisdiction envisaged in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275(1) TFEU goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 21(6) TFEU which does not fall within the CFSP". [210] In sum, the Court's jurisdiction over Article 216 TFEU is not circumscribed to non-CFSP agreements.

Enforcement of Member States' obligations deriving from Article 216 TFEU, and by implications those of Article 19(1) TEU, is critical to secure that the EU complies with its international obligations, and with the constitutional requirement that its external action be conducted in accordance with the rule of law, including in the area of CFSP.[211]

3.2.3. External expectations

The duty of the EU institutions and Member States to observe the rule of law is an obligation also towards third states and international organisations. As alluded to earlier, one may assume that EU partners interact with the EU as a subject of international law, based on an expectation that it will fulfil its commitments. In particular, they may expect from the EU as a rule-based legal order, and more specifically from the latter's custodians, that they secure full implementation of the Union's external commitments, including the protection of the rights deriving

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Policy_briefs_Exploring_avenues__EUs_rule_of_law_crisis_September_2021.pdf>

[207] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ L 433I , 22.12.2020, p. 1–10*.

[208] Article 216(2) TFEU does not include any indication that CFSP agreements based on Article 37 TEU and concluded in accordance with Article 218 TFEU have a different legal nature within the EU legal order.

[209] Case C-658/11, *Parliament v Council (Mauritius),* ECLI:EU:C:2014:2025.

[210] Ibid.

[211] See discussion under section 3.1, above.

therefrom. That expectation might be all the stronger considering the EU's identity, its foundations and objectives, and the related principles it promotes externally, notably as a condition for establishing and deepening its external relations. EU partners naturally assume that a Member State's deviation from its EU obligations, which hampers the effective implementation of an EU international agreement, will be adequately addressed through effective remedies, so that the rule of law is eventually restored.

External scrutiny of the EU in this field is growing against the backdrop of a rule of law regression in some of its Member States, and particularly as regards the functioning of their judiciaries. The case of Poland is illustrative of the phenomenon. In view of the growing number of decisions from the European Court of Human Rights[212] and from the European Court of Justice,[213] the trustworthiness of the Polish judicial system has steadily declined, not only in the eyes of several Member States' judges,[214] but also outside the Union. This has become particularly visible in the case of judges from third states which, like close neighbours from the European Free Trade Association (EFTA), have agreements with the EU involving mechanisms of mutual recognition of judicial decisions. A case in point is the EU-Norway/Iceland Surrender Procedure Agreement, [215] which essentially extends the system established by the European Arrest Warrant to the two Nordic countries.[216] In this context, several courts in Norway have shown increased reluctance to fulfil their obligations of mutual recognition and execute judicial decisions enacted in Poland, out of concern that individuals to be surrendered might not get a fair trial in Polish courts, in breach of Article 6 of the European Convention of Human Rights. Norway's Supreme Court indeed warned "that the systematic and general shortcomings of the

[212] For an analysis of this case law, see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Swedish Institute for European Policy Studies, Report 2021:3. See also: Rafał Mańko, *European Court of Justice case law on judicial independence*, Briefing, European Parliament Research Service: <https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS_BRI(2021)696173_EN.pdf>

[213] See decisions of the ECtHR in e.g. case *Xero Flor w Polsce sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021; *Broda and Bojara v. Poland*, nos. 26691/18 and 27367/18, 29 June 2021; *Reczkowicz v. Poland*, no. 43447/19, 22 July 2021; and *Dolińska-Ficek and Ozimek v. Poland*, nos. 49868/19 and 57511/19, 8 November 2021*; Advance Pharma sp. z o.o v. Poland*, no. 1469/20, 3 February 2022; *Juszczyszyn v. Poland*, no. 35599/20, 6 October 2022. See also: Report by the Secretary General under Article 52 of the European Convention on Human Rights on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland (9 November 2022: <https://rm.coe.int/report-by-the-secretary-general-under-article-52-of-the-european-convention/1680a8eb59>), and the 2017 Opinion of the European Commission for Democracy through Law (Venice Commission) on Poland's draft legislations concerning its judicial system: <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e >

[214] See e.g. the decision of 17/02/2020 of the Oberlandsgericht Karlsruhe (Higher Regional Court in Karlsruhe), DE:OLGKARL:2020:0217.AUSL301AR156.19.00. Further see: Anna Wójcik, "Muzzle Law leads German Court to refuse extradition of a Pole to Poland under the European Arrest Warrant", 6.03.2020, <https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/ >.

