EU Values as Constraints and Facilitators in Democratic Transitions*

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Abstract:
EU law plays a twofold role when a Member State decides to return to full constitutional democracy. On the one hand, Article 2 TEU places *constraints* on such a transition as it requires to respect the principle of legality. This could lead to former government members invoking Article 2 TEU to challenge the country's transition. On the other hand, EU values can *facilitate* a transition. Direct effect and primacy entail that public officials who have violated Article 2 TEU might be suspended from office, which helps overcome resistance from captured institutions. Moreover, these doctrines allow the new government and courts to set aside partisan legislation in breach of Article 2 TEU.
Keywords: EU values, authoritarian governments, judicial independence, electoral law, transformative constitutionalism, democratic transitions

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I. Introduction

Today, most democratic transitions are embedded in transnational law and institutions. The United Nations conduct constitutional policy as an important field of its activities.[1] The Council of Europe's Venice Commission has been embedding the Central and Eastern European transitions in Europe's constitutional *acquis* ever since the fall of the Iron Curtain.[2] However, nothing comes close to the embeddedness provided by the law and institutions of the European Union, which is our topic here.

The deep reason for the Union's powerful role in domestic transitions is that its Member States form part of one European society, one that is characterized by the constitutional principles enshrined in Article 2 TEU.[3] If those principles come under pressure in some Member State, the entire European society is affected. Accordingly, the Union's law and institutions have a central role to play – as demonstrated in response to the overhaul of the Polish judiciary. However, the role of EU law is not confined to protecting common values against national governments with an illiberal agenda. It plays also a role when a Member State decides to change course and return to the path of European democracy.[4] On this kind of transformation, our focus here, there is little research so far.[5]

We start our exploration by outlining the central premise on which our argument depends: the primacy, direct effect and justiciability of Article 2 TEU (II). On this basis, EU values exert a twofold impact on Member

1 Philipp Dann and Zaid Al-Ali, 'The internationalized *Pouvoir Constituant* — Constitution-Making under External Influence in Iraq, Sudan and East Timor', Max Planck Yearbook of United Nations Law 10 (2006), 423; Vijayashri Sripati, *Constitution-Making under UN Auspices* (Oxford: OUP 2020).

2 Christoph Grabenwarter, 'The Venice Commission: Its Nature, Functioning, and Significance in the Multi-Level Cooperation of Constitutional Courts' in: Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), The *Max Planck Handbooks in European Public Law, Vol. IV* (Oxford: OUP, 2023).

3 Armin von Bogdandy, *The Emergence of European Society Tthrough Public Law* (Oxford: OUP, forthcoming).

4 On ways to keep the channels for democratic change open, e.g. by assessing national measures, such as the curtailing of opposition rights, unfair electoral laws, gerrymandering, party financing and campaigning rules under Articles 10 and 2 TEU, see Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxembourg?', Columbia Journal of European Law 29 (2023); Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: OUP 2023).

5 But see the Verfassungsblog symposium 'Restoring constitutionalism', organized by Andrew Arato and Gábor Halmai, see <verfassungsblog.de/category/debates/restoring-constitutionalism/>.

States that seek to restore full compliance with these standards. On the one hand, Article 2 TEU places *constraints* on such transitions (III). Most importantly, it requires that this process respects the principle of legality. This principle commands not only respect for EU but also for domestic law. As such, it might create an obstacle for new governments that aim at overcoming the resistance of captured institutions (III.1). This could lead to a scenario where former government forces invoke Article 2 TEU to challenge the country's democratic transition (III.2). On the other hand, EU values can *facilitate* democratic transitions (IV). Direct effect and primacy entail that public officials who have violated Article 2 TEU might be suspended from office, which helps overcome resistance from captured institutions (IV.1). Moreover, these doctrines allow governments and courts to set aside partisan legislation in breach of Article 2 TEU (IV.2).

This role is a novelty for EU law, which is why we theorize it within the framework of transformative constitutionalism (V). After sketching its main features (V.1), we will demonstrate how this concept can help us to understand the Central and Eastern transformation that started in 1990 and that needs a new push today (V.2). Finally, we discuss how courts can support the development of a constitutional culture on which the success of democratic transitions ultimately depends (VI). Certainly, this approach does not come without risks: when courts discharge a transformative mandate, they engage in a deeply political exercise. This might politicise the courts and stretch their legitimacy (VI.1). Hence, it is all the more important to embed these courts in supportive social fields (VI.2).

II. Premise: Activation and Limits of Article 2 TEU

1. Activation

With its trailblazing judgment in *Associação Sindical dos Juízes Portugueses* (*ASJP*) the Court has begun to mobilise the values in Article 2 TEU and measure the Member States' internal structures against these yardsticks. In response to the overhaul of the Polish judiciary, the Court started by operationalizing the value of the rule of law. Yet, instead of relying on Article 2 TEU directly, it turned to Article 19(1)(2) TEU, which entails

the Member States' obligation to guarantee judicial independence.[6] Since Article 19 TEU 'gives concrete expression' to the value of the rule of law in Article 2 TEU, the latter is operationalized through this more specific provision.[7] Read in light of Article 2 TEU, Article 19(1)(2) was interpreted as containing standards of judicial independence applicable to any court that 'may rule … on questions concerning the application or interpretation of EU law'.[8] Considering the breadth of Union law today, this includes the entire Member State judiciary.

Many celebrated this decision 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.'[9] Importantly, this step enjoys much acceptance. With the conditionality regulation, all political EU institutions have endorsed the Court's mobilisation of Article 2 TEU: not only the Commission and the European Parliament, but also the national heads of state or government in the European Council as well as the responsible Member State ministers in the Council.[10]

Of course, the values of Article 2 TEU are indeterminate.[11] Therefore, there is particularly a tension with the criteria for direct effect, i.e. for the justiciability in domestic proceedings, which requires 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 the open-ended Article

6 ECJ, *Associação Sindical dos Juízes Portugueses*, judgment of 1 February 2018, case no. C-64/16, ECLI:EU:C:2018:117, para. 36.

7 Ibid., para. 32.

8 Ibid., para. 40. On this connection between Article 19(1)(2) TEU and Article 2 TEU, see Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values : On the Judicial Application of Article 2 TEU in the EU Value Crisis', GLJ 20 (2019), 1182 (1204 ff.); Lucia S. Rossi, 'La valeur juridique des valeurs', Revue trimestrielle de droit européen (2020), 639 (650).

9 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].

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

11 Arguing against its justiciability, see e.g. Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', EuConst 18 (2022), 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 (437); Pekka Pohjankoski, 'Rule of Law with Leverage', CML Rev. 58 (2021), 1341 (1345 ff.).

