Transition 2.0 and Rule of Law-Mainstreaming in the European Union

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I. Introduction

This paper explores how the Union can contribute by law-making to facilitate transitional justice in the Member States, enabling them to overcome systematic deficiencies concerning the Union's values enshrined in Art. 2 TEU, particularly with a view to the value of the rule of law. Transition 2.0 in the Member States should be accompanied by consistent Union measures aimed at strengthening, defending and restoring the rule of law throughout the Union.[1]

1 See Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in: Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight* (Cambridge: CUP 2016), 59–81 (60 f.); Werner Schroeder, 'The Rule of Law as a Constitutional Mandate for the European Union', Hague Journal on the Rule of Law 15 (2023), 1–17.

The Union can and should take positive legal action to flesh out the rule of law proclaimed in Art. 2 TEU. It should strengthen the rule of law in the Member States systematically by using its sectoral law-making competences, i.e. by mainstreaming the rule of law across all its policy fields. Merely prohibiting Member States from 'bringing about a reduction in the protection of the rule of law'[2] does not help where that State already suffers from systematic deficiencies with regard to the rule of law, whose constitutional institutions have been captured and which now, after a change of government, seeks to return to liberal democracy. Instead, the Union must systematically incorporate rule-of-law considerations into its policies to actively promote, realise and sustain the rule of law by means of a 'rule of law mainstreaming'.[3]

Such legal mainstreaming measures of the Union, which specify and develop the content of the rule of law, can support transition 2.0 in the Member States significantly. They can facilitate the removal of obstacles to transition arising from national laws or even national Constitutions that have been unilaterally adopted by captured national institutions in violation of the values of Art. 2 TEU. They eliminate ambiguities that may arise when national authorities and courts struggle to apply the Union's values, which might not be precise and sufficiently clear enough.

To be sure, such an approach presupposes an activist interpretation of the Constitution. However, such an understanding is typical for transformative constitutionalism, which usually underpins the process of transitional justice. It is based on a conception of a Constitution that calls for an active role of the State as a catalyst of social change and that is used as an instrument to enforce this activist idea of statehood.[4]

The doctrinal basis for this approach in Union law can be found in the values in Art. 2 TEU which can be fleshed out and mobilised[5] for the realisation of the rule of law principle in the Member States in general and the

2 ECJ, *Repubblika*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311, para. 63; *Asociația 'Forumul Judecătorilor din România'*, judgment of 18 May 2021, case no. C-83/19 and others, ECLI:EU:C:2021:393, para. 162.

3 See infra part V.; see also Daniel Halberstam and Werner Schroeder, 'In Defense of Its Identity: A Proposal to Mainstream the Rule of Law in the EU', Verfassungsblog, 17 February 2022,<https://verfassungsblog.de/>.

4 See Michaela Hailbronner, 'Transformative Constitutionalism. Not Only in the Global South', Am. J. Comp. L. 65 (2017), 527–565 (540).

5 In this respect see also chapter of Armin von Bogdandy and Luke Dimitrios Spieker in this volume, section II.1.

purposes of transformative constitutionalism in some Member States with systematic deficiencies[6] in particular. This premise is backed up constitutionally by Art. 3 paras. 1 and 6, as well as by Art. 13 para. 1 TEU and Art. 49 TEU under which the Union institutions and the Member States are committed to respect the common values referred to in Art. 2 TEU as well as to promote and actively pursue them. Thus, the systematic realisation of the principle of the rule of law must become part of the decision-making programme for the Union's institutions.[7]

II. A Union Transformative Constitutionalism

1. Transitional justice and transformative constitutionalism

The concept of transitional justice deals with the political challenges for States transiting from illiberal democracy or a hybrid system to democracy.[8] Beyond the controversy about the substantive meaning of the concept, there seems to exist a consensus that transitional justice should be guided by internationally acknowledged principles of democracy, the rule of law, human rights and respect for the principles of international law which set up the standards that the new governments have to follow after a regime change.[9] Transitional justice encompasses a 'range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses. These may include both judicial and non-judicial mechanisms, individual prosecution, reparations, truth-seeking,

6 Kim Lane Scheppele, Dimitry Kochenov and 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', YBEL 39 (2020), 3–121 (5).

7 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 and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Berlin: Springer 2021), 105–126 (113 f.).

8 On the nature of such regimes see chapter of András Jakab in this volume.

9 Report of the UN Secretary-General of 23 August 2004, The rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616, 1; Council conclusions on EU's support to transitional justice, adopted by the Council at its 3426th meeting held on 16 November 2015, 13576/15, 25 f.; Noémi Turgis, 'What is Transitional Justice?', International Journal of Rule of Law, Transitional Justice and Human Rights 1 (2010), 9–15 (13).

institutional reform, vetting and dismissals, or a combination thereof'.[10] This approach is also applied by the EU in its external action.[11]

Transformative constitutionalism is concerned with the issue of how the idea of transitional justice can be implemented from a legal and constitutional perspective.[12] While a broad understanding of transformative constitutionalism is about the interpretation of constitutional rules to contribute to democratic change, which requires a constitutional commitment leading to a more just and equal society,[13] a narrower conception interprets transformative constitutionalism as a means to remedy and overcome systemic deficits.[14] In the EU, specific transitional problems arise because some Member States have to deal with the consequences of a 'constitutional breakdown'.[15] Considering that it is specifically the systemic deficits that create problems in realigning these States with the values of the Union, it makes more sense in the current EU context to resort to the narrower understanding of transformative constitutionalism. After all, for the purposes of this paper, it does not matter which of these two understandings of transformative constitutionalism is subscribed to. The crucial point is that a conception of transformative constitutionalism presupposes institutional reforms in order to achieve transitional justice.

2. The union framework for transitional justice in the union

There is a considerable amount of experience with the transformation of societies in Europe[16], which was not only constitutionally underpinned but also legally supported by the Council of Europe and the EU. Building on

10 Report of the UN Secretary-General, The rule of law and transitional justice in conflict and post-conflict societies (n. 9).

11 See Council conclusions on EU's support to transitional justice (n. 9), 7; Laura Davis, 'Peace and Justice in EU Foreign Policy: From Principles to Practice', Transitional Justice Institute Research Paper No. 16–13, 28 June 2016), https://ssrn.com/abstract=2801548.

12 See Karl Klare, 'Legal Culture and Transformative Constitutionalism', SAJHR 14 (1998), 146–188 (150); Gábor Halmai, 'Transitional justice, transitional constitutionalism and constitutional culture' in: Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory* (Cheltenham and Northampton: Edward Elgar 2018), 372–392 (373 f.).

13 Hailbronner (n. 4), 527.

14 von Bogdandy and Spieker (n. 5).

15 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP 2019).

