Beiträge zum ausländischen öffentlichen Recht und Völkerrecht | 320

Bobek | Bodnar | von Bogdandy | Sonnevend [Eds.]

Transition 2.0

Re-establishing Constitutional Democracy in EU Member States

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https://doi.org/10.5771/9783748914938 https://www.inlibra.com/de/agb - Open Access -

Beiträge zum
ausländischen öffentlichen Recht und Völkerrecht

Edited by

the Max Planck Society
for the Advancement of Science
represented by Prof. Dr. Armin von Bogdandy
and Prof. Dr. Anne Peters

Volume 320

https://doi.org/10.5771/9783748914938 https://www.inlibra.com/de/agb - Open Access -

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Open Access funding provided by Max Planck Society.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

Library of Congress Cataloging-in-Publication Data
Bobek, Michal | Bodnar, Adam | von Bogdandy, Armin | Sonnevend, Pál
Transition 2.0
Michal Bobek | Adam Bodnar | Armin von Bogdandy | Pál Sonnevend (Eds.)
607 pp.
Includes bibliographic references.

ISBN 978-3-7560-0079-1 (Print)
978-3-7489-1493-8 (ePDF)

1st Edition 2023

© The Authors

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-7560-0079-1 (Print)
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DOI https://doi.org/10.5771/9783748914938

Onlineversion
Nomos eLibrary

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Preface

In the logic and the counting of this project, Transition 1.0 was the large-scale political, social, economic, and legal transformation that led to the (re)establishment of constitutional democracy in the countries of Central and Eastern Europe after the fall of the Communist rule, culminating in those countries joining the European Union. The would-be members of the European Union had a number of conditions and requirements to meet in order to join first the Council of Europe, and then the European Union. These included the so-called Copenhagen criteria, later transcribed into Article 2 TEU. Those requirements notwithstanding, the moment of constitutional and legal creation in the early 1990s had been unconstrained by international or EU law. Even if naturally seeking inspiration and assistance from abroad, each country exercised a high degree of local choice as to how to deal with its past, how to resolve internal democratic challenges, and how to shape its constitutional and legal future.

The rule of law decay or outright backsliding in some of those Member States meant not only that some of them ceased to comply with their own constitutional requirements. They equally fell short of their commitments under EU law. This has been observed in different statements and opinions by EU institutions and those of the Council of Europe. Even more importantly, it was equally confirmed in a number of judgments of the Court of Justice of the European Union and the European Court of Human Rights. Case law of both of these judicial bodies, together with documents emanating from different EU institutions, and those of the Council of Europe, OSCE and the UN, has put a number of legal constraints in place. It articulated what type of structural, legal, or judicial changes are not permissible in a State that is bound by EU law or by international human rights treaties.

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Transition 2.0 is a project about the future. Its central question is as follows: assume that the current governments in those Member States are one day defeated in elections to the benefit of democratically and rule of law oriented political parties. What and how may a new government do in order to re-establish constitutional democracy, as well as repair its membership within the European Union, while respecting the previously imposed European and international constraints as to what changes are permissible within a rule of law governed constitutional democracy? In contrast to Transition 1.0, Transition 2.0 is supposed to happen with the States concerned still members of the European Union and the Council of Europe. In the past years, in the context of backsliding, EU law and other international commitments have mostly played the role of constraints to certain types of systemic changes. They can, however, equally offer tools and assistance for facilitating the way back to full constitutional democracy and repaired EU membership. The various contributions in this volume, reflecting the personal views of their respective authors, explore the constitutional, legal, and social framework of such a Transition 2.0.

Brno, Warsaw, Heidelberg, Budapest — Editors
June 2023

https://doi.org/10.5771/9783748914938 https://www.inlibra.com/de/agb - Open Access - (cc) BY

Table of Contents

I. Setting the Frame 11

Matej Avbelj
Approaching Transition 2.0 in a Realist, Structural, Principled and Inclusive Constitutional Manner 13

Jiří Přibáň
The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash 33

Maryhen Jiménez and Dario Castiglione
Reversing Authoritarianism in the EU: Transformative Politics and the Role of Opposition 59

Diego García-Sayán
Authoritarianism, Judicial Independence and Democratic Transition 91

Armin von Bogdandy and Luke Dimitrios Spieker
EU Values as Constraints and Facilitators in Democratic Transitions 113

II. Constitutional Issues 143

András Jakab
How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland* 145

https://doi.org/10.5771/9783748914938 https://www.inlibra.com/de/agb - Open Access - (cc) BY

Mirosław Wyrzykowski
The Constitutional Trap 227

Kim Lane Scheppele
Asymmetric Rupture: Stabilizing Democratic Transitions 2.0 with Transnational Law 249

Zdeněk Kühn
Centralized Judicial Review and the Problem of its 'Over-Centralization' 277

III. Reestablishing the Judiciary 297

Adam Bodnar
Poland After Elections in 2023: Transition 2.0 in the Judiciary 299

David Kosař and Katarína Šipulová
Court-Unpacking: A Preliminary Inquiry 323

Michal Bobek
What Role for Courts in Transforming a Society? A Central European Cautionary Tale 361

Maciej Taborowski
EU Law and Judicial Decisions of National Judges Appointed in Breach of European Standards 383

Pawel Filipek
Defective Judicial Appointments and their Rectification under European Standards 425

Sara Iglesias Sánchez
The Role of the Court of Justice of the EU in Transition 2.0 471

https://doi.org/10.5771/9783748914938 https://www.inlibra.com/de/agb - Open Access - (cc) BY

IV. Deepening the European Dimension 495

Christophe Hillion
Reversing a Member State's Regression and Restoring (its) Union Membership
– EU law as mandatory toolbox of 'Transition 2.0' – 497

Werner Schroeder
Transition 2.0 and Rule of Law-Mainstreaming in the European Union 535

Pál Sonnevend
How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary 563

Angelika Nußberger
The Venice Commission and Constitutional Dilemmas 585

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I.
Setting the Frame

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Approaching Transition 2.0 in a Realist, Structural, Principled and Inclusive Constitutional Manner

Matej Avbelj[1]

I. Introduction 13
II. Constitutional Democracy as a Normative Ideal 18
III. Conducting Transition 2.0 in a Realist, Structural, Principled and Inclusive Constitutional Manner 20
1. Realist Approach to Transition 2.0 22
2. Structural Approach to Transition 2.0 25
3. Principled Approach to Transition 2.0 28
4. Inclusive Approach to Transition 2.0 29
IV. Conclusion 31

Abstract
The purpose of this chapter is to sketch the contours of a theory for a successful transition 2.0 in those EU Member States where the process of constitutional regression has been under way over the last decade or so. The argument proceeds in three steps. First, the normative ideal of a constitutional democracy is detailed to serve as a benchmark against which the quality of the actual legal, economic and political practices in a Member State under study is assessed and whose achievement should be the main goal of the transition 2.0. Second, the chapter explains that the transition 2.0 should be conducted in a realist, structural, principled and inclusive constitutional manner. Part three concludes.
Keywords: constitutional democracy, constitutional regression, rule of law, transition 2.0, theory of constitutional reforms

I. Introduction

The purpose of this chapter is to sketch the contours of a theory for a successful transition 2.0 in those EU Member States where the process of constitutional regression has been under way over the last decade or so. We have therefore espoused an abstract approach, seeking to devise

1 Professor of European Law, Jean Monnet Chair, New University, Slovenia. The research for this paper has benefited from the support by the Slovenian Research Agency (research project An integral theory on the future of the European Union, No. J5–1791), as well as by the EU Jean Monnet Chair (PluralEU).

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principles and arguments that could be generalizable and universalizable to all countries facing the need and the challenge of transition had they been affected by the regression of constitutional democracy. In contrast to the strategic approach, which might be driven more by the normative solutions that work, that would be effective and hence 'good' for the stake-holders responsible for transition, the theoretical take adopted here is concerned with what is 'right', so that a transition shall be widely inter-subjectively regarded as legal, legitimate and just. Preferring the theoretical over the strategic approach nevertheless does not mean that the ensuing treatise will be conducted in empirical void.

To the contrary, the discussion that follows will be informed by concrete empirical examples from the contemporary EU state of political affairs. As a result, our theory will hence be contextualized, built against the backdrop of practices in those EU Member States, in particular Hungary and Poland, which have in the last decade or even more witnessed a process of definite, deliberate and systemic regression of constitutional democracy and have even prided themselves for that. In so doing, by effectively dropping the commitment to constitutional democracy, certain EU Member States have made themselves qualitatively different from the rest which are not perfect or ideal constitutional democracies either, but they at least remain genuinely committed to this ideal and continue to live up to it to a reasonable extent.

Before describing briefly, in order to prompt our theoretical debate, the kind of practices which have contributed to a systemic regression of constitutional democracy in select EU Member States, it is still necessary to explain another core concept of this chapter, namely the notion of transition 2.0. Transition, as the chapter by Castiglione and Jiménez Morales in this volume, also attests,[2] not only can be conceived of differently already on the very level of theoretical comprehension, it can also be, and indeed it has been, understood unevenly in different socio-political and historical contexts. Speaking of transition 2.0, to which this volume is dedicated, naturally assumes the existence of transition 1.0. The meaning of the latter is, however, undisputable as it stands for a process taking place in the former communist States after the fall of the Berlin Wall when the countries then controlled by the Soviet bloc or taking part in the unaligned movement

2 See Ch 3 in this volume.

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took a conscious decision to break with the communist totalitarian system and transit towards a fully-fledged constitutional democracy.[3]

For the purposes of this chapter, transition 1.0 has thus been a process in which former communist countries were comprehensively transforming themselves into constitutional democracies. While the success of transition 1.0 across the region has varied,[4] the need for transition 2.0 emerged when certain countries not only halted the transition 1.0, but also started rolling its typically not overly robust achievements back. Transition 2.0 is therefore about restoring the state of constitutional democracy in select EU Member States at least to the level constitutional democracy reached in transition 1.0, before the systemic regression kicked in.

The process of systemic regression creating the need for transformation 2.0 has unfolded in several steps. First, constitutional courts have been taken over, packed[5] and hijacked so that they no longer even meet the minimum standard of a tribunal established by the law.[6] The ordinary courts have followed suit. Their presidents have been illegally removed[7] and the tenure of hundreds of judges had been prematurely terminated under the pretext of equalizing the general conditions for retirement.[8] The remaining judges who have opposed this illegal tempering with the independence of the judiciary have been subject to disciplinary proceedings[9] carried out by formally independent bodies, which are de facto packed by the loyalists of the ruling political parties. These same bodies have also played a decisive

3 Wojciech Kostecki, Katarzyna Żukrowska and Bogdan J. Góralczyk, *Transformations of Post-Communist States* (London: Palgrave MacMillan 2000).

4 See, for example, Matej Avbelj, Jernej Letnar Černič and Gorazd Justinek, *The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond* (Oxford: Hart Publishing 2020).

5 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

6 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

7 ECtHR (Grand Chamber), *Baka v. Hungary*, judgment 23 of June 2016, no. 20261/12; Michal Broniatowski, 'Poland's top judge refuses to leave after removal under new law', Politico, https://www.politico.eu/article/polish-president-andrzej-duda-polands-top-judge-supreme-court-refuses-to-leave-after-removal-under-new-law/.

8 ECJ, *Commission v. Hungary*, judgment of 6 November 2012, case no. C-286/12, ECLI:EU:C:2012:687; ECJ, *Commission v. Poland*, judgment 5 of November 2019, case no. C-192/18, ECLI:EU:C:2019:924.

9 ECJ, *Commission v. Poland*, judgment of 15 July 2021, case no. C-791/19 R, ECLI:EU:C:2021:596.

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role in appointing new judges to the courts, casting thus a heavy shadow of doubt on the independence of the judiciary in the longer run.[10]

Similar measures have been adopted in relation to other independent bodies and institutions, whose statutorily protected terms were also ended abruptly, often *ex lege*,[11] so to be replaced by new appointees, presumably loyal to the ruling regime. They were, typically, appointed for a duration exceeding a single parliamentary mandate, in an apparent attempt to consolidate the power of a currently ruling political regime even if the latter was ousted at the next election.[12] Following a political takeover of the institutions of the State, the political regime won control of the public broadcaster as well as sought control over the private media[13] and the civil society.[14] The universities and the academic freedom at large have not escaped unaffected either, especially not in Hungary where a private university was illegally forced out of the country[15] and where under the pretext of improving governance of the higher education institutions by way of privatisation these have also been brought under the control of the influential circles of the ruling regime.[16] Eventually, the ruling regime also penetrated into the corporate world by winning allegiance of private corporations, establishing

10 Kriszta Kovács and Kim Lane Scheppele, The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union, Communist and Post-Communist Studies 51 (2018), 189–200.

11 ECJ, *Commission v. Hungary*, judgment of 8 April 2014, case no. C-288/12, ECLI:EU:C:2014:237.

12 Miklós Bánkuti, Kim Lane Scheppele and Gábor Halmai, 'Hungary's Illiberal Turn: Disabling the Constitution', Journal of Democracy 23 (2012), 138–146.

13 Kim Lane Scheppele, 'How Viktor Orbán Wins', Journal of Democracy 33 (2022), 45–61; Scott Griffen, 'Hungary: a lesson in media control', British Journalism Review 31 (2020), 57–62.

14 Virag Molnar, 'Civil Society in an Illiberal Democracy' in: Kovács and Trenecsenyi (eds), *Brave New Hungary: Mapping the 'System of National Cooperation'* (Lanham: Lexington Books 2020).

15 ECJ, *Commission v. Hungary*, judgment 6 of October, case no. C-66/18, ECLI:EU:C:2020:792.

16 Timea Drinóczi, 'Loyalty, Opportunism and Fear', https://verfassungsblog.de/loyalty-opportunism-and-fear/; as a result 'More than 30 higher education and cultural institutions in Hungary, including 21 universities, have been cut off from Horizon Europe and Erasmus funding over ongoing concerns about rule of law breaches in the country', https://sciencebusiness.net/widening/eu-council-action-over-hungarys-rule-law-breaches-sees-21-universities-cut-erasmus-and; 'Rule of law conditionality mechanism: Council decides to suspend €6.3 billion given only partial remedial action by Hungary', https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/.

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or reinforcing their own loyal oligarchs and tycoons.[17] In so doing, not only public but also private power has been consolidated in the hands of the ruling political elite and its allies. In this way, the prerequisites for a pluralist society have been either decisively circumscribed or effectively extinguished. What is more, the described overhaul of the pre-existing constitutional democracy has not been disguised, rather it has been openly celebrated as a deliberate rupture with the past, bringing about a new model of government branded as illiberal democracy.[18]

It is important to stress that this regression is objective, rather than politically, a special interest-based motivated partial portrayal of the social construction of reality, because it has been widely inter-subjectively regarded as such by a plethora of different domestic and international laic and expert communities, as well as confirmed by independent judicial authorities external to the affected EU Member State.

Now, this chapter is motivated by an assumption that in the affected Member State it comes to a political change in power. The political regime, which has already – to a greater or lesser extent – entrenched its constitutional regressive achievements – is voted out in the elections which are, again, objectively regarded as sufficiently free and fair. It is at this point that the question driving this contribution is raised: how could and should the newly elected political powers in such a Member State, which is also part of a common European constitutional space, personified by the Council of Europe, effectively in practice restore the material essence of constitutional democracy by not violating either its substantive or formal rules, principles and values, so that the restoration will be legal, just and viable in the long-run, rather than leading several years from now, after this regime change, to yet another transition 3.0?

In attempting to sketch out the answer to this question, our argument will proceed as follows: First, we are going to detail the normative ideal of constitutional democracy, its formal and substantive predicaments, which

17 Boris Kalnoky, 'Blame Eastern Europe's Oligarchs on EU Cash', https://www.dw.com/en/my-europe-blame-eastern-europes-oligarchs-on-eu-cash/a-49403372; Bálint Magyar, *Post-Communist Mafia State: The Case of Hungary*, (Budapest: CEU Press 2016).

18 Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/; Viktor Orbán, Speech at the 30th Bálványos Summer Open University and Student Camp, https://visegradpost.com/en/2019/07/29/orbans-full-speech-at-tusvanyos-political-philosophy-upcoming-crisis-and-projects-for-the-next-15-years/.

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shall serve as a benchmark against which the quality of the actual legal, economic and political practices in a Member State under study will be assessed and whose achievement should be the main goal of the transition 2.0. Second, we are going to claim that the transition 2.0 from the present regressive state of constitutional democracy to a normative ideal sketched out in part one should, after having respected certain clear red lines, be conducted in a realist, structural, principled and inclusive constitutional manner. Part three will conclude.

II. Constitutional Democracy as a Normative Ideal

It is almost a truism to begin by noting that EU Member States are not just ordinary democracies, rather they are constitutional democracies. Democracy stands for a system of legitimation of government, in which all power emanates from, is conducted by, and acts in favour of the people. Or, as Abraham Lincoln famously quipped in his Gettysburg speech, democracy is a government of the people, by the people and for the people.[19] If democracy is merely an 'ordinary' democracy, it satisfies itself with the fact that decisions are adopted by a majority following the procedural rules of decision-making prescribed in advance. Ordinary democracies are thus majoritarian democracies, in which a decision is regarded as democratic legitimate and also legally valid if a majority adopted it in a formally correct way. In short, in an ordinary, e.g. majoritarian democracy, a majority is always right.