2 TEU as a freestanding provision.[12] Advocate General Tanchev argued in 2018 that Article 2 TEU does not constitute a standalone yardstick for the assessment of national law.[13] Similarly, Advocate General Pikamäe stated that the value of the rule of law 'cannot be relied upon on its own.'[14]

So far, the Court has avoided using Article 2 TEU as a self-standing yardstick. With *ASJP* 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. It then complements this step with a systematic interpretation of the specific provision in light of Article 2 TEU.[15] 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'.[16] In this spirit, 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.[17]

Following the Court's footsteps in *Junqueras Vies* and other decisions,[18] the Commission decided to invoke Article 10 TEU as specific expression of the value of democracy against the Polish 'Lex Tusk'.[19] Targeting specifically

12 But see, openly considering a self-standing application, Rossi (n. 8), 657; Marek Safjan, 'On Symmetry: in Search of an appropriate Response to the Crisis of the Democratic State', Il Diritto dell'Unione (2020), 673 (696).

13 Opinion of Advocate General Tanchev, *A.B. and Others*, case no. C-824/18, ECLI:EU:C:2020:1053, para. 35.

14 Opinion of Advocate General Pikamäe, *Slovenia v. Croatia*, case no. C-457/18, ECLI:EU:C: 2019:1067, paras 132–133.

15 Understanding this step rather as a teleological interpretation, see Koen Lenaerts and José A. Gutiérrez-Fons, *Les méthodes d'interprétation de la Cour de Justice de l'Union Européenne* (Brussels: Bruylant, 2020), 61 ff.

16 ECJ, *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2021:974, para. 232.

17 Ibid., paras 157 ff.

18 ECJ, *Junqueras Vies*, judgment of 2019, case no. C-502/19, ECLI:EU:C:2019:1115, para. 63. See also ECJ, *Commission v. Poland (Protocole n° 36)*, judgment of 2 September 2022, case no. C-207/21 P, ECLI:EU:C:2022:560, para. 81.

19 European Commission, Rule of Law: Commission launches infringement procedure against Poland for violating EU law with the new law establishing a special committee

the Polish opposition leader, the Commission considers the Committee for the examination of Russian Influence on the internal security of Poland to unduly interfere with the democratic process. It remains to be seen whether the Court will use this case as a springboard to extend the established case law on Article 19 TEU to Article 10 TEU.

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 19(1)(2) TEU as cumulative yardsticks, the Court placed Article 2 TEU at the centre. 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, Article 19 TEU'.[20] 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'.[21]

2. Limits

The activation of Article 2 TEU has far-reaching effects. Its application could bring about a massive power shift to the detriment of the Member States' autonomy, identity, and diversity. This applies especially in the sensitive context of democratic transitions. Democratic transitions are often a defining process for a country, requiring a high level of legitimacy. This is legally expressed by conceiving them under the principle of self-determination, whose foundational role is recognized by comparative constitutional

(8 June 2023). On the viability of this assessment, see Luke Dimitrios Spieker, 'Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 72 (76 ff.).

20 See e.g. ECJ, *Repubblika*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU :C :2021 :311, para. 63; *Asociația 'Forumul Judecătorilor din România' and Others*, judgment of 18 May 2021, cases no. C-83, 127, 195, 291, 355 and 397/19, paras 162; *Commission v. Poland (Régime disciplinaire des juges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596, para. 51.

21 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.

law as well as international law.[22] In EU law, the principle of self-determination does not only find its expression in the voluntary decision to join and the right to leave the Union (Articles 49 and 50 TEU) but also in the protection of the Member States' national identity in Article 4(2) TEU.

Yet, Article 4(2) TEU stands in a context. Any Member State must respect the Union's common values. Article 7 TEU demonstrates that reliance on national identity cannot justify any disrespect of the obligations under Article 2 TEU. When it comes to violations of Article 2 TEU, there is no possible justification, no *domaine réservé*, and no proviso of sovereignty for the Member States.[23] As Article 2 TEU is not limited by any clause such as Article 51(1) of the Charter, all exercise of public authority across the European society must abide by these principles.

At the same time, however, Article 4(2) TEU provides the context for Article 2 TEU, as does the latter for the former. There is broad consensus that Article 2 TEU may not become a tool of constitutional harmonization.[24] Instead, the provision should be read as containing only a 'hard core' of values,[25] their essence.[26] Invoking these values must remain an 'extraordinary remedy for extraordinary situations'.[27] These considerations call for a minimalist reading that refrains from developing detailed standards when

22 See Fernando Hernández Fradejas, 'Self-Determination' in: Rainer Grote, Frauke Lachenmann and Rüdiger Wolfrum (eds), *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford: OUP, last updated 2017) and Daniel Thürer and Thomas Burri, 'Self-Determination' in: Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: OUP, last updated 2008).

23 *Hungary v. Parliament and Council* (n.16), paras 233 f. There is a broad agreement on this point, see e.g. Opinion of Advocate General Cruz Villalón, *Gauweiler*, case no. C-62/14, ECLI:EU:C:2015:7, para. 61; Opinion of Advocate General Kokott, *Stolichna obshtina, rayon "Pancharevo"*, case no. C-490/20, ECLI:EU:C:2021:296, paras 73, 116 ff; Opinion of Advocate General Emiliou, *Boriss Cilevičs and Others*, case no. C-391/20, ECLI:EU:C:2022:166, para. 87. Writing extrajudicially, see also Koen Lenaerts, 'Concluding Remarks' in: Court of Justice of the European Union (ed), *EU-nited in diversity: between common constitutional traditions and national identities* (Luxembourg, 2022), 231 (234); Safjan (n. 12), 681 f.; Lucia S. Rossi, '2, 4, 6 (TUE) … l'interpretazione dell' "Identity Clause" alla luce dei valori fondamentali dell'Unione' in: *Liber Amicorum Antonio Tizzano* (Turin: Giappichelli, 2018), 858 (866).

24 See e.g. Dean Spielmann, 'The Rule of Law Principle in the Jurisprudence of the Court of Justice of the European Union' in: María Elósegui et al. (eds), *The Rule of Law in Europe* (Cham: Springer, 2021), 3 (19).

25 Praesidium, Draft of Articles 1 to 16 of the Constitutional Treaty, CONV 528/03, p. 11.

26 Opinion of Advocate General Kokott (n. 22), para. 118.

27 Opinion of Advocate General Bobek, *Prokuratura Rejonowa w Mińsku Mazowieckim*, case no. C-748/19, ECLI:EU:C:2021:403, para. 147.

Article 2 TEU is applied to the Member States. Hence, any mobilisation of Article 2 TEU must be carefully calibrated. This applies especially in the context of a Member State's democratic transition, where the principle of self-determination unfolds a strong counter-force.

