Enforcing the Rule of Law in the EU: The Case of Poland and Hungary*** **

Hermann-Josef Blanke and Aimee Sander*

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** The article is dedicated to the memory of Ministerialrat Professor *Reimer von Borries* (1937–2021) who as employee of the Federal Ministry of Economics rendered outstanding services to the development of the European rule of law principle, especially in Romania and Croatia, after the EU enlargements in 2007 and 2013. His initiatives as practitioner and his analyses as honorary professor remain a constant mission.

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Abstract

The Commission's 2022 Report on the Rule of Law highlights serious concerns about the independence and impartiality of the judiciary, particularly in Poland and Hungary. The ongoing consolidation of illiberal democracies in these countries has led not only to a stagnation but also to an erosion of the fundamental principles of the rule of law. In Poland, the ruling PiS government's judicial reforms have sparked controversy and pose a threat to the rule of law. Forced retirements, disciplinary proceedings and political appointments of judges have exposed the judiciary to legislative and governmental control. The decision of the Polish Constitutional Tribunal to declare EU primary law unconstitutional testifies to the Polish institutions' departure from the common values enshrined in Art. 2 TEU. The Union's regular control and sanction mechanisms have proved inadequate in the face of this crisis. Budgetary sanctions, such as those applied to Hungary under the Conditionality Regulation to protect the EU budget and to Poland and Hungary by withholding funds under the Union's Recovery and Resilience Facility, provide a means of pressuring those countries to halt further erosion of the fundamental guarantees and institutions of the rule of law. However, given the systemic deficits evident in both countries, doubts remain about the effectiveness of such measures.

Keywords: Rule of Law, Polish Constitutional Tribunal, Case K 3/21, Independence and Impartiality of the Judiciary, Supremacy of Union Law

A. The Current State of the Rule of Law in the Union

The European Union (EU), as a community of law and values (*Rechts- und Wertegemeinschaft*),[1] is founded on the premise that the Member States share a set of common values and principles, including respect for fundamental rights, democracy and the rule of law (Art. 2 TEU). It implies that each Member State recognises and respects these legally binding values and principles as the Union's foundation. Developments in parts of East-Central Europe, however, give rise to concerns about their compliance with the Union's founding values, notably the rule of law. As outlined once again in the Commission's Rule of Law Report,[2] areas of concern include, above all, the independence and impartiality of the judicial system. While the EU has developed several legal instruments to strengthen the rule of law in the Union, challenges encountered, particularly in Poland and Hungary, call into question the Union's political and legal ability to address the shortcomings in the rule of law of its Member States.

1 Cf. e.g. *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, para. 3.

2 *European Commission*, 2022 Rule of Law Report: The rule of law situation in the European Union, COM(2022) 500 final.

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In this context, the ruling of the Polish Constitutional Tribunal of 7 October 2021 (Ref. K 3/21)[3] has been particularly controversial. It not only runs counter to fundamental principles of the Union's legal order but tends to jeopardise the Union's very understanding as a democratic community. Though this ruling marks only the latest peak in an escalating dispute between the EU and Poland after the country has been experiencing a regression under the governing Law and Justice (PiS) party. It does, nonetheless, point to a general erosion of rule of law standards, especially in the so-called Visegrád countries, a region where tendencies towards an "illiberal democracy" are increasingly manifesting themselves. The European Parliament (EP), in its resolution adopted on 15 September 2022,[4] denied Hungary's claim to be a democracy. There is growing consensus among experts "that Hungary is no longer a democracy" and that the country has "become a hybrid system of electoral autocracy".[5]

The Polish case is used to illustrate the distortions of the rule of law caused by legislative decisions and politically influenced national jurisprudence, but also by corruption. The analysis reveals that the Union's institutions must take greater efforts to ensure that this *sine qua non* condition for a functioning democracy is upheld throughout the Union. When speaking at Charles University in Prague on the occasion of the Czech presidency of the Council of the EU, Federal Chancellor *Olaf Scholz* also emphasised the urgency needed to enable the Commission to initiate infringement proceedings for violations of fundamental EU values. Above all, the rule of law is "a fundamental value that should unite our Union. Especially in times, when autocracy is challenging our democracies [...]."[6]

3 Judgment of the Polish Constitutional Tribunal of 7 October 2021, Ref. No. K 3/21, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, available at: https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej (20/3/2023).

4 *European Parliament*, resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, 2018/0902R(NLE).

5 In recital Y of the EP resolution of 15 September 2022, it is noted that: "whereas there is increasing consensus among experts that Hungary is no longer a democracy; whereas according to the University of Gothenburg's V-Dem Democracy Index 2019, Hungary has become the EU's first ever authoritarian Member State; whereas Hungary was identified as a 'hybrid regime', having lost its status as a 'semi-consolidated democracy' in the 2020 Freedom House Nations in Transit Report; whereas Hungary is rated as a 'flawed democracy' and ranks 56th out of 167 countries (one position below its 2020 ranking) in the Economist Intelligence Unit's 2022 Democracy Index; whereas according to the V-Dem Democracy Index 2022, among EU Member States, Hungary has been one of the world's leading autocratisers over the past decade".

6 An English version of the Chancellor's speech at Charles University in Prague, 29 August 2022, is available at: https://www.bundesregierung.de/breg-en/news/scholz-speech-prague-charles-university-2079558 (20/3/2023).

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I. The Rule of Law: A Fundamental Value of the Council of Europe and the EU

The EU is, to put it in the words of *Walter Hallstein*, essentially a "community of law" (*Rechtsgemeinschaft*);[7] the Court of Justice described the former European Economic Community as "a Community based on the rule of law".[8] The European rule of law differs from the somewhat younger "international rule of law"[9] by a wide range of legally binding sub-principles which became inherent to the constitutional essence of the Union. Alongside respect for human dignity, freedom, democracy, equality and human rights, the rule of law not only represents a guiding principle common to all Member States, but it is also a condition for safeguarding all other fundamental values as well as the rights and obligations arising from the Treaties.[10] It is firmly anchored in the characteristics common to all Member States and defines the narrative of the liberal democratic constitutional order. At the same time, however, differences emerge with regard to the meaning of the principle, which are closely related to the respective understanding of "rule of law" in national constitutional law.[11]

Before a State can accede to the European Union (Art. 49 (1) sentence 1 TEU, referring to Art. 2 TEU), its accession to the Council of Europe (CoE) is a requirement for the opening of accession negotiations with the EU. Against this backdrop, the impact of the principle of the rule of law together with the States Parties' commitment to European "ideals and principles" as their "common heritage", laid down in Art. 1 point (a) and Art. 3 of the CoE Statute, has a legally unifying effect for all (future) Member States.[12] The Committee of Ministers underscored the legal importance of these provisions in its Resolution of 16 March 2022, finding that, as a result of the launch of military aggression against Ukraine, the Russian Federation "has

7 *Pech*, Jean Monnet Working Paper Series 2009/4, p. 9; *Jacqué*, in: von der Groeben/Schwarze/Hatje (eds.), Art. 2 EUV, para. 4.

8 ECJ, case C-294/83, *Les Verts v Parliament*, ECLI:EU:C:1986:166, para. 23.

9 *McCorquodale*, ICLQ 2016/2, p. 304, comes to the following conclusion: "The international rule of law is not an all-or-nothing concept but is a relative concept, in which compliance with the international rule of law is measured in terms of the extent to which participants comply with its elements, with the aim of fulfilling them all over time."; according to *Fassbender*, Chinese JIL 2018/3, p. 79, "it cannot be denied that [...] the UN, in accordance with Article 36, paragraph 2 of the Charter, has urged States to resolve legal questions by application of the law and not the exercise of political discretion or arbitrariness [...]." Both authors make reference to *Bingham*. Posing the question about "[a]n International Rule of Law?"; *Chesterman*, in: Peters/Wolfrum (eds.), para. 37, distinguishes between three possible meanings, among them that "a global rule of law might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.".

10 *Calliess*, p. 3; *Diel-Gligor,* ZRP 2021/2, p. 64.

11 *Konstadinides*, pp. 15 ff., 45 ff., 72 ff.

12 The Preamble to the CoE Statute identifies the rule of law as one of the three pillars on which the organisation is based, along with human rights and democracy. Respect for the rule of law is thus not only a precondition for membership (Art. 3 of the CoE Statute), but violations of this principle may also result in a suspension of its rights of representation to the CoE or a cessation of its membership (Art. 8 of the CoE Statute). Cf. *Bílková*, in: Kadelbach/Klump (eds.), p. 119; *Schukking*, NQHR 2018/2, p. 154.

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ceased to be a member of the Council",[13] also because this aggression constitutes "a serious breach of Article 3 [of the CoE Statute]".[14] With the expulsion, Russia also ceased to be a High Contracting Party to the European Convention on Human Rights with effect from 16 September 2022.[15] This shows that Europe's leading human rights and freedoms document, i.e. the European Convention on Human Rights, can only be credibly recognised by a European State as legally binding within its jurisdiction as long as it upholds the values of the CoE Statute.

Prospective EU members are assessed for compliance with the rule of law during the accession negotiations (Art. 49 TEU). The assessment is made on the basis of the Copenhagen criteria, which include political and economic conditions as well as the administrative and institutional capacity to effectively implement the Union's *acquis communautaire*.[16] Pursuant to Art. 4 (3) (2) TEU, Member States cannot subsequently, i.e. after the accession to the Union, amend their legislation in order to undermine the protection of the rule of law.[17] Art. 4 (2) TEU does not permit them to disregard the obligations imposed on them by EU law in areas of national competence related to the exercise of essential State functions.[18]

Art. 2 TEU conveys "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 comprising legally binding obligations for the Member States."[19] These supranational value standards essentially establish the principle of homogeneity not only vis-à-vis national constitutions but also in relation to the constitutional

13 *Council of Europe*, Resolution CM/Res(2022)3 of 23 March 2022 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a5ee2f (20/3/2023).

14 Cf. *Council of Europe,* Opinion 300 (2022) of the Council of Europe Parliamentary Assembly on Consequences of the Russian Federation's aggression against Ukraine in accordance with Art. 8 of the CoE Statute, para. 4.

15 *ECtHR,* Resolution of 22 March 2022 on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, available at: https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf (20/3/2023).

16 The political criteria encompass stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The economic criteria require a functioning market economy and the ability to deal with competition and market forces. Cf. *European Commission*, Enlargement – Accession criteria, available at: https://ec.europa.eu/neighbourhood-enlargement/enlargement-policy/glossary/accession-criteria_en (20/3/2023). *Diel-Gligor*, ZRP 2021/2, p. 64; *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, para. 33.

17 With regard to this obligation, cf., e.g., CJEU, case C-896/19, *Repubblika v Il-Prim Ministru,* ECLI:EU:C:2021:311, para. 63, without reference to the pre- and post-accession behaviour of a Member State or to Art. 4 (3) (2) TEU.

18 Cf. CJEU, case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, para. 265, with reference to Art. 4 (3) (2) second sentence TEU.

19 Cf. CJEU, case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, paras. 145, 264; see also CJEU, case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para. 232.

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principles of the Union.[20] That premise implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and, therefore, that the EU law implementing these standards will be respected.[21] Recourse to Art. 3 TEU further confirms that the rule of law represents a legally binding constitutional objective of the Union.[22]

It is acknowledged that deference to the rule of law is closely linked to democratic values and norms. Not only in the European context but also within the United Nations framework, the rule of law, democracy and fundamental human rights are seen as co-constitutive, and the process of ensuring their respect is both convergent and mutually reinforcing.[23] The European Parliament has already called for the establishment of a Democracy, Rule of Law and Fundamental Rights (DRF) mechanism[24] on the basis of an inter-institutional agreement under Art. 295 TFEU, again highlighting the interplay of these three core values.

