A Constitution Forged in Crisis: The Emergence of the Rule of Law as a Constitutional Principle in the EU Legal Order

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Abstract

The rule of law crisis and the response by national and EU institutions undoubtedly constitutes one of the most significant challenges faced by the EU in the last decades. In the absence of a political response under Article 7 TEU, two institutions took the lead in the response to autocratic governments. The Commission with the Rule of Law Framework flashed out a more ambitious concept of the rule of law applicable to backsliding in the Member States. The Court of Justice, in the seminal Portuguese judges case set out an obligation for Member States to ensure the functioning of independent courts as a guarantee for the right to effective judicial protection through a combined reading of Article 19 (1) TEU, Article 2 TEU and Article 4 (3) TEU. The legislator followed suit with the Conditionality Regulation.

This contribution traces the transformation of the rule of law into a constitutional principle in the EU legal order. It investigates whether and how the rule of law (and its components such as judicial independence) has emerged as a constitutional principle in the EU's internal domain by complementing the early structural principles whose aim was to ensure the effectiveness and autonomy of EU law. The chapter traces the emergence of the rule of law first as part of the EU pre-accession conditionality and then as part of obligations for Member States. Then it analyses the role of the Commission and the Court of Justice. Finally, it reflects on the nature of the principle and its potential emancipation as a self-standing and independently enforceable constitutional principle.

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1. Introduction: Rule of law as Constitutional Principle

The rule of law crisis and the response by national and EU institutions, undoubtedly constitutes one of the most significant challenges faced by the EU in the last decades of its existence. Autocratic governments with their actions of capturing independent institutions challenged the very foundations of the EU, targeting the rule of law as one of the founding values enshrined in Article 2 TEU. This crisis and events unfolding with it, did not just reflect the challenges and complexities of a Union that strives for more unity and common action and is characterised by increased diversity and particularism,[1] but it went further by undermining the foundations of the EU legal order, including the principle of the rule of law and mutual trust as the basis for cooperation between Member States. The crisis turned into an opportunity for a soul searching process of the Union and represented a momentum that led to a (re)confirmation of the constitutional nature of the Treaties and to a *deeper constitutionalisation* of the EU legal order through the law.

In a context of political stagnation – just like in the years of the empty chair crisis and later, until the adoption of the Single European Act – characterised by the absence of political reaction on the rule of law backsliding mostly in the Council, two institutions took the lead in the response to autocratic governments. The Commission with the Rule of Law Framework flashed out a more ambitious concept of the rule of law applicable also to the internal dimension of the EU (and not just in the context of pre-accession of candidate countries). The Court of Justice, in the seminal Portuguese judges case, through a combined reading of Article 19 (1) TEU, Article 2 TEU and Article 4 (3) TEU set out an obligation for Member States, who remain in charge of the organisation of their judicial systems, to ensure the functioning of independent courts as a guarantee for the right to effective judicial protection under Article 47 of the Charter of Fundamental Rights. Through this judgment, the Court operationalised rule of law in Article 2 TEU and resumed jurisdiction in a matter such as judicial organisation which is traditionally a matter of the Member States. This judgment was the basis for the following infringement cases brought by the Commission against Poland and Hungary.

This contribution will trace the transformation of the rule of law into a constitutional principle in the EU legal order. It investigates whether and

1 M. Varju, *Between Compliance and Particularism* (Springer, 2019).

how the rule of law (and its components such as judicial independence) has emerged as a constitutional principle in the EU's internal domain, aiming to complement the constitutional framework of the Union based on the effectiveness and autonomy of EU law. The chapter starts with a brief discussion of the early constitutionalisation of the EU law order, then it traces the emergence of the rule of law first as part of the EU pre-accession conditionality and then as part of obligations for Member States. Afterwards it analyses the role of the Commission and the Court of Justice in responding to the rule of law crisis in Poland and Hungary. Lastly follows a reflection on the nature of the principle and its potential emancipation as a self-standing enforceable constitutional principle.

2. The Early Constitutionalisation of the EU Legal Order and the Role of the Court of Justice

The focus in the founding treaties was on establishing the foundations of the European peace project and of economic integration as the instrument for peace and prosperity. To this end, the Treaty provided the initial instruments such as an institutional framework containing both elements of intergovernmentalism and supranationalism, procedures for the enforcement of EU law and policy objectives and rules. The Court of Justice made use of these instruments and gave to the Community legal order a constitutional framework and transformed itself into a constitutional court. The Community began to constitutionalise when the Court of Justice articulated the fundamental principles of the 'new legal order', namely the principle of direct effect and primacy of Community law which could be characterised as *structural* principles governing the relations between Community law and domestic law. These principles served the objective of regulating the relation between the Community (law) and Member States (law) by distinguishing the EU legal order from ordinary international law and national (constitutional) law. Especially with regards to the latter, as *Claes* notes, the Court of Justice aimed at communicating to national courts that "Community law must be seen independent from the national Constitution, which is not the source, nor the limit of Community law deriving from an autonomous source and cannot therefore be affected by national

law, however framed."[2] *Stein* spoke of "supremacy of treaty-constitution through judicial fiat" and the "making of a transnational constitution"[3]; Judge *Donner* referred to "*the constitutional powers* of the Court of Justice of the European Communities"[4]; later on, *Weiler* wrote about the role of the Court of Justice in "the transformation of Europe"[5]; and Judge *Mancini* spoke about "the making of a constitution for Europe"[6]. Thus, we were witnessing the constitutionalisation of the EU legal order, elsewhere defined as the "process by which the Rome Treaty evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on legal persons and entities, public and private within EC territory."[7] Two decades after *Van Gend En Loos* and *Costa*, the Court of Justice referred to the Community as a Community based on the rule of law, and to the treaties as the constitutional charter. In *Les Verts*, the Court famously ruled that "the European Economic Community is a Community based on the rule of law in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[8]