16 Hailbronner (n. 4), 540.

these experiences, the Union has developed its own 'Policy Framework on support to transitional justice'.[17]

It is doubtful, however, whether one can therefore speak of a specific Union policy of transformative constitutionalism. In essence, this policy framework is about how the Union, based on Art. 21 TEU and acting within its external policy agenda, supports international efforts towards transnational justice.[18] The framework does not, however, provide an answer to the question of what kind of transformative constitutionalism the Union should adopt internally vis-à-vis Member States that are faced with a change of government and want to restore the rule of law and democracy. However, that said, in view of the general obligations to ensure the coherence of the Union's internal and external values policy, as derived from Art. 13 para. 1 and Art. 21 para. 2 TEU as well as from Art. 7 TFEU, there is no reason why the basic principles of this approach should not also be applied within the Union. One could even say that they should be valid *a fortiori* in this respect. After all, Arts. 2, 3, 7 and 49 TEU call for the Union and the Member States to uphold and promote the values internally in the same way as Art. 21 TEU requires the Union to do so in the context of an external transitional justice policy.[19]

The main objectives of the Union's framework on transitional justice, which can claim both external and internal relevance, are that it 'should contribute to restoring and strengthening the rule of law'. Also relevant in this context is that it calls for 'institutional reform (that may) prove necessary in order to consolidate rule of law and ensure the genuine accountability of public powers to re-establish trust, prevent the repetition of human rights violations in the future, and ensure the protection of human rights' and which should strengthen 'oversight and democratic control.'[20] If this policy is now applied both externally and internally, i.e. also in relation to the Member States in order to consolidate their societies democratically, this could indeed be characterised as 'renewed transformative constitutionalism' or Transition 2.0.[21] My proposal, which will be presented in the

17 Council conclusions on EU's support to transitional justice (n. 9), 6.
18 Council conclusions on EU's support to transitional justice (n. 9), 2 para. 2.
19 See Marise Cremona, 'Values in EU Foreign Policy' in: Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders: Policy Interconnections Between the EU and the Rest of the World* (Oxford: Hart Publishing 2011), 275–316 (275).
20 Council conclusions on EU's support to transitional justice (n. 9), 7.
21 See further von Bogdandy and Spieker (n. 5), section III.

course of the contribution, is to show what an internal transition policy of the Union could consist of.

3. Union values as a basis for transitional justice in Member States

Art. 2 and 49 TEU in conjunction with Art. 3 para. 1 and 6 TEU make compliance with and even promotion of the Union's value standards a permanent task for the Union and its Member States. As a consequence, transformative constitutionalism in Member States must be embedded in Union constitutional law. When Member States transform their legal and political order to comply with the rule of law or democracy, this process must be consistent with the Union's values under Art. 2 TEU.

As substantive standards, they constitute the threshold Member States must meet in transiting towards a more liberal and democratic society. However, to the extent that such norms also contain procedural requirements, as the rule of law or its sub-principles such as legal certainty etc. does, they can also place constraints on the transformation process.

This could create a dilemma for Member States that find themselves in a situation where they want to remediate massive violations of the rule of law and democracy after a change of government. If such States set aside any existing national law that stands in the way of restoring their democratic liberal order, without regard to existing national constitutional law and Union law, a conflict with the rule of law requirements of Art. 2 TEU could indeed arise.[22] Possibly, a Member State's action in the fields covered by Union law could be challenged in the Union courts if it restores compliance with the values under Art. 2 TEU by reforming its national legal system while, at the same time, violating the prohibition of retroactivity or the principle of legal certainty.[23]

This scenario, however, would not materialise if the requirements for the restoration of the rule of law and democracy in the Member State in the context of transitional justice were derived from specific norms of Union law itself. The argument presented here is that Union law can be seen as an instrument that enables transitional justice where there would be obstacles to this arising from the national constitution or from Union law itself. If the

22 See von Bogdandy and Spieker (n. 5), section III.

23 See on legal certainty ECJ, *Amministrazione delle finanze dello Stato v. Meridionale Industria Salumi and others*, judgment of 12 November 1981, joined cases no. 212 to 217/80, ECLI:EU:C:1981:270, para. 10.

Union adopts secondary law norms that flesh out the rule of law within the meaning of Art. 2 TEU, then potential conflicts between a national transitional justice practice and Union law would be avoided in the first place.

4. Tools for transitional justice provided by secondary union law

To be sure, the Treaties themselves, in particular, Art. 2 and 19 TEU, already provide a primary legal framework for the rule of law, e.g., with regard to judicial independence.[24]And there is no doubt that the principle of the rule of law has already been shaped as a result of the case law of the European Court of Justice (ECJ) and has been established in the practice of the Union.[25]

However, transitional justice in the Member States of the Union cannot be relied upon to take place exclusively through applying the values in Art. 2 TEU directly and/or in combination with Art. 19 TEU or Art. 47 Charter of Fundamental Rights of the EU (FRC).[26] This presupposes that national institutions invoke these primary law provisions as yardsticks for setting aside and repealing national laws, including national constitutional law. The main task of implementing transitional justice in this way would naturally rest on the national courts,[27] which could overburden them, not only from a political perspective but also constitutionally. To be sure, *all* Member State bodies must give full effect to Union law and according to the principle of primacy disregard national laws that violate Union law.[28]

24 ECJ, *Associação Sindical dos Juízes Portugueses*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117, para. 41; *Commission v. Poland*, judgment of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, paras. 47 f.; *Repubblika* (n. 2), para. 51.

25 Koen Lenaerts, 'Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofs der Europäischen Union: eine Annäherung', EuGRZ 44 (2017), 639–642 (641); Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined-Principle of EU Law', Hague Journal on the Rule of Law 14 (2022), 107 ff.; Schroeder (n. 7), 114 ff.

26 Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391.

27 von Bogdandy and Spieker (n. 5), section IV.

28 See ECJ, *Garda Síochána*, judgment of 4 December 2018, case no. C-378/17, ECLI:EU:C:2018:979, paras 35 f.; *Simmenthal*, judgment of 9 March 1978, case no. 106/77, ECLI:EU:C:1978:49, paras 17 and 21 f.

But this obligation only pertains to provisions of Union law that enjoy direct effect,[29] which requires them to be clear and unconditional.[30]

Due to the values', mentioned in Art. 2 TEU, the high degree of abstraction and its foundational character,[31] it is not clear whether they allow and even require Member States to set aside constitutional provisions and other national laws that violate these values.[32]Arguably, the ECJ has jurisdiction to hear claims in connection with the value of the rule based on Art. 2 TEU, as it may be used as a systematically relevant anchor to develop subprinciples, for instance, requirements of effective legal protection, of separation of powers or of the independence of the judiciary etc.[33] Also, the Court has used the value of the rule of law to interlink it with constitutional principles of Union law, such as the principle of 'mutual trust' in order to create specific legal obligations of Member States, such as the prohibition to bring about a reduction in the protection of the value of the rule of law.[34]

While Art. 2 TEU is legally binding,[35] it is questionable whether the value of the rule of law as such may be applied by national courts or authorities directly.[36]The ECJ also seems to be inclined towards this view implicitly rejecting the direct effect of the value of the rule of law and, emphasizing that

29 ECJ, *Garda Síochána* (n. 28), para. 36; *Winner Wetten*, judgment of 8 September 2010, case no. C-409/06, ECLI:EU:C:2010:503, para. 56.