III. EU Values as Constraints on Democratic Transitions

1. Value compliance in process vs. value compliance in substance

Article 2 TEU places a competing set of obligations on Member States that seek to restore compliance with the Union's common values. It requires that all Member States comply with these principles *in substance*. At the same time, *the process* to achieve this compliance must in itself comply with these principles. This latter dimension flows in particular from the value of the rule of law, which comprises the principle of legality. The rule of law conditionality regulation mentions legality even as the first of several principles that together form the value of the rule of law (see Art. 2 (a)).[28] It requires that all public authority be exercised in accordance with the law. This comprises not only a Member State's respect for EU law, but also *for its own domestic law.*

One might object that EU institutions, in particular the Commission and the Court, have a mandate only to control a Member State's compliance with EU law, but not with its own domestic law (Articles 17(1) TEU and 19(1) TEU, see also Articles 258 and 267 TFEU). In the context of Article 267 TFEU, the Court explicitly refused to 'interpret domestic legislation or regulations'.[29] Instead, 'under the system of judicial cooperation … the interpretation of national rules is a matter for the national courts and not the Court of Justice'.[30] In this sense, the principle of legality cannot become

28 Venice Commission, Rule of Law Checklist, Study No. 711/2013, 18 March 2016, para. 18. See also Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', HJRL 14 (2022), 107.

29 ECJ, judgment of 15 September 2022, *Fossil (Gibraltar)*, case no. C-705/20, ECLI:EU:C:2022:680, para. 56; judgment of 8 September 2011, *Paint Graphos*, case no. C-78/08, ECLI:EU:C:2011:55, para. 34; judgment of 3 May 2001, *Verdonck and Others*, case no. C-28/99, ECLI:EU:C:2001:238, para. 28.

30 ECJ, judgment of 19 September 2006, *Wilson*, case no. C-506/04, ECLI:EU:C:2006:587, para. 34; judgment of 12 October 1993, *Vanacker and Lesage*, case no. C-37/92, ECLI:EU:C:1993:836, para. 7; judgment of 28 June 1984, *Moser*, case no. 180/83, ECLI:EU:C:1984:233.

a hook that allows the Court of Justice to become a kind of European Court of Cassation which controls the correct application of domestic law by the Member States' apex courts. That would upset the European union of courts.

Still, the principle of legality in Article 2 TEU commands that Member States respect their own domestic law. In this spirit, EU institutions have considered, when establishing a violation of Article 2 TEU, the argument that the Polish overhaul of the judiciary violates the Polish Constitution.[31] How to mediate between these opposing forces? We suggest that issues of domestic legality can only become an issue under EU law if they rise to the level of systemic deficiencies.[32] Along these lines, an argument can be made that if a new government unseats judges or deliberately disrespects constitutional provisions, this also violates the 'hard core' or 'essence' of the EU rule of law.

At this point, one might consider whether the aim – restoring compliance with Article 2 TEU in substance – justifies a violation of domestic legality in the process of democratic transition. If the transition aims to restore full compliance with Article 2 TEU, does this justify the means of violating domestic law that stands in the way? An important stream of European constitutional thinking holds, against Machiavelli, that the end can never justify the means.[33] One might consider whether the substantive requirements of Article 2 TEU might trump the procedural ones. However, there seems to be no hierarchy among the values enshrined in Article 2 TEU.[34] Rather, the Commission places an emphasis on the rule of law. For instance, it stressed that '[c]ompliance with the rule of law is … a prerequi-

31 See, e.g., 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, paras 19, 21, 29, 81, 83, 86.

32 In detail Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, What has been done, What can be done', CML Rev. 51 (2014), 59.

33 Asem Khalil, 'State of Necessity' in: Grote, Lachenmann and Wolfrum (n. 22).

34 Meinhard Hilf and Frank Schorkopf, Art. 2 EUV, in: Meinhard Hilf and Frank Schorkopf, 'Art. 2 EUV' in Eberhard Grabitz et al. (eds), *Das Recht der Europäischen Union* (75th edn, loose-leaf, Munich: C.H.Beck 2022), para. 48. See also Egils Levits, 'L'Union européenne en tant que communauté des valeurs partagées' in: *Liber Amicorum Antonio Tizzano* (n. 23), 509 (515–517); Roberto Adam and Antonio Tizzano, 'Valori e obiettivi dell'Unione' in: *Manuale di diritto europeo*, (3rd end, Turin: Giappichelli 2020), 387 (389).

site for the protection of all fundamental values listed in Article 2 TEU'.[35] Also the European legislator states that 'there is no hierarchy among Union values … [t]here can be no democracy and respect for fundamental rights without respect for the rule of law ....'[36] Thus, the values of democracy and human rights do not supersede the value of the rule of law, including the principle of legality.

2. Which way out?

Accordingly, EU law requires democratic transitions that aim to restore compliance with Article 2 TEU to respect essential requirements of domestic law. That is likely to be relevant when it comes to removing inconvenient officials from their position in violation of the respective laws to ease a transition. The same might hold true for enacting a new constitution or any other law in breach of the procedures under the current constitution.

On this basis, former government forces that oppose the respective transition could start procedures in domestic courts, invoking the principle of legality protected under Article 2 TEU. That they are currently fiercely rejecting this application would not bar such an action. It is in the nature of EU values that they can be invoked by anybody across the European society. Even the Commission might challenge a democratic transition that breaches domestic legality. After accusations of double standards and partisan enforcement by the current Polish and Hungarian governments, it might feel compelled to pursue such actions to protect its image of neutrality. Eventually, the same applies to the Court itself. The judicial mobilisation of Article 2 TEU in particular against Poland over the past 5 years has raised the reproach that the Luxembourg judges judge along their political sympathies. Yet, as the Court has stated itself, any court must avoid even the impression of partisanship, of dependence, of partiality.[37] As such, the Court of Justice must seriously engage with the arguments brought forward by those who rely on the principle of legality.

35 European Commission, A new EU Framework to strengthen the Rule of Law (11 March 2014), COM/2014/0158 final, 4. For an elaboration, see Mattias F. Schmidt, *Verfassungsaufsicht in der Europäischen Union* (Baden Baden: Nomos, 2021), 80 ff.

36 Recital (6) of the Preamble of Regulation 2020/2092.

37 See e.g. *Commission v. Poland (Régime disciplinaire des juges)* (n. 920), para. 60; *A.K. and Others*, judgment of 2 March 2021, joined cases C-585, 624 and 625/18, ECLI:EU:C:2019:982, para. 75.

All things considered, a case can be made that a new government's deliberate infringement of domestic law, when engaging in a democratic transition, could infringe Article 2 TEU. There are only two ways out: The new government could demonstrate, first, that the gravity of the respective breach of legality does not reach the core of Article 2 TEU. Second, it could substantiate that the domestic act it goes against is in itself a breach of Article 2 TEU, which leads under the logic of primacy to its disapplication. The next part shows how this argument might work.