[215] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

[216] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, *OJ L 190, 18.7.2002, p. 1–20*

Polish judiciary are so extensive and pervasive that there is relatively little of specific circumstances before an arrest warrant must be rejected under the Arrest Warrant Act [which implements the Surrender Agreement with the EU in Norwegian Law] (…) it cannot be ruled out that arrest warrants must also be rejected in more ordinary criminal cases in certain cases."[217]

Such a negative appraisal of an EU Member State's judicial system by the Supreme Court of a third state having a "special relationship" [218] based on "mutual confidence"[219] with the Union, should be cause for concern.[220] In view of the Court of Justice's integrated conception of the EU judicial system comprising Member States courts as EU courts,[221] it is by implication the trustworthiness of the EU judicial system as a whole that is being questioned from the outside.

While damaging third parties' trust in the EU court system, the conduct of regressive Member States may also affect the implementation of the EU external action, by disrupting the functioning of the bodies established by EU external agreements. A case in point is the institutional set up of the Agreement on the European Economic Area (EEA) whose Council, made up of representatives of the contracting parties, has been unable to operate as envisaged because of the obstruction of the Hungarian government.[222] The reason behind the latter's conduct is the contention that the EU partners violated their EEA obligations. The allegation relates more particularly to an earlier decision by the EEA EFTA states (Iceland, Norway, Liechtenstein) not to allocate funding to Hungary, as beneficiary state under the Financial Mechanism established by the EEA agreement.[223] That decision follows a disagreement between the EEA EFTA states and Hungary regarding the choice of entity tasked to manage the EEA funds to be allocated to Hungarian civil society.[224] The dispute arose in the broader context of the ongoing democratic and rule of law regressions in the country since the start of the 2010s, including harassment of civil society organisations partly financed by EEA funds.[225]

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[217] Our translation. For the original version, see: <https://www.domstol.no/no/hoyesterett/avgjorelser/2022/hoyesterett---straff/HR-2022-863-A/> ¶¶ 69-70.

[218] See Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262.

[219] See Preamble of the EU-Norway/Iceland Surrender Procedure Agreement, op. cit.

[220] Polish judiciary was also excluded from the ENCJ, and from cooperation programmes financed under the financial mechanism established by the EEA Agreement. Eirik Holmøyvik: "No Surrender to Poland", *Verfassungblog*, 2 November 2021, < https://verfassungsblog.de/no-surrender-to-poland/ > Eirik Holmøyvik, *"For Norway it's Official: The Rule of Law is No More in Poland" Verfassungblog*, 29 February 2020 < https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/ >

[221] Opinion 1/09, *Unified Patent Court*; Case C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117.

[222] https://hungarytoday.hu/hungary-vetoes-final-declaration-of-eea-meeting/ ; http://www.nordiclabourjournal.org/nyheter/news-2021/article.2021-11-26.4825957081

[223] Articles 115-117 EEA Agreement, and Protocol 38C of the EEA Agreement. Further on that mechanism, see Per Christiansen, "Part VIII: Financial Mechanism" in Finn Arnesen, Halvard H Fredriksen, Hans-Petter Graver, Ola Mestad and Christoph Vedder (eds.), *Agreement on the European Economic Area – a Commentary*, (C.H.Beck et al, 2018), p. 891.

[224] < https://www.politico.eu/article/hungary-loses-norwegian-funds-as-rule-of-law-concerns-intensify/ >

[225] < https://euobserver.com/eu-political/125537 >; <https://www.reuters.com/article/hungary-norway-idUSL5N0RA1TV20140909 >

The disruptive conduct of the Hungarian government has not only impeded the EU position in, and functioning of the institutional framework at hand. It has also challenged the rule of law in the external action of the EU more generally. As the Court of Justice has established, "a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach … of rules of [EU] law".[226] Incompatible with the dispute settlement system envisaged by the EEA itself, which is part of EU law, the Hungarian Government's unilateral stance undermines the overall "special relationship [with] between the European Union, its Member States and the EFTA States, which is based on proximity, long-standing common values and European identity", falls foul of its obligation of sincere cooperation and the requirement of unity in the international action and representation of the EU,[227] and injures the EU reputation more generally.[228]

The two Member States' damages to the Union's judicial and institutional structures call for action from EU institutions and other Member States, all the more so considering the nature of the relations at hand. Recall that Article 8 TEU mandates the Union to establish an area of "good neighbourliness founded on the values of the Union and characterized by close and peaceful relations based on cooperation".[229] That mandate arguably entails a higher level of commitment and accountability of the Union to those partners.