This constitutionalisation process was characterised by the establishment of *structural* principles, such as direct effect, supremacy, the doctrine of implied powers, as well as *substantive* principles related, for example, to the internal market or the protection of fundamental rights as part of the general principles of Community law. According to *Weiler's* pattern of transformation of Europe, the 'constitutionalisation of the Community legal structure', occurred during the foundational period (1958-mid 1970) in conjunction with the establishment of legal guarantees as part of a system of judicial review.[9] According to this view, there were four doctrines which

2 M. Claes, *The National Constitutional Mandate in the European Constitution* (Hart Publishing, 2006), 185.
3 E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law*, 2.
4 A. Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 *Common Market Law Review*, 127.
5 J. H. H. Weiler, 'The Transformation of Europe' (1990) 100 *The Yale Law Journal*, 2403.
6 F. Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review*, 595.
7 A. S. Sweet and T. Brunell, 'Constructing a Supranational Constitution' in A. S. Sweet (ed), *The Judicial Construction of Europe* (Oxford University Press, 2004), 65.
8 Case C-294/83 *Parti Ecologiste 'Les Verts'* [1986] ECR 1339.
9 J. H. H. Weiler, see n. 5, 2412.

constitutionalised the Community legal order: the doctrine of direct effect, the doctrine of supremacy, the doctrine of implied powers, and the doctrine of human rights. The latter was a welcome contribution in filling the lacuna left by the founding treaties. It was a step forward in addressing any criticism on the incomplete nature of the Communities without considerations of fundamental rights protection.

The constitutionalisation process also left its mark in the Community's economic constitution. Acting as a real driving force of economic integration when the political process was failing, the Court shaped the meaning of restrictions in free movement law in the trilogy *Dassonville-Cassis de Dijon-Keck*.[10] This impacted the scope for Member State regulatory autonomy. Yet, what was missing in this evolution, were values such as democracy or the rule of law with all the uncertainties that these broad concepts carry with themselves. The next section will analyse the emergence of these values.

3. The Emergence of the Rule of Law as one of the Founding Values of the EU: Towards Further Constitutionalisation?

Given their primarily economic nature, little was said in the founding treaties with regards to founding values such as rule of law or fundamental rights. The only references to the rule of law were those concerning the tasks of the Court of Justice. For instance, according to Article 31 of the Treaty establishing the European Coal and Steel Community (ECSC), the Court of Justice of the EU had the task of ensuring the rule of law in the interpretation and application of the Treaty. Similarly, Article 164 of the Treaty establishing the EEC, stated that "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed"[11]. Thus, the rule of law was to play a guiding role in the interpretation and application of the Treaty and the Court of Justice was tasked with the role to ensure this. It was with the Treaty of Maastricht that Member States formally confirmed in the Treaties "their attachment

10 Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 00837; Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 00649; Cases C-267 and 268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097.

11 Treaty establishing the European Economic Community [1957] 11957E, 75.

to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law"[12]. Few years later in the Treaty of Amsterdam values such as democracy, rule of law and human rights were formally integrated into the Treaties as founding values of the Union. Article 7 was introduced as a sanctioning mechanism in case of a breach of the founding values by a Member State. Codification in the Treaties was preceded and complemented by the case law of the Court of Justice. Although not directly related to the rule of law, the case law of the Court on fundamental rights as general principles of Community law binding on Community institutions and Member States alike, is evidence that the power in both layers of authority had to be exercised with due regard to fundamental rights and not in an arbitrary manner. As mentioned earlier, the first seeds of the authority of the rule of law appeared in the *Les Verts* case where the Court further reminded that the Treaty has established "a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions"[13]. This consitutionalisation of the EU legal order based on principles such as protection of fundamental rights and more specifically effective judicial protection was also reflected vis-à-vis international law in the seminal cases of Kadi and Opinion 2/13.[14]

In the meantime and even before such codification, the EU was enforcing rule of law, democratic principles and respect for human rights vis-à-vis candidate countries, with no constraint deriving from the principle of conferral and by applying EU pre-accession conditionality that went beyond the EU *acquis* applicable to Member States.[15] Those values were part of the EU enlargement law and practice well before the Treaty of Amsterdam. For instance, *Kochenov* illustrates this with reference to the 1952 Schuman Declaration which stated that the Communities were open to "free European states" or to the Association Agreement with Greece that was frozen following the coup d'etat of the colonels and Spain's first application in

12 Preamble to the Treaty of Maastricht [1993].
13 Case C-294/83 *Parti Ecologiste 'Les Verts',* see n. 8.
14 Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461; Opinion 2/13, ECLI:EU:C:2014:2454.
15 C. Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (Swedish Institute for European Policy Studies, 2010/6).

1962 that was not considered due to the dictatorial regime installed there.[16] Elements of political conditionality were present in the first wave of enlargement where the Commission noted that membership was only open to democratic states.[17]

In 1973, these values were articulated as part of European identity in the Declaration on European Identity which stated that the nine Member States "are determined to defend the principles of representative democracy, of the rule of law, of social justice - which is the ultimate goal of economic progress - and of respect for human rights. All of these are fundamental elements of the European Identity."[18] Democracy, the rule of law, human rights and respect for and protection of minorities were codified as part of the political criterion of the Copenhagen criteria that were the outcome of the Copenhagen European Council meeting held in 1993 in the context of the accession process of CEE countries. The prospect of Eastern enlargement and the need to fill the gap between pre-accession conditionality and membership obligations explain the emergence in the Treaty of Amsterdam of the founding values of the Union in Article 49 TEU by "constitutionalising the Copenhagen criteria"[19] into the EU constitutional order and of Article 7 TEU as a political control mechanism against the decline of the founding values.