This is not the case in a constitutional democracy. In the latter too decisions are taken by a majority following the prescribed procedural rules of decision-making, but these majoritarian decisions are only democratic, legitimate, legally valid and therefore right as long as they comply with the Constitution. In constitutional democracy a popular self-rule is thus limited by normative constraints of constitutionalism expressed through the formal and substantive requirements of the rule of law.[20] The formal requirements of the rule of law entail that a constitutional order consists of non-conflicting hierarchically ordered rules of a general application, which are precise, definite and of prospective validity. The formal requirements of

19 Abraham Lincoln, 'The Gettysburg Address', https://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

20 See, in more detail, Matej Avbelj, 'Rule of Law and the Economic Crisis in a Pluralist European Union', Hague Journal on the Rule of Law 8 (2016), 191–203.

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the rule of law are thus encapsulated in the principles of constitutionality, legality, generality, certainty, publicity, predictability and non-retroactivity.

In substantive terms, the rule of law demands compliance with the standards of human rights protection. These are derived from equal human dignity and are, in turn, in service of its protection, guaranteeing to each and every individual the rights to freedom and equality, in short, to equal freedom. Based on this right, each individual has an equal right to self-fulfilment within the limits imposed by the same rights of others. Respect for equal human dignity thus requires non-arbitrary treatment of all individuals. This is why the essence of the rule of law is about guaranteeing a non-arbitrary system of government.[21] At the same time, equal human dignity is a license for diversity,[22] that must be effectuated in a society in which pluralism thrives. Finally, shall the formal and substantive predicaments of the rule of law be violated, constitutional democracy requires that these violations need to be sanctioned and remedied by an independent, impartial, lawfully established system of the judiciary, topped by a constitutional court as an ultimate arbiter of constitutionality and human rights protection, which shall adjudicate in all cases and controversies fairly and in a reasonable time.

Constitutional democracy, in contrast to an ordinary democracy, is thus a system of government in which a democratic majoritarian popular self-rule is exercised within the limits of the formal and substantive requirements of the rule of law. As such, it indeed represents, as Habermas correctly noted, '*a paradoxical union of contradictory principles.*'[23] Namely, while in a democracy the will of the people is supreme, constitutionalism simultaneously subordinates it to the requirements of the rule of law. This paradox can only be resolved, if at all,[24] through a special kind of sociological practice relating to the very character of a citizen in a constitutional democracy. According to Tully, a viable constitutional democracy is dependent on the practices of 'citizenisation',[25] in which individuals merry

21 Martin Krygier, 'Inside the Rule of Law', Rivista di filosofia del diritto III (2014), 77–98.

22 James Tully, 'The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy', The Modern Law Review 65 (2017), 204–228, (210).

23 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles', Political Theory 29 (2001), 766–781.

24 Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', Southern California Law Review 74 (2001), 1307–1352 (1351).

25 Tully (n. 22), 210.

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their private and civic autonomy and make it part of their individual and collective self-awareness and self-formation.[26] As Habermas explains, the private autonomy, which is about the individual freedom, and the civic autonomy, which stands for a commitment to the common good, are ends in themselves, as well as the mutual preconditions for each other's existence.[27]

The exercise of civic autonomy in a democratic process is a guarantee for the equal protection of the rights of all individuals, but the use of civic autonomy is only possible if the individual autonomy of citizens is secured. '*Each side is fed by resources it has from the other*'.[28] Eventually, this requires that a constitutional democracy can only exist as an internally inclusive and externally open society, as a continuously negotiated and conciliated order,[29] in which no rule is permanently insulated from disputation.[30] Constitutional democracy is thus '*a self-correcting historical process*',[31] a process of trial and error, in which citizens as the bearers of private and civic autonomy directly and through their elected representatives in a comprehensive set of legal, economic and political practices try to live up, in a pluralist society, as closely as possible to the above presented formal and substantive predicaments of the rule of law.

III. Conducting Transition 2.0 in a Realist, Structural, Principled and Inclusive Constitutional Manner

Having laid down the normative ideal of constitutional democracy, let us now assume that the elections in a Member State, which has significantly departed from this ideal, turn in favour of a coalition of parties that have campaigned on the promise of restoring constitutional democracy. Comparing the normative ideal of constitutional democracy, sketched in part two of this article, with the means the ruling regimes have employed to depart from it, as these were detailed in the introduction, the restoration of constitutional democracy would entail at least the following ten systemic measures.

26 Ibid.
27 Habermas (n. 23), 780.
28 Ibid.
29 Tully (n. 22), 208.
30 Ibid.
31 Habermas (n. 23), 768.

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First, restoring a constitutional court as a tribunal established by the law and remedying the consequences of the rulings handed down in an unlawful composition. Second, re-establishing systemic independence of the judiciary. Third, re-establishing systemic independence of all other (relatively) independent State institutions, bodies and organs. Fourth, restoring a genuinely public broadcaster, committed to the highest professional standards of journalism in the public interest. Fifth, ensuring systemic conditions for a pluralist media space free of undue public or private pressure and interference. Sixth, providing systemic grounds for free and pluralist civil society with equal, fair and non-arbitrary access to public funding. Seventh, systemically restoring full academic freedom and pluralism, in particular in the form of full respect for the institutional and financial autonomy of the universities. Eighth, systemically facilitating a vibrant market economy, free of undue government interference, with zero tolerance for corruption and with guarantees for a level economic playing field, based on fair competition preserving economic pluralism. Ninth, protecting and guaranteeing a thriving pluralist society in a polity based on a comprehensive system of checks and balances that prevents the abuse of power, public and private alike, to ensure non-arbitrary, just and equal treatment of all individuals. Tenth, re-establishing a veritable and profound commitment to a constitutional democracy based on political liberalism.[32]

It is clear that the implementation of these ten systemic measures entails a significant rupture with the contemporary state of affairs in the affected Member States. Transition 2.0 is therefore built on the idea of a political, personnel and legal discontinuity with the past. Political discontinuity results from the electoral victory and should primarily engender a new kind of politics committed to the respect and furtherance of constitutional democracy. Political discontinuity, in turn, also entails personnel change, at least by ending the political mandates of State functionaries appointed by the preceding government. Finally, legal discontinuity also requires establishing legality and enforcing legal accountability of those who have committed criminal acts during the times of the regression of constitutional democracy.

While the transition 2.0 could also consist of many acts of political pragmatism, based on political compromises and 'deals',[33] there are certain

32 John Rawls, *Political Liberalism* (New York: Columbia University Press 1999).

33 This idea is borrowed from Michal Bobek's intervention during the 17 of May 2023 conference in Heidelberg.

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red lines that any transition to be conducted in the right way cannot cross. This is foremost criminal accountability. Potential crimes by the members of the previous regime, provided that the statute of limitation has not yet lapsed, must be prosecuted. Impunity is incompatible with the requirements of a lawful and just transition. Other red lines are the rulings of the European courts which must be unexceptionally enforced in full. However, even beyond these red lines the transition 2.0 shall not be completely unconstrained, rather it should be approached in a realist, structural, principled and inclusive constitutional manner. We continue by addressing each of these four requirements in turn, beginning with realism first.

1. Realist Approach to Transition 2.0

Realism builds on Madison's famous insistence that if men were angels, there would be no need for the law.[34] Obviously, men are no angels anywhere in this world, but across cultures and States, including Member States of the EU, the overall degree of integrity of the national stakeholders and the people as such varies. This is important because the (in)existence of personal, institutional and ultimately societal integrity is correlated with the habit of obedience, which is, at least following Hart,[35] a constitutive element of any legal order, but especially of the one that is based on the rule of law. The lower the overall integrity in a polity, the weaker the habit of obedience to the law, the rule of law included.[36]

In the EU, mostly due to the historical differences in State, polity and legal order-building, in which a particularly impactful role over the course of the last century has been played by the three European totalitarian regimes: fascism, Nazism and communism, as a rule, the southern and east-

34 James Madison, 'Federalist No. 51, The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments', New York Packet, Friday, 8 February 1788.

35 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press 1963).

36 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in: Palombella/Walker (eds), *Relocating the Rule of Law* (Oxford: Hart Publishing 2008): 'Why people obey laws, who does and when, are large questions, the answers to which vary greatly between societies, and depend only in part on the character of the laws themselves. Apart from obedience, patterns of use and manner of use are other major sources of distinction between societies where law counts and those where it doesn't. I am taken with the Bulgarian saying that law is like a door in the middle of an open field. Of course, you could go through the door, but only a fool would bother. Where the saying has resonance, the rule of law is not likely to.'

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ern EU Member States on average score lower on the rule of law index.[37] These differences can be explained by a variety of factors, including, but not limited to the relatively shorter tradition (or even lack) of statehood, democracy, rule of law; the more recent and more damaging influence of the totalitarian regimes, in some cases all three of them, on the character, especially pluralist or not, of the society as a whole, as well as on the political identity and self-perception of individuals of those societies.

As we have argued elsewhere, echoing sociological research in the countries of Central and Eastern Europe,[38] in those States the individuals 'continue to exhibit many features of *homo sovieticus*, of a distorted, strained public and private character of citizens [marked by] the general apathy, a [prevailing] sense of passivity, uninvolvement and infantilism.'[39] As a result these societies exhibit weaker political, legal and overall civic culture, and they lend themselves to higher risks of corruption and arbitrariness.[40] It is these reasons that explain the outbreak of a deep crisis of constitutional democracy in select CEE countries, but they also and simultaneously dictate a high degree of realism when 'the good guys' after their electoral success will be remedying the consequences of the objectively insidious rule of the 'bad guys.' For, in principle, both guys, the bad and the good ones are birds of a feather, for whom it is quite likely to flock together, even if in disparate political families and for heavily conflicting political goals.

This means that in a country with a relatively weaker political and legal culture, there should be – as there are even fewer angels than in general – no room for the idealization of any political side. This conclusion is self-evident as far as the political parties which have caused the constitutional and democratic regression are considered. Their violations are, as we have stated at the beginning, objective in the sense that they have been intersubjectively confirmed by a plethora of credible domestic and international actors. In accordance with the red lines of criminal, political and legal accountability, these violations should be redressed and the responsibility for them appropriately enforced. However, even these political parties, the perpetrators of a crisis of constitutional democracy, should be approached

37 https://worldjusticeproject.org/rule-of-law-index/global/2022.

38 Lev Dimitrievich Gudkov, '"Soviet Man"' in the Sociology of Iurii Levada', Sociological Research 47 (2008), 6–28; Lev Dimitrievich Gudkov, 'Conditions Necessary for the Reproduction of "Soviet Man"', Sociological Research 49 (2010), 50–99.

39 Matej Avbelj, 'The Sociology of (Slovenian) Constitutional Democracy', Hague Journal on the Rule of Law 10 (2018), 35–57.

40 Compare also with A. Jakab in this volume.

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in a nuanced manner, differentiating inside them between those who have led and directly contributed to the constitutional decline, and others who have taken part in this enterprise more indirectly, perhaps even under direct or at least indirect pressure of the party leadership that has required full loyalty in exchange for preserving, if not their very livelihood, at least their careers and welfare.

As a viable constitutional democracy, in particular, requires political pluralism, this prevents treating a rogue political party as a criminal organization, which ought to be fully disbanded and its members lustrated in analogy with denazification and decommunization. As there is no doubt that a constitutional crisis in select EU Member States is really profound so that they can no longer be qualified as democracies, rather they function as 'hybrid regimes',[41] there is equally no doubt that they cannot be qualified as totalitarian States whose democratization requires total replacement of political elite and complete removal of the cadres of this political party from State institutions and public life.

In the opposite case, if the newly elected political parties engaged in a comprehensive purge of their political opponents, targeting not only those who can be either criminally, legally or directly politically accountable for the existing constitutional crisis but everyone who could be in their political judgment associated with the previous political regime, the restoration of constitutional democracy could turn into a self-defeating process. If the new political regime removed all politically and morally corrupt individuals associated with the previous regime, even if in a profound and sincere belief that this is what the re-establishment of constitutional democracy requires, the eventual outcome would not be a veritable and viable constitutional democracy, but a mass clientelism committed by and aligned with the opposing political side, arrived at in good conscience. A kind of 'ethocracy' in the words of Jan-Werner Müller, understood 'as a rule by and for the morally pure',[42] this time around by all those who are not the members, loyalists or associates of the previous rogue political regime.

Realism thus warns us that in the process of restoration of a veritable constitutional democracy, there is a thin and fragile line between establishing a proper constitutional democracy and failing to do so by taking the

41 Ibid.

42 Jan-Werner Müller, 'The People must be Extracted from within the People: Reflections on Populism', https://www.princeton.edu/~jmueller/Constellations-Populism-JWMueller-March2014-pdf.pdf, 1–32 (22).

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State over by the previous opposition. Politics is, also and in countries with weak political cultures especially, about maximizing power. A political elite that has been long in the opposition, that has even been ostracized and subject to political, administrative, perhaps even judicial chicanery, if it really wants to breathe a new life into a particular constitutional democracy, has to be able to exercise self-restraint, staying faithful to internal checks and balances, rather surrender itself to political revanchism, no matter how much the latter would be tempting or even understandable under the given circumstances.

For that matter, the political parties which prevailed in the elections should be equally subject to public scrutiny ensuring that their declaratory commitment to rebuilding a constitutional democracy is lived up to in practice too. This scrutiny should reinforce and preserve the ethos of political accountability, which should be especially accentuated when the political temptations are at their all-time high. That happens precisely at the moment of the political regime change when on the one hand there exists a lawful and legitimate mandate to sanction and replace those accountable for the unconstitutional state of affairs, which, by way of humane and political impulses could spill over into the retaliatory practice of replacing one camp's loyalists with our own. Shall the latter happen, the political state of affairs in an already constitutionally deeply troubled Member State would simply find themselves jumping out of the frying pan into the fire.

For when both sides of the political spectrum turn complicit for hijacking a constitutional democracy, admittedly for different political ends and each with their own loyalists, there in the end remains no one, no credible political movement that could in reality, in a viable manner revitalize the ailing constitutional democracy. Under this scenario, a constitutional democracy is irreversibly transformed into a permanent spoils system. The argument from realism demands from us to be cognizant of this possibility, to warn against it in advance and to contribute to the strengthening of all those public and private mechanisms, which are available in a constitutional democracy, to keep this threat under check.

2. Structural Approach to Transition 2.0

In our pleading in favour of realism when conducting a transition 2.0 we have already alluded to the importance of the sociology of constitutional democracy, by noting that the degree of the actual existence of a constitutional democracy and its quality depends on the integrity of individuals,

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institutions and the society at large; on the pluralist character of a polity, which then, in turn, translates into the relative presence or absence of the system of checks and balances, not just in a narrower institutional sense, but in a societal sense in the broadest meaning of the term, so that no political, interest-based or private faction can monopolize politics, economy and the society as a whole. The awareness of the sociological predicaments of a constitutional democracy consequently merits adopting not just a realist approach to transition 2.0 sketched above, but also a structural approach.

The structural approach requires understanding that constitutional regression, even if eventually conducted by and through the law, is not just a legal process, but a comprehensive social phenomenon, which derives from and impacts all the main elements of societal political existence: civic mindset, culture, economy, civil society, politics and the law. Approaching transition 2.0 from the structural perspective requires recognizing that in constitutionally regressive EU Member States not only are not all problems legal problems, let alone they can be – and certainly not all of them – solved through the law.[43] The law, even in a well-ordered society, has its inherent limits.[44] We, as lawyers, should therefore eschew hubris of lawyerly omnipotence, while at the same time nourish the law as one of the most potent institutional normative orders[45] for changing our societies for the better.

This means that the remedial ambitions of treating constitutionally regressive EU Member States should extend beyond the law, to reach into the very fabric of society. It is, accordingly submitted, that a structural approach to transition 2.0 entails that the new political powers should foremost engage in the restoration of social trust, on the vertical and horizontal level, across all the building blocks of their polity. To ensure the longevity of a well-ordered constitutional democracy after transition 2.0, the greatest number in the society of an affected Member State must have an impression that they are in fact free and equal citizens, irrespective of the legitimate comprehensive doctrines to which they adhere.[46] Their sense of democratic belonging should be restored by overcoming the deeply seated polarization.

43 Neil MacCormick, *Institutions of Law, An Essay in Legal Theory* (Oxford: Oxford University Press 2007).

44 Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press 1999).

45 MacCormick (n. 43).

46 John Rawls, *Collected Papers* (Cambridge: Harvard University Press 1999), 480, accordingly a comprehensive doctrine stands for a precisely articulated scheme of

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Accordingly, the people in an affected Member State should be turned from two adversarial, close-minded, politically exploited tribes, into a sound body of citizens striving together for a common good in a country they have in common.

How this could in practice be done? A short and provisional answer reads: by putting Rawls' idea of political liberalism based on public reason[47] into action. A newly established political democratic regime should begin by openly and publicly recognizing the right of all spectres of the society, of all individuals to continue to stay faithful to their own comprehensive doctrines, ethical worldviews and ideologies, provided they are not incompatible with the respect of equal human dignity. They should all be re-encouraged in their sense of equal belonging, of full acceptance by the political community whose part they form. The new political elite that comes into power should thus actively contribute to the resurrection of an overlapping consensus over the system of justice feeding the substance of constitutional democracy, to which everyone could as much as possible commit despite their often irreconcilable disparate ideological and ethical worldviews. Instead of provoking *Kulturkampf*, rather than pushing and deepening polarization, the newly elected democratic political forces should publicly admit that they have come into power in a polity, divided by deeply seated not just political, but indeed cultural and moral cleavages. These should no longer be abused and instrumentalized for short-term political gains, no matter how politically beneficial that is, and irrespectively of the fact that political craftsmanship is much easier in a politically polarized landscape, finely divided between us and them.