II. Towards a Common Concept of the Rule of Law

A typical distinction is often made between the concepts of the rule of law in continental Europe (*Rechtsstaat/principle of the legal State*, *État de droit*) and those in the Anglo-Saxon sphere (*rule of law*).[25] In 1885, the common law concept of the *rule of law* was decisively shaped by the British constitutional lawyer and theorist *Albert Venn Dicey* who not only emphasised 'parliamentary sovereignty',[26] but also identified "three distinct though kindred conceptions […] under [the] expression […] 'rule, supremacy, or predominance of law'".[27] These include "the absence of ar-

20 *Hilf/Schorkopf*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 2 EUV, para. 9; *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, para. 7; *Mangiameli*, in: Blanke/Mangiameli (eds.), Art. 2 TEU, para. 1; on the individual components of the homogeneity principle, cf. ibid., para. 11 ff.

21 Opinion of CJEU, case C-2/13, *Accession of the EU to the ECHR,* para. 168; cf. *Spielmann*, in: Elósegui/Miron/Motoc (eds.), pp. 5, 11 ff.

22 *Sommermann*, in: Blanke/Mangiameli (eds.), Art. 3 TEU, para. 22.

23 *Carrera/Guild/Hernanz*, The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU. Towards an EU Copenhagen Mechanism, 2013, available at: https://www.ceps.eu/wp-con-tent/uploads/2013/11/Fundamental%20Rights%20DemocracyandRoL.pdf (20/3/2023), p. i; *Van Ballegooijz/Navarra*, An EU Mechanism on Democracy, EPRS Study, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654186/EPRS_STU(2020)654186_EN.pdf (20/3/2023), p. 1.

24 *European Parliament*, Report on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, 2020/2072(INL), available at: https://www.europarl.europa.eu/doceo/document/A-9-2020-0170_EN.html (20/3/2023).

25 *Sommermann*, in: Magiera/Sommermann (eds.), p. 77 ff. For a detailed analysis of the different national conceptions, see *European Commission for Democracy through Law* (Venice Commission), The Rule of Law in European Jurisprudence (by Mr Martin Loughlin), CDL-DEM(2009)006, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2010)141-e (20/3/2023).

26 *Dicey*, pp. 3 ff.

27 *Dicey*, pp. 107 ff.; *Sommermann*, in: Magiera/Sommermann (eds.), p. 77; *Pech,* Jean Monnet Working Paper Series 2009/4, pp. 27 f.

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bitrary power […]", "the idea of legal equality […]", and the fact that "[that the English Constitution] is a judge-made constitution".[28]

The German concept of *Rechtsstaat* traces its origins to *Immanuel Kant* whose work 'The Metaphysics of Morals' (1797) was a philosophical doctrine of the rule of law. He demanded that the State should limit itself to the State purpose of 'security' and strive for the 'State of greatest conformity of the constitution with principles of law'.[29] The *Rechtsstaat* was considered a *Vernunftsstaat*.[30] The jurist and politician *Robert von Mohl* considered the objective of the *Rechtsstaat* as being to organise the coexistence of people in such a way as to ensure that each member is supported and promoted as freely and diversely as possible in the exercise of his or her powers.[31] Also, *Otto Bähr*'s demand for judicial control of public administration focused on the objective of ensuring individual freedom.[32]

While the *Rechtsstaat* was initially understood in purely formal terms,[33] it was later enshrined in the Basic Law, the German Constitution (*Grundgesetz*), as a constitutional principle (Art. 20 (3)).[34] It is against this background that this principle, as advocated by *Laurent Pech*, is best understood as a "generic constitutional principle of governance" [35] which comprises formal and substantive elements.

In many European and non-European countries, the Anglo-Saxon *rule of law* and the continental European idea of the *principle of the legal State* have merged over time into a uniform model through multilateral adaptation.[36] However, even among the EU Member States, there are differences in perception of the individual elements ('sub-elements'),[37] especially when it comes to the national transposition of the concept into national legislation. According to *Carl Schmitt*, the word 'legal

28 *Dicey*, pp. 111, 114, 115 f.
29 *Kant*, §§ 45, 49.
30 *Welcker*, pp. 13–26.
31 *von Mohl*; *Mohnhaupt*, Cahiers de philosophie politique et juridique 1993/24, p. 75; *Pech,* Jean Monnet Working Paper Series 2009/4, p. 32 f.; *Sommermann*, in: Magiera/Sommermann (eds.), p. 79; *Sommermann*, in: von Mangoldt/Klein/Starck (eds.), Art. 20 GG, para. 232; *Fleiner/Basta Fleiner* (eds.), p. 237.
32 *Bähr*, pp. 45 ff.
33 See, e.g., *Kelsen*, p. 91: "'Rule of law' is not to be understood as a state order of specific content [...], but a state whose acts are all adopted on the basis of the legal order." *Kelsen* describes the "formal concept of the rule of law" as "primary in relation to the [...] substantive one [...]", and characterises the state as an "order of coercion" ("Zwangsordnung"). *Raz,* in: Raz (ed.), p. 210; in contemporary legal literature *Merten*, p. 19, follows a purely formal approach to the rule of law; with regard to the distinction between the formal and the substantive conception of the rule of law, see *Sommermann*, in: von Mangoldt/Klein/Starck (eds.), Art. 20 GG, paras. 229 ff., 233 ff.; cf. also *Fernandez Esteban*, pp. 91 ff., 94 ff.
34 *von der Pfordten*, in: Silkenat/Hickey/Barenboim (eds.), p. 24; *Pech,* Jean Monnet Working Paper Series 2009/4 p. 32; *Sommermann*, in: von Mangoldt/Klein/Starck (eds.), Art. 20 GG, paras. 227–228.
35 *Pech,* Jean Monnet Working Paper Series 2009/4, pp. 66 ff.
36 *Sommermann*, in: von Mangoldt/Klein/Starck (eds.), Art. 20 GG, para. 247; *von der Pfordten*, in: Silkenat/Hickey/Barenboim (eds.), p. 15; *von Bogdandy*, p. 7.
37 *Spielmann*, in: Elósegui/Miron/Motoc (eds.), p. 19; *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, para. 27.

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State' can have as many different meanings as the word law itself.[38] It appears appropriate to acknowledge a dynamic understanding of the rule of law. Thus, while Member States' understanding of the rule of law may not be entirely identical, they share fundamental characteristics, including the impartiality and independence of the judiciary.[39]

Also in Poland, a country which, according to Art. 2 of the Polish Constitution of 1997, is "a democratic State ruled by law and implementing the principles of social justice", the *państwo prawa* (rule of law) forms an integral part of the current legal system. Looking at Polish legal history, though, the term *państwo prawa* was not used in Polish legal doctrine, especially during the Second Republic.[40] It was during Poland's transition from a socialist State to a Western-oriented Republic that the Polish Constitutional Tribunal, in particular, defined the basic elements of Polish statehood in relation to the European-Atlantic concept of the *Rule of Law*, also through 'constitutional borrowing'. The Tribunal advanced this concept in the form of a formal, but also (in terms of human dignity) substantive concept, which thus became a decisive yardstick for judicial review.[41] Yet, it is particularly due to the controversial judicial reforms under the ruling national-conservative PiS government that the consolidation of the rule of law in Poland has declined sharply since 2015, with many achievements being reversed (point B.I.2).

III. The Need to Specify the Rule of Law in Constitutional and Administrative Law Standards

As the European Court of Justice has ruled, the "principles of the rule of law stem from the constitutional and political traditions of the Member States and their content [of the rule of law sub-principles] is specified in the case law of the [national] constitutional courts". Although "international organisations, in particular the Council of Europe, have drawn up certain criteria for assessing whether those principles have been observed, the specific embodiment of those principles is confined, in EU law, to mentioning the aims which they pursue. In view of the differences be-

38 Cf. *Schmitt*, p. 18, who spells out in derogatory terms: „Das Wort ‚Rechtsstaat' kann soviel Verschiedenes bedeuten wie das Wort ‚Recht' selbst und außerdem noch soviel Verschiedenes wie die mit dem Worte ‚Staat' angedeuteten Organisationen […]. Es ist begreiflich, daß Propagandisten und Advokaten aller Art das Wort gern für sich in Anspruch nehmen, um den Gegner als Feind des Rechtsstaates zu diffamieren. Ihrem Rechtsstaat und ihrem Rechtsbegriff gilt der Spruch: ‚Recht aber soll vorzüglich heißen, was ich und meine Gevattern preisen'." See also *Fernandez Esteban*, pp. 67 f., who, with regard to the different rule of law conceptions in different states, cites W.B. Gallie's words on "essentially contested concepts".

39 *Bingham*, p. 174: "The concept of the rule of law is not fixed for all time".

40 *Sokolewicz/Zubik*, in: Garlicki/Zubik (eds.), Art. 2; on the rule of law in Polish constitutionalism, see also the contributions in *Wronkowska* (ed.); Cf. *Raz*, in: Raz (ed.), p. 210: "The rule of law means literally what it says: the rule by laws. Taken in its broadest sense this means that people should obey the law and be ruled by it".

41 *Tuleja*, in: Bosek/Safjan (eds.), Art. 2, paras. 9 f., 14, 17, 20, 22 ff.; *Morawska*, Kwartalnik Prawa Publicznego 2002/3, p. 89.

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tween the Member States as regards their national identities, their constitutional and legal systems and their legal traditions, the EU legislature cannot specify, for all the principles of the rule of law, the means by which the objectives which they pursue may be achieved. Accordingly, the obligation for the Member States to observe those principles is limited to the need to guarantee their essence."[42] Both the CJEU and the ECtHR define the rule of law as a constitutional principle of the Union's legal order that consists of both formal and substantive components in order to ensure compliance with and respect for democracy and human rights.[43]

The need for further clarification has been addressed by the Venice Commission which has significantly contributed to reaching a consensual definition of the notion of the 'rule of law' and its core elements.[44] Already in the 2011 report,[45] the Venice Commission concluded that there is consensus on at least the core elements of the rule of law.[46] An agreement was reached on a Rule of Law Checklist[47] that aims to operationalise this principle while providing concrete indicators.[48] Essentially, the five core elements encompass: (1) legality (in particular, primacy of and reservation by law), (2) legal certainty, (3) prevention of abuse (misuse) of powers, (4) equality before the law and non-discrimination, and (5) access to justice.[49] In its 'definition' of the rule of law, the European legislator added further elements to this checklist,

42 Cf. CJEU, case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, para. 68. See also, *Pech,* Jean Monnet Working Paper Series 2009/4, p. 54; with regard to national evolutions and impacts on other legal systems, see *Weber*, paras. 216–222, 229, 231.

43 Cf. Giegerich, ZEuS 2019/1, pp. 61 ff. See e.g. ECJ, case C-50/00 P, *Unión de Pequeños Agricultores v Council,* ECLI:EU:C:2002:462, paras. 38 and 39; CJEU, Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission,* ECLI:EU:C:2008:461, para. 316; ECtHR, Application No. 46295/99, *Stafford v United Kingdom*, ECLI:CE:ECHR:2002:0528JUD004629599, para. 63. In this respect, also *Sommermann*, pp. 372 f. distinguishes, following German constitutional law doctrine, between Staatszielbestimmungen (objective principles of the State) and Staatsstrukturbestimmungen/ Staatsstrukturprinzipien (structural, i.e., formal, procedural and organisational principles of the State).

44 *Grabenwarter*, JöR 2018/1, p. 27.

45 *Venice Commission*, Report on the Rule of Law, CDL-AD(2011)003rev, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-e (20/3/2023).