3.2.4. External accountability of the EU

The final part of this discussion reflects on how third states (and their nationals) may react to the rule of law deterioration in the EU, and to the latter's negative effects on their relations therewith, especially if the custodians of the EU legal order do not undertake adequate measures. In particular, it asks what potential mechanisms and remedies – if any – third states may rely on under EU law to ensure that their rights (and those of their nationals) are effectively protected, considering that the availability of such remedies is in itself an indication of the degree to which the EU is conducting its external action in accordance with the rule of law. The discussion pays particular attention to states with which the EU has deeper relations and are thus more prescriptive in terms of rule of law observance.

EU partners (and their nationals) may activate various EU tools to counter the effects of the rule of law deterioration within the Union, based on the agreements they have with it and on EU law more broadly. These tools may ultimately contribute to bolstering the EU's resolve to address internal impediments to the effective implementation of its international commitments, including rule of law regressions. The recent case law of the Court of Justice arguably opens new avenues in this respect.

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[226] Case C-45/07*Commission v Greece (IMO)*; ECLI:EU:C:2009:81; Case 232/78 *Commission v France*, ECLI:EU:C:1979:215.

[227] See also Case C-246/07 *Commission v Sweden (PFOS)* ECLI:EU:C:2010:203; Case C-620/16 *Commission v Germany (COTIF)* ECLI:EU:C:2019:256.

[228] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262; see also Case C-431/11 *UK v Council*, ECLI:EU:C:2013:589.

[229] See section 2, above.

An EU partner that is affected by a Member State's breach of the rule of law, may decide to recalibrate its relations with the EU including, and indeed suspend cooperation. Several devices discussed earlier, and which the Union has itself inserted in its external agreements to promote the rule of law, could be relied on to that effect. At a basic level, dispute settlement mechanisms if envisaged by EU international agreements, would presumably have to be activated. However, their effectiveness might be hampered, considering that a Member State may hijack their operation as the Hungarian Government has revealed.[230] Indeed, their activation might not preclude that of other devices based on EU law.[231] The affected EU partner could also invoke the "essential element" clauses referring to the rule of law as founding the internal and external policies of the parties, if it considers that the EU does no longer comply with the standards the agreements promotes. In the same vein, third states may activate conditionality mechanisms in reacting to EU internal regressions of the rule of law, if those exist. As alluded to above, a case in point is the EEA financial mechanism, whose operations may be, and has indeed been, suspended when conditions underpinning its operation are not observed.[232] In other words, tools that the EU has traditionally deployed to promote and uphold the rule of law on the international plane could have a boomerang effect and work the other way.

Moreover administrative and judicial authorities of third states having mutual recognition arrangements with the Union may decide no longer to recognise and follow decisions taken by their counterparts in regressive Member States. The ruling of Norway's Supreme Court, mentioned above, suggests that the deterioration of the rule of law in a Member State may reach a point beyond which lower Norwegian courts will no longer have the necessary confidence "in the structure and functioning of [the EU] legal systems",[233] and thus refuse to surrender an individual to a Member State on grounds that she might not get a fair trial. Similar developments, i.e. suspension of automatic execution by third states' courts of EU courts' decisions in line with mutual recognition arrangements, could occur in the framework of the Lugano Convention too, which establishes a similar system of free movement of civil and commercial courts' decisions between the EU and the EFTA states.[234] The

[230] See section 3.2.3, above.

[231] Case C-66/18, *Commission v Hungary (CEU lex)*, ECLI:EU:C:2020:792.

[232] In reaction to controversial legislative developments concerning the Justice system of Poland, which is the main beneficiary of EEA funding, the Norwegian Courts' Administration withdrew from its cooperation with its Polish counterpart under the Justice programme financed under the EEA Financial Mechanism. Following that decision, the Norwegian Government decided not to sign a planned agreement with Poland on cooperation in the justice sector under the EEA Financial Mechanism. See: Norway's Ministry of Foreign Affairs, "Norway to reconsider judicial cooperation with Poland under the EEA and Norway Grants", Press Release 27.02.2020 <https://www.regjeringen.no/en/historical-archive/solbergs-government/Ministries/ud/news/2020/reconsider_cooperation/id2691680/>. Further: Eirik Holmøyvik, *"For Norway it's Official: The Rule of Law is No More in Poland", VerfBlog*, 2020/2/29, <https://verfassungsblog.de/for-norway-its-official-the-rule-of-law-is-no-more-in-poland/ >

[233] As envisaged in the preamble of the Surrender Procedure Agreement as premiss upon which the parties accept to apply the principle of mutual recognition of their respective courts decisions: Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, *OJ L 292, 21.10.2006, p. 2–19.*

[234] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ L 339, 21.12.2007, p. 3–41.*

same phenomenon could indeed affect the decisions of other national authorities relating to the functioning of the single market, e.g. competition authorities,[235] which the EEA Agreement extends to Iceland, Liechtenstein and Norway.[236]