30 ECJ, *van Gend en Loos v. Netherlands Inland Revenue Administration*, judgment of 5 February 1963, case no. 26/62, ECLI:EU:C:1963:19, 1–16 (13).

31 On the latter see ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 2), para. 160.

32 As von Bogdandy and Spieker (n. 5); Lucia S. Rossi, 'La valeur juridique des valeurs', RTDE 56 (2020), 639–657 (657) argue; but see Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', Eu Const. L. Rev. 18 (2022), 30–58 (30); Tom L. Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values', GLJ 23 (2022), 431–451 (437).

33 As the Court did in ECJ, *Repubblika* (n. 2), paras. 51 ff.; *Les Verts v. Parliament*, judgment of 23 April 1986, case no. 294/83, ECLI:EU:C:1986:166, para. 23; *Kovalkovas*, judgment of 10 November 2016, case no. C-477/16 PPU, ECLI:EU:C:2016:861, para. 36; *Associação Sindical dos Juízes Portugueses* (n. 24), para. 36.

34 ECJ, *Repubblika* (n. 2), paras 62 f.; *Asociația 'Forumul Judecătorilordin România'* (n. 2), paras. 160 ff.

35 See ECJ, *Asociația 'Forumul Judecătorilordin România'* (n. 2), para. 185; *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, paras 231 f.; *Poland v. Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 282.

36 Whereas Art. 19 para. 1 sub-para. 2 TEU is "formulated in clear and precise terms and (is) not subject to any conditions, and they therefore (has) direct effect", ECJ, *RS*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99, para. 58.

it 'is given concrete expression' in other provisions or subprinciples such as the obligation to grant effective judicial protection which 'impose(s) on the Member States a clear and precise obligation (…) that is not subject to any condition'.[37]The values mentioned in Art. 2 TEU have above all an indirect and reinforcing effect which implies that focusing merely on this provision for the purpose of enforcing and developing the rule of law is impractical.[38]

Against this backdrop, the mobilisation of Union values, which is indeed called for as part of a Union transition policy, should not primarily depend, therefore, on judicial application and development of Art. 2 TEU. In order to meet the requirements of legal certainty and clarity, it is essential that the Union enacts specific secondary legislation to implement the values. A Union legislative framework for the rule of law would provide better guidance on the content and scope of the rule of law and could thus strengthen transitional justice policies in the Member States.

III. Legitimacy Issues of Transformative Constitutionalism in the Union

1. Right of the union legislator to define the rule of law

Therefore, the issue is whether the Union legislator has the right to define the meaning of the rule of law if it pursues an active rule-of-law policy and, in this context, articulates positive standards for the Member States employing secondary law. If not, must the legislator employ the constitutional concept enshrined in Art. 2 TEU and defined by the ECJ?

However, when making the rule of law the subject of systematic legislative treatment, the Union legislator might further develop its concept.[39] The legislator is entitled to specify principles that form part of the rule of law by considering the case law of Union Courts. Such power to further develop a concept of primary law using secondary law also results from Art. 3

37 See ECJ, *Repubblika* (n. 2), para. 62; *Poland v. Parliament and Council* (n. 35), para. 264 as well as *Asociația 'Forumul Judecătorilor din România'* (n. 2), para. 250.

38 Pekka Pohjankoski, 'Rule of law with leverage', CML Rev. 58 (2021), 1341–1364 (1345 f.); a self-standing application of Art. 2 TEU, however, is advocated by Luke Dimitrios Spieker, *EU Values before the Court of Justice* (Oxford: OUP 2023), 54–61.

39 On interpretative pluralism promoting a judicial and legislative dialogue see Gareth Davies, 'Does the Court of Justice Own the Treaties? Interpretative Pluralism as a Solution to Over-Constitutionalisation', ELJ 24 (2018), 358 (368, 373); Spieker (n. 38), 140–143; but see ECJ, *Republic of Moldova*, judgment of 2 September 2021, case no. C-741/19, EU:C:2021:655, para. 45.

paras. 1 and 6, as well as from Art. 13 para. 1 TEU, which provides the Union's institutions with a mandate to promote the value of the rule of law and to pursue it within the framework of its competences.[40] In doing so, the Union institutions have a certain degree of discretion, taking into account the guidelines drawn by the ECJ based on Art. 2 TEU.[41] In legislative practice, this technique is commonly employed.[42]

The definition of the rule of law provided in Art. 2 lit. a) of the 'conditionality' Regulation (EU, Euratom) 2020/2092[43] refers to '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'. This broad understanding, which does not exceed the limits of the concept of the rule of law,[44] assumes correctly that the Union rule of law cannot be reduced to the situation of the judiciary but includes formal elements and substantive standards, imposing an obligation for fairness and a prohibition of arbitrariness in the content of legal norms.[45]

2. Constitutional minimum harmonisation in the union

Any legal activity of the Union to activate and strengthen the values in Art. 2 TEU in the context of transitional justice results in a power shift at

40 See, in detail, infra part IV.4.

41 ECJ, *Hungary v. Parliament and Council* (n. 35), paras 231–237; *Poland v. Parliament and Council* (n. 35), paras 324–328.

42 The use of secondary law to develop terms of primary law can be found, for example, in Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158/77, which specifies the principle of non-discrimination and the freedom of movement of Union citizens enshrined in Art. 18 and 21 TFEU; see ECJ, *Dano*, judgment of 11 November 2014, case no. C-333/13, EU:C:2014:2358, para. 61.

43 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ 2020 L 433I/1.

44 ECJ, *Poland v. Parliament and Council* (n. 35), para. 324.

45 Lenaerts (n. 25), 641; Pech (n. 25), 122 ff.; Martin Krygier, 'Rule of law' in: Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP 2012), 233–249 (236 f.); Schroeder (n. 7), 117 f. with further references.

the expense of the Member States' autonomy. This could create a conflict, in particular, as transitional justice is based on the principle of self-determination of the Member States, which is also secured at the Union level in Art. 4 para. 2 TEU, a provision protecting the national constitutional identity of the Member States.[46] It is thus the law of the Union itself that acknowledges, despite the common constitutional values of Art. 2 TEU, constitutional diversity in the manifestation of the values of the rule of law, democracy and human rights, within the Union.[47] The idea that Art. 2 TEU orders and supervises a federal state-type constitutional homogeneity is not compatible with such a model of constitutional pluralism.[48]

Consequently, "neither Art. 2 TEU nor (…) nor any other provision of EU law, requires Member States to adopt a particular constitutional model governing the relationship and interaction between the various branches of the State".[49] However, Art. 4 para. 2 TEU does not provide Member States with any constitutional discretion to disregard the duty to respect the values.[50] This is supported by the systematic status of Art. 4 para. 2 TEU, which is subordinate to the obligation of Member States to comply with the values in Art. 2 TEU. Moreover, it has always been part of the Union legal doctrine that, while Member States are free to exercise their competencies in all their reserved areas, they are nevertheless required to do so in compliance with Union law.[51]

Since the Member States have to meet 'the obligations as to the result to be achieved which arise directly from their membership of the Union, pursuant to Art. 2 TEU',[52] in practice and inevitably the mobilisation of the

46 See Spieker (n. 38), 229–232.

47 See Schroeder (n. 7), 109 f.

48 On constitutional pluralism in the Union, see Neil MacCormick, 'The Maastricht-Urteil: sovereignity now', ELJ 1 (1995), 259–266; Julio Baquero Cruz, 'The legacy of the Maastricht-Urteil and the pluralist movement', ELJ 14 (2008), 389–422; see also BVerfG, judgment of 30 June 2009, 2 BvE 2/08 – *Lissabon*, para. 343, according to which the 'inviolable core content of the constitutional identity of the Basic Law' has to be respected within the framework of the Union.