46 In its report (para. 41), the *Venice Commission* found that consensus exists on the core elements of the rule of law, which entail: (1) legality, including a transparent, accountable and democratic process for enacting laws; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; (6) non-discrimination and equality before the law.

47 *Venice Commission*, The Rule of Law Checklist, CDL-AD(2016)007rev, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)007-e (20/3/2023).

48 *Bílková*, in: Kadelbach/Klump (eds.), p. 128.

49 For a more detailed list of the principles underlying these key features, cf. *Venice Commission*, The Rule of Law Checklist, CDL-AD(2016)007rev, pp. 11 ff., and *Weber*, paras. 232–255.

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in particular a transparent, accountable, democratic and pluralistic law-making process.[50]

The CJEU has consistently emphasised the importance of the rule of law as a central component of the Union's legal order.[51] Deference to the rule of law includes, in particular, adherence to and the primacy of Union law. Further, the integral principles of the rule of law include, *inter alia*, the separation of powers, i.e. in terms of the Union's "checks and balances"[52] and in the functional sense of "institutional balance",[53] legal certainty, including the protection of legitimate expectations, effective judicial review and legal protection, the independence and impartiality of the judiciary, as well as equality before the law, but also the legality and proportionality of all state action and, last but not least, respect for fundamental rights.[54] The ECtHR has further confirmed core elements of the rule of law in its case law,[55] emphasising already in the *Golder* judgment[56] its importance.[57]

50 Cf. Art. 2 lit. a of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ L 433 I/1 of 22/12/2020: "'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU".

51 Cf. e.g. concrete expressions of the value of the rule of law are: legitimate expectations, see ECJ, case C-90/95, *De Compte v Parliament,* ECLI:EU:C:1997:198, para. 35 and ECJ, case C-120/86, *Mulder,* ECLI:EU:C:1988:213, para. 24; the principle of legal certainty, see ECJ, case C-98/78, *Racke,* ECLI:EU:C:1979:14, para. 20 and ECJ, case C-169/80, *Gondrand Freres,* ECLI:EU:C:1981:171, para. 17; effective judicial review, see ECJ, case C-222/86, *Unectef v Heylens,* ECLI:EU:C:1987:442, para. 15 and CJEU, case C-216/18 PPU, *LM.*, ECLI:EU:C:2018:158, para. 51; regarding effective judicial protection of individuals' rights, see CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117, para. 37 and CJEU, case C-284/16, *Achmea*, ECLI:EU:C:2018:158, para. 36; judicial independence, see ECJ, case C-506/04, *Wilson,* ECLI:EU:C:2006:587, paras. 48 f., CJEU, case C-49/18, *Escribano Vindel,* ECLI:EU:C:2019:106, para. 66 and CJEU, case C-619/18, *Commission v Poland*, ECLI:EU:C:2019:615, paras. 72 ff.

52 *Lenaerts*, CMLR 1991/1, p. 13.

53 ECJ, Case C-70/88, *Parliament v Council*, ECLI:EU:C:1990:217, paras. 21 ff.; cf. *Fernandez Esteban*, pp. 156 ff.

54 *Mangiameli*, in; Blanke/Mangiameli (eds.), Art. 2 TEU, paras. 29 f.; *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, paras. 26 f.

55 Cf. e.g. ECtHR, Application No. 5100/71, 5101/71, 5354/72 and 5370/72, *Engel and Others v The Netherlands*, ECLI:CE:ECHR:1976:0608JUD000510071, para. 69; ECtHR, Application No. 39343/98, 39651/98, 43147/98 and 46664/99, *Kleyn and Others v The Netherlands*, ECLI:CE:ECHR:2003:0506JUD003934398, para. 190.

56 Cf. ECtHR, Application Nr. 4451/70, *Golder v The United Kingdom*, ECLI:CE:ECHR:1975:0221JUD000445170, para. 34.

57 *Schukking*, NQHR 2018/2, pp. 155 f.; See also *Bílková*, in: Kadelbach/Klump (eds.), pp. 120 f. for a more comprehensive overview of subsequent case law related to the rule of law.

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The application of uniform assessment criteria by the Member States is compatible with "a certain degree of discretion [in their favour] in implementing the principles of the rule of law.[58] Moreover, conferring discretion on the authorities responsible for implementing "is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give adequate protection against arbitrary interference."[59]

B. The European 'Rule of Law Crisis' as an Outcome of "Autocratic Legalism"

As *Jean Monnet* said in his memoirs: "Europe will be forged in crises, and will be the sum of the solutions adopted for those crises."[60] The EU has gone through many crises in recent years, such as the financial and migration crises and Brexit.[61] However, the increasing disregard for the rule of law and other fundamental values within the Union by certain Member States poses a serious challenge to the very foundations of the Union. Accordingly, we can speak of a 'crisis of fundamental values' or, with regard to the rule of law, a 'rule of law crisis' that the EU has been witnessing for several years already.[62] In constitutional doctrine, these developments have been labelled under the terms of "autocracy" or even "authoritarianism".[63] As observed by the European Commission, we see a gradual deterioration of the rule of law in parts of Europe, a trend referred to as 'rule of law backsliding' or 'constitutional capture'.[64] In this context, *Laurent Pech* and *Kim L. Scheppele* define the 'rule of law backsliding' as follows:

> a process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks

58 CJEU, case C-156/21, *Hungary v Parliament and Council,* ECLI:EU:C:2022:97, para. 233, and CJEU, case C-157/21, *Poland v Parliament and Council,* ECLI:EU:C:2022:98, paras. 265, 283 with reference to Art. 4 (2) TEU.

59 CJEU, case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para. 225, and CJEU, case C-157/21, *Poland v Parliament and Council,* ECLI:EU:C:2022:98, para. 321.

60 Cf. *Monnet*.

61 One could even argue that the EU is facing a multidimensional 'polycrisis'. Cf. *Raube/Costa Reis,* in: Riddervold/Trondal/Newsome (eds.), p. 628.

62 *Pech/Scheppele*, CYELS 2017/19, p. 5; *Raube/Costa Reis*, in: Riddervold/Trondal/Newsome (eds.), p. 628: in this context, the authors argue that respect for the Union's fundamental values is challenged by a crisis of democracy and the rule of law in Member States, which comprises three strands of crises: (1) identity crisis, (2) compliance and implementation crisis, and (3) perception crisis.

63 Cf. *Frankenberg*; *Rhodes*. Cf. *V-Dem Institute,* Varieties of Autocratization 2022, available at: http://v-dem.net/vaut.html (20/3/2023). See also *Lührmann/Lindberg*, Democratization 2019/7; *Scheppele*, Univ Chic Law Rev 2018/2, pp. 545 ff.

64 *Müller*, in: Closa/Kochenov (eds.), p. 208: 'constitutional capture' describes "a scenario where one set of partisan actors tries to obtain control of the political system as a whole (as well as parts of the economy, the media and civil society), rendering subsequent changes in political control virtually impossible."

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> on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.[65]

The process describes a substantial decline in the state of the rule of law in general, which primarily includes the weakening of checks and balances. Political pluralism and participation, freedom of expression, freedom of the press, rights of association and organisation, the independence of the judiciary, as well as media pluralism and freedom are increasingly under attack. However, the democratic backsliding and the decline of the rule of law are not a phenomenon attributed exclusively to the EU,[66] but are increasingly noticeable at the international level. According to the latest Freedom House report, freedom is increasingly under threat worldwide, with eight out of ten people now living in an only partially free or non-free country. In this respect, the current state of freedom in the world is alarming in more than one way: while there is significant growth and consolidation of authoritarian regimes, even consolidated democracies are increasingly being weakened from within by illiberal forces.[67] The latter is particularly true in light of developments in parts of the EU, where the rise of national-conservative and populist governments and parties is increasingly undermining basic democratic principles, the rule of law and the protection of fundamental rights.

The Union's enlargement policy has long been perceived as one of the most successful foreign policy instruments when it comes to promoting democracy and the rule of law in the prospective Member States. In particular, in view of the most comprehensive enlargement process in 2004,[68] when eight Central and Eastern European countries, alongside Cyprus and Malta, acceded to the Union, democratic conditionality was widely endorsed as the key to facilitating political transformation and democratic reform in these.[69] While countries such as Poland, Hungary, Slovenia and Romania[70] were considered to meet these criteria, these countries now show clear signs of illiberal constitutionalism – namely the attempt to dismantle fundamental principles such as the separation of powers and the independence of the judiciary, as well as to weaken civil society and the independent media.[71]

Hungary serves as a prime example of a post-1989 democratic state backsliding into 'constitutional authoritarianism' with nationalist tendencies. Under the ruling

65 *Pech/Scheppele*, CYELS 2017/19, p. 7.

66 *Kochenov*, in: von Bogdandy et al. (eds.), p. 130; *Müller*, in: Closa/Kochenov (eds.), p. 209.

67 *Freedom House*, The Global Expansion of Authoritarian Rule 2022, available at: https://freedomhouse.org/sites/default/files/2022-02/FIW_2022_PDF_Booklet_Digital_Final_Web.pdf (20/3/2023), pp. 4, 6.

68 In 2004, the Czech Republic, Hungary, Poland, Slovakia, Slovenia, Lithuania, Latvia, Estonia, Malta and Cyprus became Member States. The accession of Bulgaria and Romania followed in 2007.

69 According to *Schimmelfennig/Scholtz*, EUP 2008/2, p. 189, accession conditionality proves to be a strong and significant factor for the democratisation of the European neighbourhood.

70 With regard to Romania, cf. *von Borries,* in: Blanke et al. (eds.), pp. 495 ff.

71 *Bugarič*, in: Bignami (ed.), p. 481.

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Fidesz government of Prime Minister *Viktor Orbán*, the country has seen a gradual dismantling of checks and balances as well as a deterioration of the rule of law since 2010. Constitutional amendments have allowed the Hungarian government to strengthen its political control over the independent judiciary and to limit the protection of fundamental liberties. Even the judicial independence guaranteed in the Hungarian Constitution with respect to the organisation of the courts could hardly forestall this.[72]

The reasons for these developments in East-Central Europe are complex. Some stress that while the EU has promoted the harmonisation of national legislation according to EU standards, it failed to provide guidance for the establishment of a sustainable, independent and trustworthy judiciary in these countries due to the rapid accession process.[73] Others have pointed to the lack of consensus on liberal-democratic values in Central-Eastern European societies at the time of the transition, insisting that general economic effectiveness was given preference over civic and political engagement.[74] Undoubtedly, the governments of these countries are also concerned with defending their sovereignty.

The illiberal turn in the region, however, does not mark the first instance of divergence between the Visegrád countries and the EU. Their relapse into inhumane practices has already become apparent during the 2015-2016 refugee crisis when these countries refused to take in asylum seekers and migrants and objected to the Commission's proposal to set binding redistribution quotas in the Union.[75] Such resistance was primarily rooted in security concerns according to which the uncontrolled admission of migrants and refugees would pose a threat to the society of their countries. This line of argumentation resonated particularly in national-conservative circles of Polish society and was repeatedly invoked by the PiS party, portraying itself as the defender of Polish national identity and Christian values.[76]

72 *Bugarič*, Int. J. Const. Law, 2015/1, p. 225 f.; *Calliess*, p. 3; *Halmai*, Illiberalism in East-Central Europe, 2019, available at: https://cadmus.eui.eu/bitstream/handle/1814/64967/LAW_2019_05.pdf?sequence=1&isAllowed=y (20/3/2023), p. 16; *Bugarič*, in: Bignami (ed.), pp. 484–485.