The suspension by third states' authorities of mutual recognition mechanisms with EU Member States might indeed be less implausible a development in the context of EU external agreements, than in the framework of the EU itself. While significant, the EU principles of mutual recognition and trust that the Court of Justice has articulated in Opinion 2/13 and which it has been adamant to preserve since,[237] do not constrain third states' relations with EU Member States as much as they bind Member States inter se. Even for those closely integrated with the EU legal order through a "special relationship", EU partners are not included to the same extent in the "structured network of principles, rules and mutually interdependent legal relations that link the EU and its Member States". [238] Thus, while they may take account of a European Council decision establishing the existence of a serious and persistent breach of EU values by the regressive Member State under Article 7(2) TEU, Norway's or Iceland's courts are not (as) dependent on that decision generally to suspend mutual recognition e.g. under the Surrender Procedure agreement,[239] the way Member States' courts are under the European Arrest Warrant, as interpreted by the Court of Justice.[240]

The authorities of EU partners, however close they may be, may thus be less inhibited, legally and practically, to take earlier/bolder steps in reaction to the deterioration of the rule of law within an EU Member State, by reference to their own constitutional norms, and/or international obligations such as the ECHR. A failure effectively to address the deterioration of the rule of law in some Member States, and the impact it has for the functioning and external reputation of the EU judicial and administrative structure as a whole, thus opens the risk that the mutual recognition of national authorities' decisions which several EU agreements envisage with third countries, and the confidence the latter have "in the structure and functioning of [the EU] legal systems", will collapse.

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[235] Case T-791/19 *Sped-Pro S.A. v European Commission*, ECLI:EU:T:2022:67.

[236] Case C-897/19 PPU, *Ruska Federacija v. I.N.*, EU:C:2020:262; see also Case C-431/11 *UK v Council*, ECLI:EU:C:2013:589.

[237] Through its reiterated, though contested, *LM* case law: case C-216/18 *LM* ECLI:EU:C:2018:586, case C-562/21 PPU and C-563/21 PPU *Openbaar Ministerie (Tribunal established by law in the issuing Member State*, EU:C:2022:100; case C-480/21, *WO*, ECLI:EU:C:2022:592. For a critical analysis of this case law, see e.g. Petra Bard and John Morijn, "Luxembourg's Unworkable Test to Protect the Rule of Law in the EU" (part I) *VerfBlog*, 2020/4/18, <https://verfassungsblog.de/luxembourgs-unworkable-test-to-protect-the-rule-of-law-in-the-eu/> and Part II: *VerfBlog*, 2020/4/19: <https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-rule-of-law-in-the-eu/>

[238] Opinion 2/13 *re: EU Accession to the ECHR (II)* ECLI:EU:C:2014:2454.

[239] It does not mean that such a European Council decision is of no relevance for Norwegian courts. Indeed in its ruling mentioned above, the Supreme Court of Norway did refer to the effect that a decision of the European Council under Article 7(2) TEU would have for the operation of the European Arrest Warrant, thereby suggesting that such a decision, could also prompt a decision by Norwegian courts to suspend mutual recognition under the Surrender Procedure Agreement that extends the application of the EAW to Norway and Iceland, even if such scenario is not contemplated in the latter Agreement.

[240] See Case C-216/18 *LM* ECLI:EU:C:2018:586, Joined Cases 562/21 PPU and C-563/21 PPU, *X and Y v Openbaar Ministerie*, ECLI:EU:C2022:100.

A decision by a third state's court no longer to execute an EU court's decision would indeed send a powerful, negative, signal to the Union and Member States, and to their partners. It would indicate that the integrated judicial system of the Union is no longer trustworthy, and in turn imply a need to act to restore confidence. It could have ripple effects across the EU, as some Member States' courts have already expressed increased discomfort in recognising and executing judicial decisions from regressive Member States.[241]

Beyond the impact on its reputation and credibility, the deterioration of the rule of law in its own Member States could also raise the question of whether the European Court of Human Rights' would have to revisit its evaluation of how fundamental rights are safeguarded within the EU legal order. Recall that in its *Bosphorus* ruling, the ECtHR found that the protection of fundamental rights by EU law could be considered as "equivalent", in the sense of "comparable", to that of the ECHR system.[242] The capacity of the EU constitutional system effectively to stop and reverse such regression will be critical to maintain that equivalence.