Engaging with differences, turning them into commonalities, in pursuit of the common good, which is a priori hampered by irreconcilable visions of that very good, involves a lot of reason-giving, political dialogue, compromise-seeking, and is politically much more laborious, less efficient and potentially, especially in the eyes of the political allies in a particular political club, much less rewarding than politics of exclusion, division and polarization, where the opposite side is a priori conceived of as illegitimate, an entity that can be tolerated, without any need of constructively engaging with. Therefore, if in structural terms transition 2.0 is to succeed, a new democratic political regime should, once having put in place the formal and

thought, which covers all conceptions of what is of value in human life in its totality, informing our political as well as non-political conduct.

47 Ibid., 573.

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substantive pillars of constitutional democracy and enforcing criminal, legal and political accountability along the red lines sketched above, in terms of political narrative, political ethos and practice be as much as possible internally inclusive by striving for consensus, for unity, for collaboration, for acceptance of the other, to turn the public institutions in service of all citizens, ensuring that what dominates the public political life is the topics that unify, that contribute to social cohesion. At the same time a new political regime in power should avoid as much as possible, but certainly not exploit, all those political and societal neuralgic points at which a disagreement is profound, indeed inexhaustible. In this manner, it could indeed be possible even for a deeply split political community to viably travel in the same boat, not just for the sake of a successful transition 2.0, but indeed in the longer run.

3. Principled Approach to Transition 2.0

The required mending of the social fabric in an affected Member State, ensuring its social, value, cultural, economic and political cohesion can only take place as a result of a principled approach. The latter is an antipode to revenge and retaliation, of conquering and irreversibly defeating the opposing political camp, its actual and imagined loyalists, in short, all those who do not belong to 'us'. In other words, and without succumbing here to the idealism avoided above, the new political regime has to lead by example, by applying and enforcing the rules and principles of constitutional democracy as they would consider it fair, were these same rules and principles applied to them, had they been on the side of the constitutionally regressive regime. The more this principled approach will be not just visible, but actually employed in practice, the greater the chance for a structural and therefore successful transition to a veritable and actually existing well-ordered constitutional democracy.

A principled approach, in particular, prevents using the law as a means for exclusively furthering political objectives. As Gianluigi Palombella noted, when it comes to the law, we ought to distinguish between two conceptions of the law. Law as an instrument of power: *gubernaculum*; and law as a limit to power: *jurisdictio*.[48] The principled approach is only compatible with the law conceived of as a limit to power. Ruling in a prin-

48 Gianluigi Palombella, 'The Rule of Law and Its Core' in: Palombella/Walker (eds), *Re-locating the Rule of Law*, (Oxford: Hart Publishing 2008).

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cipled manner foremost requires treating equal cases alike; respecting the established administrative and judicial jurisprudence, rather than carving our special exceptions from the general rules for a particular case always whenever an opportunity arises. Principled approach also demands heeding the formal and substantive requirements of the rule of law and not succumbing to the temptation that virtuous political ends, even if constitutionally compliant, can justify any legal means whatsoever.

In other words, a principled approach binds the newly elected government when conducting transition 2.0 and restoring the fundamentals of constitutional democracy to do so in a way that lives up fully to the procedural and substantive principles of constitutional democracy. The new political regime, again, has to feel, act and appear as being fully bound by the law, which is not just an instrument to rule with, but also an inherent and necessary limit on that rule. All concrete actions and reforms to be carried out by the new government would thus need to comply with the principle of proportionality. Statutory reforms have to be thoroughly reasoned and justified by universalizable arguments, meaning that their validity and persuasive quality do not hinge on the particular instances, rather they can be used, as they have ideally also been applied in the past, in all similar situations in the future. Eventually, the principled approach thus boils down to the golden rule, requiring the new political regime not to do to others, what they would not like to see the others do to them.

4. Inclusive Approach to Transition 2.0

Finally, the approach taken should be inclusive. While internal inclusivity in form of acceptance of the other, of the political adversaries, has already been discussed as part of the requirement of a structural approach identified above, inclusivity discussed here is conceived of in an external sense. That is in a sense that the new political powers do not act in isolation, in a solipsistic, parochial, exclusively national way rather that they take fully into account and full advantage of the institutions, both hard and soft, of the European constitutional space. The latter is conceived of here as a set of three concentric circles consisting of national constitutional orders, the legal order of the Council of Europe and the constitutional order of the European Union. These three legal orders, taken together, with a totality of their interactions, constitute the European constitutional space, which is more than the sum of its three constitutive parts, replete with constitutional standards that equal at least the common minimum formal and substantive

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constitutional denominator below which no European jurisdiction is permitted to fall.

An inclusive approach to transition 2.0 requires that all adopted restorative measures, in particular the more radical ones, which will be doubtlessly necessary and simultaneously extremely politically and socially contested, should be justified with a persuasive reference to the common standards of the European constitutional space and the binding law of the European Union. The active involvement of the actors external to the affected Member State, either the institutions of the Council of Europe[49] or the EU or both, is an essential part of the inclusive approach advocated for here. The inclusion of the external actors namely reinforces the credibility of the principled approach by undergirding, in particular, its claim towards universalizability.

It is obvious that the European constitutional space boasts a plethora of formal and persuasive institutional authorities that can be relied upon to stimulate the environment of reason-giving, deliberation, and sincere engagement in institutional and legal reform following not just the minimum common European constitutional standards, but indeed the best practices in the respective fields. Conducting transition 2.0 in response to the rulings of the CEJU and ECtHR, under the formal supervision of the European Commission within the ambit of its rule of law framework, as well under the advisory oversight by the Venice Commission reinforces the credibility of the measures adopted and strengthens trust not just among the political allies, but more importantly among the adversaries. For them, most importantly, the inclusion of external actors in the management of the process of transition 2.0 adds another element to the domestic system of checks and balances, limiting further the probability of restoration of constitutional democracy spilling over into a spoils system.

In short, the active involvement of the external rule of law enhancing institutions increases the legitimacy of the transition and bolsters the overall integrity of the process of restoration of constitutional democracy, provided, however, that the external actors strictly act in a principled manner too. In the opposite case, the apparent or real double-standards controversy will break out, which will be (ab)used to portray transformation 2.0 as just another narrowly politically motivated attempt, to make it worse: even backed up by foreign political allies, to take over the State and cement in it

49 See Angelika Nussberger in this volume on the special role the Venice Commission can play in this.

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a competing political ideology catering to an adversarial political class, their loyalists and cronies.

IV. Conclusion

This chapter has examined in an abstract manner, albeit informed by concrete case studies, how to conduct, after the political change achieved at the ballot box, a transition to a full and actually existing constitutional democracy in an EU Member State, which has been for almost a decade subject to a systematic constitutional and democratic regression. The arguments arrived at should ideally be generalizable and universalizable across contexts, so to be relied upon in all future similar cases, irrespectively of a Member State in which they occur.

Consequently, we have identified ten systemic measures that ought to be adopted as part of the transition 2.0. The first three relate to the re-establishment of de facto independence and supervisory operationality of the constitutional court, the overall system of judiciary and all other (semi)-independent organs and institutions of the State. The next six measures are directed at the re-establishment of a viable, actually existing pluralism in the comprehensive market of ideas, including the media, both public and private, education, civil society and the economy at large. The last, but certainly not the least important measure, requires rebuilding a veritable and profound commitment to a constitutional democracy based on political liberalism.[50]

We have insisted that the transition towards these ten crucial objectives, once the red lines of criminal accountability and full compliance with the jurisprudence of European courts have been respected, to be conducted in the right, e.g. legal, legitimate and just way, should be performed in a realist, structural, principled and inclusive constitutional manner. In the opposite case, the outcome of a transition will not be a veritable, viable and enduring constitutional democracy, but just another round of the proto-schmittian desperate struggle by one side of the political spectrum, which has so far been in opposition, to capture the State, eliminate or at least subordinate the political enemy. This will, inevitably, soon spur the need for transition

50 John Rawls (n. 46), 461.

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3.0, to be followed by transition 4.0, turning transition in an affected Member State into a permanent part of the new (ab)normal.

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The Liberation of Illiberal Democracy: On Limits of Democratization after the Authoritarian Backlash

Jiří Přibáň

I. Introduction 33
II. Transformative Constitutionalism: Preliminary Questions 36
III. The Liberation of Democracy from Illiberal Politics: Theory and Practice 39
IV. External Assistance or Internal Threat? On the EU's Ambivalent Rule of Law, its Democratic Deficit and Dividend in 'New Europe' 42
V. Why Populism Matters: On Theoretical Misconceptions of Constitutionalism and Populism 46
VI. The Absolute Concept of Constitution and the Authenticity of Constituent Power in Populism 50
VII. Political *Doxa*, Legal *Episteme* and Transformative Constitutionalism's Teleology: Concluding Remarks on Law's Community of Values and Social Justice 54

Abstract:
This chapter argues that exceptional measures of post-communist constitutional transitions and transitional justice are not applicable to the potential transitions of illiberal populist regimes currently in power in Hungary and Poland. This specific transition can be described as *the liberation of democracy* from illiberal policies. A hypothetical electoral victory of the anti-populist opposition would be different from the regime change associated with the process of post-authoritarian democratic transitions. Rather than legitimized by broad societal and political consensus, the transition would have to be enforced in a deeply divided society with populist parties and authoritarian politicians now in opposition, yet still enjoying strong popular support. Transformative measures, therefore, would have to be limited and its finality should be the re-establishment of democratic constitutionalism. The concept of social justice and solidarity, successfully exploited by populists in many different countries, has to be an intrinsic part of transformative constitutionalism if it is to secure popular legitimacy in the post-populist political and societal condition.
Keywords: illiberal democracy, authoritarianism, democratization, democratic constitutionalism, populism, transformative constitutionalism

I. Introduction

Studies of constitutional transitions used to be a simple endeavour analysing different countries moving from authoritarian or totalitarian rule to the system of constitutional democracy based on the rule of law, human

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rights and liberties. The opposites of authoritarianism and democracy had clear classifications and typologies describing the general process of democratisation at the end of which the system of consolidated constitutional democracy was to replace the original authoritarian rule.

The concept of democratic transition signified a systemic change achieved through political reforms dismantling authoritarianism and replacing it with democracy. Constitution-making and democratic state-building were both intrinsic parts of this change. The concept of transformative constitutionalism was coined to highlight this function of constitution during the process of social and political transformations of post-authoritarian societies in former Soviet bloc States, South Africa, Latin America and other countries in the 1990s.[1]

Nevertheless, modern history is full of stalled, reversed and failed democratic transitions.[2] The recent history of Europe is no exception as European constitutional politics and democratic institutions experience what is commonly and often superficially described as the authoritarian backlash and democratic backsliding in EU Member States and elsewhere.[3]

The growing popularity and power of populist and authoritarian leaders leave defenders of the Constitutional Democratic State protecting civil rights and liberties with difficult choices. Some want to instrumentalize constitutionalism to either prevent authoritarian populists from coming to power or confront those already in power. Constitutionalism thus becomes a battlefield between populists abusing constitutional institutions to entrench their authoritarian practices and democrats hoping that constitutional systems and bodies can effectively stop populists from their power abuses.

In this chapter, I argue that exceptional measures of post-communist constitutional transitions and transitional justice are not applicable to the potential transitions of illiberal populist regimes currently in power in

1 See, for instance, Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', *South African Journal on Human Rights* 14(1) (1998), 146–88; for more general reflections on constitutionalism and social transformations, see particularly Richard Bellamy and Dario Castiglione (eds), *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford: Blackwell 1996).

2 John S. Dryzek and Lesley T. Holmes, *Post-Communist Democratization: Political Discourses Across Thirteen Countries* (Cambridge: Cambridge University Press 2002).

3 Cas Mudde and Cristóbal R. Kaltwasser (eds), *Populism in Europe and the Americas: Threat or Corrective for Democracy?* (Cambridge: Cambridge University Press 2013); Paolo Cossarini and Fernando Vallespín (eds), *Populism and Passions: Democratic Legitimacy after Austerity* (London: Routledge 2019).

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Hungary and Poland. This specific transition can be described as *the liberation of democracy* from illiberal policies. I argue that a hypothetical electoral victory of the anti-populist opposition would be different from the regime change associated with the process of post-authoritarian democratic transitions. Rather than legitimized by broad societal and political consensus, the transition would have to be enforced in a deeply divided society with populist parties and authoritarian politicians now in opposition, yet still enjoying strong popular support. Transformative measures, therefore, would have to be limited and its finality should be the re-establishment of democratic constitutionalism.

In the opening part of the chapter, I discuss specific historical, political and legal aspects of the rise of illiberal populism and its impact on the constitutional rule of law in different European countries, particularly Hungary and Poland. After highlighting potential problems with the external assistance of EU institutions and the ambivalence of confronting illiberal populist politics by the rule of law and constitutional democratic values, I proceed to discuss more general and theoretical distinctions between constitutionalism and populism. I argue that post-illiberal transformative constitutionalism has to avoid the conceptual trap of simplistically identifying populism with the autocratic rule and opposing it to the constitutionalism as a beacon of democratic rule.

The populist rule depends on what Kelsen described as the absolute concept of the constitution which considers the authenticity of constituent power its ultimate legitimation principle. Identity politics employed by populists is merely a consequence of this concept of constitution which eventually turns all political conflicts into culture wars. I argue that transformative constitutionalism's power depends on its capacity to stop these wars and replace them with deliberative politics and civil liberties manifested beyond the constitutional system in the public and private spheres of a democratic polity.

The concept of social justice and solidarity, successfully exploited by populists in many different countries, has to be an intrinsic part of transformative constitutionalism if it is to secure popular legitimacy in the post-populist political and societal condition. In the final part, I argue that the problem of illiberal and anti-constitutional populism is a specific form of the systemic tension between popular *doxa* and expert *episteme* which translates into the tension between democratically generated public opinion and authoritative judgements of legal and constitutional reasoning. Outlining different options in the post-populist rule of law and societal

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transitions, I criticize the distinctions between juristocracy and democracy or autocratic legalism and democratic mobilization from the perspective of sociologically informed theories of the rule of law and constitutionalism. This theoretical shift leads to the general conclusion that transformative constitutionalism has the potential to reconstitute individual polities as the rule of law based communities of democratic values and social justice.

II. Transformative Constitutionalism: Preliminary Questions

In some EU countries, most notably Hungary and Poland, democratically elected and popular political leaders weakened and even dismantled some checks and balances of constitutional democracy. In Hungary, this process was steered through controversial constitution-making in the democratically elected Parliament in 2010. In the wake of these political and constitutional developments, a general question arises whether these self-described 'illiberal democracies'[4] are outcomes of the same transitional process which started after the collapse of communism and now merely goes in the opposite direction of another authoritarian rule.

Are those countries just the most recent examples of stalled or reversed democratic transitions which, following the interim period of backlash or backsliding, still can be reasonably assumed to reach the safe haven of consolidated democratic statehood in the future? Is this merely a specific situation of another 'catch-up revolution' (*nachholende Revolution*) to stop backsliding and resolve the temporary weakening of legitimation in the countries which have relatively new constitutional democratic institutions and the lack of both expertise and experience in them?

If Hungary and Poland are still considered unconsolidated democracies of 'new Europe', how come they could join the European Union in the first place? If not, is the current 'backlash' in Hungary and Poland only a specific example of the general legitimation crisis of constitutional democracy? Furthermore, can these countries be recursively democratized by internal political forces as much as with the external assistance of EU institutions?

4 The public speech invoking 'illiberal democracy' was made by Viktor Orbán in 2014. For details, see Aron Buzogány, 'Illiberal democracy in Hungary: authoritarian diffusion or domestic causation?', Democratization 24(7) (2017), 1307–25, 1307; for a general theoretical and comparative view, see, for instance, Boris Vormann and Michael D. Weinman (eds), *The Emergence of Illiberalism: Understanding a Global Phenomenon* (London: Routledge 2020).

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Can this democratization of illiberal democracies use the same forms of transitional justice which are commonly applied in democratic transitions of post-authoritarian and post-totalitarian societies? How far can the EU's legal and political assistance go in rebuilding and stabilizing these countries without paradoxically further undermining the democratic legitimacy of their constitutional systems?

These long lists of general and specific questions raise doubts about the simple populism/constitutionalism distinction and the authoritarianism/democracy scale along which countries allegedly can move forwards and backwards. Contrasting populist politics to democratic constitutionalism may be popular among legal and political theorists,[5] yet populism hardly can be defined as the realm of the political will without constitutional constraints[6] because it has its specific constitutional forms.[7]

Typologies and contrasts between populism/authoritarianism and constitutionalism/democracy fail at theoretical, institutional and procedural levels. Constitutionalism has potentially authoritarian tendencies as powerful and risky as plebiscitarian democracy driven by populist politics.[8] Similarly, the alleged democratic backsliding often paradoxically has popular support achieved through democratic elections. For instance, the constitutional majority support of successive Orbán Governments hardly can be explained as mere consequences of the clientelist State and its money, unfair election rules, vitriolic political propaganda and media control.

The structural analysis of the constitutional and democratic transitions shows several important general features of these political and societal processes. The first is the coordination of external and internal agencies and forces behind the transition. The second is the systemic tension between legitimation by constitutional procedures and political outcomes which explains why even the illiberal state run by a government in breach of the most fundamental rule of law principles and procedures can relatively easily uphold its popular legitimacy by delivering policy promises and responding to the public expectations. Finally, the success and extent of

5 Jan-Werner Mueller, 'Populism and Constitutionalism' in: Cristóbal R. Kaltwasser et al (eds), *The Oxford Handbook of Populism* (Oxford: Oxford University Press 2017).

6 Jan-Werner Mueller, *What is Populism?* (Philadelphia: University of Pennsylvania Press 2016).

7 Paul Blokker, 'Populism as a constitutional project', International Journal of Constitutional Law 17(2) (2019), 536–53.