But what was the scope of the principle of the rule of law, both in its internal and external dimension? Or was it an amorphous concept, hard to define, let alone to enforce before courts? If we go back to the *Les Verts* case, one notices the principle is interpreted as meaning that the Treaty, the basic constitutional Charter, constitutes the limits to action of Member States and EU institutions. Judicial review of Union or Member State acts as a tool of limiting power, is certainly part of this understanding. This reflects the meaning of the rule of law in the context of the pre-accession policy.

16 D. Kochenov, 'EU Enlargment Law: History and Recent Developments. Treaty-Custom Concubinage?' (European Integration Online Papers, 2005).

17 R. Janse, 'The Evolution of the Political Criteria for Accession to the European Community, 1957–1973' (2018) *European Law Journal*, 57, 73.

18 Bulletin of the European Communities, 'Declaration on European Identity' (1973) 118–122 <https://www.cvce.eu/en/obj/declaration_on_european_identity_copenhagen_14_december_1973-en-02798dc9-9c69-4b7d-b2c9-f03a8db7da32.html> accessed 29 April 2025.

19 B. De Witte, 'The Impact of Enlargement on the Constitution of the European Union' in M. Cremona (ed), *The Enlargement of the European Union* (Oxford University Press, 2003), 209.

According to *Janse's* review of Commission documents and assessments in EU candidate countries from 1997 to 2004, the rule of law "meant, first of all, that the powers of the government and its officials and agents are circumscribed by law and exercised in accordance with law."[20] Other elements included an independent and impartial judiciary with strong guarantees for judges concerning their appointment and non-interference from the executive.[21]

Thus, after Copenhagen, EU pre-accession conditionality was characterised by a wider scope than the EU acquis applicable to Member States.[22] For instance, in the context of fundamental rights, the European Commission used multiple international treaties as the basis of its assessment and reports, including not just the European Convention on Human Rights (ECHR), but also other documents such as, for instance, the *Council of Europe Framework Convention on National Minorities* or other documents of the Organisation for Security and Cooperation in Europe (OSCE). By contrast, Member States in the Union "had a duty only to respect some fundamental rights in some circumstances"[23], rights in the EC Treaties or secondary legislation, as well as fundamental rights as part of general principles of Community law whenever they were implementing or derogating from EU law. Similarly, judicial independence featured as one of the key principles in the pre-accession period, yet, its enforcement vis-à-vis Member States was limited to the well-functioning of the reference for a preliminary ruling in Article 267 TFEU. The early case law of the Court of Justice of the European Union (CJEU), before *Wilson*, reflected a more "functional"[24] notion of judicial independence aiming at determining in an uniform manner those bodies which should be allowed to enter judicial dialogue with the Court of Justice. This was in stark contrast with the approach taken by the European Court of Human Rights.

In this sense, the codification of the founding values in the Treaty of Amsterdam and the introduction of Article 7 TEU were seen as mechanisms that would fill the gap between pre-accession conditionality and member-

20 R. Janse, 'Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement' (2019) 17 *International Journal of Constitutional Law*, 43, 57.

21 R. Janse, see n. 20.

22 C. Hillion, see n. 15, 15.

23 B. De Witte, see n. 19.

24 C. Reyns, 'Saving Judicial Independence: A Threat to the Preliminary Ruling Mechanism?' (2021) 17 *European Constitutional Law Review*, 26, 30.

ship obligations. However, the rule of law crisis in Poland, Hungary and Romania reflected the limited capacity of Article 7 as an enforcement tool for Article 2 TEU.

4. A Principle Forged in Crisis: The Role of EU Institutions in Flashing out the Rule of Law as a Constitutional Principle of the EU Legal Order

The rule of law crisis has been widely analysed, and it constitutes one of the most important crises that the Union has faced in the last decades. The background is well known, but here is a short summary of its genesis. Following the 2010 general elections in Hungary, the two majority winning parties introduced constitutional amendments with major impact in the constitutional landscape. These were followed by

> "separate attacks on public institutions, such as the judiciary or ombudsman, unforeseeable interference with the market economy, the exploitation of a situational vulnerability of exposed actors in the public sphere, such as in the case of the 'Lex NGO', or the use of 'hidden single-case laws' such as in the 'Lex CEU'"[25].

Various instruments were used to counter these attacks against independent institutions and founding values, such as infringement proceedings brought by the Commission. Ultimately on 12 September 2018, the European Parliament called on the Council for the very first time to determine the existence of a clear risk of a serious breach by Hungary of the Article 2 TEU values based on Article 7 (1) TEU.[26] However, the Council paralysed by its procedural requirement of unanimity, never took action. Similarly, a series of attacks on the judiciary took place in Poland, shortly after the 2015 parliamentary elections. This started with the replacement of sitting judges in the Polish Constitutional Tribunal. Similar measures impacted the Supreme Court and other lower courts. Similarly, the situation of the rule of law in Romania was challenging, despite the continuous monitoring of

25 P. Bogdanowicz and M. Schmidt, 'The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU' (2018) *55 Common Market Law Review*, 1086–1087.

26 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7 (1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded <2017/2131(INL)> accessed 9 March 2022.

the judiciary and anti-corruption policies in the context of the Cooperation and Verification Mechanism.