In this regard, while third parties may call the EU to account on the basis of its external agreements, they may also rely on EU law more generally to that effect. If the EU fails to address instances of Member States' non-compliance with its international commitments, and thus does not restore the rule of law, it is arguable that affected third state(s) - or indeed its nationals - may contest that prevarication before the Court of Justice. The EU is bound by international law in its entirety,[243] and in particular "the general international law principle of respect for contractual commitments (*pacta sunt servanda*)", and thus to implement its international agreement in good faith. By the same token, it "may not rely on the provisions of its internal law as justification for failure to comply with its obligations under international law".[244]

In circumstances where private enforcement through a Member State's courts or through an agreement-based dispute settlement are obstructed by regressive Member States, third states - and their nationals - depend on EU public enforcement to ensure implementation of their agreement with the EU, and have their rights protected. They cannot themselves bring an action against an EU Member State to the Court of Justice as the inter-state dispute settlement mechanism of Article 259 TFEU is only open to "Member States". The Commission's role as guardian of the Treaties is thus critical to compensate for the deficiency of private and inter-states enforcement mechanisms. More specifically, the infringement procedure constitutes a critical tool

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[241] See in this regard, the decision of the Irish Supreme Court of 4 August 2022 in *Minister for Justice & Equality -v- Orlowski; Minister for Justice & Equality -v- Lyszkiewicz*, [2022] IESC 37 <https://www.courts.ie/view/Judgments/30f5489d-2b83-4201-930c-31fd821f3b09/ae3c6e76-65b1-418b-a8ed-2324a64dd7f1/2022_IESC_37.pdf/pdf >; On those ripple effects, see e.g Christophe Hillion, *"A(nother) lost opportunity? The European Council and domestic assaults on the EU constitutional order"*, *VerfBlog*, 2021/11/03, < https://verfassungsblog.de/another-lost-opportunity/ >

[242] See *Bosphorus*, no. 45036/98, 30 June 2005, para 165; *Avotiņš v. Latvia*, no. 17502/07, 23 May 2016.

[243] Case C-266/16, *Western Sahara Campaign UK*, EU:C:2018:118.

[244] Case C-66/18, *Commission v Hungary (CEU lex)*, ECLI:EU:C:2020:792

to ensure that the EU to fulfil its international obligations, and ultimately that it conducts its external action in compliance with the rule of law.[245]

But what if the Commission (and/or Member States) is reluctant to intervene and to enforce EU law in those situations?[246] Can affected third states, or their nationals, challenge the EU lack of action to protect their rights, and the non-enforcement of the rule of law? Arguably, the recent case law of the European Court of Justice opens a way for affected third states to challenge the potential lack of EU decisive (re)action. Space precludes a detailed analysis of this novel case law in terms of the EU protection of third states' interests by reference to the rule of law. The following discussion will only flag a couple of, admittedly speculative, points.

In its *Venezuela* ruling, the Court of Justice acknowledged that third states could have standing as legal persons to contest the legality of EU actions under Article 263(4) TFEU, in the following way:

> an interpretation of the fourth paragraph of Article 263 TFEU in the light of the principles of effective judicial review and the rule of law militates in favour of finding that a third State should have standing to bring proceedings, as a 'legal person', within the meaning of the fourth paragraph of Article 263 TFEU, where the other conditions laid down in that provision are satisfied. Such a legal person governed by public international law is equally likely as any another person or entity to have its rights or interests adversely affected by an act of the European Union and must therefore be able, in compliance with those conditions, to seek the annulment of that act.[247]

Having standing as "a legal person" to challenge the legality of an EU act, that same third state would arguably have standing, also as "legal person", to contest the legality of a *failure* to act under Article 265(3) TFEU. It would indeed be awkward for the Court to adopt two different approaches to third states' standing whether

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[245] On the importance of the infringement procedure based on Article 258 TFEU to enforce the rule of law, see Joni Heliskoski, "Infringement proceedings as a tool for enforcing the rule of law in EU Member States – a critical review" in Allan Rosas, Pekka Pohjankoski and Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Hart, forthcoming), Pekka Pohjankoski, "Rule of law with leverage: Policing structural obligations in EU law with the infringement procedure, fines, and set-off", (2021) 58 *CMLRev*. p. 1341; Kim Lane Scheppele, Dimitry Vladimirovich Kochenov, Barbara Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", (2020) 39 *Yearbook of European Law*, p. 3; Matthias Schmidt and Piotr Bogdanowicz, "The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU", (2018) 55 *CMLRev* p. 1061, Hillion, *Overseeing*, op. cit.

[246] See in this sense Daniel Kelemen and Tomasso Pavone, "Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union" (December 27, 2021). Available at SSRN: ; Gráinne de Búrca, "Poland and Hungary's EU membership: On not confronting authoritarian governments" (2022) 20 *International Journal of Constitutional Law*, p. 1; Laurent Pech Patryk Wachowiec and Dariusz Mazur, "Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action" (2021) 13 *Hague Journal on the Rule Law*, p. 1; Sonja Priebus, "The Commission's Approach to Rule of Law Backsliding: Managing instead of Enforcing Democratic Values" (2022) *Journal of Common Market Studies* p. 1.