IV. EU Values as Facilitators of Democratic Transitions

To substantiate a possible role of EU values as a facilitator of a democratic transition, we hypothesize that *PiS* in Poland or *Fidesz* in Hungary suffer an electoral defeat. 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 favour the currently ruling party. Given their entrenchment, this agenda cannot be implemented overnight but will require a transition. In the following, we will assess how EU values can facilitate such transitions, taking the current Polish and Hungarian challenges as points of reference to develop our argument.

1. The Polish case: Restoring an independent judiciary

Any new Polish government will face the challenge of how to deal with the judicial system. Though the Luxembourg and the Strasbourg courts have established its deficiencies, the *PiS*-led government has continued appointing judges in open violation of EU law and the ECHR.[38] 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

38 These appointment procedures were subject of several decisions, see *Commission v. Poland (Régime disciplinaire des juges)* (n. 20), paras 95 ff. as well as *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of 6 October 2021, case no. C-487/19, ECLI:EU:C:2021:798, paras 138–152; *A.B. and Others*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, paras. 121 ff.; *A.K. and Others* (n. 38), paras 123 ff. 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 and 57511/19; *Advance Pharma sp. z o.o v. Poland*, app. no. 1469/20.

in individuals'?[39] 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. But that is critical under Article 2 TEU: Even if the procedure of an appointment has been deficient, that does not translate into the power to remove the officials. Indeed, the CJEU has accepted preliminary references from judges appointed in that way.[40] Moreover, many of these judges – though appointed in an unlawful manner – may nevertheless be devoted to their mission as independent judges. There are also practical concerns. Reversing all appointments, and perhaps even all decisions rendered, could create legal chaos.[41]

We suggest a much more constrained approach. 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 full compliance with the principle of legality*. 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 Arti-

39 For this formulation, see e.g. *Commission v. Poland (Régime disciplinaire des juges)* (n. 20), para. 167.

40 See e.g. ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no.C-132/20, ECLI:EU:C:2022:235.

41 For a discussion, see the contributions by Paweł Filipek and Maciej Taborowski in this volume.

cle 6 ECHR.[42] The Tribunal's practice clearly demonstrates its descent to a loyal servant rubber stamping the government's agenda.[43] In this context, the Polish Constitution can hardly serve as a 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 IV.1).

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).[44] 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.[45]

Such an 'excess of authority' can 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 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. Infringements of EU law must be punished under conditions 'analogous to those applicable to infringements of national law of a similar nature and importance.'[46] If it is a domestic

42 *Xero Flor v. Poland*, app. no. 4907/18, paras 252 ff.

43 See e.g. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', HJRL 11 (2018), 63.

44 For comparative studies, see e.g. Guy Canivet and Julie Joly-Hurard, 'La responsabilité des juges, ici et ailleurs', Revue international de droit comparé 58 (2006), 1049 (1052 ff.); Mauro Cappelletti, 'Who Watches the Watchmen? A Comparative Study on Judicial Responsibility', AJCL 31 (1983), 1 (36 ff.). For a comparative study on disciplinary measures against judges, see Richard Devlin and Sheila Wildeman (eds), *Disciplining Judges. Contemporary Challenges and Controversies* (Cheltenham: Elgar 2021).

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

46 See Opinion of Advocate General Kokott, *Taricco*, case no. C-105/14, ECLI:EU:C:2015:293, para. 80. See also *Scialdone*, judgment of 2 May 2018, case no. C-574/15, ECLI:EU:C:2018:295, para. 28; *Rēdlihs,* judgment of 19 July 2012, case no. C-263/11, ECLI:EU:C:2012:497, para. 44; *Berlusconiand Others*, judgment of 3 May 2005, joined cases C-387, 391 and 403/02, ECLI:EU:C:2005:270, para. 65. See also Koen

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.

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.[47] In balancing these two principles, all legal orders limit the criminal responsibility of judges to *extreme cases*.[48] 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'.[49] 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*. It seems clear that such a conception would go too far. It would disincentivise national courts from engaging with EU law and severely jeopardize the idea of cooperation that underlies the European judicial system. 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 does not exclude their judicial applicability, especially when Article 2 TEU is operationalized through more specific Treaty provisions (see I.2). National law must be applied

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Lenaerts and José Gutiérrez-Fons, 'The European Court of Justice and fundamental rights in the field of criminal law' in: Valsamis Mitsilegas et al. (eds), *Research Handbook on EU Criminal Law* (Cheltenham: Elgar 2016), 7.

47 *Commission v. Poland (Régime disciplinaire des juges)* (n. 20), para. 137.

48 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 and Łukasz Bojarski, 'Judicial Independence in Poland' in: Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Heidelberg: Springer, 2012), 667 (716).

49 *Commission v. Poland (Régime disciplinaire des juges)* (n.20), paras 137–140.

or interpreted in a way that complies with Article 2 TEU. This includes the meaning these values have acquired through Luxembourg's interpretation.[50] At least courts of last instance cannot disregard a consolidated CJEU jurisprudence unless they refer again to the Court.[51]

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 which has adjudicated many proceedings against those parts of the judiciary that seeks to defend its independence.[52] 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.[53] 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.[54] 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

50 On the binding effect of interpretations in preliminary rulings, see e.g. Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (3rd edn, Oxford: OUP 2021), 406 ff.; Jürgen Schwarze and Nina Wunderlich, 'Art. 267 AEUV' in: Jürgen Schwarze et al. (eds), *EU-Kommentar* (4th edn, Baden-Baden: Nomos 2019), para. 72; Bernd Schima, 'Article 267 TFEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: OUP 2018), para. 61. Critically, see Robert Schütze, *European Union Law* (3rd edn, Oxford: OUP 2021), 398 ff.

51 See already *CILFIT*, judgment of 6 October 1982, case no. 283/81, ECLI:EU:C:1982:335, para. 21 and, more recently, *Consorzio Italian Management*, judgment of 6 October 2021, case no. C-561/19, ECLI:EU:C:2021:799, para. 33. Discussing also a duty of lower courts to refer, see Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford: OUP 2014), para. 3.61; Ulrich Ehricke, 'Art. 267 AEUV' in: Rudolf Streinz (ed.), *EUV/AEUV* (3rd edn, Munich: C.H.Beck 2018), para. 69.

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

53 After a two-years suspension, Judge Tuleya was allowed to return to his work, see 'New Supreme Court chamber overturns suspension and refuses to forcibly bring in Judge Tuleya', *iustitia.pl*, 29 November 2022.