8 Mark Tushnet, 'Authoritarian Constitutionalism', Cornell Law Review 100(2) (2015), 391–461.

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transitions depend on political and social consensus and the popularity of political and societal changes and their agencies.

Any study of transformative constitutionalism subsequently has to adopt this structural analysis and examine both external and internal agencies involved in the process of transition as well as popular consensus, the concept and telos of political constitution, and the difference between legal and political legitimation procedures and outcomes.

The first lesson of transformative constitutionalism is the untenability of defining constitutionalism and populism as merely the conceptual opposites. Populism hardly can be identified as the ultimate reason behind the authoritarian backlash because there are numerous authoritarian risks and policies associated with unelected anti-majoritarian institutions including courts, banks, and other bodies of public and political economy in any constitutional democracy.

Similarly, the populist rule is contrasted to the rule of law as if plebiscitarian democracy were just another name for arbitrary rule. However, the rule of law always can be usurped by politicians and the laws can be written and interpreted in ways to enhance corruption and appropriation of public goods by private parties associated with the ruling political elite. Populist mobilization typically uses the anti-corruption rhetoric and the establishment accusations of nepotism as much as incompetence.[9]

The popularity of populist policies is often closely linked to the corruption, social injustice and growing inequality, clientelism and power abuses of political elites and parties operating within the system of constitutional democracy. Cynicism, illegalities and selective uses of constitutional procedures by former governments of Hungary and Poland paved the way to the current illiberal and autocratic rule of Orbán and Kaczyński Governments.

The paradox of illiberal and authoritarian populism, therefore, consists in its capacity to mobilize against corruption and clientelism while accumulating power exactly through the same economic activities and constituting the clientelist state in which public assets are both factually and legally controlled by servants loyal to the ruling party. Classic warnings of economic power threats to the Constitutional Democratic State materialize in this perpetuation of political power through economic control which per-

9 Anti-corruption policies and their risks are well discussed in the global context by Staffan Andersson and Paul J. Heywood, 'Anti-Corruption as a Risk to Democracy: On the Unintended Consequences of International Anti-Corruption Campaigns' in: Barry Hindess, Peter Larmour and Luís De Sousa (eds), *Governments, NGOs and Anti-Corruption: The New Integrity Warriors* (London: Routledge 2009), 33–50.

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meates civil service institutions as much as electoral processes. Rather than populism per se, the real opposite of constitutionalism is the arbitrary rule embedded in legal, economic, and social practices and power constellations and affecting both liberal and illiberal democracies and their constitutions.

Post-illiberal democratization, therefore, will have to respond to the problem of economic inequalities and social justice typically neglected in the post-1989 democratic transitions. The liberation of illiberal democracies has its economic, educational, cultural and other societal dimensions which will require moving beyond institutional and textual levels of constitutional politics to the contextual and everyday practices of democratic constitutionalism and social solidarity.

III. The Liberation of Democracy from Illiberal Politics: Theory and Practice

The first problem to be addressed by transformative constitutionalism is the paradox of democratically elected leaders who undermine democracy. Stopping this democratically legitimized backsliding of democracy by the authority of the constitution widens the legitimacy gap between majoritarian and anti-majoritarian institutions of the Constitutional Democratic State and increases the tensions between constituent and constituted powers.[10]

Furthermore, transformative constitutionalism has to address the problem of autocratic legalism[11] established when anti-majoritarian institutions such as constitutional and other top courts, prosecution offices, national banks and other independent bodies already are captured by governing populists such as Orbán, Modi, Erdogan and others.

The problems of both popular legitimacy and autocratic legalism and different scenarios of transformative constitutionalism represent a big challenge to democratic constitutionalism as an open, neutral and impartial space for the resolution of partisan conflicts emerging in democratic politics. Transformative constitutionalism may be protecting the classic function of the constitution as power limitation, yet it also operates as power confronting anti-constitutional authoritarian politics by constitutional means.

10 Joel Colon-Rios, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (London: Routledge 2012).

11 For the concept, see Kim L. Scheppele, 'Autocratic Legalism', *University of Chicago Law Review* 85 (2018), 545–83.

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In the early 2000s, Stephen Holmes commented that 'Democracy does not exist, but degrees of democratization do. A society becomes more democratic if more citizens become routinely able to use legal instruments to protect their vital interests.'[12] The statement clearly associates democratic government with judicial independence and the rule of law.

According to this view, the success of constitutional transitions, rather than formal and institutional reforms, depends on the change of civic culture and the adoption of democratic values and practices. Nevertheless, promulgating the principles of judicial independence is not enough because it can paradoxically lead to the judiciary's corruption and pursuit of corporate advantages rather than the reassertion and protection of liberal and democratic values. Examples such as the Slovak judicial reforms establishing judicial autonomy and self-governance and effectively perpetuating undesired judicial practices and promoting the existing corrupt and clientelist networks through the officially independent bodies should serve as clear warning signs in this respect.[13] The democratic cultivation of the judiciary expert knowledge — *doxa*, therefore remains as important as during post-communist democratic and constitutional transitions.[14]

Courts are the most important constitutional institutions regarding civic empowerment through rights. Because of their anti-majoritarian design, they can be used by the populist opposition in the hypothetical post-illiberal political condition and judges appointed by populist governments may prefer to exercise their political loyalty instead of adhering to the rule of law. These risks, however, cannot be mitigated by personal vetting and as was the case in post-communist transformations of the 1990s. Instead, strict requirements of legality should be applied and individual disciplinary procedures initiated in the cases of power abuse and arbitrary decision-making by the judiciary during the populist period of autocratic legalism.

The function of transformative constitutionalism is *the liberation of democracy* from illiberal politics. This situation does not amount to the regime change associated with the process of post-authoritarian democratic transitions as it is likely to fall short of what Linz and Stepan describe

12 Stephen Holmes, 'Judicial Independence as Ambiguous Reality and Insidious Illusion', in: Ronald Dworkin (ed), *From Liberal Values to Democratic Transition: Essays in Honor of János Kis* (Budapest: CEU Press 2004), 3–14 (14).

13 Peter Čuroš, 'Panopticon of the Slovak Judiciary – Continuity of Power Centers and Mental Dependence', German Law Journal 22 (2021), 1247–81.

14 Jiří Přibáň, 'Varieties of Transition from Authoritarianism to Democracy', Annual Review of Law and Social Science 8 (2012), 105–12.

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as general social and political consensus.[15] Power limitation proceeds as power enhancement in transformative constitutionalism. This may be easily done at times of revolutionary change benefiting from strong social and political consensus. However, the scale and force of any transformative constitutional measures will be profoundly limited without such consensus.

Policies described as transformative constitutionalism, therefore, must be limited due to the persisting political, economic, social and cultural divisions associated with identity politics.[16] Newly elected government will not have the legitimacy to generate sweeping institutional and personal changes across the executive, legislative and judicial power. Nevertheless, laws and judgements in breach of the constitution should be repealed by post-illiberal governments through established parliamentary procedures.

Furthermore, the abusive application of legal and constitutional rules by illiberal populist governments and their officials at all levels of governance needs to be tackled by transformative constitutionalism. It, therefore, is an important task for new post-illiberal governments to address these abuses disguised under the mask of legality and described as discriminatory legalism[17] while avoiding the temptation of using formal legality and constitutional rules as a partisan tool of a political fight which defined the populist illiberal rule.

Remedies of these abuses stretch beyond the realm of constitutional and legislative policies and incorporate both positive and negative legal and political sanctions. Nevertheless, these remedies should be possible to apply within the limits of current constitutional and ordinary laws and without the need to resort to exceptional measures of transitional justice. Post-illiberal transformative constitutionalism should not be mistaken for post-communist transitional justice which, by definition, is 'partial and limited' and 'implies compromise'.[18] Transformative constitutionalism, rather, has to proceed on the basis of impartiality and unlimited application and

15 Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore, MD: Johns Hopkins University Press 1996).

16 John S. Dryzek, 'Deliberative Democracy in Divided Societies', Political Theory 33 (2005), 218–242.

17 The term 'discriminatory legalism' is used to describe selective and corrupt uses of legality by populists to strengthen their clientelist networks and attack their enemies. See, for instance, Kurt Weyland, 'The Threat from the Populist left', Journal of Democracy 24 (2013), 18–32.

18 Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press 2000), 230.

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avoid negotiated political compromises to return to the fully-fledged constitutional democratic system.

Transitional justice is both retrospective justice responding to the historical injustices of autocratic regimes, and prospective justice constituting rights, freedoms and democracy in post-authoritarian society. It combines elements of general justice based on the rule of law with political realism and pragmatic compromises required by the process of political transition.

The post-illiberal political condition is different from the post-authoritarian one because retrospective and prospective goals are the same, namely, to apply the principles and rules of democratic constitutionalism and formally sanction their breaches during the period of illiberal politics. As such, it can apply all measures of retributive, rehabilitative, and restitutive justice, yet it hardly can resort to any special judicial tribunals or legal and non-legal institutions dealing with historical injustices such as truth and reconciliation commissions or political crime tribunals.

In short, no more transitional justice in post-illiberal constitutional transitions but the strict and principled application of the formal rule of law breaches and power abuses committed through the practices of autocratic legalism of the clientelist and corrupt state constituted and controlled by illiberal populist governments.

IV. External Assistance or Internal Threat? On the EU's Ambivalent Rule of Law, its Democratic Deficit and Dividend in 'New Europe'

The transformative constitutionalism's finality is the re-establishment of constitutional democracy, yet it should not be mistaken for a simple political enforcement of *status quo ante*. After removing illiberal politicians from power in democratic elections, new post-illiberal governments in EU Member States such as Poland and Hungary, indeed, will have to restore the constitutional rule of law and institutional checks and balances of democracy. However, this general telos has to go beyond the constitutional restoration of the post-1989 political and societal order and all measures taken to address illegalities and abuses of the constitutional rule of law will have to rigorously comply with general constitutional and democratic values as much as the specific laws of the EU. At the same time, the EU's external assistance to these Member States will have to be carefully calibrated and limited due to the Union's internal democratic legitimacy deficits.

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Democracy, constitutionalism and the rule of law have become an intrinsic part of global political and economic governance. Organizations such as the United Nations, World Bank and International Monetary Fund have become increasingly involved in external assistance to the individual states undergoing political transition.[19] In this respect, the EU's increasing role in the rule of law policies and accountability of its Member States fits the pattern of external assistance of international and transnational organizations which, nevertheless, also internally constitutes criteria and benchmarks of the rule of law accountability. This process of European constitutional synergies[20] and coeval external assistance and internal constitutionalisation of the EU rule of law conditions requires further analysis and historical contextualisation to better comprehend the current crises in some Member States in particular and the EU in general.

The last three decades can be described as a paradoxical process of the internally growing democratic deficit of the EU and the externally growing democratic dividend which used to be offered to post-communist countries since the Copenhagen criteria had been introduced for candidate states in 1993.[21] The EU's democratic dividend coevally promoted both the process of rebuilding the Democratic Constitutional State in post-communist countries and the accession process eventually leading to their EU membership. The membership was a widely shared political goal enjoying general societal consensus even in more Eurosceptic countries such as the Czech Republic.

Nowadays, the democratic dividend's growth is directly related to the growing threats and infringements of the democratic rule of law in individual countries of Central and Eastern Europe. The reason why the rule of law protection has become a core value and political priority of the Union is given by both the originally tacit assumption that all Member States must be Constitutional Democratic States and the recent threats to the rule of law in some EU countries. This is why the EU has been increasingly focusing on the rule of law compliance and principles of the Constitutional Democratic State in its Member States in the last two decades. In this respect, a main

19 Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Ithaca, NY: Cornell University Press 2004).

20 Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2012), 205–212.

21 Wojciech Sadurski, 'Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe', European Law Journal 10 (2004), 371–401 (374–82).

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critical remark may be summarised in the following questions: 'Why so late? Why so little?'

Before the current rule of law conflict between the EU and Hungary or Poland, the EU already had been dealing with the question of democratic legitimacy and constitutional rights infringement by Member States in the case of Austria following the coalition government formation between the conservatives of Chancellor Schüssel and the Right-wing populists of Jörg Haider. At that time, the EU briefly enacted sanctions against Austria on the basis of problematic legal arguments and with dubious and ambivalent effects.[22]

Because of this experience, the Treaty of Nice, approved in December 2000, incorporated the possibility of suspending voting rights of a Member State which would be in breach of human rights — a principle currently regulated by Article 7 of the Treaty on European Union. However, the risks of the authoritarian rule combined with the constitutional counter-revolution in Hungary in 2011 and the increased constitutional conflicts in Poland since 2015 represent another specific crisis of the EU and need to be historically contextualised before their legal and political analysis.

The Constitutional Treaty's rejection by national referenda in France, the Netherlands and Ireland revealed a growing tension between the EU's democratic deficit and legal integration. The Eurozone crisis and Draghi's famous statement that he would save the Euro currency 'whatever it takes' from July 2012 saved the Eurozone's unity and protected individual Member States from a deep fiscal crisis, yet the whole move was made at the expense of democratic values. The Troika and the ECB decided the fate of democratically elected governments and their policies in the countries affected by the Eurozone crisis. Instead of the rule of law, the Eurozone ended up in a paradoxically permanent state of exception.[23]

Similarly, ignoring the constitutional changes in Hungary after 2011, subsequent changes in the election law and the establishment of what Orbán himself declared the regime of 'illiberal democracy' already in 2014 has undoubtedly contributed to the current crisis of the democratic rule of law

22 Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria', Journal of Common Market Studies 39(1) (2001), 55–79.

23 See, for instance, Christian Joerges and Carola Glinski (eds), *The European Crisis and the Transformation of Transnational Governance Authoritarian Managerialism versus Democratic Governance* (Oxford: Hart Publishing 2014).

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as one of foundational and indisputable values of the EU.[24] In this respect, the EU failed because its institutions ignored for too long constitutional and legal as well as political changes implemented by the Orbán Government which, furthermore, found its support among some politicians in the EPP parliamentary group, especially Austrian and German conservatives.[25]

These views did not change even vis-a-vis the refugee crisis of 2015 and Orbán's policies had been relativised, for instance, during debates in the European Parliament, when some MEPs from the EPP group stated that Hungary was not the only country in breach of the refugees' rights and similar situation was typical of Greece or Slovakia. This soft relativistic approach resulted in a very weak and only mildly critical parliamentary resolution approved in December 2015 and did not start to harden until September 2018 when the European Parliament adopted a report on the rule of law in Hungary warning of a 'systemic threat' to the EU's fundamental principles and unprecedently triggering Article 7 of the Treaty on European Union.[26]

In 2015, Poland joined Hungary when its new PiS government started its governing by an attack on the Constitutional Tribunal and unconstitutionally appointed new judges. In this context, Koen Lenaerts, President of the CJEU, made the following remark unrelated to his professional duties:

It was taken as read that national governments would encourage citizens to trust the courts as the ultimate arbiters of any legal dispute, including in situations when a court ruling opposed the political majority of the day […] Recent developments show that this assumption cannot simply be taken for granted.[27]

Attacks on the independent judiciary have initiated a response from EU bodies. However, this approach is not specifically targeting Hungary and Poland. It is a consistent and general approach and part of the CJEU decision-making.

The CJEU's recent judgements regarding the system of justice and judicial independence are as important as the above mentioned landmark cases Costa v. ENEL and Van Gend en Loos. The Portuguese judges' case

24 Marc F. Plattner, 'Illiberal Democracy and the Struggle on the Right', Journal of Democracy 30(1) (2019), 5–19 (9–11).

25 Ibid., 13.

26 Cas Mudde, 'The 2019 EU Elections: Moving the Center', Journal of Democracy 30 (2019), 20–34 (31).

27 Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU', German Law Journal 21 (2020) 29–34 (30–31).

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from 27th February 2018[28] and the series of judgements regarding judicial independence in Poland but also Malta (the Maltese judges' case from 20th April 2021)[29] recall Article 19(1) of the Treaty of the European Union which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law' plus Article 2 legislating for common European values and Article 4(3) demanding the Member States to ensure fulfilment of the Treaty obligations.

The Polish case, nevertheless, is different because the situation is related to the escalation of political conflict in the country and the government's attempts to subject the judicial power to its control under the disguise of judicial reform. In three cases, the CJEU ruled that Poland was in breach of the Treaty's Article 19, namely, C-619/18, *Commission v. Poland (the Supreme Court's independence)*;[30] C-192/18, *Commission v. Poland (Independence of ordinary courts)*[31] and C-791/19, *Commission v. Poland (Régime disciplinaire des juges)*.[32]

V. Why Populism Matters: On Theoretical Misconceptions of Constitutionalism and Populism

Recent developments in Hungary, Poland and other countries of the EU show that constitutional structures and settlements of nation states remain popular among citizens of the EU and may inspire both democratic and authoritarian forms of politics. The EU's external assistance to the internal constitutional and political conflicts in Member States in the realm of constitutionalism and the rule of law, therefore, has its limitations and its application remains risky and ambivalent.

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28 CJEU, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment of the Court of Justice (Grand Chamber) of 27 February 2018, Case C-64/16, ECLI:EU:C:2018:117.

29 CJEU, *Repubblika v. Il-Prim Ministru*, Judgment of the Court (Grand Chamber) of 20 April 2021, Case C-896/19, ECLI:EU:C:2021:31.

30 CJEU, *Commission v. Poland (the Supreme Court's independence)*, Judgment of the Court (Grand Chamber) of 24 June 2019, Case C-619/18, ECLI:EU:C:2019:615.