[247] Case C-872/19 P, *Venezuela*, ECLI:EU:C:2021:507,

targeted at an unlawful action or whether it concerns an unlawful failure to act, especially since the Court has otherwise recognised that both procedures (Articles 263 and 265 TFEU) "merely prescribe one and the same method of recourse".[248]

An affected third state would then have to overcome two additional hurdles successfully to challenge the Commission's failure to act, viz. address a Member State's failure to fulfil its obligations under the external agreement of the Union, and thereby to preserve the rule of law.

To begin with, the applicant must demonstrate that "the Union has failed to address to that person [in casu, a third state as legal person] any act other than a recommendation or an opinion" (Article 265(3) TFEU). According to established case law, that condition itself entails two requirements:

> that natural or legal person must establish either that he, she or it is the addressee of the act which the institution complained of allegedly failed to adopt in respect of that person, or that that act directly and individually concerned him, her or it in a manner analogous to that in which the addressee of such an act would be concerned (…).
>
> Moreover, such a natural or legal person must show an interest in bringing proceedings on the basis of Article 265 TFEU, the existence of which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it.[249]

The requirement to "show an interest in bringing proceedings", mentioned in the second paragraph of the quote should not be overly difficult for the third state to show. Such an interest could be established if the situation at hand involves the Commission's failure to address a Member State's breach of EU law, having the effect of depriving the applicant, the third country (and its nationals) from the effective enjoyment of the rights stemming from an agreement it has concluded by the Union. While there is no guarantee that the infringement would be confirmed should it reach the Court, the sought-after Commission action, should it be activated, might in itself be significant in pressing the recalcitrant Member State to comply with its EU obligations, and implement the agreement at hand.[250] It is thus arguable that the action would "procure an advantage to the [third state] bringing it".[251]

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[248] According to the Court the two procedures are complementary: Case 15/70, *Amedeo Chevalley v Commission*, ECLI:EU:C:1970:95. See also the terms of Article 266 TFEU.

[249] See e.g. Case T-350/20, *Lukáš Wagenknecht* ECLI:EU:T:2020:635.

[250] See in this regard, the significance of the Commission's reasoned proposal in the context of the procedure of Article 7(1) TEU, as established by the Court's order in *Commission v Poland*, Case C-619/18 R ECLI:EU:C:2018:1021, ¶85.

[251] If the action before the Court of Justice was successful, it could provide additional legal ammunitions to the third state and/or its nationals, in potential actions for damages against the EU, under Article 268 TFEU and Article 340(2) TFEU, under the (demanding) conditions set out by the Court in Case 5/71, *Zuckerfabrik Schöppenstedt*, EU:C:1971:116, and acknowledging that "unlawfulness (…) is not a sufficient basis for holding that the non-contractual liability of the European Union, flowing from illegal conduct on the part of one of its institutions, has automatically arisen. In order for that condition to be met, the case-law requires the applicant to demonstrate, first, that the institution in question has not merely breached a rule of law, but *that the breach is sufficiently serious and that the rule of law was intended to confer rights on individuals*" (emphasis added) (see Case T-692/15 *HTTS Hanseatic Trade Trust*, ECLI:EU:T:2021:410).

By contrast, the other requirement, referred to in the preceding paragraph of the ruling quoted above, might be more difficult to fulfil. The question at this point is whether the Commission's activation of the infringement procedure against a Member State, whose unlawful conduct impedes the implementation of an EU external agreement, would qualify as a course of action to which the applicant third state as party to this agreement is entitled. It is arguable that it is if, for instance, the Commission's action is the only available remedy left for a third state to ensuring that the Member State complies with its EU obligations, given that individuals may no longer rely on the regressive Member State' courts to provide effective judicial protection.[252] The affected third state would first have to call on the Commission to act, as required by Article 265 TFEU. If, within two months the Commission would not define its position, the third state could then bring the case to the Court of Justice, within another period of two months.

The second hurdle relates to the discretion the Commission has conventionally enjoyed in the operation of the infringement procedure. It is indeed based on that discretion, interpreted as being broad, that the Court of Justice has traditionally found against the argument that the Commission may be compelled to trigger the infringement procedure under Article 258 TFEU, and that in turn the failure to start infringement proceedings might amount to a failure to act under Article 265 TFEU.