49 ECJ, *Euro Box Promotion and others*, judgment of 21 December 2021, joined cases no. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, para. 229.

50 ECJ, *Poland v. Parliament and Council* (n. 35), paras. 265 and 284; in *RS* (n. 36), paras 71–72 the Court claims exclusive jurisdiction to define the content of Art. 4 para. 2 TEU.

51 ECJ, *Pringle*, judgment of 27 November 2012, case no. C-370/12, ECLI:EU:C:2012:756, para. 69.

52 ECJ, *Poland v. Parliament and Council* (n. 35), para. 284.

Union's values leads to a certain constitutional harmonisation in the Union. However, such policy does not violate Art. 4 para. 2 TEU[53] as long as the claim for the respect for the rule of law in the Union does not seek to establish uniform principles and rules, but solely the observance of a European minimum standard.[54] This is not to advocate a 'minimalist reading', i.e. a restrictive interpretation of Art. 2 TEU values, whereby the development of detailed value standards for the Member States is dispensed with.[55] Rather, it is a matter for the Member States, having their own national constitutional identities, which are respected by the Union, to adhere to a common basic concept of the 'rule of law' as a value which they share, common to their own constitutional traditions.[56] Art. 2 TEU contains only the essence of the values,[57] a non-negotiable core, which the Member States must not undermine.[58] However, they may – similar as with fundamental rights under Art. 53 FRC – well develop rule of law standards beyond the common Union standard, provided that the 'primacy, unity and effectiveness of EU law are not thereby compromised'.[59]

Union law is a dynamic legal order that is constantly evolving, a living instrument.[60] This also applies to the values in Art. 2 TEU which the Union and its Member States must continuously promote and pursue, as demanded by Art. 3 para. 1 and 6 TEU, Art. 13 para. 1 TEU and Art. 49 TEU. Accordingly, the value standards set out in Art. 2 TEU are not to be interpret-

53 But see von Bogdandy and Spieker (n. 5), section II.2., arguing that Art. 2 TEU must not become a tool of constitutional harmonisation; see also Dean Spielmann, 'The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union' in: María Elósegui and others (eds), *The Rule of Law in Europe* (Cham: Springer 2021), 3–20 (19).

54 Lenaerts (n. 25), 640; Schroeder (n. 7), 110.

55 But see von Bogdandy and Spieker (n. 5), section II.2.

56 ECJ, *Poland v. Parliament and Council* (n. 35), para. 266.

57 Advocate General Juliane Kokott, *Stolichna obshtina, rayon* '*Pancharevo*', Opinion of 15 April 2021, case no. C-490/20, ECLI:EU:C:2021:296, para. 118; Advocate General Michal Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim*, Opinion of 20 May 2021, case no. C-748/19, ECLI:EU:C:2021:403, para. 147.

58 See ECJ, *Repubblika* (n. 2), paras 63 f.; *Asociaţia 'Forumul Judecătorilor din România' and Others* (n. 2), para. 162.

59 See ECJ, *Melloni*, judgment of 26 February 2013, case no. C-399/11, ECLI:EU:C:2013:107, para. 60.

60 Loïc Azoulai and Renaud Dehousse, 'The European Court of Justice and the Legal Dynamics of Integration' in: Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford: OUP 2012), 350–364 (350 ff.); see with regard to the FRC recently Giuseppe Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* (Leiden and Boston: Brill Publishing 2015).

ed statically, but in a way that is open to development. At the same time, the Union is not prevented from specifying or raising the standards set out therein. This has already happened as a result of the developing case law of Union Courts,[61] but also through the adoption of secondary law by the Union legislator, a prominent example of which is Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. The ECJ, therefore, has made clear that such legislative measures, that legally define, implement and enforce the concept of the rule of law or specific aspects of it, do not violate the national identity of the Member States.[62]

IV. The Value-Function of the Rule of Law

1. A functional view of the rule of law

Clearly, a Union policy fleshing out the rule of law in Art. 2 TEU and developing it through secondary law within the framework of a rule of law mainstreaming policy presupposes an activist understanding of the concept of values. At the same time, however, such an activist interpretation of the Union Constitution as a value-led order also provides the foundations for transformative constitutionalism in the Union. Transformative constitutionalism as an idea typically seeks to overcome the paradigm according to which Constitutions must primarily constrain state power. It rather envisages a public order that actively pursues change. In this context, transformative constitutionalism implies that Constitutions are used as instruments to enforce this activist idea of statehood.[63] Whether it is possible or even necessary for the Union to pursue an active rule-of-law policy and use it as an instrument for transformative constitutionalism in the Union depends not only on its content but above all on the function attributed to the rule of law.[64]

61 Explicitly ECJ, *Poland v. Parliament and Council* (n. 35), paras 290 f.

62 ECJ, *Poland v. Parliament and Council* (n. 35), para. 158; see also *Commission v. Poland (Régime disciplinaire des juges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596, para. 50.

63 See Hailbronner (n. 4), 540 with reference to the US Constitution.

64 See Martin Krygier, 'Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?' in: James E. Fleming (ed.), *Getting to the Rule of Law* (New York and London: New York University Press 2011), 64–104 (65).

The most basic function of the rule of law is the institutionalised taming of the arbitrary use of public power in order to safeguard the right of citizens,[65] an idea which also has its place in Union law.[66] Similar to fundamental rights, the rule of law is traditionally conceived as a negative norm of competence that limits the exercise of powers by a sovereign entity. Moreover, the rule of law has a positive dimension. The rule of law is not merely about preventing or limiting the exercise of repressive power – it also entails a programmatic function.[67] This function can be seen by examining the rule of law in the Union order, which considers its realisation to be a constitutional objective.

In that context, note that the Treaty of Lisbon rebranded the rule of law as a value, whereas it was formerly regarded as a principle, manifesting the transformation of the Community from a single market organisation to a Union defined as a community of values.[68] While principles are associated with a sense of obligation, a sense of purpose is connoted by values.[69] The word 'value' in the context of the rule of law thus does not seem to be a meaningless formula[70] but rather indicates that the framers of the Lisbon Treaty wanted to associate the rule of law with a broader goal and strategy. Therefore, the rule-of-law notion has several potential functions. Originally, the rule of law could be understood as a constitutional principle with an ordering function for the Union's constitutional structure.[71] At the same time, it is a value which entails a constitutional programme and even a

65 Martin Loughlin, *Foundations of Public Law* (Oxford: OUP 2010), 336; András Jakab, 'The rule of law, fundamental rights and the terrorist challenge in Europe and elsewhere', in: András Jakab (ed), *European Constitutional Language* (Cambridge: CUP 2016), 117.