73 *Mendelski*, The EU's Rule of Law Promotion in Central and Eastern Europe: Where and Why Does It Fail, and What Can Be Done About It?, Global Rule of Law Exchange Practice Notes, Bingham Centre for the Rule of Law, London, available at: https://binghamcentre.biicl.org/ruleoflawexchange/documents/190_180216_mendelski.pdf?showdocument=1 (20/3/2023), pp. 5 ff.; *Bugarič*, Int. J. Const. Law, 2015/1, p. 234.

74 *Halmai*, Illiberalism in East-Central Europe, 2019, available at: https://cadmus.eui.eu/bitstream/handle/1814/64967/LAW_2019_05.pdf?sequence=1&isAllowed=y (20/3/2023), p. 28.

75 For a critical comment on the CJEU's ruling regarding the conformity with EU primary law of the Council's redistribution decisions of 6 September 2017, CJEU, joined cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council,* ECLI:EU:C:2017:631, paras. 283 ff.; see *Nettesheim*, in: De Lucia/Wollenschläger (eds.), pp. 7, 14 f.; in favour of this ruling *Blanke*, in: De Lucia/Wollenschlägel (eds.), p. 59 ff.

76 *Szczerbiak*, How is the European migration crisis affecting Polish politics?, LSE Blog, 6/7/2017, available at: https://blogs.lse.ac.uk/europpblog/2017/07/06/european-migration-crisis-affecting-polish-politics/ (20/3/2023).

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I. Interferences with the Independence of the Judiciary

The requirement of judicial independence has become a divisive issue in the European value-system. In its settled case law, the Court of Justice has emphasised that this requirement is part of the essence of the right to effective judicial protection and of the fundamental right to a fair trial pursuant to Art. 47 (2) CFREU.[77]

The Commission has raised particular concerns about the independence of the judiciary in a number of Member States, in particular Hungary, Bulgaria and Slovakia.[78] In Poland, the increasing influence of the executive and legislative branches on the judiciary remains a source of serious concern, as the independence and impartiality of the Disciplinary Chamber of the Supreme Court and the Constitutional Tribunal continue to be subject to dispute (point B.I.2).[79] A fast-track adoption of legislation continues to be used for structural reforms in various areas consolidating the ruling party's influence, with the most recent peak being the Constitutional Tribunal's ruling that the Polish Constitution takes precedence over the Union law (point B.II). The European Court of Human Rights has also raised several concerns about the impartiality and independence of the judiciary in Poland. [80] At the time of writing, there are 195 applications pending before the Court, highlighting concerns about various aspects of the reform of the Polish judicial system introduced by legislation that came into force in 2017 and 2018. [81]

The fundamental dissent between the Union and Poland and, respectively, Hungary on this issue is the result of the decisions of the Polish and Hungarian legislatures, the national reforms of the appointment procedures for judges of the High Courts, which secure for the governing parties the exclusive right to nominate and replace judges. This is despite the fact that the Polish Constitution guarantees in

77 CJEU, case C-216/18 PPU, *LM.*, ECLI:EU:C:2018:158, para. 48; cf. also *Bingham*, pp. 91 f.: "The right to a fair trial is a cardinal requirement of the rule of law [...] and that fairness means fairness to both sides [...] and independence of judicial decision-makers."; *Spielmann*, in: Elósegui/Miron/Motoc (eds.), pp. 11, 12 f.

78 This is consistent with the perceived judicial independence in those countries, which according to the EU Justice Scoreboard 2022 remains low (below 30%), see Figures 50 and 52, available at: https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2022.pdf (20/3/2023).

79 See CJEU, case C-791/19, *Commission v Poland,* ECLI:EU:C:2021:596, paras. 80 ff., confirming the disciplinary regime for judges in Poland to be incompatible with Union law.

80 Cf. e.g. ECtHR, Application No. 43572/18, *Grzęda v Poland,* ECLI:CE:ECHR:2022:0315JUD004357218; ECtHR, Application No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland,* ECLI:CE:ECHR:2021:0507JUD000490718; ECtHR, Application No. 43447/19, *Reczkowicz v Poland*, ECLI:CE:ECHR:2021:0722JUD004344719; ECtHR, Application No. 1469/20, *Advance Pharma sp. z o.o v Poland*, ECLI:CE:ECHR:2022:0203JUD000146920; ECtHR, Application No. 39650/18, *Żurek v Poland*, ECLI:CE:ECHR:2022:0616JUD003965018; ECtHR, Application No. 35599/20, *Juszczyszyn v Poland* (communicated).

81 The Court has decided that all current and future applications concerning complaints about various aspects of the reform of the judicial system in Poland should be given priority, cf. Press release ECHR 379 (2022) of 7 December 2022, available at: https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22379%20(2022)%22],%22sort%22:[%22kpdate%20Descending%22]} (20/3/2023).

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nine provisions[82] the judicial independence as a legal guarantee or, respectively, a principle of judicial organisation. The same holds true for the Hungarian Constitution, passed in 2011 with the two-thirds majority of the national-conservative governing coalition of Fidesz – Hungarian Civic Alliance and Christian Democratic People's Party, which contains two such provisions.[83]

Due to the political leadership's disregard for the substantial requirements of effective fundamental rights protection and its institutional backing, the national constitutions of certain Member States with illiberal tendencies risk degenerating into pure façades because they no longer determine legal reality. This shows how thin the patina of shared European values is even within the European community of States. According to the communitarian approach to the European political identity, the 'thin' universal values of democracy, rule of law and respect for human rights are not sufficiently strong to sustain the legitimacy of a democratic polity at the post-national level.[84] What is needed now in the Union is "a thick conception of the common good".[85]

1. Appointment of Judges to High Courts

Partisan factors likewise may not be entirely ruled out in other national procedures for the nomination of judges. In Germany, for example, the *Bundestag* and the *Bundesrat* each elect half of the judges of the Federal Constitutional Court (*Bundesverfassungsgericht*) in accordance with Art. 94 (1) of the Basic Law. Judges are elected by a two-thirds majority by the *Bundesrat* in plenum and public session (Sect. 7 BVerfGG). Since 2015 the *Bundestag* elects the judges of the Federal Constitutional Court *directly* by a two-thirds majority without prior debate by secret ballot on the proposal of its selection committee, which is composed of twelve deputies (Sect. 6.1 and 2 BVerfGG).[86] According to the principle of proportional representation, its composition should reflect that of the plenary as far as possible. After being elected,

82 Art. 45, 173, 178 (1), 178 (3), 186 (1), 186 (2), 195.1 and 195 (3), and 199 (3) of the Polish Constitution of 1997.

83 Art. XXVIII para. 1 (within the chapter on "Freedom and Responsibility") and Art. 26 (1) (within the chapter on "Courts") of the Hungarian Constitution of 2011.

84 For *Bellamy/Castiglione's* hybrid conception on the European political identity that would reflect the hybrid characteristics of its polity, the so-called "cosmopolitan communitarianism", see *Bellamy/Castiglione*, in: Archibugi/Held/Kohler (eds.), pp. 152 ff.; *Bellamy/Castiglione*, in: Bankowski/Scott (eds.), pp. 170 ff.; *Bellamy/Castiglione*, in: Eriksen/Fossum (eds.), chapter 4; *Bellamy/Castiglione*, Eur. J. Political Theory 2003/1, pp. 7–34. In contrast to scholars like *Bellamy/Castiglione*, however, the republican/communitarian viewpoint generally regards democracy and demos as concepts limited to nation States, and therefore, not suitable for the European Union.

85 For the thick conception of common good in communitarian approach regarding European constitutionalism see *Olsen*, in: Dobson/Follesdal (eds.), pp. 75 ff.; *Baykal*, p. 40.

86 The indirect election of the constitutional judges by the committee for the selection of judges of the *Bundestag*, as practised before under Sect. 6.1 BVerfGG, was partly objected to as being unconstitutional. For criticism, see e.g. *Eichborn*; *Pieper*, pp. 29 ff.; *Voßkuhle*, in: von Mangoldt/Klein/Starck (eds.), Art. 94, para. 10. But the Federal Constitutional

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the judges are appointed by the Federal President (*Bundespräsident*) (Sect. 10 BVerfGG). Judges at the other federal courts are elected by the Judges Election Committee (*Richterwahlausschuss*), which is composed of 16 ministers of the *Länder* and 16 members elected by the *Bundestag* (Art. 95 (2) of the Basic Law in conjunction with Sect. 1.1 of the Federal Judges Election Act – *Richterwahlgesetz*).[87]

Since this election falls within the competence of the *Bundestag* and the *Bundesrat*, political interests do matter.[88] But a crucial difference compared to the judges election procedure by the Polish *Sejm* (Art. 194 of the Polish Constitution) lies in the fact that the selection committee of the *Bundestag* nominates the candidates as a joint, i.e. cross-party proposal. At the federal level, currently the SPD, CDU/CSU, Bündnis 90/Die Grünen (Alliance 90/The Greens) and the FDP assign the 16 judgeships at the Federal Constitutional Court on a quasi-proportional basis to strong candidates (Art. 33 (2) of the Basic Law) qualified to hold the position of a judge (Sect. 3.2 BVerfGG). The impact of the multi-party democracy (Art. 21 (1) of the Basic Law) on this selection and election process is apparent from the fact that the suitable candidate must also have shown in his previous activities a close connection to the basic political orientations of the party nominating him for this high judicial office through its deputies in the Federal Parliament. The criteria for selecting and electing the judges to be chosen by the *Bundesrat* are comparable.

Another example of party-political influence in the appointment of judges to High Courts can be found in the USA, where federal judges are appointed by the US President and must be confirmed by a majority vote of the US Senate (Art. II, Section 2, clause 2 of the US Constitution).[89] This, too, happens to be a highly contested political process, as evidenced most recently by the nomination of conservative US Supreme Court Justice *Amy Vivian C. Barrett* to succeed the deceased US Supreme Court Justice *Ruth Bader Ginsburg* by former US President *Donald*

Court has confirmed the provision of Sect. 6 of the Federal Constitutional Court Act as being in conformity with the Basic Law and has pointed out in this respect: "It is constitutionally unobjectionable that the German Bundestag choses the judges of the Federal Constitutional Court […] by indirect election through a selection committee consisting of twelve deputies (§ 6 BVerfGG)." Cf. BVerfG, 2 BvC 2/10, paras. 9 ff.

87 According to Art. 95 (2) of the Basic Law in conjunction with Sect. 1 (1) of the Federal Judges Election Act (*Richterwahlgesetz*), the judges of the federal courts "shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent *Land* ministers and an equal number of members elected by the Bundestag." Cf. *Wissenschaftliche Dienste des Deutschen Bundestages*, WD 7 – 3000 – 098/17, available at https://www.bundestag.de/resource/blob/526458/fd60a319fbbde8e8813708f0b199d9ce/wd-7-098-17-pdf-data.pdf (20/3/2023); *Groß,* Die institutionelle Unabhängigkeit der Justiz in Deutschland – ein Defizitbefund, 2019, available at https://verfassungsblog.de/die-institutionelle-unabhaengigkeit-der-justiz-in-deutschland-ein-defizitbefund/ (20/3/2023).

88 Regarding objections to the institutional independence of the judiciary in Germany, see *Terhechte*, EuR 2020/6, pp. 569, 594 f. with further references in fn. 167.

89 According to Art. II, Sect. 2, clause 2 of the US Constitution, the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint […] Judges of the supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law."

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Trump in September 2020. Lifetime appointments of judges not only affect the US Supreme Court's jurisprudence beyond the term of office of a US President but can also have a lasting impact on the political guidelines of the US administration.