31 CJEU, *Commission v. Poland (Independence of ordinary courts),* Judgment of the Court (Grand Chamber) of 5 November 2019, Case C-192/18, ECLI:EU:C:2019:924.

32 CJEU, *Commission v. Poland (Régime disciplinaire des juges),* Judgment of the Court (Grand Chamber) of 15 July 2021, Case C-791/19, ECLI:EU:C:2021:596. For further details regarding all above mentioned cases, see Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', Hague Journal of the Rule Law 12 (2020), 451–483.

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Theories contrasting populism to constitutionalism and associating the former with authoritarianism and the latter with democracy and human rights typically fail to grasp functional differentiation of law and politics. Constitutionalism is always at risk of diminishing democratic deliberation and will formation by legal procedures and judgments of top courts. Accusations of juristocracy replacing democracy and depoliticisation by legal reason find their way into the ivory tower of constitutional theory[33] and constitutional politics.[34] The concept of transformative constitutionalism subsequently has to tackle this risk at a theoretical level to avoid addressing primarily political questions of democratic legitimacy by instrumental legality and judicial decision-making.

Populism is often perceived as a primal cause of democratic backsliding despite its mobilisation of popular will and public anger. It gets contrasted to modern rational politics as a force which threatens human rights and democracy, distorts the public sphere and weakens its legitimation capacity.[35] For instance, Sajó and Uitz contrast constitutionalism and populism in these words:

Constitutionalism stands for minorities (at least in the minimum sense that they have the right or legal possibility to be a part of the majority or become the majority). The populist stands for the unity of the people and those who are 'outside' (the others or 'them') do not count. This helpful division is often made on xenophobic grounds: the others are those who do not share the (imaginary) national identity based on immutable characteristics. Such constitutional populism relies on identity politics.[36]

33 This is nothing new and intellectually original and represents a typical feature of modern constitutional politics. For some typical examples in constitutional theory, see Ran Hirschl, *Towards Juristocracy* (Cambridge MA: Harvard University Press 2004); Martin Loughlin, *Against Constitutionalism* (Cambridge MA: Harvard University Press 2021).

34 For constitutional politics in some countries of Central and Eastern Europe, see particularly Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing 2015).

35 Paolo Cossarini and Fernando Vallespín (eds), *Populism and Passions: Democratic Legitimacy after Austerity* (London: Routledge 2019).

36 András Sajó and Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press 2017), 53.

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While identity politics is populism's hallmark, these views also typically consider democratic constitutionalism part of modern political rationality threatened by populism.[37]

Critics of liberal constitutionalism then often perceive populism as a necessary anti-dote to the prevailing anti-majoritarian and authoritarian tendencies in contemporary constitutional democracies.[38] According to these critical voices, populism is a force of democratic mobilisation against the ever-growing power of technocracy dominating over the public reason and democratic deliberation. Populism is to expand democratic legitimacy and operate as a counterforce against anti-majoritarian institutions legitimised by expert knowledge and its de-politicisation impact on democratic politics.[39]

Populism is thus associated with direct self-expression of collective will which makes the relationship between the people and its leader unlimited by the principles of democratic representation and constitutional separation of power.[40] Most importantly, populism is driven by the jargon of authenticity because there is always a call for 'true' will and voice of the people unlimited and uncorrupted by institutions of representative constitutional democracy.

Populism represents changes and trends in local, national, European and global politics and political leaders and the general public all around the world face significant shifts in both the style and substance of democratically legitimised politics. The voice of disapproval and disconnection among ordinary citizens has been raised by populist leaders gliding on the anti-establishment rhetoric as much as the weakening legitimacy of liberal democracy and nation state. Populism thus expands its arguments beyond modern statehood and its historical and normative framework.[41]

Populism is a negative response to the powerlessness of both local and global politics vis-a-vis the powerful impact of the global economy on issues of social justice, equality and solidarity built within the framework of

37 Andrew Arato and Jean Cohen, *Populism and Civil Society: The Challenge to Constitutional Democracy* (2021), 153.

38 Tom Donnelly, 'Making Popular Constitutionalism Work', Wisconsin Law Review 159 (2012), at 161–162.

39 See, for instance, Jeremiah Morelock (ed.), *Critical Theory and Authoritarian Populism* (London: University of Westminster Press 2018).

40 Mueller (n.6), 40.

41 Andrew Arato, 'Political theology and populism' in: Carlos de la Torre (ed.), *The Promise and Perils of Populism. Global Perspectives* (Lexington: University Press of Kentucky 2015), 31.

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modern nation states. Several observations, therefore, can be made before moving to the analysis of populism as imaginary of the authentically self-constituted polity living under the absolute constitution.

First, the nation state as a formerly central organisation of constitutional democracy is at the centre of attention of populist politics. While the populist Right promises its restoration to the former national glory, the populist Left aims at its radical transformation into the power successfully challenging the negative consequences of economic globalisation.[42] The nation state, its democratic institutions and the public sphere thus appear in the centre of populist protests and contestations.

Second, the rise of populism globally and locally is closely related to the growing public distrust of expert knowledge and anti-majoritarian technocratic governance. Epistemic communities of experts steering economic, legal and other policies are portrayed as enemies of the people and real causes of growing inequality and social injustices and exclusion of the whole population.

Finally, the tension between public opinion and expert knowledge is related to the typical perception of populism and constitutionalism as opposites. The process of juridification of politics and its criticisms highlight this divide between legal experts serving the rule of law and populist leaders declaring to be the authentic voice and servants of the people.

For instance, Ernesto Laclau famously argued that populist reason mobilises the multitudes and speaks for 'the outsiders' of 'the system'.[43] According to this view, the system is controversially considered just another name for totality and homogeneity while the multitudes and their collective identities challenge the totalising coherence of social bonds and replace the logic of equivalence by the logic of difference. Social heterogeneity of the multitudes opposes the homogenising and unifying forces of the system.[44]

The legitimising force of those outside the system is determined by their anti-systemic capacity of alternative social formation, collective identity and political self-constitution. The dynamic between legitimation and delegitimation of the system is reformulated as populist reason's mobilisation

42 Paolo Gerbaudo, *The Mask and the Flag: Populism, Citizenism and Global Protest* (Oxford: Oxford University Press 2017).

43 Ernesto Laclau, *On Populist Reason* (London: Verso 2005), 153.

44 For a critique of Laclau's concept of 'the system' and 'populist reason', see Jiří Přibáň, Constitutionalism, Populism and Imaginary of the Authentic Polity: A Socio-Legal Analysis of European Public Spheres and Constitutional Democratisation', Journal of Law and Society 49(S1) (2023), in print.

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of the excessive crowds against the common good of a rational political community.

These criticisms of structuralist and functionalist paradigms may be painted with a broad brush. Nevertheless, Laclau's philosophical appraisal of populism has a critical value for theory of constitutionalism because it demonstrates how closely populism gets associated with contemporary identity politics and collective authenticity of the Left as much as the Right.

VI. The Absolute Concept of Constitution and the Authenticity of Constituent Power in Populism

According to Hermann Heller, the people as constituent power of democratic politics are socially heterogeneous. It is then the legal constitution protecting freedom and social equality that turns the heterogeneous people into the homogeneous unity of a democratically self-governing polity.

Heller's notion of social homogeneity represents a critique of political existentialism and its notions of the culturally homogeneous community externally legitimising the State and its Constitution. According to him, the belief that culturally homogeneous people can be identified as a racial community which can 'demand from the state the breeding of a cultural community by racial means'[45] is a legitimising force of the national socialist concept of the racially constituted and exclusive state.

This tension between the legally substantiated and protected social homogeneity of modern democracy and the cultural homogeneity of the concrete existence and collective will of the people is extremely important and echoes the polemic between Hermann Heller and Hans Kelsen as much as Carl Schmitt.[46] Unlike Heller, Schmitt formulated the absolute concept of the constitution as the complete condition of political unity and order and 'the concrete manner of existence that is given with every political unity.'[47] Homogeneity is guaranteed by the polity's very existence represented by the state and its will.

45 Hermann Heller, 'Authoritarian Liberalism?', European Law Journal 21(3) (2015), 295–301(298).

46 See also Anthoula Malkopoulou and Ludvig Norman, 'Three Models of Democratic Self-Defence: Militant Democracy and its Alternatives', Political Studies 66 (2018), 442–458.

47 Carl Schmitt, *Constitutional Theory* (Durham: Duke University Press 2008), 59.

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The Constitution is thus referred to as the state's 'soul', concrete life and individual existence.[48] For Schmitt, the state's will depends on the collective will of the German people. Reflecting on the constitutional system of hierarchically ordered norms and provisions of the Weimar Constitution, Schmitt concluded:

The unity of the German Reich does not rest on these 181 articles and their validity, but rather on the political existence of the German people. The will of the German people, therefore something existential, establishes the unity in political and public law terms beyond all systematic contradictions, disconnectedness, and lack of clarity of the individual constitutional laws. The Weimar Constitution is valid because the German people "gave itself this constitution."[49]

On this view, the Constitution is constituted by the collective will of a nation and constitutional sovereignty is conditioned by national sovereignty formulated as the concrete existence of a substantively homogeneous people. Collective identity and will are located outside the order of constitutional norms and the authentic sovereign nation determines its existence through this order and unity.[50]

Imaginary of the authentic will and concrete existence of a homogeneous people as the constitution's precondition and ultimate legitimation is matched by the people's collective self-identification with the state as a protector of cultural unity and order. This is a typical imaginary of modern nationalism and nation state which was subsequently racialised and turned into the totalitarian state.

In this context, Kelsen, criticised by both Heller and Schmitt, correctly identified the main reason behind imaginary of the authentic people constituting its collective identity and protecting it through the sovereign State and Constitution. In his treatise *Foundations of Democracy*, he toyed with Lincoln's triadic structure of democracy as the government of the people, by the people and for the people and speculated on the situation in which the people might be misled about their 'true' interests and the 'true' will of the people may be corrupted by political institutions and formal procedures and rules of the legal constitution.[51]

48 Ibid., 60.
49 Ibid., 65.
50 David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: Oxford University Press 1997), ch.1.
51 Hans Kelsen, 'Foundations of Democracy', *Ethics* 66 (1955), 1–101 (4).

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Discussing the form and substance of democracy, Kelsen thus stated that arguments from the perspective of truth and authenticity of the concretely existing people may be easily twisted and shifted from the participatory 'government by the people' to 'government for the people' because a charismatic leader, an elite, or a revolutionary avant-garde may declare itself to be the only 'true' and ultimate representative of the people's interests.[52]

Kelsen's rejection of the absolute concept of the Constitution as the concrete order and ultimate popular will is important for considering the problems of constitutional populism. In discussions about whether populism is a style of political persuasion or an ideology with its specific set of ideas used as a blueprint for political action,[53] the argument from authenticity makes populism closer to the ideological vision of a 'true' popular will unspoiled by elitist interference governing pure and sovereign people in its 'true' self-government. Authenticity is considered a guarantee of mutual trust between charismatic populist leaders and the general public.[54]

Arguments from constitutional identity and authenticity are typically anti-elitist and emphasise the common sense values and practical wisdom of ordinary citizens. Populism is considered a political style used by political leaders which makes them appear as true representatives and guardians of those popular values and wisdom, especially in struggles against the allegedly corrupt political system and its power holders. Populism is identity politics of constituent power rebelling against the constitutional system.[55] Populists, therefore, can be regarded as authentic in their anti-establishment rhetoric even if their claims are insincere, dishonest and full of lies and overtly false accusations.

Furthermore, when in power, populists, while using the absolute concept of constitution and arguments from the authenticity of the voice and will of the people, can engage in corrupt power techniques and constitutional procedures described by Kim Lane Scheppele in the particular context of post-2010 Hungary in the following way:

52 Ibid., 5.

53 Benjamin Moffitt, *The Global Rise of Populism: Performance, Political Style and Representation* (Stanford: Stanford University Press 2016), 28.

54 Alessandro Ferrara, *Reflective Authenticity: Rethinking the Project of Modernity* (London: Routledge 1998).

55 Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', European Constitutional Law Review 12 (2016), 6–26.

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"[Fidesz party] won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the onstitution. Twelve times in a year in office, it amended the constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next – which was to install a new constitution. The new Fidesz Constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named."[56]

The populist semantics of authenticity and national unity is deeply rooted in the Romantic imaginary of modern society as permanently threatened by moral corruption and alienation which paradoxically legitimises even stronger and more blatant corruption of constitutional democratic principles and political rules which effectively disables the democratic constitution's functions.[57] In the context of Hungary's development since Orbán's seizure of power, György Konrád even used the term *democradura* originally applied to the Latin American regimes combining populist and authoritarian politics in the 1970s and 1980s.[58]

Populist claims of authenticity may be different in terms of their content. The populist Right's notion of the people draws on its concrete historical and ethnic pre-political existence which is allegedly under threat. The populist Left's ideal of homogeneity and authenticity imagines the people as a collective of initially heterogeneous individuals and groups who eventually constitute one sovereign polity of socially equal, politically participating and ethically solidary citizens. At the same time, Left-wing populism, as clearly witnessed in Latin America, can use the same cultural registers and signifiers as the populist Right and incorporate them into the difference between the elites representing the system and the masses representing the multitudes. Leftist leaders, such as Evo Morales and Hugo Chávez, also

56 Kim L. Scheppele, 'Testimony: U.S. Commission on Security and Cooperation in Europe hearing on "The Trajectory of Democracy – Why Hungary Matters"', Washington, D.C., 19 March 2013.

57 Miklós Bánkuti, Gábor Halmai and Kim L. Scheppele, 'Disabling the Constitution', Journal of Democracy 23 (2012), 38–46.

58 György Konrád said this in a panel discussion organized by the journal *La Règle du Jeu* in Paris on 19 February 2012. The term *democradura,* or, literally, 'hard democracy,' was coined by Guillermo O'Donnell and Philippe Schmitter to describe certain Latin American regimes of the 1970s and 1980s. See Jacques Rupnik, 'Hungary's Illiberal Turn: How Things Went Wrong', Journal of Democracy 23 (2012) 132–137, n. 1.

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claimed to be the only voice of 'the people-as-one'.[59] Further complicating these differences in style and content, Right-wing populism also promises social equality and solidarity within the ethnically constituted polity. The divide between Right-wing and Left-wing populist politics and movements, therefore, can be blurred such as during the gilets jaunes protests in France in 2020[60] and populist parties and movements in the Central and East European countries.[61]

Populist politics shows that imaginary of the authentic polity existing truthfully and in harmony with its 'real' collective identity is common to the great variety of populist politics and continues to play a profound role in the contemporary globalised political condition including the post-national condition of the European Union. Institutions of representative democracy and popular will legitimised by the public sphere are condemned as failing to represent authentic political voices uncorrupted by the political and social institutions. Populists and their followers then demand alternative forms of political mobilisation and institutional transformation of representative democracy and its constitutional framework.

VII. Political *Doxa*, Legal *Episteme* and Transformative Constitutionalism's Teleology: Concluding Remarks on Law's Community of Values and Social Justice

Populism draws on the political appeal to the public opinion – the *doxa* and adjustment of political preferences to the popular demand. It is contrasted to the expert knowledge — the *episteme* forming the technocratic rationality and expertise of lawyers, economists and other professional classes. The role of expert knowledge and technocratic legitimation are permanently challenged by the public opinion and democratic legitimation.[62]

59 Carlos de la Torre, 'Is Left Populism the Radical Democratic Answer?', Irish Journal of Sociology 27 (2019), 64–71 (67).

60 Charles Devellenness, *The Gilets Jaunes and the New Social Contract* (Bristol: Bristol University Press 2022), 10.

61 Sarah Engler, Bartek Pytlas and K. Deegan-Krause, 'Assessing the diversity of anti-establishment and populist politics in Central and Eastern Europe', West European Politics. Issue 6: Varieties of Populism in Europe in Times of Crises 42 (2019), 1310–36.

62 Eri Bertsou and Daniele Caramani (eds), *The Technocratic Challenge to Democracy* (London: Routledge 2020).

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The distinction between the *doxa* of democratic reasoning and the *episteme* of expert decision-making constitutes the specific argumentative balance and tensions within the modern political system.[63] Politicians have to be careful and avoid accusations of being either ignorant populists, or arrogant elitists. Modern democratic politics thus operates through the permanent tension between political reasoning validated by public opinion and expert reasoning validated by its impact on the democratic public.

The distinction between public opinion that steers populists and the expertise that guides the technocrats informs both modern politics and law. Democratic constitutionalism, combining the public reason of democratic mobilisation and legal reasoning controlled by the epistemic community of constitutional experts, uses the distinction between the *doxa* and the *episteme* as its organising principle.

Politicians typically rely on legal and other forms of expertise to govern and preserve their power in society. The public sphere is a theatre of permanent conflicts between different values shared in different regimes of the soft *doxa* of public opinion that never have a clear-cut rational solution, but for all that, claim permanent validity. The technocratic sphere, on the other hand, is an expanse of clear, but always temporary, solutions of the *episteme* — expert knowledge.

The paradox of constitutional democratic politics subsequently lies in the rule according to which the authoritative logos of constitutional experts must resound with the pathos of political persuasion and populist reason. The original distinction between public opinion and expert knowledge, *doxa* and *episteme*, thus finds its secondary coding in the distinction between democratic *authenticity* and technocratic *alienation*.[64]

The process of legitimation by democratic mobilisation is conditioned by the possibility of self-identification of members with the true nature and existence of their imagined polity.[65] The paradox of modern constitutional democracy in which constituent power of the sovereign people, by definition unlimited, can materialise only through constituted power of a limiting legal constitution subsequently finds its specific form in imaginary of the authentic polity by stretching the first constitutional question *Who is the*

63 Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (Evanston: Northwestern University Press 1970), 13, 290, 336.