66 See Schroeder (n. 7), 117; Till Holterhus, 'The History of the Rule of Law', Max Planck Yearbook of United Nations Law 21 (2017), 430–466 (463 ff.).

67 Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford: Stanford University Press 2012), 135 f.

68 See Lenaerts (n. 25), 640; Joris Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union', ICLQ 63 (2014), 935–962 (935); on the rule of law as 'common value' ECJ, *Commission v. Poland* (n. 24), paras 42 f.

69 Jürgen Habermas, *Between Facts and Norms* (Cambridge: Polity Press 1996), 255.

70 See Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crises', GLJ 20 (2019), 1182–1213 (1199).

71 Armin von Bogdandy, 'Founding Principles' in: Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Oxford: Hart Publishing 2009), 11–54 (20).

constitutional mandate for the Union,[72] to safeguard the foundations of its identity and of the membership of States in the Union[73], a concept that will be explored in the following section.

2. A 'System of Values' doctrine for the rule of law

The doctrine that values may inform a constitutional system and, beyond that, an entire legal system stems from German constitutional theory.[74] It indicates that a Constitution provides a system of values (*Wertordnung*) that contains a material justice programme serving to identify and integrate a (state) community.[75] Fundamental rights, in particular, enshrined in the Constitution are a crucial expression of these values.[76]

This 'system-of-values' doctrine tends to anchor the legitimacy of the polity largely in the Constitution instead of seeking it in the political process. This model of immanent legitimacy also lends itself to other polities, in particular to those endowed with little natural legitimacy, as is the case with the Union. Indeed, the designation of the rule of law and other norms as legally binding values in Art. 2 TEU might appear to be an attempt to compensate for the existing legitimacy deficits[77] of the Union. However, this attempt can only be successful if the Union's values are substantiated and constitutionally operationalised. Only if the rule of law, along with the other values, is endowed with a significant constitutional presence and occupies a

72 Schroeder (n. 1), 9–10.

73 In this regard see chapter of Christophe Hillion in this volume.

74 Developed during the Weimar period in a reaction to the value relativism that prevailed, in particular, in Hans Kelsen's Pure Legal Theory, see Rudolf Smend, *Verfassung und Verfassungsrecht* (Berlin: Duncker & Humblot reprints 1928), 127 f.; on its influence on post-war German constitutional doctrine see Dominik Rennert, 'Die verdrängte Werttheorie und ihre Historisierung', Der Staat 53 (2014), 31–59 (42).

75 Critical, conjuring up a 'tyranny of values' Carl Schmitt, *Die Tyrannei der Werte* (4th edn, Berlin: Duncker & Humblot 2020), 35 f; but see with regard to Art. 2 TEU Spieker (n. 38), 245–266.

76 Elementary to 'Wertordnung' (system of values) which the fundamental rights of the Basic Law establish: BVerfG, judgment of 15 January 1958, 1 BvR 400/51; BVerfGE 7, 198 (205 f.) – *Lüth*.

77 See Udo Di Fabio, 'Grundrechte als Werteordnung', JZ 59 (2004), 1–8 (1); Philipp Allott, 'Epilogue: Europe and the Dream of Reason' in: Joseph Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge: CUP 2003), 202–225 (202).

central position within the Union's policies will it be able to contribute to the legitimacy of the Union.[78]

Recent case law seems to embrace this position and, with a view to the new role of values under the Treaties, ascribe a broader significance to the rule of law than before. The ECJ perceives the values of Art. 2 TEU (and above all the rule of law) as specific characteristics of the Union, defining membership in the Union and at the same time the Union's identity.[79] Consequently, the ECJ regards the Union as a community of values, one of whose tasks is to actively protect and defend these values within the limits of its powers.[80] This statement about the Union's right to use its competencies to defend and protect its values is of general and fundamental importance and does not only refer to the use of the Union's budget.

3. Negative and positive obligations emanating from the rule-of-law value

The system of values theory has gained practical relevance by conceiving parts of the Constitution as a positive order that sets standards for the entire legal system. This applies in particular to fundamental rights but is also true of the rule of law.[81] The aim of the value theory is not only to limit the sovereign's power but also to derive a positive obligation from the Constitution to protect the sphere of freedom for its citizens, including from interference by third parties.[82]

In the context of the Union Constitution, this doctrine implies that the rule of law as a fundamental value of the Union permeates its entire legal order and all legal relations between the institutions, the Member States and the citizens of the Union.[83] This objective function of the rule of law

78 Andrew Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', Oxford J. Legal Stud. 29 (2009), 549–577 (552, 555 and 560 f.); critical Armin von Bogdandy, 'Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States' in: von Bogdandy and others (n. 7), 73–103 (75).

79 ECJ, *Hungary v. Parliament and Council* (n. 35), paras 124 – 127; *Poland v. Parliament and Council* (n. 35), paras. 142–145.

80 ECJ, *Hungary v. Parliament and Council* (n. 35), para. 127; *Poland v. Parliament and Council* (n. 35), para. 145.

81 Krygier (n. 67), 134 f.

82 Hans Jarass, 'Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts', AöR 110 (1985), 363–397 (395).

83 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*

must then also give rise to an obligation on the part of the Union to actively protect by all legal means the subjects of Union law against threats to the rule of law.[84]

The idea that substantive parts of a Constitution such as the rule of law contain positive obligations, including the need to protect and enforce certain aspects of a Constitution, is certainly rooted in a broader European tradition. Positive obligations have also become an important element of the European fundamental rights doctrine.[85] Note that the European Court of Human Rights (ECtHR) has derived positive obligations from the substantive content of the human rights guarantees[86] enshrined in the ECHR.[87] The ECtHR has consistently emphasised that the ECHR may demand effective legislative, administrative and judicial measures from the Member States to ensure effective freedom.

4. The promotion of the rule of law as a constitutional mandate

Values must not be confused with objectives. The Union's objectives, as mentioned in Art. 3 TEU, are directives referring to policy goals of the Union and providing orientation to its action.[88] However, the reference to the values in Art. 3 para. 1 and 6 TEU as well as in Art. 13 para. 1 TEU, which oblige the Union 'to promote' those values as its primary objectives and to 'pursue' them 'by appropriate means', underlines that the Treaty also assigned the rule of law a functional role. A systematic reading of Art. 2, Art. 3 and Art. 13 TEU reveals that values such as the rule of law may not be

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Europe: From a Common Concept to Mechanisms of Implementation (Oxford: Hart Publishing 2016), 3–34 (15 f.).

84 See ECJ, *Hungary v. Parliament and Council* (n. 35), para. 127; *Poland v. Parliament and Council* (n. 35), para. 145; Schroeder (n. 1), 8.

85 Heike Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?', HJIL 74 (2014), 187–213 (189 f.).

86 ECtHR, *Airey v. Ireland*, judgment of 9 October 1979, no. 6289/73, para. 32; *Siliadin v. France*, judgment of 26 July 2005, no. 73316/01, para. 89; see Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing 2004), 221.