2. Other Political Influences on the Polish Judiciary

In Poland, the ruling PiS party, after winning the presidential elections and obtaining a parliamentary majority in 2015, has severely eroded the foundations of liberal democracy. In particular, the independence and impartiality of the Disciplinary Chamber of the Supreme Court and the Constitutional Tribunal have been called into question, threatening to turn the rule of law into a hollow façade. Judicial autonomy has been systematically undermined by legislative amendments relating to the Act on the Supreme Court and the Constitutional Tribunal, including forced retirements, a disciplinary regime for judges and similar measures affecting the status and composition of these institutions.[90]

Over a period of time, several supposed "reforms" have been adopted that affect the functioning of courts at all levels, from the Constitutional Tribunal to the Supreme Court, the ordinary courts, the administrative courts, the National Council for the Judiciary (NCJ) and the Public Prosecutor's Office. While it is well beyond the scope of this analysis to elaborate on all aspects of the judicial reforms since 2015, it is important to identify the main amendments and their consequences for the independence and impartiality of the Polish judiciary.[91]

Starting with the new Act on the Constitutional Tribunal amending the appointment of judges, those judges previously duly appointed were removed from office while the *Sejm* has chosen other judges in their stead. Despite the Constitutional Tribunal (under its former justices) declaring this act to be unconstitutional, the government refused to publish that ruling on the grounds that it had no legal validity. By additionally shortening the term of office of the President and Vice-President of the Tribunal, the PiS ultimately succeeded in altering the composition of the Constitutional Tribunal in favour of politically loyal judges.[92]

In another step, the Act on the Public Prosecutor's Office provided the basis for merging the office of the Minister of Justice with that of the Public Prosecutor-General, which led to concerns about the authority to issue directives and the transfer of public prosecutors.[93] With reference to the need to de-communise and restore pub-

90 *Bugarič*, in: Bignami (ed.), pp. 485 ff.

91 For a detailed overview of developments in Poland with regard to the rule of law since 2015, see *Halmai*, Illiberalism in East-Central Europe, 2019, available at: https://cadmus.eui.eu/bitstream/handle/1814/64967/LAW_2019_05.pdf?sequence=1&isAllowed=y (20/3/2023), pp. 26 f.; *Sadurski*, pp. 17 ff.

92 *Niklewicz,* European View 2017/16, p. 282; *Sadurski,* p. 19; *Wyrzykowski*, HJRL 2019/11, p. 417; *Gajda-Roszczynialska/Markiewicz*, HJRL 2020/12, p. 457.

93 *Venice Commission*, Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, CDL-

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lic faith in the judiciary,[94] further reforms were carried out, targeting the organisation and functioning of the Supreme Court, the NCJ, the ordinary courts and the National Judicial School. The combined effect of these acts has been characterised as a threat to the independence of the judiciary.[95]

The ruling government continued to pursue its court packing plan, enacting legislation on the judiciary in 2017 that introduced a new retirement scheme for judges.[96] The Law on Ordinary Courts and the Law on the Supreme Court notably lowered the general retirement age of judges from 70 to 65 years. Any prolongation may only be granted upon the approval of the President. This measure prompted approximately 40% of judges into early retirement, providing the possibility for the Polish President to appoint new judges on the recommendation of the newly constituted NCJ.[97] This is highly worrying as the NCJ has increasingly suffered a loss of credibility owing to the fact that its members are elected by the *Sejm*, its recommendations certainly not being aimed at strengthening an autonomous and self-confident judiciary.

The Commission has initiated infringement proceedings against Poland on the grounds that the newly introduced retirement regulations for judges violate Art. 19 (1) (2) TEU in conjunction with Art. 47 CFREU, i.e., the right to an effective remedy and a fair trial.[98] The CJEU has confirmed that the retirement legislation is contrary to Union law in that the new regulations on the retirement age of judges, read together with the novel rules on the possible prolongation of the service period, are incompatible with the requirements of the independence of judges. It, therefore, issued two interim orders for the immediate suspension of the application of the measures in question.[99]

AD(2017)031, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e (20/3/2023), para. 14.

94 The government has justified the reforms on the grounds of low public confidence in the judiciary, which is related to the generally low level of trust in the legal system, the inefficiency of legal proceedings and the fact that the Polish judiciary has not accounted at all for its communist past. For a detailed discussion, see https://www.statewatch.org/media/documents/news/2018/mar/pl-judges-association-response-judiciary-reform-3-18.pdf (20/3/2023).

95 *Śledzińska-Simon*, GLJ 2018/7, p. 1852; *Pech/Wachowiek/Mazur*, HJRL 2021/13, p. 5.

96 *Matczak*, Poland's Constitutional Crisis: Facts and Interpretations, FLJS Policy Brief, available at: https://www.fljs.org/polands-constitutional-crisis-facts-and-interpretations (20/3/2023), pp. 2 ff.

97 *Bodnar,* JöR, 2018/1, p. 649; *Wyrzykowski*, HJRL 2019/11, p. 417; *Sadurski,* p. 40; *Venice Commission*, Poland – Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, CDL-AD(2017)031, para. 90.

98 *Wróblewska*, in: Drinóczi/Bień-Kacała (eds.), p. 145; *Pech/Wachowiek/Mazur*, HJRL 2021/13, pp. 13, 28; *Bossong*, p. 3; *European Commission*, Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final, p. 3.

99 CJEU, case C-619/18, *Commission v Poland,* ECLI:EU:C:2019:531, paras. 108 ff., and CJEU, case C-192/18, *Commission v Poland*, ECLI:EU:C:2019:924, paras. 58 ff., 98 ff. Legal scholars argue that the legislative act lowering the retirement age of Supreme Court

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On top of that, the President of the Supreme Court has been replaced by a PiS affiliated candidate.[100] In this context, two new chambers were established at the Supreme Court, the Disciplinary Chamber, and the Extraordinary Appeals and Public Affairs Chamber, both of which are made up of new judges appointed at the request of the NCJ.[101] The gradual dismantling of the independence and impartiality of the judiciary has been accompanied by a judicial disciplinary regime (the so-called Muzzle Act) imposed in 2019, the aim of which is to keep judges subservient to the political will of the government. Within this framework, judges could face disciplinary investigations, proceedings and sanctions relating to the content of judicial decisions, for example, deciding to refer questions to the Court of Justice in Luxembourg for preliminary rulings.[102]

Judges are further obliged to disclose personal information such as their membership in associations. They may not challenge the legality of judicial appointments or the authority of a judge to perform judicial duties.[103] In this way, any critical voices are suppressed. This prompted the Commission to open another infringement procedure against the disciplinary regime for judges, arguing that it erodes the judicial independence of Polish judges and fails to provide the necessary safeguards to protect judges from political interference (Art. 19 (1) (2) TEU).[104] Acting upon a request for interim measures, the CJEU again ruled in favour of the Commission and ordered the immediate suspension of the application of the provisions concerning

judges is a violation of the principles of judicial independence and the principle of the irremovability of judges; cf. *Spielmann*, in: Elósegui/Miron/Motoc (eds.), p. 9.

100 Following the amendment, the Minister of Justice shall enjoy full authority over the appointment and dismissal of court presidents as well as employees in key positions in the courts. Cf. *Bodnar*, JöR, 2018/1, p. 647.

101 *Gajda-Roszczynialska/Markiewicz,* HJRL 2020/12, p. 458 f.; *Pech/Wachowiek/Mazur*, HJRL 2021/13, p. 9; *European Commission*, Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final, pp. 4–5; *Venice Commission*, Poland – Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 January 2020, CDL-AD(2020)017, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)017-e (20/3/2023), paras. 8–11.

102 The so-called 'Muzzle Act' extends the disciplinary responsibility of judges. As a result, it prohibits judges from ensuring compliance with the right to a fair trial and guaranteeing the rights deriving from the Treaties, including effective legal protection. For further information see https://ruleoflaw.pl/extraordinary-control-and-public-affairs-chamber-to-euthanise-the-supreme-courts-own-resolution/ (20/3/2023).

103 *Gajda-Roszczynialska/Markiewicz*, HJRL 2020/12, p. 461; *Pech/Wachowiek/Mazur*, HJRL 2021/13, p. 3; *European Commission*, Country Chapter on the rule of law situation in Poland, SWD(2020) 320 final, pp. 6–7; *Venice Commission*, Poland – Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 January 2020, CDL-AD(2020)017, para. 11.

104 *Gajda-Roszczynialska/Markiewicz*, HJRL 2020/12, p. 455; *Bossong*, p. 3; *Pech/Wachowiek/Mazur*, HJRL 2021/13, p. 29.

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the powers of the Disciplinary Chamber of the Supreme Court in relation to disciplinary proceedings against judges.[105]

II. The Judgment of the Polish Constitutional Tribunal of 7 October 2021

A consequence of the loss of judicial independence may be seen in the decision of the Polish Constitutional Tribunal of 7 October 2021. Acting upon a motion by Prime Minister *Mateusz Morawiecki*, who appealed to the Tribunal to review the judgment of the CJEU of 2 March 2021 on the primacy of Union law vis-à-vis national constitutional law,[106] the Tribunal ruled in case K 3/21[107] that several core provisions of the EU Treaty (Art. 1 TEU in conjunction with Art. 4 (3) TEU and Art. 19 (1) (2) TEU as well as Art. 2 TEU) were unconstitutional. Prior to this, the Constitutional Tribunal already declared the CJEU's interim orders relating to the organisation of the courts to be incompatible with the Polish Constitution, refusing to implement the order to suspend the activities of the Disciplinary Chamber of the Supreme Court in disciplinary proceedings against judges.[108] Moreover, provisions of the European Convention on Human Rights, in particular Art. 6, have recently been deemed unconstitutional and incompatible with the Polish Constitution.[109] These decisions have serious implications as they call into question the primacy of Union law and the foundations of European integration.[110]

105 CJEU, case C-791/19 R, *Commission v Poland,* ECLI:EU:C:2020:277, paras. 80 ff., 134 ff., 187 ff., 222 ff.

106 Cf. CJEU, case C-746/18, *Prokuratuur,* ECLI:EU:C:2021:152, paras. 45, 59 (on the primacy of Union law).

107 The motion has been triggered by recent judgments of the CJEU, which found some alterations to the Polish judicial system to be incompatible with Union law. See the CJEU's judgement of 2 March 2021 (CJEU, case C-824/18, *A.B. and Others,* ECLI:EU:C:2021:153, para. 169), in which it ruled that the current national procedure for selecting judges was not compatible with Union law. Cf. *Letowska,* The Honest (though Embarrassing) Coming-out of the Polish Constitutional Tribunal, 2021, available at: https://verfassungsblog.de/the-honest-though-embarrassing-coming-out-of-the-polish-constitutional-tribunal/ (20/3/2023).

108 Cf. *European Commission,* 2021 Rule of Law Report – the rule of law situation in the European Union, COM(2021) 700 final, p. 22.

109 For a detailed description of the judgement, see https://notesfrompoland.com/2022/03/10/part-of-european-human-rights-convention-inconsistent-with-polish-constitution-rules-top-court/ (20/3/2023). The judgment can be seen as a reaction to the ECtHR's judgment in ECtHR, Application No. 4907/18, *Xero Flor w Polsce sp. z o.o. v Poland,* ECLI:CE:ECHR:2021:0507JUD000490718, paras. 165 ff., 186 ff., 243 ff. The Court ruled that there was a violation of the right to a fair trial and the right to a tribunal established by law (Art. 6). Additionally, the ECtHR found a violation of Art. 6 (1) ECHR owing to the absence of judicial remedies on the premature termination of the judge-membership of the NCJ (ECtHR, Application No. 43572/18, *Grzęda v Poland,* ECLI:CE:ECHR:2022:0315JUD004357218, paras. 257 ff.).