64 Rahel Jaeggi, *Alienation* (New York: Columbia University Press 2014).

65 Cornelius Castoriadis, *The Imaginary Institution of Society* (Cambridge: Polity Press 1987), 101–112.

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people as a political sovereign? into a pre-political question of *What is the true and honest voice and will of the people?*

The constitutional paradox of modernity offers a number of examples of formal laws legitimizing the will of a tyrant and operating as a tool of political repression, not least in the name of the authentic will of the people and the fight against its enemies. Instead of the classical Aristotelian distinction between the rule of law and men, modern society thus presents us with the paradox of the arbitrary rule of men, legitimized by the legal rule.[66]

The formalist concept of legalism and constitutionalism is applicable even to the authoritarian regimes legitimised by the politics of authenticity[67] because their systems of positive law provide for some elements of social predictability, certainty and stability. Legal and constitutional formalism, therefore, needs to be contrasted to the rule of law based on substantive democratic values.[68] Legitimation by the rule of law is reformulated as the legal process of political liberalization, democratization and constitutionalisation based on the system of power separation and limited government. It is associated with the Constitutional Democratic State based on the protection of human rights protected by an independent judiciary.

Transformative constitutionalism is expected to restore the substantive concept of the rule of law which stretches beyond purely formalistic institutional and procedural conditions and constitutes a broader political and moral imaginary informed by 'the values of equality, individual autonomy and security implicit in it.'[69] The formalistic concept of law thus transforms into a substantive goal informed by political and constitutionally protected values. Legality is not a mere formal technique of the legitimate government. It constitutes 'law's community of values.'[70]

66 Jiří Přibáň, 'The Nation State's Legitimation in Post-National Society: A Social Systems Perspective of Values in Legality and Power', in Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press 2019), 137–157 (147).

67 Marshall Berman, *The Politics of Authenticity: Radical Individualism and the Emergence of Modern Society* (London: Verso 2009 [1970]), ch.1.

68 Jiří Přibáň, *Legal Symbolism: On Law, Time and European Identity* (Aldershot: Ashgate 2007), 156.

69 Roger Cotterrell, 'The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality', Social and Legal Studies 5 (1996), 451–470 (470).

70 Roger Cotterrell, *Law's Community: Legal Theory in Sociolegal Perspective* (Oxford: Clarendon Press 1995).

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In this context, Martin Krygier critically distinguishes between the law's anatomy and teleology and formulates his sociological approach to the rule of law and democratic constitutionalism as promoting 'teleology before anatomy.'[71] Apart from criticising the narrowness of analytical jurisprudence and its formalist conceptualisations of the rule of law, this approach moves beyond common jurisprudential analyses of legal principles and structures and emphasises the importance of societal goals and values embedded in the rule of law.

This theoretical perspective is functionalist in the sense that it asks 'what we might want the rule of law for'[72] and what needs to happen in society to achieve it. Specific historical, cultural and social conditions behind universal constitutional principles and values are analysed to understand different ways in which particular polities deal with their social and political problems.

Rather than focusing on the structure of abstract rules and institutional guarantees of law's legitimacy, this perspective explores social conditions of the law's functionality and operative capacity. The rule of law is then analysed as a variable achievement relative to the cultural and social conditions of particular polities.

It has a special value which consists of tempering, constraining and channelling the exercise of all powers evolving in those polities — political, social and economic.[73] While the law's capacity to transform these powers from their arbitrary exercises to the stable and predictable procedures and routine practices remains the first job of constitutionalism, it is clear that this job must tackle political as much as other societal forces, especially those operating within the system of economy and permeating the areas of private and labour law.

Transformative constitutionalism has to address the issue of social justice and solidarity beyond common arguments from growing inequality, corruption and unaccountable power of new oligarchies emerging during post-communist economic transitions, market reforms and privatisation processes. The issue has its clear European dimension because of the

71 Martin Krygier, 'The Rule of Law and State Legitimacy' in: Wojciech Sadurski, Michael Sevel and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford: Oxford University Press 2019), 106–136 (111).

72 Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in: Gianluigi Palombella and Neil Walker (eds), *Re-locating the Rule of Law* (Oxford: Hart Publishing 2009), 45–69 (46).

73 Krygier (n. 71), 125–126.

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history of European integration evolving as the values of prosperity and peace promoted by the economic rationality of market collaborations and productive competition.

Transnational consociation through the European single market is expected to contribute to the common wealth, interests and bonds beyond national economies and politics. The European economic constitution assumes that economic rationality and its expert *episteme* enhances European transnational political *doxa* and the constitution of a transnational polity sharing the values of democracy, freedom, rights and peaceful coexistence of the multitude of European peoples and citizens.

Apart from challenging the absolute constitution promoted by populists with their identity politics, transformative constitutionalism has to address the problem of social justice and solidarity in post-illiberal polities through both internal policies and external assistance. The EU cannot be assisting merely by setting formal standards and conditions of the rule of law modelled on its treaties and policies. It also has to provide for material support of post-illiberal governments to facilitate the re-establishment of the rule of law as much as political and social consensus in those Member States.

To conclude, transformative constitutionalism cannot be limited to the formal rule of law because all constitutional democracies, stabilised or backsliding, have their social dimension guaranteed by both the political and economic constitution at national as much as transnational European levels.

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Reversing Authoritarianism in the EU: Transformative Politics and the Role of Opposition

Maryhen Jiménez[1] and Dario Castiglione[2]

I. Introduction 60
II. Reversing the Authoritarian Turn: Transition 2.0 and Transformative Strategies 63
1. Transition from what? 64
2. The Agents of transformation 69
III. Opposition Politics in Authoritarian Contexts – Strategies and Coalitions 72
1. Experiences from Latin America 74
2. Anti-authoritarian coordination strategies in and out of government 76
IV. The European Context: A Two-Level Game 83
1. The social dimension – Boosting democratic performance from below 83
2. The political-institutional dimension 84
V. Conclusions 88

Abstract:
This chapter argues that reverting or preventing democratic and rule of law backsliding can only succeed as the result of a multi-level strategy involving 'transformative politics' as well as 'transformative constitutionalism.' Our chapter is divided into four sections. In the first part (section II), we suggest that both transformative strategies need the identification of what Claus Offe has called 'agents of transformation,' institutional and political forces capable to motivate and direct such transformations. In the second part (section III), we draw on a comparative analysis with Latin America to examine the role that oppositions and political parties have played in the quest for democratization and/or prevention of further autocratization, and we argue that opposition coordination and use of institutional strategies are key to defy incumbent autocrats. In the final part (section IV), we explore the double pincer strategy – political and constitutional, national and supranational. Here, we emphasize that to restore constitutional democracy in EU countries that have experienced democratic backsliding also involves advancing a more egalitarian and democratic EU model for the long run.
Keywords: Transformative strategies; Agents of transformation; Role of institutions, parties, and oppositions; EU as a safeguard; Social dimension; Inter-institutional dialogue

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I. Introduction

Democratic decline has been a notable trend in the past two decades, with several countries having been experiencing setbacks in their democratic institutions and practices. Across the world, voters have looked to populist candidates – both from the left and right – hoping they would readily fix their economic, social, and political anxieties. Unlike in other processes of democratic decay, in recent years, executives who erode democracy do so after winning what counts as free, though not always fully fair elections, and not after violent turnovers. Even in countries where democracy had been 'the only game in town' for several decades, such as Hungary, Poland or Venezuela, authoritarian incumbents used institutions built under democracy to erode it from within.

The COVID-19 pandemic has exacerbated the situation in some regions, with countries using illiberal or outright authoritarian emergency measures that violated human rights and/or undermined accountability.[3] This has had the double effect of reinforcing a general trend in democratic systems towards supremacy of the executive over the legislative and offering arguments to aspiring autocrats to follow the same path by eroding civil liberties and the rule of law, restricting freedom of speech and of the press, repressing civil society and imposing barriers on opposition parties.[4] This may have also added to the general dissatisfaction with traditional political institutions, and the shortcomings of globalization to deliver tangible benefits for all ordinary citizens, thus pushing voters to elect leaders with a 'populist' message, even centrist ones, who promise to solve complex problems rapidly and with scant regard for established constitutional values and procedures.

Europe has not been exempted from this trend. In countries such as Denmark, France, Germany, Spain, Sweden, and Italy, far-right parties who promise to curb immigration, limit the rights and freedoms of a liberal democratic society to a smaller group of citizens,[5] and protect a narrow and inward-looking view of national sovereignty, have been gaining ground

3 V-Dem, 'Pandemic Backsliding: Democracy Nine Months into the Covid-19 Pandemic', 2020, https://www.v-dem.net/media/publications/v-dem_policybrief-26_201214_v31.pdf.

4 See, for instance, Kim Lane Scheppele, 'How Vitkor Orbán Wins', Journal of Democracy 33 (2022), 45–61.

5 Jasper Theodor Kauth and Desmond King, 'Illiberalism', European Journal of Sociology 61 (2020), 365–405.

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for a while. Inside and outside the office, these parties mobilize using exclusionary, xenophobic, and racist rhetoric to polarise societies. The drivers of electing far-right parties seem twofold: on the one hand, voters have elected illiberal parties to safeguard exclusionary values; on the other, they have sided with these parties because of their tolerance for authoritarian and autocratic practices.[6] There are other countries, such as Poland or Hungary, where rightist parties have already eroded democracy. Despite these countries having signed up to the main constitutional values underpinning the European Union, their constitutional order has openly and progressively challenged those very same constitutional principles.

To what extent can opponents in Member States experiencing democratic and constitutional backsliding prepare for a transition back to a consolidated constitutional and democratic order? Which strategies can opposition parties pursue to reverse authoritarianism? Can a robust democratic culture across the European space be bolstered? Our chapter addresses some of these questions in the following way. In the first section, we argue that a potential transition, or a reversion of the authoritarian turn, would have to take place on different arenas and at different levels. To be effective, the re-establishment or consolidation of democratic constitutional order must involve political and legal-constitutional changes. Accordingly, this requires 'transformative politics' as well as 'transformative constitutionalism.' It is important for these strategies to operate on both terrains and to be interactive in their action. Moreover, particularly in the EU context, these transformative strategies can be played at both national and supranational levels in a way in which the latter can be harnessed to produce and facilitate the necessary transformation in the Member States. The capacity of the EU institutional system to prevent or to help correct constitutional involution in the Member States is what Claus Offe has described as one of the ideally inspiring reasons of the EU project, or what he calls its '*mission civilisatrice interne*'. In other words, European integration may work as 'a precautionary safeguard against de-civilizing tendencies' that may undermine long-established standards of civil and human rights.[7] For this to take place, however, the combination of the political and legal-constitutional levels is essential.

6 Milan W. Svolik et al., 'In Europe, Democracy Erodes from the Right', Journal of Democracy 34 (2023), 5–20.

7 Claus Offe, *Europe Entrapped* (Cambridge: Polity Press 2015), 63–64.

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The second section looks more at the role of leadership, more specifically at democratic elites, in their quest for democratization and/or prevention of further autocratization. Scholarship on oppositions in Africa, Asia, Central and Eastern Europe, or Latin America has consistently shown that oppositions can be capable of exercising an active role in terms of mobilization, organization, and offering alternative narratives, challenging authoritarian regimes. Moreover, scholars have argued that the type of strategies they choose or linkages to civil society or international allies they build can define their probabilities for success or failure in producing regime change. Here, we draw on comparative analysis from contemporary Latin America and Eastern Europe to argue that opposition coordination is crucial to i) defy authoritarian incumbents and ii) govern after their victory. Past and recent developments show that when opposition parties coordinate formally (i.e. internal decision-making and conflict resolution mechanisms, joint program, unitary candidate) and mobilize peacefully. In this way, can slow down further autocratization, but also, crucially, develop strategies, policies, and institutional changes that are effective once they dislodge autocrats from power.

In our third section, we look at both the social and institutional problems that transformative strategies need to address to be effective in the European context. On the one hand, we look at society's expectations from democratization processes, and how economic inequality and unmet expectations from previous transitions or political and economic integration may have favored the recent authoritarian turn. We argue that paying close attention to the conditions that favoured democratic backsliding in Hungary and Poland in the first place may also help counteract similar tendencies in other EU Member States. On the other hand, we explore the double pincer strategy – political and constitutional, national and supranational – that can be effectively pursued within the EU context, paying particular attention to which transformative strategies are best suited to the different territorial levels given the present EU constitutional architecture. Ultimately, the objective of these strategies is not only to develop successful social, political, and cultural strategies to restore an acceptable form of constitutional democracy in those countries that have most been affected by the current authoritarian turn but also that of fostering a more egalitarian and democratic EU in the long run.

The chapter concludes by highlighting that a constitutional democracy founded on liberal and egalitarian values is not something that can be forever legally enshrined. In contrast, it requires that democratic partisan

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elites and civil society constantly renew their commitment and will toward democratic politics, the rule of law, and the fundamental constitutional principles underlying the Union.

II. Reversing the Authoritarian Turn: Transition 2.0 and Transformative Strategies

The present volume is meant to address the problem of the 'transition' back to a constitutional order, particularly in countries such as Poland and Hungary, an order congruent with the general principles to which all EU Member States have subscribed to. These principles are summarised in Art. 2 TEU, expressing the EU's and its Member States' fundamental values on which participation in this community of states is presupposed. The importance of these values as part of the Union's institutional and policy-making fabric has been emphasized by the judgments of the CJEU of 16 February 2022 in the two cases of *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21). The judgements support the idea of a general conditionality regime that applies to the EU budget in relation to breaches of rule of law principle. This, arguably, gives the EU institutions concrete power to challenge such breaches and a material incentive for Member States to take fundamental principles seriously.

There are, of course, different ways of interpreting these values and a certain latitude in the way in which different national regimes implement them locally. Moreover, there are fundamental disputes on whether the Union itself, its constitutional architecture, and its structural policies reflect such values. But, leaving aside these more general problems about the nature and scope of the EU and varieties of constitutionalism, there is a general agreement that countries like Hungary and Poland have, in the last decade or so, taking a turn towards what Victor Orbán himself has described as an 'illiberal state', based on a constitutional order that challenges some of those values, if not as a matter of principle, at least in practice.[8] The object of the volume is, therefore, to imagine how a 'transition' back to a recognizable

8 Elisabeth Bakke and Nick Sitter, 'The EU's Enfants Terribles: Democratic Backsliding in Central Europe since 2010', Perspectives on Politics 20 (2022), 22–37; R. Daniel Kelemen, 'The European Union's Authoritarian Equilibrium', Journal of European Public Policy 27(2020), 481–499; Lenka Buštíková and Petra Guasti 'The Illiberal Turn or Swerve in Central Europe?', Politics and Governance 5 (2017), 166–76.

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constitutional democracy can be engineered in such countries. Given that in the case of Hungary and Poland, there was a recent transition from Soviet-type regimes to constitutional democracies broadly of a European kind, it is tempting to think of this as a 'second' transition and find similarities and differences with the previous one.[9]

To imagine such a 'transition', it may be important to have some clarity about several points. First, what kind of constitutional order is currently in place in those countries, or how and how much they have diverged from the standard principles of constitutional democracy we aim to re-establish? In other words, transition *from what*? Secondly, social, political, and constitutional orders are never fixed in time; they are in a state of permanent transition, so to speak, that makes it possible to produce and reproduce the kind of relations that underpin a particular order. Actors interested in crafting a transition towards a determined objective need to know not only the kind of new order they wish to establish but also how to do so. In other words, who are the *agents* of transformation?[10] In the rest of this section, we address these two issues, even though we do not pretend to solve them here.

1. Transition from what?

There is no consensus in political science literature on how to define emerging non-democratic regimes across the world that are 'in-between' fully democratic and fully authoritarian regime types. Some scholarship refers to them as mixed regimes, hybrid regimes, or electoral authoritarian regimes, be they competitive or hegemonic.[11] These definitions, however, are often constructed by negative rather positive definitions, risking to provide little content on what these regimes are or how they operate. One way of getting to the substance of these regimes is to see how their definition has become part of different debates centering on separate features – democratic, constitutional, social – of these regimes.

9 For a discussion of some of the qualitative differences between Transition 1.0 and Transition 2.0, see Jirí Pribán's contribution to this volume.

10 See Offe (n. 7), 56–60.

11 See Valerie Bunce and Sharon L. Wolchik, *Defeating Authoritarian Leaders in Postcommunist Countries* (Cambridge: Cambridge University Press, 2011); Steven Levitsky and Lucan Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War* (New York, Cambridge: Cambridge University Press, 2010); Thomas Carothers, 'The End of the Transition Paradigm', Journal of Democracy 13 (2002), 5–21.

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Several debates merge in the assessment of the parlous state of 21st-century constitutional democracy. There is a long-standing discussion about the 'crisis' of democracy and its retrenchment, or 'rollback' in the last 20 years.[12] Such a debate started by the end of the first decade of the 21st century, as there was increasing disappointment with the promises of democratisation. After several successive waves of democratisation, culminating with the Arab Spring, its almost irresistible tide seemed to alt and go into reverse. This version of the 'rollback' of democracy was primarily seen in geographical terms, emphasising the international retreat of democracy. In parallel, there was a debate about the quality of democracy, which was concerned with the deterioration of democratic governance. This was in part a debate about the 'hollowing out' of the main representative institutions of democracy,[13] which no longer guaranteed a 'space of engagement' between citizens and governing elites; and partly a debate on what Colin Crouch[14] has called post-democracy, a system where the formal institutions of democracy still work, but only as a façade, since political power and decisions are in the hand of small economic-political elites, and where politics is kept within the iron cage of neo-liberal ideology. The EU itself has not escaped such criticism, and of course, there has been a long-standing discussion about its 'democratic deficit' since before Maastricht.[15]

12 Larry Diamond, 'The democratic rollback: the resurgence of the predatory state', Foreign Affairs 87 (2008), 36–48; see also, Global Policy Journal, Special Issue: 'Changing the European Debate: A Rollback of Democracy' (2015).