It was in this context of crises that the concept of the rule of law was flashed out and turned into a principle whose elements (such as judicial independence) would be enforced, albeit within constraints, before the Court of Justice. It is since 2012 that we have witnessed "the rapid evolution of the EU's rule of law toolbox" which has been characterised by a "multiplication of new instruments but in an uncoordinated manner"[27]. Since then, the European Commission has developed quite an extensive rule of law toolbox which is organised in two parts: prevention and promotion as well as response. Prevention and promotion, includes different mechanisms such as the European Rule of Law Mechanism, the EU Justice Scoreboard, the European Semester, the Cooperation and Verification Mechanism, support for civil society, networks and projects, structural reforms. Response includes tools such as the Rule of Law Framework, Article 7 procedure, infringement proceedings under article 258 TFEU and a regime of conditionality to protect the EU budget.[28] Ultimately, Article 7 TEU as the original political instrument in the Treaties did not prove effective, but we have witnessed policy and judicial creativity regarding responses to the crisis. The sections below will briefly highlight some of the main instruments developed with the aim of extracting the meaning and scope of the rule of law as a constitutional principle of the EU legal order.

4.1 The Commission

One of the first responses by the Commission was the Rule of Law Framework designed as a preventive mechanism to threats to the rule of law and as a preventive tool before the use of Article 7 TEU. Based on this instrument, the Commission assesses the situation of the rule of law in the Member States, adopts recommendations and follows up on the actions of Member States in complying with those. Although perhaps it did not play a determining role in addressing the rule of law crisis, this instrument

27 L. Pech, 'The Rule of Law' in P. Craig and G. de Burca, *The Evolution of EU law* (Oxford, 2021), 319.

28 Factsheet European Commission <https://commission.europa.eu/document/download/0202c616-e7e6-4378-9961-512c56d246c5_en?filename=rule_of_law_mechanism_factsheet_en.pdf> accessed 29 April 2025.

"sensibly attempted to offer a working and comprehensive definition of the notion of the rule of law in an internal context"[29].

The Commission in this document listed six principles that stem from the rule of law: legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights and equality before the law.[30] It construed the rule of law as a "constitutional principle with both formal and substantive components" and as a vehicle for ensuring respect for democracy and fundamental rights.[31] It is a pre-requisite for upholding all the rights from the Treaties and international law as well as the basis for mutual trust and for the functioning of an area of freedom, security and justice without internal frontiers.[32] The Commission recognises its own limitations to the enforcement of the rule of law through infringement proceedings, as these proceedings can be initiated against a Member State where it can be shown that what is at stake is not only the rule of law as one of the founding values but also a specific provision of EU law, or in the case of the Charter, when Member States are implementing Union Law.[33] In addition, developments in Poland and Hungary showed the ineffectiveness of Article 7 TEU. Therefore, considering these limitations of the existing mechanisms, the Commission introduced this new instrument in the EU's toolbox.

Whereas the Rule of Law Framework was intended for systemic breaches identified in a Member State, the Annual Rule of Law Reports launched for the first time in 2020, aimed more generally to scale up the role of the Commission in monitoring developments relating to the rule of law in Member States and to prevent problems from requiring formal steps such as those in the context of the Rule of Law Framework, infringement proceedings or activation of Article 7 TEU.[34] Thus, the Rule of Law Review cycle was introduced and it was intended to have a wide scope including

29 L. Pech, 'The Rule of Law', see n. 27, 112.
30 Commission, 'A new Framework to strengthen the Rule of Law', COM(2014)158 final, 4.
31 Commission, see n. 30.
32 Commission, see n. 30.
33 See, for example, C-617/10, *Åklagaren v Hans Åkerberg Fransson*, ECLI:EU:C:2013:105.
34 Commission, 'Strengthening the rule of law within the Union' COM(2019) 343 final, 9.

> "systemic problems with the process for enacting laws, lack of effective judicial protection by independent and impartial courts, or non-respect for the separation of powers. The review would also examine the capacity of Member States to fight corruption and, where there is a connection with the application of EU law, look at issues in relation to media pluralism and elections."[35]

The Commission would also monitor national actors involved in the enforcement of EU law such as courts, prosecution offices and law enforcement authorities.[36] In this context, the Commission publishes Annual Rule of Law reports where significant developments relating to the justice system, the anti-corruption framework, media pluralism, and other institutional checks and balances are identified and analysed. These four areas were identified as "key interdependent pillars for ensuring the rule of law"[37]. As an illustration on judicial independence, the Commission in its 2020 Rule of Law Report is careful to say that the organisation of judiciaries remains a Member State competence, however when exercising it they "must ensure that their national justice systems provide for effective judicial protection."[38] A fundamental element of such judicial protection are independent courts. Effective judicial protection is the essence of the rule of law and the basis for "mutual trust, which is the bedrock of the common area of freedom, justice and security, an investment friendly environment, the sustainability of long-term growth and the protection of EU financial interests."[39] Performance of judiciaries in the EU was an early concern following developments in Hungary and Poland. In this context, one of the first tools introduced by the Commission in 2013 was the Justice Scoreboard which aimed at assisting "the EU and the Member States to achieve more effective justice by providing objective, reliable and comparable data on the functioning of the justice systems of all Member States."[40] This instru-

35 Commission, see n. 34.
36 Commission, see n. 34.
37 Commission, '2020 Rule of Law report' (European Commission, 30 September 2020) <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/annual-rule-law-cycle/2020-rule-law-report_en> accessed 29 April 2025.
38 Commission, see n. 37.
39 Commission, see n. 37.
40 Commission, 'The EU Justice Scoreboard. A tool to promote effective justice and growth' COM(2013) 160 final, 2.

ment primarily justified on economic grounds,[41] provides an overview of performance of judiciaries in EU Member States, focusing on efficiency, quality and independence of national judiciaries. Apart from serving as a mirror of the performance of judiciaries in the EU, this instrument reflects a change in the approach towards independence of judiciaries in the EU, an element which is not considered just for the sake of judicial dialogue in the context of the reference for a preliminary ruling. Judicial independence goes beyond this functionalist characterisation and is considered as part of the rule of law as a founding value.