110 *Bárd/Bodnar*, The End of an Era. The Polish Constitu-tional Court's Judgment on the Primacy of EU Law and its Effects on Mutual Trust, 2021, available at: https://www.ceps.eu/download/publication/?id=34395&pdf=PI2021-15_The-end-of-an-era_The-Polish-Constitutional-Courts-judgment-on-the-primacy-of-EU-law-and-its-effects-on-mutual-trust.pdf (20/3/2023), p. 1; *Bainczyk*, EuR 2022/5, pp. 647 ff.

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The principle of the primacy of Union law forms an inherent part of the Union's legal order. First established in the *Costa v E.N.E.L.* case[111] in 1964, it was confirmed by the judgment in the *Internationale Handelsgesellschaft* case[112] and later "recalled" by the Intergovernmental Conference in Declaration No. 17 annexed to the Lisbon Treaty.[113] In essence, it entails that in the event of conflict, the application of Union law shall prevail over national law, i.e. national law shall remain in force, but shall cease to apply to the extent and for as long as it conflicts with Union law (primacy of application). In this vein, respect for the rule of law requires Union law to have primacy over national legislation and the judgments of the CJEU to be binding on all Member States.[114]

While there have been several cases where courts have challenged judgments of the CJEU on the grounds that it acted *ultra vires*, prompting the Commission to initiate infringement proceedings for breaches of the principle of the primacy of Union law,[115] the Polish Constitutional Tribunal's decision clearly takes a hitherto unprecedented direction, in which not secondary Union law but essential norms of primary Union law are at stake.[116] In particular, the CJEU has been accused of exceeding its competencies in interpreting Treaty provisions, thereby substantially in-

111 ECJ, case 6-64, *Costa v E.N.E.L.*, ECLI:EU:C:1964:66, pp. 1270 f.

112 ECJ, case C-11/70, *Internationale Handelsgesellschaft,* ECLI:EU:C:1970:114, para. 3.

113 Consolidated version of the Treaty on the Functioning of the European Union – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – 17. Declaration concerning primacy, OJ C 115 of 9/5/2008.

114 Cf. *European Commission,* 2021 Rule of Law Report – the rule of law situation in the European Union, COM(2021) 700 final, p. 22; *Bossong*, pp. 3–4.

115 In June 2021, the Commission initiated infringement proceedings against Germany for violating the principle of the primacy of Union law. This was in connection with the Federal Constitutional Court's ruling of May 5th, 2020, which found the ECB's bond purchases partially unconstitutional. However, the Commission recently closed the infringement proceedings. For the situation in Germany resulting from the early closure of the infringement proceedings, refer to the statement by the Federal Government summarized by the European Commission in a press release of 2 December 2021. According to this statement, the German government "with explicit reference to the [...] duty of loyal cooperation [undertakes] to use all means at its disposal to actively avoid a repetition of an ultra vires finding [by the BVerfG] in the future" (available at https://germany.representation.ec.europa.eu/news/vertragsverletzungsverfahren-im-dezember-eu-kommission-stellt-verfahren-gegen-deutschland-wegen-ezb-2021-12-02_de (20/3/2023)). *Hain/Ferreau*, Auf heiklem Terrain, Verfassungsblog, 30/12/2021, available at: https://verfassungsblog.de/auf-heiklem-terrain/ (20/3/2023), interpret this "obligation" in a way consistent with the constitution in the sense that the federal government "only wanted to promise the use of means that preserve judicial independence [Art. 97 (1) GG]." But even then, in the authors' view, constitutional doubts remain with regard to the BVerfG's possible approval of such a declaration by the federal government. See also *Giegerich*, All's well that ends well? – European Commission closes infringement procedure against Germany on PSPP judgment of the Federal Constitutional Court, Saar Brief, 3/12/2021, available at: https://jean-monnet-saar.eu/?page_id=125638 (20/3/2023). On other aspects of judicial independence in the enforcement of Union law in Germany, see *Terhechte*, EuR 2020/6, pp. 588 f.

116 *Thiele*, Whoever equates Karlsruhe to Warsaw is wildly mistaken, Verfassungsblog, 10/10/2021, available at: https://verfassungsblog.de/whoever-equals-karlsruhe-to-warsa

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fringing national competencies enshrined in the Polish Constitution and disregarding respect for state sovereignty.[117] Despite considerable differences compared to the decision of the Federal Constitutional Court of 5 May 2020, ruling out (for the time being) the primacy of application of the "PSPP" in the German legal order,[118] the decision of the Karlsruhe judges is likely to have triggered a replicating effect.[119]The Constitutional Tribunal's decision drew considerable criticism at both the international and national level. Retired Constitutional Tribunal judges felt compelled to explain the 'lies and misunderstandings' regarding the decision,[120] while the Committee on Legal Sciences of the Polish Academy of Sciences[121] released a resolution criticising the Constitutional Tribunal's decision which seeks to legitimise the unlawful amendments to the Polish judicial system implemented since 2015. In a similar vein, the deans of law faculties of Polish universities issued a statement saying that the Constitutional Tribunal's conclusion "was made in violation of the Constitution of the Republic of Poland, with the participation of persons not authorised to adjudicate and in fact exceed the scope of cognition of the Constitutional Tribunal, which does not include the control of judicial decisions, including decisions of the Court of Justice of the EU".[122]

In his statement before the European Parliament, Prime Minister *Mateusz Morawiecki* defended the Constitutional Tribunal's decision, stressing that it was neces-

w-is-wildly-mistaken/ (20/3/2023); *Bárd/Bodnar*, The End of an Era. The Polish Constitu-tional Court's Judgment on the Primacy of EU Law and its Effects on Mutual Trust, 2021, available at: https://www.ceps.eu/download/publication/?id=34395&pdf=PI2021-15_The-end-of-an-era_The-Polish-Constitutional-Courts-judgment-on-the-primacy-of-EU-law-and-its-effects-on-mutual-trust.pdf (20/3/2023), p. 3. The Polish Constitutional Tribunal has already challenged the Union's legal order in various judgments, e.g., cases K 6/21, P 7/20, K 3/21, K 5/21, K 8/21, Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union.

117 *Wójcik*, Legal PolExit, available at: https://ruleoflaw.pl/legal-polexit-julia-przylebskas-constitutional-tribunal-held-that-cjeu-judgments-are-incompatible-with-the-constitution/ (20/3/2023); *Swiecicki*, Why is the Decision of the Constitutional Tribunal such a Threat to the Rule of Law?, available at https://ruleoflaw.pl/why-is-the-decision-of-the-constitutional-tribunal-such-a-threat-to-the-rule-of-law/ (20/3/2023).

118 Cf. BVerfGE 154, 17 (234 f.). For similarities and differences between the two decisions, see *Wissenschaftliche Dienste des deutschen Bundestages*, *WD 3 – 3000 – 179/2*, pp. 11 f. According to this ruling, the Federal Constitutional Court only demanded selective corrections in a field of the ECB's previous policy that will hardly be relevant in the future.

119 Cf. *Blanke/Pilz*, EuR 2020/3, p. 295; for a different view, see *Riedl*, Die Ultra-vires-Kontrolle als notwendiger Baustein der europäischen Demokratie, Verfassungsblog, 12/6/2021, available at: https://verfassungsblog.de/ultra-vires-pspp/ (20/3/2023).

120 Retired Constitutional Tribunal's judges explain lies and misunderstandings regarding the K 3/21 decision, available at: https://ruleoflaw.pl/constitutional-tribunal-biernat-letowska-k-3-21-poland/ (20/3/2023).

121 Committee of Legal Sciences of the Polish Academy of Sciences resolution on the Constitutional Tribunal's ruling of 7 October, available at: https://ruleoflaw.pl/committee-of-legal-sciences-of-the-polish-academy-of-sciences-resolution-on-the-constitutional-tribunals-ruling-of-7-october/ (20/3/2023).

122 Statement of Deans of Law Faculties of Polish Universities regarding the Constitutional Tribunal's conclusion of 7 October 2021 in case K3/21, available at: https://ruleoflaw.pl/statement-of-deans-of-law-faculties-k3-21/ (20/3/2023).

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sary to raise “the question as to whether the monopoly of the Court of Justice to define the actual limits of entrusting these competences is the proper solution”. For this reason, “someone must also express an opinion on the constitutionality of such new, possible competences, especially when the Court of Justice introduces more and more new competences of EU institutions from the treaties”. He further reiterated that “supreme law of the Republic of Poland is the Constitution. It precedes other sources of law. No Polish court, no Polish parliament and no Polish government can depart from this principle.”[123]

The fact is that the Tribunal’s decision, after having been published in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), has acquired binding character, increasing the pressure on judges to comply with the ruling. Judges failing to do so continue to face disciplinary proceedings. The Constitutional Tribunal has been deprived of its function as guardian of the rule of law, rendering it merely a body to enforce the political will of the government.[124]

What is worse, the ruling not only jeopardises the very foundations of the Union but also imposes practical obstacles on Polish judges when applying Union law, compromising individuals’ right to an effective remedy and access to impartial and independent courts (Art. 47 (2) CFREU).[125] It is in light of this that Poland has been facing major backlash from the Commission having launched infringement proceedings for undermining Union law and the independence of the Polish judiciary.[126] The question remains whether the Polish government will resort to the "independence" of the Constitutional Tribunal in these proceedings. In February, the Commission decided to refer Poland to the Court of Justice for breaches of EU law by the Polish Constitutional Tribunal and its case law.[127]

123 The complete statement can be found at: https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament (20/3/2023).

124 *Bárd/Bodnar*, The End of an Era. The Polish Constitu-tional Court’s Judgment on the Primacy of EU Law and its Effects on Mutual Trust, 2021, available at: https://www.ceps.eu/download/publication/?id=34395&pdf=PI2021-15_The-end-of-an-era_The-Polish-Constitutional-Courts-judgment-on-the-primacy-of-EU-law-and-its-effects-on-mutual-trust.pdf (20/3/2023), p. 3.

125 With regard to the importance of Art. 19 (1) TEU in conjunction with Art. 47 CFREU as a subjective right to an effective remedy and to a fair trial in the CJEU’s case law, see CJEU, case C-487/19, *Procurator*, ECLI:EU:C:2021:798, paras. 107 f., 124-126, with reference to the ECtHR’s case law (para. 124); the Court regards the right to the lawful judge as an element of the right to a fair trial (para. 126). See also *Terhechte*, EuR 2020/6, pp. 571, 592.

126 For further information, see https://www.dw.com/en/eu-starts-new-legal-action-against-poland-over-rule-of-law/a-60220102 (20/3/2023).

127 Cf. *European Commission*, The European Commission decides to refer POLAND to the Court of Justice of the European Union for violations of EU law by its Constitutional Tribunal, Press release of 25/2/2023, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842 (20/3/2023).

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C. Union Measures against the Rule of Law Violations in Poland and Hungary

Being alarmed at the deterioration of democracy and the rule of law in its Member States, the EU has been actively involved in establishing legal instruments and procedures to uphold and enforce the rule of law in its Member States.[128] The imposition of sanctions and suspension of EU funds, albeit *ultima ratio*, appears to be the most effective remedy for bringing a Member State into line with the rule of law.[129] One of the Union's instruments to respond to these developments is the EU Recovery and Resilience Facility (RRF).[130] It aims to promote reform and investment and to mitigate the socio-economic consequences of the covid-19 pandemic. The Regulation provides that payment of all or part of the financial contribution and, where applicable, of the loan can be suspended if the Commission establishes that the milestones and targets agreed in the Member States' national recovery and resilience plans have not been satisfactorily fulfilled (Art. 24 (6)). The suspension shall only be lifted if the Member State concerned has taken the necessary measures to ensure fulfilment of the milestones and targets set out in the Council implementing decision (Art. 19 (1) in conjunction with Art. 20 (1) of Regulation (EU) 2021/241). Therefore, when Poland submitted its national recovery and resilience plan in May 2021, the Commission did not forward the necessary proposal to the Council for determining whether the conditions for disbursement were met. The Commission pointed in particular to the rule of law deficits in the Polish judiciary.