13 Peter Mair, *Ruling the Void: The hollowing of western democracy* (London: Verso 2013).

14 Colin Crouch, *Post-democracy* (Cambridge: Polity Press 2004).

15 The debate on the democratic deficit has punctuated the formation of the European Union since the mid-1990s, if not earlier. As suggested by Domenico Majone long ago, 'Arguments about Europe's democratic deficit are really arguments about the nature and ultimate goals of the integration process' ('Europe's 'Democratic Deficit': The Question of Standards', JCMS 4 (1998), 5–28 (5). The literature on the 'democratic deficit' is therefore huge. Here, only a few, very selective, examples: Andreas Føllesdal and Simon Hix, 'Why there is a Democratic Deficit in the European Union. A Response to Majone and Moravcsik', JCMS 44 (2006), 533–562; Andrew Moravcsik, 'In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union', JCMS 40 (2002), 603–624; Richard Bellamy and Dario Castiglione, *From Maastricht to Brexit: Democracy, Constitutionalism and Citizenship in the EU* (London, New York: Rowan & Littlefield 2019), Part V 'The Democratic Deficit'; Vivienne A. Schmidt, 'Democracy and legitimacy in the European Union revisited: Input, output and 'throughput', Political Studies 61 (2013), 2–22; Kalypso Nicolaïdis, 'European Democracy and Its Crisis', JCMS 51 (2013), 351–369.

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Related to the debates about modern democracy as a mere 'formal shell' one finds discussions about the 'delegative' twist that democracy has taken particularly in Latin American democracies,[16] where the democratic mandate is understood to delegate power to a strong leader without clear forms of intermediation, control, and accountability. This is not exclusively a Latin American phenomenon since it harks back to old discussions about plebiscitary democracy or to debates about presidential and parliamentarian forms of democracies. In more recent times, many of the problems raised about these debates on the internal erosion of democracy have re-emerged in connection to new waves of populist politics in Europe. On the one hand, many of these new populist parties and movements have embraced the rhetoric of popular democracy and the will of the people. On the other, their politics has often become associated with right-wing and exclusionary, and anti-universalist ideas of the political community, an anti-pluralist conception of the people, and a delegative-charismatic idea of leadership, which is dismissive of the need for checks and balances and the protective role that intermediate institutions play in constitutional democracies.

Most of these debates referred to the effectiveness of its institutions; in other words, they raised issues about democratic disempowerment and political autonomy in so far as the political system seemed increasingly unable to perform its democratic functions; important decisions tended to become exogenous to the democratic process; and everyday life was increasingly dominated by system-decisions escaping the control of individuals and groups. On the other hand, more recent discussions about the so-called 'democratic backsliding' in the European context raise issues about the regression in the very formal structure of constitutional democracy in terms of separation and balance of powers, rule of law, and personal autonomy. What is at stake is not just the substance of democratic decision-making but also the formal context for democratic decision-making. In other words, democratic backsliding is eroding the constitutional order of a democratic society and entrenching instead a different kind of constitutional order,

16 Guillermo A. O'Donnell, 'Delegative Democracy', Journal of Democracy 5 (1994), 55–69.

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which is not more 'authoritarian' in relative terms, but embodies a different constitutional regime.[17]

We do not aim to categorize Hungary or Poland's current constitutional order from scratch, nor do we make any claims about whether such order will prove durable or may even become a model for other EU Member States where governments with similar ideologies may come to power. This is something not so far-fetched, given the new governments in Italy and Sweden and the long-feared possibility that Le Pen may win the presidency in France. But it appears important to see which of the different aspects of the debates mentioned above are relevant and/or specific to these countries. Wojciech Sadurski,[18] for instance, has identified three main aspects in what he calls the Polish 'constitutional breakdown'. These have resulted in what he calls the 'anti-constitutional populist backsliding' nature of the current Polish regime: anti-constitutional, because the de-facto exercise of power eludes the formal constitution; populist, because the constitutional change is propped up by social and political mobilisation of a populist kind, and backsliding because there has been a deterioration of the quality of democracy. Sadurski rightly argues that his description mainly fits the Polish case because there are important social, political, and cultural differences between this and the Hungarian case. Yet, we partly follow Sadurski's analysis, identifying a few distinctive features that may apply more generically to both the Polish and Hungarian cases and that may also be relevant to developments in other European countries where democracy has a more established pedigree.

In brief, we can characterize the recent evolution of these constitutional regimes along three lines. i) With the erosion of political autonomy by the occupation of power of executive regimes of a majoritarian kind that have progressively colonised both intermediate institutions and important parts of civil society (media, for instance), thus weakening the principle of balance and division of powers and threatening political pluralism. ii) With the erosion of personal autonomy by the attack against social and cultural pluralism and a new version of what Ernst Frankel called the 'dual state,'[19]

17 See Mark Tushnet, 'Authoritarian Constitutionalism', Cornell L Rev. 100 (2015), 391–462. Tushnet argues, with reference to Singapore, that it is possible to consider some authoritarian regimes as having a thin, basic rule-of-law type of constitutional order.

18 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

19 Ernst Fraenkel, *The Dual State* (New York: Octagon 1969); Mark Tushnet considers the possibility that one of the characters of 'illiberal constitutionalism' is that of a

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or certain aspects of what Hermann Heller labeled 'liberal authoritarianism' – a kind of state that emerged in several European countries in the first part of the 20th century.[20] Such erosion is based on the return of exclusivist and ethnocultural ideas of the political community, mainly aimed against immigrants and minority cultures, and intended to stop or revert new and more diverse conceptions of lifestyles and the rights that come with such recognition. Finally, iii) with what Sadurski calls the 'populist' element of social mobilisation. It is worth recalling that this is based on a populist and narrowly sovereignist conception of democracy rather than on a rejection of democracy. Such rejection characterised fascist regimes in the 20th century. These regimes presented similar threats to political and personal autonomy to those indicated above, but used clear anti-democratic rhetoric, and rejected a rule-of-law state altogether, developing more racially based and totalitarian conceptions of the state. In the present cases, personal and political autonomy is instead threatened by appeals to a majoritarian vision of democracy based on an anti-pluralist conception of the 'will of the people' and on the undermining of the balance between trust and distrust that is essential in a constitutional democracy aimed to build social cohesion but to be vigilant on the exercise of power.[21]

As we said, we think it is important to have an understanding of the nature of these regimes in order to start thinking about transformative strategies. Moreover, the elements we have identified suggest that, although these may be important for defining the constitutional involution in Hungary and Poland, they are also present, though to different degrees, in other European countries. The problem we are facing is not just one of transition back to an established constitutional democracy, but also one that involves rethinking and consolidating constitutional democracy across Europe.

'dual state', even though he suggests that such a kind of constitutionalism may not be sufficiently stable, 'The Possibility of Illiberal Constitutionalism', Fla. L. Rev. 69, 1367–1384 (1376–1377).

20 Hermann Heller, 'Liberal Authoritarianism?', ELJ 21 (2015), 295–301; originally published in German in 1933 in vol. 44 of Die Neue Rundschau (289–298).

21 See on this issue Gábor Attila Tóth, 'Breaking the Equilibrium: From Distrust of Representative Government to an Authoritarian Executive', Wash. L. Rev. 28 (2019), 317–348.

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2. The Agents of transformation

It is at this stage that we may introduce the second problem to which we referred at the start of this section, that of *agency*. In order to address this, we need to consider an important distinction, the one between the political and the legal-constitutional level in the way in which constitutional democracies work. If the transformation we have in mind is mainly intended as the establishment or the re-establishment of a constitutional order that reflects general principles such as those indicated in Art. 2 TEU -human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities- it may seem, *prima facie*, that this involves a constitutional transformation that precedes and frames politics, and that the instruments and discourses that we need to mobilise should be, in the first instance, those of a legal-constitutional character. This would seem an entirely plausible strategy in the case of Hungary and Poland, countries that not only have in the recent past experienced an autonomous transition from a more authoritarian regime, which was propped up from outside, to a more democratic and constitutional regime; but also because they have freely adhered to the European Union and to its funding values as formally established by Art. 2 TEU. Although paths out of (electoral) authoritarianism are typically uncertain as they can come about in different ways and can lead to various outcomes -transitions do not necessarily imply democratisation- in the EU, we should not expect the same levels of unpredictability. A transition 2.0 in the EU is, to a large extent, pre-defined as states have the obligation to comply with the Union's values.[22]

Within such a context, one can reasonably apply the logic of 'transformative constitutionalism'. This is usefully articulated by Armin von Bogdandy and Luke Dimitrios Spieker[23] as being mainly intended to overcome 'systemic deficiencies' and to rely on the courts as important – though not the only – actors that may mobilise the values of an already established constitutional document to correct such deficiencies.[24] It is important to note that Bogdandy and Spieker stress how the transformative jurisprudence of

22 See Hilliol and Schröder's contributions in this volume.

23 Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxembourg: How the Court can support Democratic Transitions', Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2022–14, 25 June 2022; but see also their contribution to this volume.

24 von Bogdandy and Spieker (n. 23).

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the relevant courts cannot be seen in isolation, but it operates within a horizontal institutional structure where its place and action acquires recognition, and in conjunction with other agents that contribute to the success of transformative constitutionalism. Moreover, it is important that the values advocated in the constitutional document can be mobilised within an appropriate jurisprudential logic within which they can become justiciable and effective in correcting systemic deficiencies. Nonetheless, for them, court activism remains meaningful to such a strategy, and transformative constitutionalism might be an engine of transformation.

In its way, the logic of transformative constitutionalism is quite compelling. The question to be addressed, however, is one of effective 'agency'. This is a topic discussed a few years ago by Claus Offe in his book on *Europe Entrapped*.[25] There he identifies this as the central problem that faced the EU at the time of the monetary and financial crisis. But we can extend his argument to the problem of democratic backsliding in particular Member States. What Offe argued was that in order to address the crisis, Europe needed to solve the problem of agency by finding adequate 'social and political forces, inspiring ideas, or sufficiently resourceful actors'. There is no doubt that 'transformative constitutionalism' can point to the CJEU, and in some respect to the ECHR, as 'resourceful actors'. It can also suggest that there are social and political forces that may support the action of the Court. But can the appeal to the constitutional values enshrined in Art. 2 TEU provide those 'inspiring ideas' that can mobilise the public or at least have their support? The role of values as part of the mobilising factors in the European integration project is indeed one of the issues that Offe deals with in his book, and it may be useful to look at it.

Offe identifies seven *finalitées* that are often given as grounds for 'Europe as a 'project' intrinsically worth pursuing'.[26] He mentions 7, but the last one is of a more pragmatic nature. The others, in the order in which he discusses them, are (1) peace; (2) economic prosperity and social inclusion; (3) democratic and accountable government; (4) 'soft power' within the international system; (5) diversity of cultures and traditions; and (6) what Offe calls the EU's '*mission civilisatrice interne*.[27] It is probably worth concentrating on the last one, which seems closer to the kind of values that

25 Offe (n. 7).
26 Offe (n. 7), 61–80.
27 Offe (n. 7), 63.

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transformative constitutionalism would appeal to in the case of Hungary and Poland.

He points out how European integration may be looked at as 'a precautionary safeguard against de-civilizing tendencies' undermining long-established standards of civil and human rights. Contrary to the experience in other parts of the world – as in the re-normalisation of the idea of torture in the United States during the Bush Jr presidency – Offe argues that in Europe, such regression and the ensuing violations of rights 'could not go undetected and unsanctioned,' an achievement 'that cannot be lightly dismissed.' Nonetheless, Offe thinks that the rather 'negative' character of this 'prevention' function is insufficient as a ground for mobilising popular support for the EU. One could raise other doubts about Europe's self-immunisation capacity against de-civilizing tendencies by asking, for instance, whether this is truly the case; and, if so, whether the safeguards come more from the public cultures and institutions of the Member States than from the Union itself. Hungary and Poland appear to be ideal cases in this context. On the one hand, this is an example of how the Union may fulfil the self-reflexive capacity that Offe identifies by providing members states with some external reminder of the kind of standards of rights and democratic organisation that they have committed to as part of their membership in the EU. On the other hand, the fact that the action taken by the European institutions has not been able to prevent fully, even though it has arguably delayed and made more difficult, the evolution of the Hungarian and Polish regimes towards more authoritarian and autocratic forms is indicative of the relatively low capacity for social and political mobilisation that the European institutions have when trying to take sanctions against one of the Member States. This confirms that the Union's *mission civilisatrice interne* is not fully effective, ultimately depending on the robustness of the democratic and civil-rights culture of the Member States.[28]

If this is true, one must assume that 'transformative constitutionalism', on its own, is incapable of mobilising and motivating the kind of action required to correct and transform profound constitutional deficiencies. Any profound and durable transformation needs what we call 'transformative politics.' To understand such politics, we need to avoid some common misconceptions. Politics is often considered a mere fight for power and sectori-

28 The recent demonstrations in Israel against the constitutional law reforms of the Netanyahu government show the importance of civic mobilisation against democratic backsliding.

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al advantage through factional divisions and low forms of compromise. On those occasions when a broader, more constitutive, and transformative view of politics is acknowledged, this tends to be identified with an unrealistic and idealised form of high-minded rational deliberation. By contrast, politics is always a mixture of high and low politics. It is this way of conceiving and practising politics that is often concealed and underestimated as part of motivating and legitimating processes of social transformation. But we think that it is only by appealing to this two-faced view of politics and of its transformative capacities, as well as to other transformative forces in society, such as the power of a vibrant constitutional culture or the autonomous capacities of civil society, that profound changes can happen and be made durable.

Offe's discussion of the Union's *mission civilisatrice interne* points to another distinction that is important in the way in which we think of constitutional transformation in a more interconnected world, and this is between the national and the international and supranational levels. This is particularly true for the EU, where one can argue that the European space has reached a high level of social and institutional interconnectedness and constitutionalisation (even though the nature of this process remains contested). But the interrelation between these two levels also takes place in cases where there is no such a level of integration, like Latin American cases, where the IACtHR has played a similar role to that played by the CJEU, and in some respect of the ECtHR, in supporting and bolstering some processes of democratic constitutionalisation. As we argue in the rest of this paper, it is by paying close attention to the interconnection between the political and constitutional dimensions, on the one hand, and the national and international on the other, that it is possible to pursue a transformative process aimed at reverting the current authoritarian turn. Before looking at the European context in particular, we would like to discuss some important features of transformative politics through a comparison with similar processes in the Latin American context.

III. Opposition Politics in Authoritarian Contexts – Strategies and Coalitions

How do democratic oppositions or newly elected governments sustainably revert authoritarianism? Among other factors, comparative research on

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oppositions has so far argued that building inclusive movements between civil society groups and political parties to participate in elections as well as peaceful protests and moderate international pressure are key to enabling transitions to democracy.[29] Even unpopular autocrats may remain in office when the oppositions fail to effectively organise and coordinate their actions. Therefore, it is essential to pay attention to the dilemmas oppositions encounter as well as the window of opportunity available to them as they challenge authoritarian regimes.

Around the world, political oppositions and newly elected democratic governments have faced a series of challenges when trying to revert authoritarianism. Military dictatorships in the past century were marked by a legacy of utter violence and repression, which traumatised and paralyzed societies, including opposition actors. Nonetheless, grass-roots movements, opposition coordination, collective action, as well as favourable international factors, including the collapse of authoritarian regimes in Southern Europe, such as Spain and Portugal, facilitated important transitions to democracy in the region from the mid-70s onwards.[30] The collapse of the Soviet Union as well as successful participation in elections of a previously organised opposition, also allowed for democratisation processes to occur in Eastern Europe. However, these democratisation processes implied in general terms an improvement in the respect for human rights, adoption of formal democratic procedures, and some institution-building, they did not prevent further irruptions of authoritarian practices altogether. For example, in Central and Eastern Europe unmet expectations of prosperity and governance fuelled dissatisfaction with democratic institutions in the 1990s and 2000s.[31] Over the past decades, Latin America has also under-

29 Laura Gamboa, *Resisting Backsliding: Opposition Strategies against the Erosion of Democracy* (Cambridge: Cambridge University Press, 2022); Valerie Bunce and Sharon L. Wolchik, *Defeating Authoritarian Leaders in Postcommunist Countries* (Cambridge: Cambridge University Press, 2011).

30 Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 2014); Ruth Berins Collier, *Paths toward Democracy: The Working Class and Elites in Western Europe and South America* (Cambridge: Cambridge University Press, 1999); Guillermo A. O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule. Tentative Conclusions about Uncertain Democracies* (Baltimoreand London: Johns Hopkins University Press 1986).

31 Kiran Auerbach and Bilyana Petrova, 'Authoritarian or Simply Disillusioned? Explaining Democratic Skepticism in Central and Eastern Europe', Political Behavior 44 (2022), 1959–1983.

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gone different transitions to democracy and back to authoritarianism. It is therefore a region that offers key insights into the variables that explain the rise and fall of democracies and/or autocracies.