The usual authority to which the case law refers to support the Commission's discretion to commence proceedings, namely *Starfruit*, [253] however relates to a situation in which it was a private party, in casu a Belgian firm, that had asked the Commission to take action, in the form of an activation of the infringement procedure against France. The Court held that

> "based on the scheme of Article 169 of the Treaty [as it then was, now Article 258 TFEU] that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position."[254]

The situation at hand would differ significantly from the one the Court had to address in the *Starfruit* case, at least in terms of the situation of the claimant involved, the legal context in which the claim is made, and indeed the function of the infringement procedure in the situation at hand, in relation to other remedies. In particular, it involves an EU partner, as legal person located outside the EU, having rights under EU law, requesting the Commission as guardian of the Treaties and as external representation of the Union,[255] to take steps to ensure that the latter fulfils its obligations towards it (and its nationals), in the form of an action against a prevaricating Member State that does provide effective legal protection of the rights deriving from the agreement.

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[252] The dispute settlement mechanism may also be blocked as a result of the Member State's behaviour.

[253] See Case 247/87, *Starfruit*, ECLI:EU:C:1989:58.

[254] Ibid, ¶11.

[255] Article 17(1) TEU.

These dissimilarities could warrant a different approach of the Court, particularly as to the way the Commission's discretion may be conceived and exercised in the context of Article 258 TFEU, also in consideration of the fact alluded to earlier that the Commission's infringement procedure may be one of the last, if not the only available means under EU law to help the claimant have its rights protected. Conversely, the Commission inaction would be problematic in view of the principle that the external action of the EU should be conducted in accordance with the rule of law.[256]

To be sure, the Commission's discretion has never been envisaged as absolute. As it did in *Starfruit*, the Court often refers to "*a* discretion". Thus:

> the principle, established in the settled case-law of the Court, that the Commission has *a discretion to determine whether it is expedient to take action against a Member State* and what provisions, in its view, the Member State has infringed, and to choose the time at which it will bring an action for failure to fulfil obligations; the considerations which determine that choice cannot affect the admissibility of the action.[257]

The Court has also referred to "the *objective* of the procedure provided for in Article 258 TFEU",[258] namely to find that a Member State has failed to fulfil its EU obligations. This particular objective determines the way the Commission applies the infringement procedure, and in particular the nature and scope of its discretion. The latter should also be envisaged in consideration of the general role which the Commission is mandated to play by the EU constitutional charter, and in particular by Article 17(1) TEU, and as part of the EU institutional framework whose functions, as recalled above, includes that of promoting EU values, including the rule of law.[259] Article 17(1) TEU contains mandatory language whereby the Commission "shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [and] shall oversee the application of Union law under the control of the Court of Justice of the European Union" (emphasis added). The responsibility of the Commission as guardian of the rule of (EU) law and the way it exercises it, are determined by those constitutional prescriptions,[260] and it is the duty of the Court of Justice to control that the Commission acts accordingly, including in the way in which it exercises its discretion. In particular, the Court must ensure that that discretion is not exercised to the detriment of the objective of Article 258 TFEU, and that of the general task the Commission is entrusted to perform.

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[256] The Court has shown more openness in towards a claimant in an action for damages in a situation where no remedies are available at national level effectively to ensure protection for individuals: see case 20/88 *Roquettes Frères*, ECLI:EU:C:1989:221, ¶¶15-16. Thanks to Michal Bobek for this point.

[257] Case C-213/19, *Commission v UK*, ECLI:EU:C:2022:167, ¶¶163-164.

[258] *Ibid.*, ¶162. See also joined cases C-715/17, C-718/17 et C-719/17, *Commission v Poland* e.a., ECLI:EU:C:2020:257, ¶¶64ff.

[259] Article 13(1) TEU.

[260] The mandate of the Commission has been significantly widened by the Treaty of Lisbon. As noted by Koen Lenaerts and Piet Van Nuffel, "before the Lisbon Treaty, Article 211 EC listed the tasks which the Commission was to carry out 'in order to ensure the proper functioning and development of the common market'", see *EU Constitutional Law* (OUP, 2012), p. 428, footnote 222.

Recall that it is on the basis of Article 19(1) TEU, located in the TEU institutional provisions, and its objectives, that the Court of Justice has defined its own jurisdiction, and its particular exercise in the context of the external action, to ensure that it is conducted in accordance with the rule of law.[261] The Court ought to envisage the role of the European Commission established by Article 17 (1) TEU, also located in the institutional part of the TEU, in a similar purposive and systemic fashion.[262]

Also, the Court should oversee the Commission's performance, including in the way it exercises its discretion, in the particular context of the external action of the Union, and the constitutional principles governing it. The Commission's function in that context ought to be conceived of in consideration of Articles 21 and 23 TEU, and article 205 TFEU discussed above, and in particular the obligation for the Union to conduct its external action in accordance with the principles they encapsulates, including the rule of law.