Art. 260 TFEU recognises the Court of Justice's competence to impose a lump sum or penalty payment at the request of the Commission in cases where Member States have failed to comply with a judgment of the CJEU. In October 2021, the CJEU imposed a daily fine of EUR 1 million on Poland for failing to suspend the disciplinary regime for judges introduced in the course of its judicial reforms. However, Poland has not yet been willing to pay this fine, as well as the daily EUR 500,000 penalty for not closing a lignite mine on the Czech border.[131] In response, the Commission first decided to withhold EU funds for Poland to cover the first part of the unpaid fines. This "recovery by offsetting" is a common tool in the enforcement of sanctions.[132] As Poland is one of the largest net recipients of EU funds, the strategy of withholding funds already seems to be increasing the pressure on the incumbent government. This effect could be further reinforced by the Rule of Law Conditionality Regulation. The Commission considers the suspension of EU-funded programs ("freezing") in light of the CJEU ruling of 16 February 2022,

128 *Hilf/Schorkopf*, in: Grabitz/Hilf/Nettesheim (eds.), Art. 2 EUV, para. 47; *Calliess*, in: Calliess/Ruffert (eds.), Art. 2 EUV, para. 34.

129 Stäsche, ZEuS 2021/4, pp. 561 ff.

130 Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Facility (RRF Regulation), OJ L 57 of 18/2/2021, p. 17.

131 Cf. *Sánchez Nicolás*, Poland to pay Czech Republic €45m in coal mine settlement, available at: https://euobserver.com/green-economy/154287 (20/3/2023).

132 Cf. in this respect Art. 102 of the Financial Regulation as well as ECJ, case C-87/01 P, *Commission v CCRE,* ECLI:EU:C:2003:400, para. 56.

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also in the case of rule of law breaches in Hungary, to be an appropriate means to induce the government to reform.

Despite the lack of effective implementation of the respective CJEU and ECtHR rulings, the Commission proposed to the Council in early June 2022 to approve Poland's national recovery and resilience plan within the framework of the Recovery and Resilience Facility;[133] the Council decided to follow the proposal.[134] Before, the Polish government had announced its willingness to reform the disciplinary regime regarding judges, to abolish the Disciplinary Chamber of the Supreme Court and to initiate review proceedings for those judges affected by decisions of the current Disciplinary Chamber.[135] In particular, Poland has agreed to submit all disciplinary cases and decisions to an independent and impartial court. This ought to encompass cases in which judges are subject to disciplinary proceedings for submitting a preliminary request to the Court of Justice or for assessing whether another court is deemed to be independent and impartial, as well as cases brought before the Disciplinary Chamber for reviewing the content of their judicial decisions because the latter do not "conform to political preferences".

These benchmarks, described by the Commission as "milestones" for Poland's realignment with the European rule of law, are intended to enable the disbursement of EUR 23.9 billion in grants and EUR 11.5 billion loans under the EU's Recovery and Resilience Facility. Speaking at the European Parliament on 7 June 2022, Commission President *von der Leyen* explained that approval of the Polish Recovery and Resilience Plan would depend on clear commitments from the Polish government regarding the independence of the judiciary. Payments are only to be made once Poland can prove that the necessary measures have been implemented.[136] For that purpose, the *Sejm* adopted amendments to the disciplinary regime for judges. The Act of 9 June 2022 amending the Law on the Supreme Court entered into force on 14 July 2022.

Despite these developments, disciplinary proceedings are still underway against several judges, not to mention that the deposed judges have not been reinstated to

133 *European Commission,* Proposal for a Council implementing decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268. See preceding *European Commission*, Recommendation for a Council Recommendation on the 2022 National Reform Programme of Poland and delivering a Council opinion on the 2022 Convergence Programme of Poland, COM(2022) 622 final.

134 *Council of the EU*, Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland, 9728/22. The document is available at: https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=consil%3AST_9728_2022_INIT (20/3/2023).

135 *European Commission,* 2022 Rule of Law Report – Country Chapter on the rule of law situation in Poland, SWD(2022) 521 final, pp. 6–7.

136 *European Commission,* Proposal for a Council implementing decision on the approval of the assessment of the recovery and resilience plan for Poland, COM(2022) 268, paras. 44–45. For more information, see European *Commission,* NextGenerationEU: European Commission endorses Poland's €35.4 billion recovery and resilience plan, Press release of 1/6/2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_3375 (20/3/2023).

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their offices. On 29 November 2022, the Chamber of Professional Responsibility, which replaced the previous Disciplinary Chamber, rehabilitated the previously dismissed judge *Igor Z. Tuleya*, who is considered the most prominent critic of the Polish judicial reforms. It must be doubted, however, that this decision already marks a turning point in the years-long violation of the independence of Polish judges. Rather, it is likely to take many more years to revoke the personnel changes in Poland as well as in Hungary made in a purely political context, especially those in the judiciary. What is more, judgments and rulings issued by these appointed judges have long since become *res judicata*. Measures that violate the rule of law have implications for the future.

The European Parliament has criticised the move of the Commission and called on the Commission and the Council only to approve the Polish recovery and resilience plan once the recent CJEU and ECtHR rulings have been fully and properly implemented, while ensuring that the assessment of the plan takes into account relevant European Semester country-specific recommendations.[137] Although the recent efforts of the Polish government are encouraging, the mere pledge to ensure respect for judicial independence in future proceedings before the current Chamber of Professional Responsibility cannot remedy the systemic deficiencies of the rule of law in the overall organisation of the judiciary. Disagreements among and within the Union institutions on this approach to Poland likewise account for why the Commission's proposal is seen as running the risk of a "more or less capitulation at the expense of the law";[138] even within the College of Commissioners, five members voted against it or expressed serious concerns.

I. The Art. 7 TEU Instruments and Preventive Strategies

Sanction measures, based on the EU Recovery and Resilience Facility, as well as comparable steps that can be proposed by the Commission to the Council under the Conditionality Regulation (point C.II), are the results of the long-recognised necessity of developing alternative instruments of combating rule of law backsliding. In fact, also in the cases of Poland and Hungary the tool kit provided for by Art. 7 TEU has proven to be largely ineffective.[139]

1. The Commission's Rule of Law Framework (2014)

The Commission, under its former Commissioner for Justice *Viviane A. Reding*, adopted a Rule of Law Framework in 2014,[140] aiming at complementing and pre-

137 Joint Motion for a Resolution on the rule of law and the potential approval of the Polish national recovery plan (RRF), 2022/2703(RSP).
138 Cf. *Mayer*, Die Kapitulation, Verfassungsblog, 2/6/2022, available at: https://verfassungsblog.de/die-kapitulation/ (20/3/2023).
139 *Kochenov*, in: von Bogdandy et al. (eds.), pp. 142 ff.
140 Cf. *European Commission*, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, p. 4.

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venting the initiation of Art. 7 proceedings.[141] The Commission invoked the Framework for the first time in 2016 to engage in a dialogue with Poland.[142] Since entering into dialogue, the Commission has issued a total of four recommendations.[143]

2. The Art. 7 TEU Procedures

Art. 7 TEU provides for the most prominent sanctioning mechanisms which can be deployed to safeguard the values of Art. 2 TEU. It allows the EU institutions and Member States to issue reasoned proposals in cases where there is a clear risk of a serious breach (Art. 7 (1) TEU) or a serious and persistent breach (Art. 7 (2) TEU) by a Member State of the values set out in Art. 2 TEU. Art. 7.3 TEU further foresees a sanction mechanism that can only be invoked following a finding of a serious and persistent breach.[144] Art. 7 (1) TEU has been invoked by the Commission in December 2017 in relation to Poland,[145] and by the European Parliament in September 2018 in relation to Hungary,[146] with remarkably little effect.[147] Discussions have already occurred on reforming Art. 7 TEU to render it a more effective instrument to counteract the backsliding of the rule of law in the Member States.[148] It is, above all, the hitherto required unanimity in the European Council that hinders its efficient implementation.[149] So far, Art. 7 TEU has proven to be a 'paper tiger' incapable of enforcing common European values and restoring mutual trust and the credibility of the Union as a whole.

141 *Baratta*, HJRL 2016/2, pp. 362–363; *Kochenov/Pech,* JCMS 2016/5, p. 1064; *Pech/Scheppele,* CYELS 2017/19, pp. 9 ff.

142 *Kochenov/Pech*, JCMS 2016/5, p. 1069; *Baratta*, HJRL 2016/2, p. 371.

143 Cf. *European Commission*, Recommendation (EU) 2016/1374 of the Commission regarding the rule of law in Poland, OJ L 217 of 12/8/2016, p. 53; *European Commission*, Recommendation (EU) 2017/146 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, OJ L 22 of 27/1/2017, p. 65; *European Commission*, Recommendation (EU) 2017/1520 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146, OJ L 228 of 22/9/2017, p. 19; *European Commission*, Recommendation (EU) 2018/103 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, OJ L 17 of 23/1/2018 p. 50.

144 *Kochenov*, in: von Bogdandy et al., p. 142.

145 *European Commission,* Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final.

146 *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).

147 *Diel-Gligor,* ZRP 2021/2, p. 65.

148 Cf. *European Parliament*, Resolution of 6 June 2022 on the call for a Convention for the revision of the Treaties, 2022/2705(RSP), sub D point 5.

149 *Kochenov/Pech*, JCMS 2016/5, p. 105; *Diel-Gligor*, ZRP 2021/2, p. 65; *Kochenov*, in: von Bogdandy et al. (eds.), p. 143. An abstention under qualified majority voting counts as a vote against. Abstention is not the same as not participating in the vote. Any member can abstain at any time. Cf. https://www.consilium.europa.eu/en/council-eu/voting-system/qualified-majority/ (20/3/2023).

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II. The Conditionality Regulation as a New Tool for the Protection of the Union Budget in the Case of Breaches of the Rule of Law Principle (2021)

While the Common Provisions Regulation (CPR)[150] does not provide for sanctions for breaches of the rule of law, the Union budget has, as of 2021, an additional layer of protection in cases where such breaches risk affecting the EU financial interests: The Rule of Law Conditionality Regulation.[151] It bridges the gap between respect for the rule of law and sound financial management of the Union budget and effective use of the Union funding.[152] This concerns the disbursement of funds from the "NextGenerationEU" programme to allow the necessary reforms mentioned in the country-specific recommendations. Measures under this Regulation can only be proposed if the Commission determines that breaches of the rule of law principles directly affect or seriously risk affecting the sound financial management of the Union budget or of the financial interests of the Union in a sufficiently direct way (Art. 3 Regulation (EU, Euratom) 2020/2092).

1. Actions Brought by Hungary and Poland Before the Court of Justice

The adoption of the Conditionality Regulation was strongly contested by Poland and Hungary who challenged the validity of the regulation by appealing to the CJEU. As a result of the Court's judgments of 16 February 2022 in the cases of *Hungary* and *Poland* contesting Regulation 2020/2092, a clear link can be drawn between deference to the rule of law and the efficient management of the Union's budget. The Court stated "that the EU legislature in no way conferred on the Council and the Commission an unlimited right to assess […] observance of the principles of the rule of law or to link any identified breach of those principles, in a

150 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231 of 30/6/2021, p. 159.