4.2 The Role of the Court of Justice

The first test for the Court of Justice came from Hungary and it concerned legislation on the retirement age for judges and prosecutors. The Court found a breach by Hungary of provisions of Council Directive 2000/78/EC on equal treatment in employment.[42] Yet, the issue of lowering the retirement age for judges, prosecutors and notaries was not phrased as a threat to judicial independence and as a result as an assault to the rule of law guaranteed in Article 2 TEU. Nearly two years later, the Court declared that Hungary had failed to fulfil its obligations under EU law by removing the data protection supervisor before the end of the term.[43] Neither infringement proceeding was brought and decided as a rule of law case, reflecting a slow start in judicial cases as responses to the rule of law crisis. It was only a few years later that the Court of Justice operationalised the rule of law in Article 2 TEU - in combination with other provisions - as one of the founding values.[44] As a second step in this constitutionalisation, the Court set out the principle of non-regression according to which "compliance by a Member State with the values enshrined in Article 2 TEU is a condition

41 L. Pech, 'The Rule of Law', see n. 27, 322–323.

42 See Case C-286/12 *Commission* v. *Hungary* [2012] ECLI:EU:C:2012:687; U. Belavusau, 'On age discrimination and beating dead dogs: Commission v. Hungary Case C-286/12, Commission v. Hungary, Judgment of the Court of Justice (First Chamber) of 6 November 2012, nyr.' (2013) 50 *Common Market Law Review*, 1145–1160.

43 Case C-288/12 *Commission* v. *Hungary* [2014] ECLI:EU:C:2014:237.

44 Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* [2018] ECLI:EU:C:2018:117.

for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State"[45].

The Portuguese Judges case[46] originates in a challenge brought by the trade union of Portuguese judges concerning a reduction of salaries, a measure taken by the government as a response to the financial crisis. One of the arguments put forward was that this reduction infringed the principle of judicial independence enshrined in the Portuguese Constitution but also in EU law, more specifically in the second subparagraph of Article 19 (1) TEU[47] and Article 47 of the Charter. This case has acquired its place as a landmark case in EU law because judicial independence is seen as more than a criterion determining the admissibility of requests for a preliminary ruling: it is a principle which Member States have the obligation to ensure in order to uphold one of the founding values of the EU, the rule of law. This was the first time in which the Court of Justice interprets Article 19 (1) second subparagraph in relation to the principle of judicial independence. The Court ruled that Member States have an obligation deriving from Article 19 TEU to "provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law."[48] Such effective judicial review, according to the Court, is "of the essence of the rule of law"[49]. Furthermore, Member States must make sure that all courts and tribunals that fall within its definition under EU law, meet the requirements of effective judicial protection. Precisely here the Court sees the role of the principle of judicial independence as a tool for enforcing effective judicial protection by national courts that interpret or apply EU law.[50]

The Portuguese judges cases can indeed be considered a watershed moment for judicial independence and the rule of law in the EU and more generally for the EU constitutional order. According to *Kochenov* and *Pech*

> "This judgment can be viewed as belonging to the Pantheon of the most significant ECJ rulings, on a par with *Van Gend en Loos* and *Costa*.

45 Case C-896/19 *Repubblika v Il-Prim Ministru* [2021] ECLI:EU:C:2021:311, para 63.
46 Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, see n. 44.
47 Article 19 (1) second sub paragraph reads: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law"; and Article 47 of the Charter enshrines the right to an effective remedy and to a fair trial.
48 Case C-64/16, see n. 44, para 34.
49 Case C-64/16, see n. 44, para 36.
50 Case C-64/16, see n. 44, para 41.

> Indeed, it marked a new beginning for the rule of law as a fundamental and enforceable value of the EU legal order, referred to in Article 2 TEU and given concrete and justiciable expression by inter alia the second subparagraph of Article 19 (1) TEU."[51]

Since this case, judicial independence

> "appears in the EU constitutional framework under many guises: as a value under Articles 2 and 49 TEU (implicit in the rule of law), promoted in the enlargement policy under the Copenhagen criteria and safeguarded by the EU institutions after accession; as a fundamental right under Article 47 of the Charter; as a requirement for courts or tribunals to be able to make references under Article 267 TFEU; and now as a primary law obligation enforceable by the Court of Justice, deriving from Article 19 TEU, that binds Member States 'in the fields covered' by Union law."[52]

It is clear that this case by the Court constitutes a substantive leap forward in the meaning of judicial independence in the EU, going beyond the meaning and role of the principle in the early years of the Communities where it served as a one of the criteria for defining a court or tribunal under EU law.

The Portuguese judges case paved the way for the enforcement of judicial independence as an element of the rule of law in subsequent infringement cases brought against Poland. In a series of cases brought by the Commission concerning legislation that lowered the retiring age of sitting judges in ordinary courts or in the Polish Supreme Court, or legislation that introduced a disciplinary chamber within the Polish Supreme Court, the Court of Justice found violations of the principle of judicial independence as reflected in Article 19 (1) TEU which in itself gives concrete expression to Article 2 TEU.[53]

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51 L. Pech and D. Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (Swedish Institute for European Policy Studies, 2021/12).

52 M. Bonelli and M. Claes, 'Judicial serendipity: How Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses' (2018) 14 *European Constitutional Law Review*, 622, 634–635.