87 Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950).

88 Similar provisions can be found in several Member States' Constitutions, Joris Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law', CLEER Working Papers 5 (2011), 21 f.

understood merely as constitutional principles but, additionally, also as a constitutional mandate and work order.

In practical terms, linking the rule of law with the objectives of the Union signifies that the rule of law informs the Union's institutional framework and pertains to the decision-making programme of the Union's institutions. Like other Treaty objectives, the obligation of the Union to promote its values in Art. 3 para. 1 TEU is a legally binding policy directive,[89] even if it is of a very fundamental nature and concerns "meta-goals" of the Union.[90]

The normative surplus stemming from the linking of the values in Art. 2 TEU with the objectives of the Union in Art. 3 paras. 1 and 6 TEU and the institutional framework in Art. 13 para. 1 TEU is that it increases the normative force of the Union's values. An overall reading of these provisions gives the Union a legal mandate to take positive action to fully realise the values in the process of making and enforcing Union law.[91]

In general, the ECJ has accepted the policy of the Union to actively implement the rule of law using secondary law. A prominent example of Union legislation intended to protect and enhance the rule of law is the 'conditionality' Regulation (EU, Euratom) 2020/2092, which the ECJ has declared lawful. In particular, it is now clear that the sanctioning procedure in Art. 7 TEU does not constitute an exclusive legal mechanism, barring an active rule-of-law policy pursued by the Union legislator. Legislative measures aimed at promoting and protecting the rule of law differ in their aim and subject matter from the procedure laid down in Art. 7 TEU, which is designed to penalise serious and persistent breaches of the values by Member States by ultimately depriving them of voting rights, and may not be regarded as an improper 'parallel procedure' to Art. 7 TEU.[92]

89 See for previous objectives in Art. 2 EEC Treaty, ECJ, *European Economic Area*, 14 December 1991, Opinion 1/91, ECLI:EU:C:1991:490, paras 16 f.

90 Jörg Terhechte, 'Art. 3 EUV' in: Eberhard Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, (74th edn, Munich: C.H.Beck 2021), para. 29.

91 Werner Schroeder (n. 1), 10.

92 ECJ, *Hungary v. Parliament and Council* (n. 35), paras 168–174; *Poland v. Parliament and Council* (n. 35), paras 199, 206 f. and 213.

V. Mainstreaming the Rule of Law as a Union Task

To be sure, an obligation to promote values may not *per se* create legal competences for the Union institutions.[93] Art. 3 para. 6 TEU states that the efforts of the Union to pursue its values and other objectives must be limited to 'means commensurate with the competences which are conferred upon it in the Treaties'. Therefore, any policy aimed at strengthening and implementing the rule of law through legislative action presupposes that the Union acts within the limits of its powers as laid down by Art. 5 para. 2 TEU (principle of conferral).

1. Residual union competences for promoting the rule of law

That said, even under the Treaty of Lisbon, neither the TEU nor the TFEU ascribes a general power to the Union to enact provisions to implement the rule of law internally. This competence deficit has also been identified as a problem concerning human rights within the Union. Neither have the Treaties bestowed the Union with the general legal competence to develop an internal human rights policy.[94] To be sure, this has not barred the Union from gradually integrating human rights concerns into many of its internal policies.[95] Similar questions and challenges arise in relation to the rule-of-law situation, characterised by the Union's recent efforts to strengthen its ability to ensure that Member States respect the rule of law.[96]

The Union does not have an explicit arsenal of legal instruments available to implement the rule of law in the Member States, which gives rise

93 Bruno de Witte, 'Conclusions: Integration clauses – a comparative epilogue' in: Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (London: Routledge 2018), 181–188 (182).

94 ECJ, *ECHR I*, 26 March 1996, Opinion 2/94, ECLI:EU:C:1996:140, para. 27; see the critique from Philip Alston and Joseph Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', EJIL 9 (1998), 658–723.

95 See Oliver De Schutter, 'Mainstreaming Human Rights in the European Union' in: Philip Alston and Oliver De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford: Hart Publishing 2005), 37–72 (37 f.).

96 Advocate General Campos Sánchez-Bordona, *Hungary v. European Parliament and Council*, Opinion of 2 December 2021, case no. C-156/21, ECLI:EU:C:2021:974, para. 78.

to the idea of an implicit competence to pursue this value and objective via secondary law. According to the doctrine of implicit competences, the Union is, "for the purpose of attaining a specific objective", empowered to undertake the legal measures necessary for the attainment of that objective.[97] To be sure, the Court has associated the purposes and objectives of the rule of law with the tasks and powers of the Union.[98] However, to infer from this that the Union has a corresponding competence to legislate in this area would overstretch the doctrine of implied powers. On the one hand, the concept has so far only been applied to external action of the Union; on the other hand, it is linked to the fact that there exists an explicit competence in the treaties attributed to the Union that is incomplete and requires supplementation.[99] Neither of these conditions applies to the Union's legislation concerning the rule of law.

However, the Union legislator could possibly use the 'flexibility clause' of Art. 352 TFEU[100] as a legal basis for such purpose. Filling a gap left by the Treaty, this provision is designed to confer powers to act on Union institutions when such powers appear necessary to enable the Union to attain one of the objectives laid out by the Treaty. The Union institutions have had recourse to the residual powers clause of Art. 352 TFEU as a legal basis for some rule of law and human rights-related measures,[101] such as the establishment of the Union's external program for the consolidation of democracy, the rule of law and human rights[102] and the European Union Agency for Fundamental Rights under Regulation (EC) 168/2007.[103]

97 ECJ, *ECHR I* (n. 94), para. 26 with regard to human rights-related measures.
98 ECJ, *Poland v. Parliament and Council* (n. 35), paras 128 and 145.
99 ECJ, *1980 Hague Convention*, 14 October 2014, Opinion 1/13, ECLI:EU:C:2014:2303, paras 67–68.
100 See Paul Craig and Graínne de Búrca, *EU Law* (Oxford: OUP 2020), 120–122.
101 ECJ, *ECHR I* (n. 94), paras 30 and 34 f. has not ruled out the use of Art. 235 TEC, the predecessor provision of Art. 352 TFEU, for achieving a human rights policy of the Union in general.
102 Council Regulation (EC) No 975/1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, OJ 1999 L 120/1.
103 Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1; see Armin von Bogdandy and Jochen von Bernsdorff, 'The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law', CML Rev. 46 (2009), 1035–1068 (1044 f.).