54 Dominika Maciejasz, 'Gag Lawsuits and Judicial Intimidation: PiS Seeks to Turn Courts into an Instrument of State Censorship', Gazeta Wyborcza, 16 March 2021.

of the Polish government.[55] 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 disregards a decision in which the Court of Justice established the non-compliance of national legislation with EU values, a red line and, in all likelihood, the threshold of criminal responsibility are crossed.

This proposal meets two fundamental objections. First, the criminal responsibility of judges for infringements of Union law could be understood as an inadmissible harmonization of the Member States' criminal law. The German Constitutional Court, for instance, 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'.[56] 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.

Secondly, the Polish Constitutional Tribunal prohibits national courts from following the CJEU's decisions[57] and rather confirms the constitutionality of the judicial appointment processes.[58] 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

55 For his critique, see, e.g., Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP 2019); Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'Is It Polexit Yet? Comment on Case K 3/21 of 7 October 2021 by the Constitutional Tribunal of Poland', EuConst 19 (2023), 163.

56 BVerfG, judgment of 30 June 2009, *Lisbon*, 2 BvE 2/08, para. 252.

57 See e.g. Polish Constitutional Tribunal, judgment of 14 July 2021, P 7/20 and judgment of 7 October 2021, K 3/21.

58 Polish Constitutional Tribunal, judgment of 20 April 2020, U 2/20 and judgment of 21 April 2020, Kpt. 1/20.

disregarded. This is the gist of the CJEU's decisions in *Euro Box Promotion* and *RS*.[59]

The criminal responsibility of judges is a delicate topic as it sits uneasily 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.[60] Under these conditions, the criminal responsibility of judges might help restroring a judicial system in line with the rule of law.

2. The Hungarian case: Breaking constitutional entrenchments

The situation in Hungary seems even more entrenched than the Polish one. Over the last decade, *Fidesz* has skilfully cemented its power, personnel and policies. Central instruments for this entrenchment are constitutional amendments and so-called cardinal laws,[61] which require a two-thirds majority of members present in parliament for their amendment. In the run-up to the 2022 elections, many reform options were discussed.[62] Some suggested adopting a new constitution.[63] But even if a new government would finally replace *Fidesz*, the adoption of a new constitution would be legally difficult, given the unlikeliness of a two-thirds majority. And again, any reform outside the current legal framework would be difficult to square with the principle of legality in Article 2 TEU (see II.1).

59 *RS (Effet des arrêts d'une cour constitutionnelle)*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99, para. 44; *Euro Box Promotion*, judgment of 21 December 2021, joined cases C-357, 379, 547, 811 and 840/19, ECLI:EU:C:2021:1034, para. 230. See also Luke D. Spieker, 'Werte, Vorrang, Identität: Der Dreiklang europäischer Justizkonflikte vor dem EuGH', EuZW 33 (2022), 305 (309).

60 With regard to disciplinary regimes *Commission v. Poland (Régime disciplinaire des juges)* (n.20), para. 61.

61 On the deficiencies, see e.g. Venice Commission, Opinion on the new Constitution of Hungary, No. 621/2011, paras. 11, 144. See also András Jakab and Pál Sonnevend, 'Continuity with Deficiencies: The New Basic Law of Hungary', EuConst 9 (2013), 102.

62 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', HJIL 82 (2022), 223 (236 ff.).

63 Among many others, see Andrew Arato and Gábor Halmai, 'So that the Name Hungarian Regain its Dignity: Strategy for the Making of a New Constitution', Verfassungsblog, 2 July 2021.

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 facilitate such reform and muster internal and external support. 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.[64] 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'.[65] Both the Venice Commission and the OSCE noted that the respective amendments did not meet these standards and consider them to preclude fair elections.[66]

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.[67] Accordingly, they must refrain from applying national legislation that is contrary to EU law, including constitutional provisions.[68] For sure, such an EU obligation sits uneasily with the principles of legality and legal certainty. 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.[69] There are exceptions to this rule based on 'overriding con-

64 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, 21 December 2021.

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

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

67 See only *Garda Síochána*, judgment of 4 December 2018, case no. C-378/17, ECLI:EU:C:2018:979.

68 *Internationale Handelsgesellschaft*, judgment of 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114, para. 3; *Euro Box Promotion* (n.59), para. 251; *RS (Effet des arrêts d'une cour constitutionnelle)* (n. 59), para. 51.

69 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: Katja Ziegler et al. (eds), *Research Handbook: The General Princi-*

siderations of legal certainty'.[70] 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.

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.[71] 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,[72] 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

ples of EU Law (Cheltenham: Elgar 2022), 157 (159 ff.). See also Herwig Hofmann, 'Conflicts and Integration: Revisiting Costa v. ENEL and Simmental II' in: Miguel Maduro and Loïc Azoulai (eds), *The Past and Future of EU Law* (Oxford: Hart 2010), 62.

70 *A and Others (Wind turbines at Aalter and Nevele)*, judgment of 25 June 2020, case no. C-24/19, ECLI:EU:C:2020:503, para. 84; *Inter-Environnement Wallonie*, judgment of 29 July 2019, case no. C-411/17, ECLI:EU:C:2019:622, para. 177; *Winner Wetten*, judgment of 8 September 2010, case no. C-409/06, ECLI:EU:C:2010:503, para. 67.

71 Christoph Grabenwarter, 'Standard-Setting in the Spirit of the European Constitutional Heritage' in: Venice Commission (ed.), *Thirty-year Quest for Democracy through Law* (Lund: Juristförlaget, 2020), 257.

72 Opinion of Advocate General Bobek, *Asociația 'Forumul Judecătorilor din România'*, joined cases C-83, 127, 195, 291 and 355/19, ECLI:EU:C:2020:746, para. 170; Opinion of Advocate General Hogan, *Repubblika*, case no. C-896/19, ECLI:EU:C:2020:1055, para. 88.

traditions.[73] Opinions of the Venice Commission may help identify these traditions.[74]

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. In our constellation, by contrast, both the Commission and the Hungarian government would represent the *same* side and pursue the same aim.

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 of allowing it against a hesitant legislature. The Court issued a groundbreaking opinion in 2017 by holding that same-sex couples should enjoy all rights, including marriage, without discrimination.[75] Another example is the *Barrios Altos* case, although it was not the government that formally initiated the procedure.[76] 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.

73 See e.g. Opinion of Advocate General Cruz Villalón, *Gauweiler*, case no. C-62/14, ECLI:EU:C:2015:7, para. 61. There is a general agreement on this point, see e.g. Andreas Voßkuhle, *The Idea of the European Community of Values* (Cologne: Bittner, 2018), 114.

74 See e.g. Sergio Bartole, 'Comparative Constitutional Law – An Indispensable Tool for the Creation of Transnational Law', EuConst 13 (2017), 601.