151 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ L 433 I of 22/12/2020, p. 1. For an analysis of the conditionality mechanism in the light of the CJEU's judgments in CJEU, case C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, paras. 128 ff., 231, 242, 244; CJEU, case C-157/21, *Poland v Parliament and Council,* ECLI:EU:C:2022:98, paras. 182, 188, 205, 281 ff. cf. *Diel-Gligor*, ZRP 2021/2, p. 64; *Kölling,* The new conditionality mechanism for the protection of the EU budget: does the CJEU judgment give the all-clear?, 2022, available at: https://www.realinstitutoelcano.org/en/analyses/the-new-conditionality-mechanism-for-the-protection-of-the-eu-budget-does-the-cjeu-judgement-give-the-all-clear/ (20/3/2023).

152 Cf. recital 7 of the Preamble to Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget, OJ L 433 I of 22/12/2020, p. 1.

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general manner, to the principle of sound financial management of Union funds."[153] The complaints of Poland and Hungary were dismissed, potentially subjecting them to suspensions under the Conditionality Regulation.[154]

2. First Application of the Conditionality Regulation to Hungary

A first-time application of the Conditionality Regulation and after the adoption of the Guidelines for the application of the Regulation on 2 March 2022,[155] the Commission, on 18 September 2022, proposed to the Council to take budget protection measures vis-à-vis Hungary. Faced with allegations of corruption and other breaches of the rule of law, the Commission suggested to impose sanctions on Hungary for its breaches of the rule of law amounting to approx. EUR 7.5 billion, i.e. a suspension of 65 percent of the commitments for three operational programmes under cohesion policy within the EU's current seven-year budget (2020-2027).[156]

The Commission outlined 17 remedial measures that Hungary had to meet by 19 November 2022. High priority was placed on combating corruption and ensuring competition and transparency in public procurement, as well as on strengthening the independence of the judiciary.[157] On 30 November 2022, the Commission delivered its assessment on this matter. Despite the (appeasing) measures initiated by Hungary, in particular the setting up of an independent anti-corruption authority ("integrity authority"), the Commission noted that critical shortcomings remain, which threaten to seriously undermine the effectiveness of the measures in practice.[158] This assessment was again confirmed by the Commission in its updated assessment of 9 December 2022. In this context, the Committee of Permanent Representatives (COREPER) decided on 12 December by qualified majority to recommend to the Council to adopt the implementing decision on Hungary under the Conditionality Regulation. Instead of the EUR 7.5 billion proposed by the Commission, however, they settled by compromise on freezing only about EUR 6.3 billion, equivalent to 55 percent of the cohesion funds to be allocated to

153 Cf. CJEU, case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, para. 358.

154 The Conditionality Regulation enables the Commission to impose measures, including the suspension of funds from the Union budget, on Member States that do not respect the principles of the rule of law. Cf. *Diel-Gligor,* ZRP 2021/2, pp. 63 f.

155 *European Commission*, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ C 123 of 18/3/2022, p. 12.

156 For information on the Commission's proposal, see https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623 (20/3/2023). Cf. *Baade*, NVwZ 2023/3, pp. 132 ff.

157 Cf. *Zalan*, Hungary and EU approach year-end showdown on rule of law, EUobserver, 17/11/2022, available at: https://euobserver.com/rule-of-law/156434?utm_source=euobs&utm_medium=email (20/3/2023).

158 *European Commission,* Communication from the Commission to the Council on the remedial measures notified by Hungary under Regulation (EU, Euratom) 2020/2092 for the protection of the Union budget, COM(2022) 687 final, recitals 151–156.

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Hungary.[159] Relative to the total funds Hungary is receiving from the Union, this is said to represent only 18 percent that will be frozen.[160] As requested, the Council adopted the implementing decision by qualified majority on 15 December 2022 (Art. 6 (10) of the Conditionality Regulation).[161]

At the same time, the COREPER came to an agreement on a recommendation to the Council to approve the implementing decision on the Hungarian recovery and resilience plan.[162] Like Poland, Hungary had submitted its national recovery and resilience plan in May 2021. Though the plan has been approved in the implementing decision following a proposal by the Commission,[163] the disbursement of funds amounting to around EUR 5.8 billion will be withheld until the Hungarian government has implemented the 27 so-called "super-milestones". The 17 remedial measures are to be understood as part of this package of measures. The application of such measures is guided by the principle of proportionality.[164] To make further resources from these funds available to Hungary, national measures are needed which „put an end to the breaches of the principles of rule of law and/or to the risks they create for the EU budget and the Union's financial interests".[165]

3. Balancing the Rule of Law With Other National and Union Interests?

It is evident that the EU has so far not been capable of countering rule of law violations by means of its ordinary monitoring and enforcement instruments. In view of Poland's persistent intransigence and resistance, this set of instruments fails to unfold

159 *Council of the European Union*, Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary, Press release of 12/12/2022, available at: https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/ (20/3/2023).

160 *Rohac*, The EU is letting itself be blackmailed by Hungary, The Spectator, 15/12/2022, available at: https://www.spectator.co.uk/article/the-eu-is-letting-itself-be-blackmailed-by-hungary/ (20/3/2023); cf. the interview with *Daniel Freund*, MEP Greens, on: EU-Hungary and Corruption in the EP, Deutschlandfunk, 20/12/2022, available at: https://www.deutschlandfunk.de/interview-daniel-freund-mdep-gruene-zu-eu-ungarn-und-korruption-im-ep-dlf-31949043-100.html (20/3/2023).

161 *Council of the European Union*, Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325 of 20/12/2022, p. 94.

162 *Council of the European Union*, Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary, Press release of 12/12/2022, available at: https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/ (20/3/2023).

163 *European Commission*, Proposal for a Council Implementing Decision of 30 November 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, COM(2022) 686 final.

164 Cf. recital 18 of Regulation (EU, Euratom) 2020/2092; cf. also point 44 of the Commission Communication of 2 March 2022 (C(2022) 1382 final) and Art. 10 (4) of RRF Regulation.

165 Cf. *European Commission*, EU budget: Commission proposes measures to the Council under the conditionality regulation, Press release of 18/9/2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_5623 (20/3/2023).

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the desired effect to bring about compliance with the Union's fundamental values. The underlying causes of this inability emanate from the interplay of the fragmented enforcement of the Union's monitoring and compliance instruments, their limited enforceability, as well as their ineffective and inconsistent application vis-à-vis Member States. In addition, a blockade attitude of the actual Polish or Hungarian government in the EU Council, which means a "veto" in areas such as sanctions, the so-called passerelle clauses, and emergencies, could considerably hinder further decision-making processes, especially in areas where unanimity is required, i.e. in the areas of common foreign and security policy and tax policy. Earlier, on 12 December 2022, *Viktor Orbán* dropped his initial veto at the Committee of Permanent Representatives against the approval of the financial aid package for Ukraine amounting to EUR 18 billion[166] and the introduction of a minimum tax of 15 percent on corporate profits.[167] Refraining from such obstructionist tactics may testify to the Hungarian prime minister's growing awareness that both the Council and the Commission are firmly committed to imposing sanctions on his government. Responding to the initial Hungarian boycott, the Council had also previously halted approval of the EUR 5.8 billion Hungarian recovery and resilience plan for the time being.[168]

In the face of the new wave of refugees that the second Russian war against Ukraine has brought to the EU Member States, one might be inclined to rebalance the relationship between the rule of law and solidarity. On the reception of refugees, Poland has shown a high degree of solidarity with both the Ukrainians and the EU, thus – in contrast to the so-called "refugee crisis" of 2015 – fulfilling the "principle of solidarity and fair sharing of responsibilities among Member States" (Art. 80 TFEU) for the first time since the entry into force of the Lisbon Treaty. However, in fulfilling the Union's mandate of shaping and implementing a value-based policy on a daily basis, there can be – at least regarding the basic issues – no freedom of choice for the Member States in terms of an "either-or". Likewise, the Union budget is considered one of the principal instruments for giving practical effect to the principle of solidarity (Art. 2 TEU).[169] In contrast to the position taken by *Joseph H.H. Weiler*,[170] the rule of law is all too closely linked to the ideas of justice and reasonableness to be (temporarily) compromised for the sake of loyalty to other Union principles.

166 *Zalan,* EU delays Hungary funds decision, as Budapest vetoes Ukraine aid, EUobserver, 6/12/2022, available at: https://euobserver.com/rule-of-law/156515 (20/3/2023).

167 *Council of the European Union*, Council Directive on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, 2021/0433(CNS). The document is available at https://data.consilium.europa.eu/doc/document/ST-8778-2022-INIT/en/pdf (20/3/2023).

168 Cf. *European Commission*, Commission finds that Hungary has not progressed enough in its reforms and must meet essential milestones for its Recovery and Resilience funds, Press release of 30/11/2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_7273 (20/3/2023).

169 Cf. CJEU, case C-157/21, *Poland v Parliament and Council*, ECLI:EU:C:2022:98, para. 129.

170 See *Weiler*, La ley de las consecuencias imprevistas: Rusia, Ucrania y la Unión Europea, El País, 16/3/2022, available at: https://espanol.clonline.org/noticias/prensa/2022/03/16/la-ley-de-las-consecuencias-imprevistas-rusia-ucrania-y-la-unión-europea (20/3/2023).

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Despite the increased political pressure and sanctions mechanisms provided for in Union law, it is questionable whether the precarious rule of law situation in several Member States will be resolved and the conflict between the EU and Poland or Hungary finally settled as long as the incumbent and democratically legitimised governments remain in power. A timely solution towards the full re-establishment of the rule of law is tantamount to squaring the circle. As shown in an exemplary manner in the elections in Hungary in April 2022, when *Viktor Orbán* won his fourth consecutive term in office despite a high national inflation rate reaching 22.5 percent by December 2022, the current political approval of a majority of the population, albeit only marginally, does not suggest any changes in the general political course of the governments in Warsaw and Budapest in the near future. The parliamentary elections in Poland in the fall of 2023 remain to be awaited.

The likelihood of a 'Polexit' or 'Hungarexit' seems low for now. In Poland, despite the government's attempts to undermine EU law, support for EU membership remains strong, partly because of the geopolitical and economic benefits it brings.[171] Paradoxically, however, Polish society continues to vote for a government that systematically seeks to undermine EU law. The government's social welfare policies have secured the support of low-income households, who prioritize socio-economic considerations over the rule of law concerns.[172] Similarly, in Hungary, despite disputes with the EU over issues such as migration policy and the rule of law, the majority of society and the government recognize the importance of EU membership for economic and political stability. The EU's support for Hungary's development and the risks associated with losing access to the single market render departure an unlikely scenario.

While it is certainly true that a perceived decline in a norm may only be a temporary stagnation, and that in some cases contestation may lead to confirmation of the contested norm, [173] this cannot lead the EU to remain in a state of relative complacency when it comes to defending the rule of law. The rule of law is the cornerstone of democracy and essential for the protection of human rights and individual freedoms. It ensures that those in power are held accountable and that citizens have access to justice. Recent challenges to the rule of law within the EU, such as attacks on the independence of the judiciary and the media, demonstrate the need for the EU to step up its efforts to uphold the rule of law. The EU has a responsibility to ensure that the fundamental values of democracy, human rights and the rule of law are respected and protected for all citizens within the Union. This requires a firm commitment to defend these values against all attempts to undermine them.

171 In fact, according to the State of the European Union survey 2021, the EU enjoys a fairly to very positive image in Poland. For more information, see https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer/soteu-flash-survey and the respective national factsheets (20/3/2023).

172 *Bond/Gostyńska-Jakubowska*, Democracy and the Rule of Law: Failing partnership?, Centre for Europan Reform, January 2020, available at: https://www.cer.eu/sites/default/files/pbrief_ruleoflaw_17.1.20.pdf (20/3/2023), pp. 2 f.

173 Cf. *Maluwa*, in: Krieger/Nolte/Zimmermann (eds.), p. 320, with regard to value-based norms on an international scale.

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