53 Case C-619/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:531 (Supreme Court judges); Case C-192/18 *European Commission v Republic of Poland* [2019] ECLI:EU:C:2019:924 (ordinary courts); Case C-791/19 *European Commission v Republic of Poland* [2021] ECLI:EU:C:2021:596,

4.3 The Legislator Adds to the Definitional Jigsaw of the Rule of Law in the EU and the Court Embarks into the (Constitutional) Identity Discourse

The legislator followed suit by adopting the Conditionality Regulation[54] where a definition of the rule of law is provided. According to Article 2 (a) of the Regulation the rule of law includes

> "[…] the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU."[55]

The scope of the regulation is limited to the "rules necessary for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Members States."[56] This limited scope of the Regulation was also confirmed by the Court in the two actions for annulment of the Conditionality Regulation brought by Hungary and Poland where it stated that "the purpose of the contested regulation is to protect the Union budget from effects resulting from breaches of the principles of the rule of law in in a Member State in a sufficiently direct way, and not to penalise those breaches as such."[57] Thus, it should not be seen as a new sanctioning mechanism in the EU's rule of law toolbox, but rather as an instrument devised to protect the EU's budget from abuses in the Member States.[58]

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para 51 (disciplinary chamber); Case C-204/21 *Commission v Poland* [2023] ECLI:EU:C:2023:442 (Muzzle law case).

54 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I.

55 Regulation, see n. 54, Article 2 (a).

56 Regulation, see n. 54, Article 1.

57 Case C-156/21 *Hungary v Parliament and Council* [2022] ECLI:EU:C:2022:97; C-157/21 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:98, para 199.

58 See Case C-156/21, paras 111, 119 and Case C-157/21, paras 125, 137. See for a commentary V. Borger, 'Constitutional Identity, the rule of law, and the power of the purse: The ECJ approves the conditionality mechanism to protect the Union budget: Hungary and Poland v. Parliament and Council. Case C-156/21 *Hungary v Parliament and Council* [2022] EU:C:2022:97 and Case C-157/21 *Poland v Parliament and Coun-*

One of the most important implications of the interpretation by the Court of the Conditionality Regulation in the two annulment cases, was the definition of the founding values in Article 2 TEU - including the rule of law - as values that "define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties."[59] This common core is the connecting element between the Member States and the basis for mutual trust among them. Compliance with those values is a pre-condition for the enjoyment of rights deriving from the Treaties and moreoever, "[c]ompliance with those values cannot be reduced to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession."[60]

This was the first time that the Court of Justice embarked into a (constitutional) identity discourse. For the first time and in a way that "echoes what defines constitutionalism in many Member States"[61], it identified Article 2 TEU as the non-negotiable core of the Treaties which is the basis for accession and for continued rights of membership. This is made clearer in response to the arguments by Hungary and Poland that respect for national identity under Article 4 (2) TEU prevents a uniform definition of the rule of law. The Court takes this opportunity to install a brake in the operation of Article 4 (2) by explicitly invoking the values in article 2 TEU as limits to arguments of protection of national identities of Member States "inherent in their fundamental structures, political and constitutional". It is clearly a move towards further centralisation and ultimately constitutionalisation of the EU legal order. *Bast* and *von Bogdandy* locate these judgments in a series of steps taken by the Court and through which it "has been complementing and indeed overwriting its long-standing functionalist approach to constitutionalism"[62].

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cil [2022] EU:C:2022:98; Judgments of the Court of 16 February 2022' (2022) 59 Common Market Law Review, 1771.

59 Case C-156/21, see n. 57, para 127; Case C-157/21, see. 57, para 145.

60 Case C-156/21, see n. 57, para 16; Case C-157/21, see n. 57, para 144.

61 J. Bast and A. von Bogdandy, 'The Constitutional Core of the Union: On the CJEU's new, principles constitutionalism' (2024) 61 *Common Market Law Review*, 1471, 1472.

62 J. Bast and A. von Bogdandy, see n. 61, 1471–1472.

5. On Rationale and Enforcement

Major progress can be traced with regards to the definition and operationalisation of the rule of law since its initial reference in the *Les Verts* case and the subsequent codification in the Treaty of Amsterdam. For one, the gap between the rule of law as a principle intensively monitored and enforced in relation to candidate countries, and the rule of law as a founding value of the Union and binding for its Member States, has been reduced considerably. Nowadays, there is a robust case law of the Court of Justice which has defined a core meaning of the rule of law. This is further complemented by the legislator in the Conditionality Regulation and by the various instruments of prevention and monitoring set up by the Commission. As *Pech* puts it, before the adoption of the Conditionality Regulation, "the main issue has never been the lack of a definition but rather the multiplication of references and adoption of documents emphasising different components of the rule of law"[63]. Various instruments, beyond Article 7 TEU, have been employed in practice in order to guarantee the principle. Preventive tools have been put in place, existing judicial mechanisms in the treaties (such as infringement proceedings and preliminary rulings) have been utilised. However, the fact remains that the Union "has few options to truly intervene at *the national level*."[64] It cannot (and should not) design the judiciaries in the Member States and modify them to its own standards. It can sanction Member States through financial instruments in case of their failure to comply with requirements of judicial independence.[65] Article 7 TEU remains as a sanctioning mechanism, although difficult to activate, and the Conditionality Regulation may come with concrete financial consequences. Notwithstanding these developments, there remain conceptual issues related to the rationale and mode of enforcement of the principle of the rule of law in Article 2 TEU and these will be addressed briefly in the subsequent sections.

63 L. Pech, 'The Rule of Law as a well-established and well-defined principle of EU law' (2022) 14 *Hague Journal on the Rule of Law*, 107, 118.
64 V. Borger, see n. 58, 1797.
65 See e.g. in the Polish context, Case C-204/21 R [2021] ECLI:EU:C:2021:878.