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

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

V. Faming the Transition

1. Transformative constitutionalism: Concept and practice

The legal innovations suggested in the previous parts would increase the impact of EU values and open up an important area of activity for the Court of Justice. To better understand the proposed developments, we suggest conceiving the mobilization of Article 2 TEU in terms of transformative constitutionalism. This concept originates from the Global South and was used to frame how constitutional and supreme courts in South Africa, Colombia or India interpreted their respective constitution to address and overcome systemic deficiencies.[77] In the context of the South African Constitutional Court, Karl Klare defines transformative constitutionalism as a long-term process of drafting, interpreting, and enforcing a constitution in order to transform political and social institutions and power relations so as to make them more democratic, inclusive, and equal.[78]

Substantively, transformative constitutionalism is about interpreting and applying constitutional rules with the objective of contributing to democratic transformation. Within this frame, two understandings can be distinguished. The first, which is less demanding, finds transformative constitutionalism in any constitutional jurisprudence that promotes democracy.[79] The second one concentrates on attempts to address and overcome systemic deficiencies, although these deficiencies need not have the magnitude of South African apartheid or the Colombian state's collapse. Being more instructive, we will employ, the second, more demanding – i.e. narrower – understanding. Institutionally, transformative constitutionalism provides a concept for the role of constitutional courts in such processes. It conceives courts not merely as guardians of constitutional rights and principles. Instead, they possess a transformative mandate for supporting a society in overcoming systemic deficiencies. Transformative constitutionalism thus helps to see the bigger picture beyond individual cases.

What are the politics of this concept? What is sure is that it stands for constitutional democracy with strong courts and a flourishing culture of

77 Daniel Bonilla Maldonado (ed.), *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge: CUP 2013).

78 Karl Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146 (150).

79 Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', AJCL 65 (2017), 527.

rights. Klare portrays South African transformative constitutionalism as a decidedly post-liberal law. By contrast, the South African constitutional scholar Theunis Roux contends that the South African Constitution aligns with liberal constitutionalism from the Global North.[80] Roux's understanding finds support in Latin America, where a similar phenomenon is called *neo-constitucionalismo.* Essentially, it seeks to help advancing towards a truly democratic society in difficult circumstances.[81]

Following this line of thought, we conceptualise strategies to realise the values in Article 2 TEU in systemically deficient European contexts as transformative constitutionalism. Especially the Latin American experience helps to illuminate how the CJEU and the ECtHR, the EU Commission and the Venice Commission, activists and legal scholars as well as national courts and ombudspersons can respond to systemic deficiencies in European society, such as those under the Polish PiS government, and what might happen after their electoral defeat.

The Latin American experience is instructive in this respect because it uses regional institutions and a common law to address such systemic deficiencies. Though there is no regional organisation like the European Union to provide political unity, Latin America features regional processes that advance constitutional principles.

On the institutional level, there is a horizontal network of transformative domestic actors -particularly courts, ombudspersons, public prosecutors' offices, and dedicated bureaucracies – as well as grassroots and non-governmental organisations, all of which generate much of the system's dynamics, including new legislation. Yet, two institutions stand out at the regional level: the Inter-American Commission and the Inter-American Court of Human Rights (IACtHR). These institutions and groups turn transformative constitutionalism into a social practice far beyond the black letter of legal sources.

The Court's legal basis is the American Convention on Human Rights of 1969, in force since 1978. The Court found its role by interpreting the

80 Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution. Distinction without a Difference?', Stellenbosch Law Review 20 (2009), 258. For central Europe see Lukas Oberndorfer, 'From new constitutionalism to authoritarian constitutionalism' in: Johannes Jäger and Elisabeth Springler (eds), *Asymmetric Crisis in Europe and Possible Future*s (London: Routledge 2015).

81 Paolo Comanducci, 'Formas de (neo) constitucionalismo. Un análisis metateórico' in: Miguel Carbonell Sánchez (ed.), *Neoconstitucionalismo(s)* (Madrid: Trotta 2003), 75.

Convention as a means to accompany the Latin American democratization that started in the early 1980s. This democratization rested on monumental political decisions, much like the Central and Eastern European one a decade later. Until the 1970s, fundamental rights played a largely decorative role in Latin America. In response to increasing government repression, however, claiming rights became a tool of resistance, which means that they gained political clout and social traction. Human rights and democratization became intimately intertwined, and courts started addressing structural problems accordingly.

Such court cases were part of a broad process of constitutional reform. We may recall the new Constitution of Brazil in 1988 or the Colombian one of 1991, which gave rise to the most visible transformative jurisprudence in the region. Like many of the other new or amended constitutions, the two were designed to overcome a dark legacy, including that of repressive law. Both constitutions contain comprehensive fundamental rights catalogues and improve the citizens' democratic participation. In addition, they strengthen independent institutions, above all the courts.[82]

These reforms reflected a new understanding of law. Before the 1980s, many people in the region believed that the law primarily served to consolidate the elite's power and prevent social change.[83] After 1980, many started to recognize its potential for *supporting* social transformation, that is, for effectively guaranteeing rights in daily life and strengthening democratic participation. The Colombian President César Gaviria's opening speech at the Constituent Assembly in 1991 stressed the law's – i.e. the lawyers' – responsibility for the country's transition to a democratic society.[84] This implied a new professional self-understanding, new doctrines, and new techniques of legal reasoning.[85] Traditional legal formalism was considered a major obstacle.

82 César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial. The Impact of Judicial Activism on Socio-economic Rights in the Global South* (Cambridge: CUP 2015), 5, 12.

83 Eduardo Novoa Monreal, *El derecho como obstáculo al cambio social* (Cerro del Agua: Siglo 1975).

84 César Gaviria Trujillo, Informe al Congreso, 1 December 1991, quoted in Manuel J. Cepeda Espinosa, *Introducción a la constitución de 1991. Hacia un nuevo constitucionalismo* (Bogotá: Presidencia de la República, Consejería para el Desarrollo de la Constitución 1993), 335.

85 Carlos Santiago Nino, *Fundamentos de derecho constitucional. Análisis filosófico, jurídico y politológico de la práctica constitucional* (Buenos Aires: Astrea 1992).

This transformative thrust could have remained a phenomenon of domestic constitutional law, as it did in South Africa. However, it became a regional phenomenon, for the new or reformed Latin American constitutions opted to embrace the regional human rights system. The ensuing doctrine of the constitutional bloc ('*bloque de constitucionalidad*') links national constitutions with the American Convention on Human Rights. On this basis, the domestic constitution has been read as mandating the Inter-American System to participate in the transformation towards a democratic society.[86]

In sum, Latin American transformative constitutionalism is the joint product of national constitutional and international human rights law. This multilevel constitutionalism formalises a key experience gleaned from repressive times: As Keck and Sikkink observed in Argentina, Chile and Mexico, many Latin American actors strongly relied on international and foreign institutions to counter oppression and strive for democratic transition.[87] The constitutional incorporation of the regional human rights system validated this strategy.