To be sure, the text of Article 265 TFEU does not itself preclude actions against the Commission for failure to instigate an infringement procedure. The provision explicitly recognises that an action can be directed against the Commission without making any distinction in terms of the powers it exercises – i.e. whether executive, representation or monitoring powers. Moreover, Article 265 TFEU envisages a complaint to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion. In other words, the only textual exclusion the provision contemplates in terms of contestable failure is an institution's *omission to adopt a recommendation or opinion*. Indeed, the procedure does not only concern failures to adopt final legal acts, the case law suggests that it may address failures to adopt preparatory acts too.[263]

There is therefore space for an interpretation according to which the Commission may be asked to take steps to enforce EU law including by way of an Article 258 TFEU course of action, to ensure that the EU meets its obligations towards third states (and their nationals). Such an openness might be even more justified in the case of neighbouring states having a special relationship with the EU, considering the terms of Article 8 TEU, and in particular if that relationship does involve the creation of elaborate individual rights, and/advanced forms of cooperation, if not degrees of integration.[264]

The *Venezuela* decision is a step in that direction. It should be followed by acknowledging the possibility for affected third states to invoke the failure to act

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[261] See *Rosneft*, ¶75.

[262] Further : Christophe Hillion, "Conferral, cooperation and balance in the institutional framework of the EU external action" in Marise Cremona (ed) *Structural principles in EU external relations law* (Hart Publishing, 2018), p. 117.

[263] See Jean-Paul Jacqué, *Droit institutionnel de l'Union européenne* (Dalloz, 2015), pp. 717.

[264] Note, in this sense, that the Court of Justice has also broadened the right of some specific non-EU states to submit observations to the Court in cases involving the application of EU law within the EU legal order. Thus in Case C-328/20, *Commission v Austria*, ECLI:EU:C:2020:1068, the Court acknowledged the right of the EEA EFTA states to submit observations in infringement cases based on Article 258 TFEU, in addition to preliminary ruling cases based on Article 267 TFEU.

procedure in case EU institutions do not themselves intervene effectively to enforce the rule of law internally, and/or indeed for impacted third country nationals to obtain reparation. Precluding such a procedure would sit uneasily with the mandatory language of Article 17(1) TEU, understood in the light of Articles 21, 23 TEU and Article 205 TFEU, and ultimately Article 2 TEU.

Opening up to such external claims of answerability of the EU would add pressure on Union institutions and Member States to secure coherence between the EU external action, the objectives it shall pursue, and the principles it shall respect. In particular, it would contribute to ensuring that its external action is conducted in accordance with the rule of law, thus preserving its credibility in promoting it in its relations towards the wider world, while at the same buttressing its authority to enforce it internally. The EU should thus embrace such external scrutiny and accountability. Openness and consistency would demonstrate the maturity of the EU as constitutional order and as subject of international law. It would be the epitome of the Union's autonomy rather than a threat thereto.

4. CONCLUDING REMARKS

The EU constitutional charter establishes a complex mandate for the Union to safeguard the rule of law in its relation to the wider world. The rule of law must be promoted and upheld as objective of the EU external action, and it must be respected in the latter's conduct, that is in the development and implementation of the EU external action, both by EU institutions and Member States, under the control of the European Court of Justice.

It has been argued that upholding the rule of law externally, *and* safeguarding it internally, are as imperative as they are intrinsically interlinked requirements for the Union to fulfil its Treaty-based rule of law mandate towards the wider world. Without observance of the rule of both inside *and* outside, and without systematic deployment of available enforcement mechanisms to that effect, the EU will not only be discredited as a constitutional order deemed to be based on the rule of law (the proverbial "community of law") and as subject of international law advocating a "rules-based international order", on which its influence otherwise depends.

In the face of a fast return of the rule by force, EU institutions and Member States have a fundamental interest in redoubling their efforts to help the EU fulfil its external rule of law mandate. This requires further elucidation and systematisation of operational standards internally, as well as consistency in their external promotion. Simultaneously, it entails thorough enforcement of the rule of law in the development and implementation of the EU external policies, at both institutions' and Member States' levels. This, in particular, means overcoming the tension inherent in the Treaties between its general assertion of the rule of law as constitutional principle governing the whole of the EU external action, and the restrictions imposed on the judicial control over measures adopted in the context of the EU external action. It equally presupposes the Member States' systematic compliance with the rule of law, guaranteed by an active EU and transnational

monitoring and enforcement, if need be with the help of third countries and their nationals. They too expect that the EU live up to its mandate.