5.1 Cementing a Constitutional Order Beyond Effectiveness and Autonomy

A pertinent point of reflection is the rationale behind guaranteeing the rule of law as a founding value. Is the the rule of law, and more specifically one aspect of it, namely judicial independence, guaranteed in order to protect the characteristics of the EU legal order and guarantee the effectiveness and uniform application of EU law? Or is it primarily guaranteed as a principle of modern liberal constitutionalism reflecting the fundamental idea that the law is the limit to the arbitrary exercise of public power[66] and the foundation to this are independent courts? In the beginning of the Communities, except for the *Les Verts* judgment, the Court has been reluctant to use constitutional terminology by being mainly preoccupied with structural principles of EU law and ensuring effective application of EU law.[67] Arguments on effective judicial protection have been articulated in the context of standing for individuals in annulment proceedings, but without major changes related to effective judicial remedies. Similarly, the emergence of fundamental rights as general principles of Community reflected also the need to bring fundamental rights claims against EU acts within the remit of EU law and within the jurisdictional reach of the Court of Justice. This ultimately fosterd effectiveness and autonomy of EU law vis-à-vis national constitutions. However, since the ratification of the Lisbon Treaty, the Court

> "[…] has added a principled constitutional logic to the previous functional logic of practical effectiveness. […] For example, the Court now derives the requirement to ensure the effectiveness of Union law from the values in Article 2 TEU, in particular the rule of law."[68]

Bast and *von Bogdandy* name the Białowieska case as an example, where the Court explained that compliance by Member States with CJEU interim measures is necessary to guarantee the effective application of EU law. Such application is "an essential component of the rule of law, a value enshrined in Article 2 TEU and on which the European Union is founded."[69] One could contrast this centrality of the rule of law in the discourse of the

66 M. Krygier, 'The Rule of Law: An Abuser's Guide', in A. Sajo (ed), *The Dark Side of Fundamental Rights* (Eleven International Publishing, 2006), 129.
67 J. Bast and A. von Bogdandy, see n. 61, 1481.
68 J. Bast and A. von Bogdandy, see n. 61, 1481.
69 Case C-441/17 R *Commission v. Poland* [2017] ECLI:EU:C:2017:877.

Court with some of the statements of the Court in Opinion 2/13 whereby the judicial system established in the Treaties was explained by the need to ensure consistency and uniformity in the interpretation of EU law and ultimately ensuring that the "specific characteristics and the autonomy of that legal order are preserved"[70]. In the context of this judicial system, the Court of Justice and national courts cooperate and ensure full application of EU law in all Member States and judicial protection of individual's rights under EU law.[71] The reasoning of the Court clearly seems to give more weight to arguments of effectiveness, uniformity, autonomy of the EU legal order – but also to some extent to effective judicial protection of individual's rights. The outcome of the case – which put into hault the accession of the EU to the Convention – also favoured the autonomy of EU law vis-à-vis the acceptance of an additional layer of judicial protection before the Strasbourg court.

Or take, for example, the requirement of independent courts which has featured as one of the key principles in the pre-accession period vis-à-vis candidate countries. Yet, its application in Member States was limited to the context of the reference for a preliminary ruling in Article 267 TFEU. The early case law of the CJEU, before the ruling in *Wilson*,[72] "set out a functional notion that delineates which bodies should be allowed to the judicial dialogue"[73] in contrast to the more substantive and human rights related notion of judicial independence as applied by the European Court of Human Rights which has coupled judicial indendence with the guarantees flowing from Article 6 of the European Convention of Human Rights. In *Wilson*, the CJEU seemed to approximate its approach on judicial independence to that of the ECtHR by setting out the external and internal aspects of judicial independence.[74] Thus, this case allowed the CJEU to go beyond its "functionalist"[75] approach on judicial independence by paving the way for the later developments and constitutional developments in the Portuguese Judges case. This is not to say that the "effet utile" considera-

70 Opinion 2/13, para 174–176.
71 Opinion 2/13, para 174–176.
72 Case C-506/04 *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg* [2006] ECLI:EU:C:2006:587.
73 C. Reyns, see n. 24, 30.
74 Case C-506/04, see n. 72, para 51–52.
75 C. Reyns, see n. 24.

tions were absent in the Portuguese Judges case,[76] but the argument is that judicial independence was not seen as just a parameter for referring courts but also as a substantive requirement for effective judicial protection and the rule of law more generally.

5.2 Full Emancipation of (the Rule of Law in) Article 2 TEU as a Self-Standing Enforceable Principle?

By now there is some clarity that Article 2 TEU may produce legal effects for the purposes of mutual trust and its operationalisation or in the context of the principle of non-regression.[77] In the conditionality judgments the Court described Article 2 TEU as "not merely a statement of policy guidelines or intentions" but as a provision that "contains values which […] are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States."[78] As Advocate General Ćapeta admits, this last statement may give the impression that Article 2 TEU does not create legally binding obligations for Member States if such values need concrete expression in other provisions of EU law.[79] However, the founding values in Article 2 TEU represent the bare minimum during the pre-accession stage as well as the core identity of the Union which must be respected by every Member State. Hence, they cannot be seen as void of legal effects.

The issue remains whether and to what extent Article 2 TEU and the founding values therein, can be invoked and enforced by the Commission and the Court as self-standing values in judicial proceedings. Are these values justiciable? So far, the principle of rule of law in Article 2 TEU has been enforced *in combination* with other provisions of primary law, whereby, for instance, Article 19 (1) TEU is seen as giving concrete expression to the

76 L. D. Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 *German Law Journal*, 1182, 1204.

77 M. Bonelli and M. Claes, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTQ+ rights in Hungary' (2023) 30 *Maastricht Journal of European and Comparative Law*, 3, 8.