The IACtHR's transformative jurisprudence affects many social fields. One concerns keeping authoritarian forces from power to stabilise democratic regimes. For instance, the Court can impose on states the obligation to prosecute serious human rights violations such as disappearances, executions and torture. Those responsible must be found, prosecuted, and punished, and the victims and their families must be compensated.[88] That helps the new government to battle the authoritarian forces. The IACtHR also supports democracy, that is, the separation of powers, judicial independence, freedom of expression, and the right to access information and to a fair trial.[89]

86 Manuel E. Góngora Mera, *Inter-American Judicial Constitutionalism on the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication* (San José: Inter-American Institute of Human Rights 2011).

87 Margaret E. Keck und Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell Univ. Press 1998), 79 ff.

88 IACtHR, *Velásquez Rodríguez v. Honduras*, Decision (Merits), 29 July 1988, Series C, No. 4.

89 See e.g. IACtHR, *Chocrón Chocrón v. Venezuela*, Decision (Preliminary Objections, Merits, Reparations and Costs), 1 July 2011, Series C, No. 227.

2. European transformative constitutionalism

By the same token, one can see transformative constitutionalism in Central and Eastern Europe at work. After the Iron Curtain came down, Central and Eastern European societies decided to overcome their authoritarian structures by transforming themselves in the light of the values that were first enshrined in the Copenhagen criteria and later in Article 2 TEU. These societies have tasked their constitutions, but also Union law and the law of the Council of Europe, to bring about a corresponding transformation.

This constitutionalism yielded true successes. Yet, democratic structures remain frail in some countries. One of the major questions of our time is whether the strengthening of authoritarian forces and whether a renewed transformative constitutionalism can consolidate the European democratic society.

In the early 1990s, everything seemed so self-evident. European transformative constitutionalism began with the Central and Eastern European liberation from authoritarian rule, as in Latin America in the 1980s. Most citizens demanded a democratic rule of law that complied with common European standards. A broad reception of Western European constitutional law ensued. European institutions soon started supporting this transformation.

Most actors and observers were confident that the Central and Eastern European societies to the West of the former Soviet Union would become liberal democracies. Francis Fukuyama's 'end of history' or Jürgen Habermas' dictum of the 'catch-up revolution' expressed this zeitgeist.[90] In 1993, the united Western European governments agreed on common European governance to help those societies transiting to constitutional democracy by joining the resources of the various European organizations. One manifestation of this agreement was the European Council's decision of 21 and 22 June 1993 that promised the transforming states accession under the so-called Copenhagen criteria, i.e. standards that would later be incorporated into Article 2 TEU.[91] In the same vein, the Council of Europe issued its like-minded Vienna Declaration of the Heads of State and Government of

90 Francis Fukuyama, 'The End of History?', *The National Interest* 16 (1989), 3; Jürgen Habermas, *Die nachholende Revolution* (Frankfurt a.M.: Suhrkamp 1990).

91 European Council of 21/22 June 1993, Presidency Conclusion (SN 180/1/93 REV 1), at 13. In detail, see Christophe Hillion, 'The Copenhagen Criteria and their Progeny' in: ibid. (ed.), *EU Enlargement: A Legal Approach* (Oxford: Hart 2004), 1; Ronald Janse, 'Is the European Commission a credible guardian of the values? A revisionist account

9 October 1993.[92] These texts laid the political foundation for European institutions to frame, guide and support these transformations.

On this basis, the European Union, the Council of Europe, and the CSCE (which became the Organization for Security and Co-operation in Europe (OSCE) in 1994) developed a policy of transformative constitutionalism, albeit without articulating it as such. Despite there being some tensions between them, these organizations cooperatively formulated and implemented the Western European principles of democratic rule of law vis-à-vis those states. This policy gained traction because it promised accession to the European Union, which many Central and Eastern European citizens eagerly desired.

For some scholars, this transformation ended in failure.[93] This strikes us as a crass misjudgement. Still, regressions exist, in particular in Hungary and Poland. Most observers agree that these regressions are not solely due to Viktor Orbán and Jarosław Kaczyński's political skills but can also be explained with insufficient transformations.[94] Some argue that the transformation was too elitist and that legal culture could not keep up with it.[95] Others maintain that the transformation disappointed many by unexpectedly resulting in economic hardship rather than prosperity.[96] The funds with which the European Union supports Orbán's and Kaczyński's governments, the German industry's heavy investments in those countries, and the European People's Party's logic of power also bear mentioning.[97]

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of the Copenhagen political criteria during the Big Bang enlargement', I-CON 17 (2019), 43.

92 Council of Europe, Vienna Declaration of 9 October 1993.

93 Ivan Krastev and Stephen Holmes, *The Light that Failed: A Reckoning* (London: Penguin 2019).

94 See e.g. Dariuzs Adamski, 'The Social Contract of Democratic Backsliding in the "New EU" Countries', CML Rev. 56 (2019), 623.

95 András Jakab, 'Institutional Alcoholism in Post-socialist Countries and the Cultural Elements of the Rule of Law — The Example of Hungary' in: Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe* (London: Hart 2019), 209. On the fault of one-size-fits-all criteria for admission to the EU, see David Kosař, Jiří Baroš and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism', EuConst15 (2019), 427.

96 Pál Sonnevend, 'Preserving the Acquis of Transformative Constitutionalism in Times of Constitutional Crisis: Lessons from the Hungarian Case' in: Armin von Bogdandy et al. (eds), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford: OUP 2017), 123.

97 R. Daniel Kelemen, 'The European Union's Authoritarian Equilibrium', JEPP 27 (2020), 481.

As German legal scholars, we will not presume to identify the regressions' root causes, nor will we offer political recommendations for what to do in countries we hardly know. At the same time, we feel that we have a stake, as the future paths of these societies will shape European law and society as well. There are some aspects that German legal scholars can address. One is to identify legal obstacles and develop doctrinal paths to overcome them (III and IV). Another possible contribution is a theoretical framing (V). Finally, we can demonstrate how transformative constitutionalism by courts might foster the development of a democratic culture (VI).

VI. Fostering a Democratic Culture

Transformative constitutionalism is not only the province of courts, nor only of public institutions. To succeed, transformative constitutionalism requires a constitutional culture. This is what Article 2 TEU refers to when it speaks of values: broadly and deeply held normative convictions that inform social practices by members of society. Though courts cannot sentence a democratic society into being, they can play a role. For example, courts can support democratic politicization and create a social field that sparks the development of a constitutional culture.