Although Art. 352 TFEU is termed broadly and refers to the "attainment of objectives set out in the Treaties" this does not imply that the Union legislator may adopt on the basis of this provision, referring to Art. 3 para. 1 TEU, institutional or substantive provisions in the area of the rule of law. Note that the legal situation has changed as a result of the Lisbon Treaty. Unlike under the predecessor provision of Art. 308 TEC, Art. 352 TFEU no longer allows the Union to develop new policy areas because under this provision legal measures can be adopted only within the framework of policies already defined in the Treaties. However, there is no separate policy area in the Treaties that aims at the realisation of the Union's values. In addition, the Intergovernmental Conference on the Treaty of Lisbon stated in Declaration No. 41 of the Final Act that invoking the objectives of Art. 3 para. 1 TEU is not sufficient to justify action based on the flexibility clause. It declared that the reference in Art. 352 TFEU to the objectives of the Union is limited to the objectives as set out in Art. 3 paras. 2 and 5 TEU. The drawing of this boundary reflects the fundamental reservations that many Member States have about the use of the flexibility clause by the Union legislator.[104] Of course, one can argue whether the declaration of the Member States is legally binding. Still, because Art. 352 TFEU requires a unanimous Council decision, its interpretation will probably prevail in practice.

2. Making use of the union's sectoral competences

Against this background, it makes more sense for the Union institutions to make the strengthening and the implementation of the rule of law a cross-cutting task, drawing on existing sectoral competences covered by the Treaties.

The first step in this direction is the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget which makes the receipt of funds from the Union budget subject to a Member State's respect for the rule of law insofar as this relates to the implementation of the Union budget.[105] The idea expressed therein –

104 See Craig and de Búrca (n. 100), 121–122.

105 Definition by ECJ, *Poland v. European Parliament and Council* (n. 35), paras 140 and 151; see further Viorica Vită, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality', Cambridge Yearbook of European Legal Studies 19 (2017), 116–143 (116).

that respect for the rule of law may be required by a mechanism established by secondary legislation – is compatible with the Treaties.

It has always been part of the integration doctrine that where a provision of the Treaty confers a specific competence on the Union, at the same time, it provides itwith powers indispensable for carrying out the objectives enshrined in the Treaties. This, in turn, presupposes that the objectives and values of the Union can be integrated into the law-making process.[106] That is, the realisation of these objectives is a cross-sectional task that obliges all Union institutions within the scope of their activities. In this sense, the Union could streamline its actions to promote the rule of law more effectively.

The Treaties do not explicitly mention an obligation to integrate the rule of law into the Union's sectoral policies, as do 'integration clauses' such as Art. 8–13 TFEU and Art. 114 para. 3 TFEU in relation to other Treaty objectives, e.g. the protection of social rights, consumer interests and the environment.[107] It is possible, however, to assume an implicit obligation of the Union institutions to pursue a value-driven policy when legislating in the internal market or the area of freedom, security and justice or in other areas of Union law.

The Union's mandate to promote and pursue the values and Treaty objectives within the framework of its competences as prescribed by Art. 3 para. 1 and 6 TEU clarifies that it is legitimate as a sectoral policy measure for the Union legislator to include requirements stemming from the general objectives or – in a broader sense – from the values of the Union.[108] Provided that the conditions for recourse to a sectoral competence norm are fulfilled, the Union may rely on that legal basis while carrying out its task of safeguarding the general interests recognised by the Treaty.[109] Against this

106 See Francesca Ippolito, Maria Eugenia Bartoloni and Massimo Condinanzi, 'Introduction: Integration clauses – a prologue' in: Ippolito, Bartoloni and Condinanzi (n. 93), 1–13 (1).

107 ECJ, *Germany v. Commission*, judgment of 9 July 1987, case no. 281/85 and others, ECLI:EU:C:1987:351, para. 28.

108 See de Witte (n. 93), 184.

109 ECJ, *Czech Republic v. Parliament and Council*, judgment of 3 December 2019, case no. C-482/17, ECLI:EU:C:2019:1035, paras 30 f. regarding internal market law.

backdrop, it is clear that secondary law aiming to enhance and realise the rule of law in specific areas of Union law is compatible with primary law.[110]

3. How to mainstream the rule of law in union law

This approach allows for extending the integration of rule-of-law criteria into the sectoral activities of the Union beyond a conditionality mechanism, introduced by Regulation (EU, Euratom) 2020/2092. Conditionality aims at mere compliance while mainstreaming reaches out further. Mainstreaming is intended to ensure that an objective or value is fully respected across all Union policies. It has been pursued in particular relating to implementing fundamental rights and anti-discrimination law.[111] Taking a page from these policy contexts and taking Art. 3 para. 1 and 6 TEU seriously, rule-of-law mainstreaming should provide for systematic, deliberate and transparent incorporation of rule-of-law considerations into all Union policies and practices at all stages.[112] This mainstreaming policy naturally involves the obligation of the Union's institutions to systematically consider rule-of-law implications for any laws they produce.

Several internal policy areas mainstream rule-of-law concerns and thus apply to a 'rule-of-law driven' policy. This concerns, in particular, the Union's legislation in the area of freedom, security and justice.[113] Art. 67 para. 1 TFEU makes it dependent on the respect for fundamental rights and the different legal systems and traditions of the Member States, including respect for the rule of law. However, systematic mainstreaming will reveal that numerous other provisions in the Treaties have untapped potential that can be exploited to allow the rule of law to influence the Union's internal policies if the competence norms are interpreted in the light of the values as suggested above. Ultimately, the fundamental premises that each Member

110 ECJ, *Hungary v. Parliament and Council* (n. 35), paras 125–127; *Poland v. Parliament and Council* (n. 35), paras 148 f. and 165; see also *ECHR I* (n. 94), para. 32 on human rights.

111 See Commission, Incorporating Equal Opportunities For Women and Men Into All Community Policies and Activities (Communication), COM (96) 67 final, 2; De Schutter (n. 95), 43 f.; Vasiliki Kosta, 'Fundamental rights mainstreaming in the EU' in: Ippolito, Bartoloni and Condinanzi (n. 93), 14–44 (14 f.).

112 Halberstam and Schroeder (n. 3).

113 See the examples given by Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', Verfassungsblog, 21 December 2021, <https://verfassungsblog.de/>.

State shares with all the other Member States and the common values referred to in Article 2 TEU, applies to all areas of Union law. For this reason, it must be ensured that the secondary law of the Union, which fleshes out these values, is also implemented and applied by the national authorities and courts in areas such as competition law or internal market law.[114]

First, the Union legislature can ensure that substantive standards set in legal harmonisation include rule-of-law elements and specify the requirements implied by the rule of law. This may apply, for instance, to the Union's provisions that have been enacted based on the Union's competencies in the area of data protection (Art. 16 para. 2 TFEU),[115] the internal market (Art. 114 TFEU) or competition policy (Art. 103 TFEU).[116]

In addition, when harmonising the law of Member States within the framework of its competences, the Union legislator could enact procedural and structural standards for the administrative and judicial enforcement of Union law that specify requirements regarding the rule of law. Under the Framework Decision 2002/584/JI,[117] for example, a European arrest warrant must be issued by a 'judicial authority'. Secondary law based on Art. 82 TFEU and inspired by Art. 2 TEU could impose requirements concerning such authorities' independence and institutional structure based on rule-of-

114 See regarding competition law, EC, *Sped-Pro v. Commission*, judgment of 9 February 2022, case no. T-791/19, ECLI:EU:T:2022:67, paras 84–88; Maciej Bernatt, 'Economic frontiers of the rule of law: Sped-Pro v. Commission', CML Rev. 60 (2023), 199–216.