78 Case C-156/21, para. 232.

79 Opinion of AG Ćapeta in Case C-769/22 *Commission v. Hungary* [2022] *OJ C 54*, delivered on 5 June 2025.

value (or principle) of the rule of law guaranteed in Article 2 TEU.[80] From this basis, the Court has articulated an obligation for Member States to provide effective legal protection (through independent courts) in the fields covered by Union law.

The Court has the chance to clarify the mode of invocability of Article 2 TEU in the infringement proceedings against Hungary's 'anti- LGBTIQ+ Law'.[81] In its pleas the Commission argued that through its legislative amendments aiming at a higher protection of children and the adoption of stricter measures against persons convicted of pedophilia, Hungary has infringed Artice 2 TEU. Article 2 TEU appears as a self-standing ground but complementary and following other claims based on internal market law and Charter rights. This position was clarified by the Commission during the hearing on 19 November 2024 whereby it explained that it did not base the case solely on Article 2 TEU but also on other provisions of EU law.[82] Commission's representatives in the hearing clarified that Article 2 TEU can be enforced only if the case falls within the scope of EU law for other reasons,[83] such as for instance a breach of substantive provisions of EU (internal) market law and, in addition, potentially, but not indispensably, of a Charter right. The approach taken by Advocate General Ćapeta in the Hungarian case is that Article 2 TEU can be invoked as a self-standing ground in infringement proceedings as long as this complements other breaches of specific provisions of primary and secondary law and Charter provisions.[84] Such complementary mode of invocation pre-empts the argument that EU institutions (the Commission and the Court) act outside of the scope of EU law because it is assumed that a breach of Article 2 TEU would be declared only after a breach of provisions of primary and secondary EU law has been found.

80 On this combined approach, L. D. Spieker, see n. 76, 1201.

81 Case C-769/22 *Commission v. Hungary* [2022] *OJ C 54*, action brought on 19 December 2022.

82 See for an initial analysis L. Kaiser, A. Knecht and L. Spieker, 'Society Strikes Back: The Member States Embrace Article 2 TEU in Commission v Hungary' (VerfBlog, 26 November 2024) <https://verfassungsblog.de/european-society-strikes-back/> accessed 22 May 2025; F. de Cecco, 'Added value(s)?: On the Hearing in Commission v Hungary' (VerfBlog, 05 December 2024) <https://verfassungsblog.de/commission-v-hungary/> accessed 22 May 2025.

83 See for a comment B. Riedl, 'The Case against Enforcing the Article 2 TEU Values Independently' (2025) European Law Blog <https://doi.org/10.21428/9885764c.568f5c0e> accessed 29 April 2025.

84 Opinion of AG Ćapeta in Case C-769/22 *Commission v. Hungary*, see paras. 142–145.

One of the obstacles to the self-standing invocation of Article 2 TEU is the vague wording of the provision and the general nature of the values. Advocate General Ćapeta is right when positing that interpreting vague notions is "one of the core tasks of constitutional courts"[85] and in this case of the Court of Justice. Also the Court previously has employed these vague principles for judicial review of Member State actions.[86] In addition and with regards specifically to the rule of law, the Court (and the Commission in infringement cases) could rely on the definition elaborated so far in case law, legislation and Commission documents in order to render more concrete that value. The same can be said for other values protected in Article 2 TEU.

Besides jusiticiability there is also the more complex question of the concrete criteria for determining a breach of the values in Article 2 TEU in infringement proceedings. There is clearly a divide between the Advocate General and the Commission in the Hungarian case: For the Commission, the test should be one of "particularly serious, numerous and blatant" breaches that "constitute a generalised and coordinated violation of the fundamental rights in question"[87]. For the Advocate General, the threshold of the breach is met when a Member State negates the values in Article 2 TEU. According to the Advocate General the basis of all infringements of primary and secondary law (including the Charter) is that Hungary denies equality for LGBTI persons. The Advocate General posits that the seriousness or quantity of breaches should be seen as an indication of the breach but it cannot constitute the basis for finding an infringement.[88] These differing positions illustrate the difficulty with which the Court is presented: provided that it will accommodate the invocation of Article 2 TEU as a self-standing ground, what will be the criteria for determining a breach of the EU founding values? How to determine the seriousness and blatant nature of an infringement that may bring about a breach of Article 2 TEU? Is it easier to determine when a value is negated? These different paths illustrate the difficulty with the (self-standing) invocation of Article 2 TEU and which the Court will have to face in its forthcoming judgment in the Hungarian case.

85 Opinion of AG Ćapeta in Case C-769/22 *Commission v. Hungary*, para. 206.
86 See Case C-848/19 P Germany v Poland [2021] EU:C:2021:598, referred to in the Opinion of AG Ćapeta in Case C-769/22 *Commission v. Hungary*, para. 205.
87 See para. 235 of Opinion.
88 See para. 247 of the Opinion.

6. Conclusion

There is no doubt that the rule of law has acquired its place in the EU's constitutional norms and practice, and this is mainly thanks to its main institutions, the European Commission, the Court of Justice and later on, the legislator. The rule of law crisis triggered a European response to autocratic governments and at the same time articulated the principle in more detail by, simultanously, reducing the gap between the enforcement of the rule of law vis-à-vis accession countries and vis-à-vis Member States. The principle, as part of Article 2 TEU, has been upgraded into a constitutional principle of the EU, despite persisting uncertainties concerning the self-standing invocation of Article 2 TEU.