1. On politicisation

If courts engage in transformative constitutionalism, they engage in an activity that affects the entire society. Already for that reason, such judicial activity can be considered as political. Hence, transformative constitutionalism is often associated with the courts' politicisation. Such a politicisation might result in backlash and endanger the entire edifice of constitutional democracy.[98] The politicisation of courts is a multifaceted and complex issue. As such, we will address only one aspect that seems most pertinent in the present context. Many fear that when courts address social problems in terms of constitutional law, they remove them from the reach of normal

98 See Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', International Journal of Law in Context 14 (2018), 237–257; Mikael Madsen, 'From Boom to Backlash? The European Court of Human Rights and the Transformation of Europe' in: Helmut Aust and Esra Demir (eds), *The European Court of Human Rights: Current Challenges in Historical and Comparative Perspective* (Cheltenham: Elgar 2021), 21.

political processes. In turn, this might hinder a society from successfully addressing entrenched social problems.

The Latin American example, however, demonstrates that often the opposite is the case.[99] When apex or international courts deal with social problems, they help to create a *new language* to address social deficits and articulate demands. In this sense, judicial proceedings can often stir and improve the quality of public discourse. Forty years ago, human rights were a normative standard few actors in Latin America took seriously. Because of the work of the courts, human rights have become operative over these past four decades. Today, many political discourses and struggles in the region are often framed and developed in a new language, the language of human rights. Being lawyers, we know that form, language and words do matter.

Closely connected is that courts have become *new fora* for publicly identifying structural deficiencies and for developing possible solutions. Often, court cases are a prime and sometimes the only avenue to bring a social issue to the general public's attention. Moreover, the IACtHR, like other courts, does not only adjudicate concrete disputes. It explicitly tackles deficient structures and provides transformative impulses for society as a whole, thereby generating political processes. Accordingly, juridification and politicisation can be constructively linked. Or put differently: the juridification of political problems can spark democratic politicisation. This in turn can foster the development of a constitutional culture.

2. On social support

If we credit courts for the development and consolidation of constitutional culture, we do not claim that they are the only relevant actors. Courts rely on a social field, i.e. a group of actors that operationalize the constitutional principles.[100] Such a field is necessary for transformative constitutionalism to flourish because it is nothing less than a solitary judicial activity. Transformative constitutionalism requires numerous other actors who identify suitable facts, prepare them as legal cases, take them to court, litigate them, accompany the process of implementation, and then use the decisions as

99 In detail Armin von Bogdandy and René Urueña, 'International Transformative Constitutionalism in Latin America', AJIL 114 (2020), 403.

100 Antoine Vauchez, 'Introduction. Euro-lawyering, Transnational Social Fields and European Polity-Building' in: Antoine Vauchez and Bruno de Witte (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Oxford: Hart 2013), 1.

precedents in later controversies.[101] Court decisions are only the tip of an iceberg of social practice. Often, such a field emerges in parallel to the rise of the respective court.[102] In the end, they depend on each other.

In Latin America, many civil society organizations have only developed thanks to the possibilities of the Inter-American System.[103] The same is true in Central and Eastern Europe. We may think of NGOs such as *Amnesty International*, the *Stefan Batory Foundation*, the *Helsinki Foundation for Human Rights*, the *Centre for Legal Resources*, or the *Wolne Sądy* (Free Courts) initiative, but also of associations such as the Polish judicial organizations *Iustitia* and *Themis* or the association of prosecutors *Lex Super Omnia* or *Asociația Forumul Judecătorilor din România*.[104] The Hungarian government's actions against civil society organizations such as the *Open Society Foundation* and the *Central European University* confirm that the latter are relevant societal forces.[105]

Especially for the CJEU this suggests attending more to actors who support their case law and help it enter social reality. That civil society organizations play a minor role before the Luxembourg court, compared to the Inter-American Court, which shows potential for development.[106]

101 Antoine Vauchez, 'Communities of International Litigators' in: Cesare P.R. Romano, Karen J. Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford: OUP 2014), 655 (656 f.).

102 Stéphanie Hennette-Vauchez, 'The ECHR and the Birth of (European) Human Rights Law as an Academic Discipline' in: Vauchez and de Witte (n.100), 122 (123).

103 Par Engstrom (ed.), *The Inter-American Human Rights System: Impact Beyond Compliance* (Cham: Palgrave 2019).

104 On Poland, see in detail Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland', Utrecht Law Review 17 (2021), 56; 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', GLJ 22 (2021), 1344; Claudia-Y. Matthes, 'Judges as activists: how Polish judges mobilise to defend the rule of law', East European Politics 38 (2022), 468. From Romania, see in particular Konrad Adenauer Stiftung and Asociația Forumul Judecătorilor din România, *900 Days of Uninterrupted Siege upon the Romanian Magistracy: A Survival Guide* (2020).

105 The CJEU has declared both laws to be contrary to Union law, see *Commission v. Hungary (Transparency of Associations)*, judgment of 18 June 2020, case no. C-78/18, ECLI:EU:C:2020:476; *Commission v. Hungary (Enseignement supérieur)*, judgment of 6 October 2020, case no. C-66/18, ECLI:EU:C:2020:792.

106 This is different in the ECtHR-context, see Elif Erken, 'The Participation of Non-Governmental Organisations and National Human Rights Institutions in the Execu-

VII. Conclusion

Our analysis has shown what our title suggested: EU values are both a constraint as well as a possible facilitator of democratic transitions. Unless it withdraws from the Union, even a Member State's constituent power is subject to the principles of Article 2 TEU. As a constraint, it stands mainly in the way of authoritarian developments that create and deepen systemic deficiencies. But it also constrains a government that wants to overcome those systemic deficiencies by restoring full compliance with Article 2 TEU. The main reason is that the rule of law requires such transitions to respect domestic law. EU law certainly allows for constitutional transitions, but they need to be legal.

At the same time, the EU might facilitate such transitions. Primacy and direct effect of EU law imply that domestic measures that violate Article 2 TEU are inapplicable. This opens possibilities to go against captured institutions that acted as instruments of repression as well as disapplying deficient constitutional provisions. We theorise this facilitating role as transformative constitutionalism that might also help develop a democratic constitutional culture.

Whether to activate that facilitating role of EU law is a colossal political question, far beyond the province of legal scholarship. Even as European citizens, we are uncertain about what to consider the best path for democratic transitions. Yet, inventing doctrines for such a role is part of the vocation of scholarship in our European society.

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tion of Judgments of the Strasbourg Court. Exploring Rule 9 Communications at the Committee of Ministers', ECHR Law Review 2 (2020), 248.