115 See the Directive (EU) 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, OJ 2016 L 119/132; ECJ, *Ligue des droits humains*, judgment of 21 June 2022, case no. C-817/19, ECLI:EU:C:2022:491, para. 146 according to which Member States are bound by the principle of legality as a component of the rule of law under Art. 2 TEU, when implementing the above directive.

116 See Art. 3 Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ 2020 L 11/3, under which competition proceedings by national authorities shall comply with general principles of Union law.

117 Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1.

law criteria.[118] In the area of competition law, such an approach, based on Art. 103 TFEU, has already been pursued through secondary law.[119]

Moreover, in areas where the principle of mutual recognition applies, such as the internal market or the area of freedom, security and justice, the Union legislator could adopt rules imposing specific requirements for the mutual recognition[120] of legal acts of Member States from the perspective of the rule of law. Mutual recognition of all legal acts, judgments, administrative decisions or documents by the Member States should be scrutinised or made subject to conditions under secondary legislation if there are serious and systemic flaws in the rule of law in the issuing Member State. After all, such recognition is based on the mutual trust of Member States in their respective legal, administrative and judicial systems.[121]

The Union legislator is increasingly signalling the use of this option to integrate rule-of-law considerations into legal acts adopted in these policy areas. For example, according to Art. 11 para. 1 lit. f of Directive 2014/41/EU,[122] the recognition or execution of a European Investigation Order on gathering evidence for criminal proceedings issued by the authorities of one Member State may be rejected by the authorities of other Member States where there are substantial grounds to believe this could be incompatible with Art. 6 TEU and the FRC. This approach, applied to the rule of law, could be extended to the mutual recognition of civil judgements under Regulation (EU) 1215/2012[123] or even to the mutual recognition of documents in the internal market under Regulation (EU) 2019/515[124] on the mutual recognition of goods. In principle, it cannot be assumed that any deci-

118 See on such requirements ECJ, *OG and PI*, judgment of 27 May 2019, joined cases no. C-508/18 and C-82/19 PPU, ECLI:EU:C:2019 : 456, paras 73 f.

119 See Art. 4 Directive (EU) 2019/1 (n. 116) guaranteeing the independence of national administrative competition authorities.

120 See ECJ, *ECHR II*, 18 December 2014, Opinion 2/13, ECLI:EU:C:2014:2454, paras 191 f.

121 ECJ, *Gözütok and Brügge*, judgment of 11 February 2003, joined cases no. C-187/01 and C-385/01, ECLI:EU:C:2003:87, para. 33.

122 Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (European Investigation Order), OJ 2014 L 130/1.

123 Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation), OJ 2012 L 351/1.

124 Regulation (EU) 2019/515 of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (Mutual Recognition Regulation), OJ 2019 L 91/1.

sions taken at the legislative, judicial or administrative level in a Member State with serious rule-of-law deficiencies have been made according to objective criteria.

4. Supporting transitional justice by mainstreaming the union rule of law

The approach advocated here, by which the rule of law is implemented by secondary law and made the yardstick for any legislative, administrative and judicial activity, may accompany and facilitate the process of transitional justice in the Member States concerned.

Rule of law-driven secondary Union law may, in general, improve the enforcement of values throughout the Union.[125] When making the rule of law the subject of systematic legislative treatment, the Union legislator also might specify principles that form part of the rule of law by considering the case law of the ECJ. This approach will eliminate ambiguities that may arise when national courts in the context of transitional justice struggle to apply the principle of the rule of law.[126] Additionally, as has been shown above, it is questionable whether the rule of law as mentioned in Art. 2 TEU is precise and sufficiently clear to entail a direct effect. Even if individual aspects of the rule of law developed in the case law of the ECJ were to enjoy direct effect,[127] it should be easier in positivist legal systems, which exist in most of the Member States, for national authorities and courts to apply corresponding, secondary-law norms than the judge-made guidelines of the Court of Justice. Incorporating the rule of law into secondary legislation with specific provisions, therefore, might help national authorities and courts to apply and enforce the rule of law in the Member States, by invoking primacy against conflicting provisions of national constitutional law or cardinal laws.

It is important to keep in mind that transitional justice is a multifaceted process involving all public actors, not only national courts but also na-

125 Halberstam and Schroeder (n. 3).

126 See ECJ, *X and Y*, judgment of 22 February 2022, joined cases no. C-562/21 PPU and C-563/21 PPU, ECLI:EU:C:2022:100, paras 50–53; *L and P*, judgment of 17 December 2020, joined cases no. C-354/20 PPU and C-412/20 PPU, ECLI:EU:C:2020:1033, paras 50 f. which require national courts to apply a two-step test when systematic or general deficiencies affect the right to a fair trial before they may refuse to execute a European arrest warrant.

127 See supra part II. 4.; on direct effect of Art. 19 para. 1 sub-para. 2 TEU ECJ, *RS* (n. 36), para. 58.

tional lawmakers and national authorities. More precise secondary law provisions on the practical relevance of the rule of law help these actors and also civil society stakeholders to engage in the transitional justice process in the Member States with arguments based on Union law. Therefore, the codification of the rule of law is an appropriate instrument to accompany and support transitional justice.

VI. Conclusion

The rule of law has been constitutionalised and at the same time mobilized by the case law of the Court of Justice. However, the values in Art. 2 TEU must also become part of the political process in the Union.[128] Against this backdrop, it makes sense for the Union legislature to get involved in shaping the rule of law. Promoting the rule of law and mainstreaming rule-of-law issues into all its policies via secondary law could improve the internalisation of the rule of law in the Member States. It could contribute to creating or supporting 'an enabling ecosystem' for the rule of law in the Member States transiting (back) to liberal democracy.[129]

The creation of such a regime which supports the transitional justice process in the Member States concerned represents a key element of the Union's transformative constitutionalism. The constitutional basis for this policy can be found in Art. 2 and 49 TEU in conjunction with Art. 3 para. 1 and 6 and Art. 13 para. 1 TEU, making compliance with and realisation of the Union's value standards a permanent task for the Union and its Member States.

However, one should not ignore that even if a Union policy of mainstreaming the rule of law is compatible with the Treaties and, particularly with Art. 4 para. 2 TEU, a legitimacy problem might remain. It could interfere with the right of self-determination and the identity claims of Member States that are engaged in restoring democracy and the rule of law – and could therefore be politically difficult to realise in these States. In that context, it might be helpful to recall that due to Art. 49 TEU '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 re-

128 Spieker (n. 38), 134.

129 See Commission, 2020 Rule of Law Report: The rule of law situation in the European Union (Communication), COM (2020) 580 final, 4.

spect those values and which undertake to promote them'.[130] As a consequence, the obligation to observe the rule of law 'as to the result to be achieved on the part of the Member States (…) flows directly (…) from their membership of the European Union'.[131]In practice, this requires the Member States to respect and realise the core Union rule-of-law standard if they wish to remain members of the Union.

130 ECJ, *Repubblika* (n. 2), para. 61.
131 ECJ, *Poland v. Parliament and Council* (n. 35), para. 169.