1. Experiences from Latin America

From the 1980s onwards, a series of drastic market reforms to address economic instability, including fiscal austerity, privatisation of public enterprises, removal of regulations and control, incentivizing foreign trade, dismissal of government employees, were put in place. These measures contributed to limiting the quality of democracy. Neoliberal policies imposed reduced government responsiveness to its constituents and their capacity to implement beneficial socio-economic reforms as incumbent administrations were vulnerable to the economic interests of domestic and foreign investors. As a result, citizens began to disregard political parties and disengage from politics.[32] In the late 1990s, political party systems were crumbling across a more democratic region. Unresponsive political parties, corruption scandals, inequality, and poverty, next to economic instability, paved the way for the so-called 'pink tide,' a wave of left-wing candidates who got elected to office. While some of these governments' policies and performance can be attributed to the moderate democratic left (Lula's Brazil), others are defined as 'contestatory left' (Correa's Ecuador, Morales's Bolivia), and yet others belong to the radical authoritarian left (Chávez and Maduro's Venezuela, Ortega's Nicaragua).[33] In the latter two sets of countries, incumbents began -to varying degrees- to purge key institutions, such as the judiciary, electoral authorities, media, and civil society organisations, making it difficult for opposition groups to gain a foothold over time.

In two out of these four cases, Bolivia and Ecuador, we have observed, even if briefly, incumbent turnover, while in Nicaragua and Venezuela, we have not, so far. Existing research on Bolivia and Ecuador argues that moderate strategies, including participating in elections and peaceful protests, enabled the opposition to mobilise citizens in their favour. In

32 Kurt Weyland, 'Neoliberalism and Democracy in Latin America: A Mixed Record', Latin American Politics and Society 46 (2004), 135–157.

33 Raúl L. Madrid, Wendy Hunter and Kurt Weyland, 'The Policies and Performance of the Contestatory and Moderate Left' in: Kurt Weyland, Raúl L. Madrid and Wendy Hunter (eds), *Leftist Governments in Latin America: Successes and Shortcomings* (Cambridge: Cambridge University Press, 2010), 140–180.

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the 2021 elections in Ecuador, businessman Guillermo Lasso, who had in previous elections lost to a once popular Rafael Correa, was able to craft an alliance and message that appealed to various groups within society. People on the right, in the center, dissatisfied government supporters, as well as environmental and indigenous groups, voted against Correa's candidate Andrés Arauz fearing that high polarisation and authoritarian practices would return if he won.[34] In 2019, Evo Morales was forced to step down after a series of contentious events. Partisan and non-partisan denounced irregularities and protests erupted. Although once popular because given his government's ability to reduce poverty and inequality, Morales alienated voters with his power-maximising ambitions and disrespect for democratic institutions over time, including the disregard for his lost 2016 referendum to seek re-election.[35]

In contrast, both in Venezuela and Nicaragua, incumbents consolidated their power even more. Despite peaceful protests and concrete demands for democratisation between 2013 and 2018, citizens and opposition leaders in Nicaragua were not able to achieve their goals. The Ortega regime brutally repressed these attempts and has persecuted and exiled all relevant opposition figures as well as civil society members, including the Catholic church, over the past years. Despite decreasing popularity rates, his ruling coalition has installed a regime of fear that seems hard to topple so far. International pressure and domestic coordination among political opposition were not present when most needed, thereby allowing Ortega to consolidate his grip on power even faster.[36] In Venezuela, chavismo also gradually turned the country's once weak democracy into an electoral authoritarian regime that manipulated elections to maintain power, repressed civil society and opposition groups, engaged in violent crackdowns, arbitrary detentions, and even torture of dissidents.

In all these cases, authoritarian incumbents have relied on the classical 'divide et impera' strategy to weaken their opponents. Using highly polarising and inflammatory rhetoric, repression, or co-optation mechanisms,

34 John Polga-Hecimovich and Francisco Sánchez, 'Latin America Erupts: Ecuador's Return to the Past', Journal of Democracy 32 (2021), 5–18.

35 Laura Gamboa, 'What Should the Opposition Do in Authoritarian Regimes? Here Are Lessons from Bolivia', Mischiefs of Faction, 21 February 2020, https://www.mischiefsoffaction.com/post/what-should-the-opposition-do-in-authoritarian-regimes-here-are-lessons-from-bolivia.

36 Kai M Thaler and Eric Mosinger, 'Nicaragua: Doubling Down on Dictatorship', Journal of Democracy 33 (2022), 133–46.

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autocrats exacerbate pre-existing divisions or create new ones to prevent opposition groups from coordinating before legislative or executive elections. When oppositions do not overcome fragmentation to present a viable alternative, they can unintentionally help the autocrat consolidate his power. Therefore, it is essential to understand the relevance of *ex ante* and *ex post* coordination among diverse opposition groups. We make this distinction because there are different stages in the struggle for democracy as different obstacles and costs emerge with each stage. Oppositions make commitments to one another *prior* to the election to win, however, they must also craft credible mechanisms *upon* winning to be able to govern.

2. Anti-authoritarian coordination strategies in and out of government

Coordination between anti-authoritarian forces is crucial for a series of individual and collective reasons. Firstly, it allows different opposition groups to amplify their collective capacity, given that winning individually is harder to achieve. By joining forces, opposition groups can pool their material resources, expertise, and networks to create a larger and more competitive movement. Coordinating can also help to create a unified message and set of objectives to galvanise wide public support. Finally, coordination can provide a sense of individual safety for opposition groups, who may otherwise face intimidation or violence from the regime.[37] Precisely because the playing field is largely uneven in electoral authoritarian regimes, opponents are often forced to enter alliances they would not have pursued under democratic settings.

Yet, beyond the willingness or need to coordinate, the factor that can shape the effectiveness of collective efforts in the mid- and long run is *how* parties coordinate, which can be informal or formal. While informal coordination is one-off actions (i.e. organising protests), cross-party endorsement, or non-aggression pacts, formal coordination implies that parties commit to certain internal rules.[38] These rules help structure internal conflicts and facilitate collective decision-making among diverse opposition

37 Elvin Ong, 'Opposition Coordination in Singapore's 2015 General Elections', The Round Table 105 (2016), 185–194; Orçun Selçuk and Dilara Hekimci, 'The Rise of the Democracy – Authoritarianism Cleavage and Opposition Coordination in Turkey (2014–2019)', Democratization (2020), 1–19; Daniela Donno, 'Elections and Democratization in Authoritarian Regimes', American Journal of Political Science 57 (2013), 703–716.

38 Keck and Sikkink (n. 30).

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parties. While the Venezuelan opposition under chavismo has not managed to oust incumbents from power, their formal coordination attempt around the so-called Mesa de la Unidad Democrática (MUD) helped opponents narrow the gap to chavismo, even under barely competitive circumstances. In 2009, opposition parties in Venezuela decided to announce the creation of their opposition alliance Mesa de la Unidad Democrática (MUD), to contest upcoming elections more effectively. This alliance progressively allowed opposition parties to win in legislative, municipal, and regional elections. It also helped parties narrow the gap in the 2012 and 2013 presidential elections, where the opposition candidate, Henrique Capriles, lost to Chávez with a narrower margin (44 % to 55 %) compared to Manuel Rosales's 2006 loss (36 % to 62 %) and only with a 1.5 % difference to Maduro. In 2015, the MUD won the supermajority in the National Assembly because of their competitive collective campaign.

Over several electoral cycles between 2010 and 2015, voters learned to reward the MUD's efforts of building a serious alternative to the government. The 'secret' of these incremental successes was the careful work conducted by the MUD's Executive Secretariat and its working commissions, who tried to align the interests of all coalition members and helped craft unitary lists, select joint candidates, and design a joint minimal program. In the face of internal tensions, the coalition could manage conflicts based on the internal rules it had designed. This experience helps to stress the importance of mutual commitment based on written rules that tried to increase the costs of non-cooperation and allowed the coalition to survive four election cycles.[39] Though the MUD was not able to reverse authoritarianism altogether, it represented a valuable tool to slow autocratization in Venezuela to some extent.

Beyond ex-ante coordination to win elections, however, *ex-post* coordination upon winning also seems vital. A broad opposition coalition that wins legislative elections or assumes power after a period of authoritarianism must be able to govern, implement state reforms and public policies that benefit the people while it deals with authoritarian enclaves and informal structures built during the authoritarian recent past. Therefore, oppositions who want to remain in power and successfully democratize a country, must craft credible ex-post coordination agreements. It is often believed that an anti-incumbent umbrella movement can revert authoritarianism. However, existing empirical evidence shows that if newly elected

39 Keck and Sikkink (n. 30).

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governments do not distinguish themselves in programs and practices from the authoritarian past and/or authoritarian successor parties and most importantly do not engage in credible elite bargaining, their coalitions are vulnerable to collapse.

Cases from Latin America and Europe show that where oppositions fragmented upon winning executive offices, democratisation processes did not consolidate over time. For example, the opposition coalition led by Violeta Chamorro in Nicaragua, which won the 1990 presidential election, beating the Sandinista National Liberation Front (FSLN) that ruled a decade long, could not survive in time. Even though Chamorro's victory was attributed to her ability to unite a previously fragmented opposition, she could not hold it together after winning office. Her government suffered from internal divisions and conflicts, particularly because at heart what united them in the first place was their shared anti-incumbent sentiment and not a collectively designed reforms and/or program.[40] Similarly, the interim government of Jeanine Añez, who assumed office amidst a political crisis in November 2019 after Evo Morales was ousted from power, exemplified the series of errors an incoming opposition government could commit. On the one hand, Añez failed to build a broad-based coalition to support her government, which left her vulnerable to opposition from various sectors of Bolivian society. Her main supporters were on the right of the ideological spectrum, which left indigenous and working-class groups, who were the core constituents of the Movement for Socialism (MAS) outside her support base. Additionally, Añez's administration was questioned for attacking journalists, pressuring prosecutors to its favour, and retaliating against former MAS officials and supporters.[41]

A similar trend can be identified in Central and Eastern Europe. The lack of functioning institutions, democratic governance, accountability, and representation boosted dissatisfaction with democracy as the preferred regime type in Eastern Europe.[42] The most referred to cases of democratic

40 Laura Nuzzi O'Shaughnessy and Michael Dodson, 'Political Bargaining and Democratic Transitions: A Comparison of Nicaragua and El Salvador', Journal of Latin American Studies 31 (1999), 99–127.

41 César Muñoz and José Miguel Vivanco, 'Bolivia Should End Revenge Justice', Human Rights Watch (blog), 22 March 2021, https://www.hrw.org/news/2021/03/22/bolivia-should-end-revenge-justice; V. Ximena Velasco Guachalla et al., 'Compounding Crises: Bolivia in 2020', Revista de Ciencia Política 41 (2021), 211–237.

42 Kiran Auerbach and Bilyana Petrova, 'Authoritarian or Simply Disillusioned? Explaining Democratic Skepticism in Central and Eastern Europe', Political Behavior

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backsliding within the EU are Poland and Hungary where Fidesz and PiS, both with a track record as democratic parties after the collapse of communism, have since 2010 and 2015, respectively, attacked the free press and independent civil society, restricted judicial independence and changed electoral laws to their benefit.[43] Research on these countries has argued that backsliding in recent years is a product of structural conditions (i.e. economic crisis in 2008, European refugee crisis in 2015) and the long-term impacts of the first transition to democracy after the fall of communism. Bernhard (2021) argues that the extrication processes from communism in Poland and Hungary were contentious and negotiated. He shows how the strength of the opposition was a key factor in initiating the democratisation process but less so after the extrication process. In both countries, the opposition had a relatively well-developed organisational capacity, which allowed them to strategically mobilise and open the system. However, after the extrication process, opposition parties split over strategic and personal motifs. The post-communist political and discursive space was divided between maximalists and moderates about how the transition process had come about. These struggles facilitated the 'memory warrior stance', which diminished the accomplishments of negotiated settlements and framed them as rotten deals. Meanwhile, post-communist parties were still able to survive and shape the emerging political landscape. The Polish Democratic Left Alliance (SLD) and Hungarian Socialist Party (MSzP) embraced programs supporting democratic and market reforms, as well as membership in NATO and the European Union, leaving little room for the opposition to distinctively distinguish itself on programmatic grounds. In addition, two exogenous factors contributed to the rise of illiberalism: the 2008 economic crisis and the 2015 refugee crisis. Both events consequently boosted PiS and Fidesz's ethno-national xenophobic capacity to mobilise Polish and Hungarian voters around discourses on the need to protect them from exogenous problems.[44]

Historical case studies from Latin America illustrate the impact of intra-opposition bargaining and coordination post-victory. Credible coordina-

44 (2022), 1959–1983; Besir Ceka, 'The Perils of Political Competition: Explaining Participation and Trust in Political Parties in Eastern Europe', Comparative Political Studies 46 (2013), 1610–1635.

43 Elisabeth Bakke and Nick Sitter, 'The EU's Enfants Terribles: Democratic Backsliding in Central Europe since 2010', Perspective on Politics 20 (2022), 22–37.

44 Michael Bernhard, 'Democratic Backsliding in Poland and Hungary', Slavic Review 80 (2021), 585–607.

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tion mechanisms among democratic opposition can help elites better navigate the multiple challenges of governing in a post-authoritarian country. Chile is a case that reveals the importance of opposition coordination prior to and post-transition. As in other countries, opposition parties in Chile were also deeply divided along ideological differences and personal rivalries. It took elites on the center-left and center-right years to process and transform internal tensions. Learning from past strategic mistakes, deemphasizing ideology, and developing a sense of duty to the Chilean people, parties in the opposition camp developed incentives for cooperation, which allowed for the creation of the Concertación in 1988, the longest-running coalition in Chile and among the longest running in Latin America. By building a coherent front to win the plebiscite against Pinochet in 1988 and subsequent presidential election in 1989, the opposition coalition was able to polarise along the regime-cleavage and in favour of democracy.[45] Upon winning, the Concertación, which was composed of the Christian Democratic Party (PDC), the Socialist Party (PS), the Party for Democracy (PPD), and the Radical Social Democratic Party (PRSD) – a party composed of the previous Radical Party (PR) and Social Democratic Party PSD) -, developed series of formal and informal mechanisms that enabled multiparty power sharing and representation. These mechanisms included regular meetings of party leaders, constant elite negotiations about appointments and candidates, ministerial distribution arrangements (*cuoteo*), consultative mechanisms, and a firm commitment to internal pacts. The Concertación also established a system of rotating the presidency among coalition parties, which helped to distribute power and prevent one party from dominating the coalition.[46] For twenty years, parties learned how to respond to formal incentives (i.e. constitution or electoral system) with a set of informal strategies 'designed to simultaneously balance the goals of promoting party interests, ensuring coalition survival, and winning political office'.[47] While the Chilean transition is not just a success story, it does illustrate the difficult compromises newly elected democratic governments have to pursue, both vis a vis the outgoing authoritarian cohort and its coalition partners. It is also a case that exemplifies the constraints outgoing

45 Mariano Torcal and Scott Mainwaring, 'The Political Recrafting of Social Bases of Party Competition: Chile, 1973–95', B. J. Pol. S. 33 (2003), 55–84.

46 Kirsten Sehnbruch and Peter M. Siavelis (eds), *Democratic Chile: The Politics and Policies of a Historic Coalition 1990–2010* (Boulder: Lynne Rienner Publishers 2013).

47 Peter M. Siavelis, 'From a Necessary to a Permanent Coalition' in: Sehnbruch and Siavelis (n. 46).

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elites impose on democratic parties and society's desire for rapid and all-encompassing reforms.

Venezuela also helps illustrate the relevance of elites' commitment to post-transition coordination and bargaining. In 1958 after the fall of Marcos Pérez Jiménez's military dictatorship, three political parties Acción Democrática (social-democrats), Copei (Christian-democrats), and URD (center-left) signed the Puntofijo Pact to establish a democratic system. These parties decided to design and follow a series of elite pacts and agreements to facilitate political stability and democratic governance, which they had agreed to months before the signature and Pérez Jiménez's fall. Some of these pacts centered around the shared idea that i) parties would be the key players of the new centralised system, in which they would structure society through its networks, ii) the state would be central in designing the economy and society, iii) party competition should be based on pluralism and competition. Though elite pacts and tight elite control over society and state institutions were vehemently rejected decades later, these very first negotiated compromises about procedures (democratic rules) and objectives (policy) allowed for a successful democratisation process in which citizens saw institutions and the state as legitimate.[48] In addition, because parties committed to redistributing the country's oil-based income by building a welfare state to address inequalities and facilitate social mobility, as well as providing a series of benefits to economic actors, Venezuela's emerging democracy counted on widespread support.[49]

These two examples demonstrate the importance of elites' normative preference for democracy. As Diamond and Linz put it 'to a considerable degree, the option for a democratic regime was a matter of pragmatic, calculated strategy by conservative forces who perceived that representative institutions were in their best interest. Even at the elite level, deep normative commitments to democracy appear to have followed these rational choices. In Chile, Uruguay, and Costa Rica (and much later in Venezuela), values of tolerance, participation, and commitments to democratic principles and procedures developed as a result of practice and experience with

48 Brian F. Crisp, Daniel H. Levine and Juan Carlos Rey, 'El problema de la legitimidad en Venezuela', Cuestiones Políticas 12 (1996), 5–43.

49 Terry Lynn Karl and Philippe C Schmitter, 'Modes of Transition and the Emergence of Democracy in Latin America and Southern Europe' in: Eva Etzioni-Halevy (ed), *Classes and Elites in Democracy and Democratization: A Collection of Readings* (New York: Routledge 1997).

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democratic institutions.'[50] In Chile and Venezuela, elites' commitment to consensus-building, self-restraint, and respect for democratic principles and procedures allowed for democratic political systems to emerge. Members of the Concertación in Chile as well as the two main political parties in Venezuela – AD and Copei – consciously crafted formal and informal coordination mechanisms to strengthen a democratic system based on pluralism, tolerance, and moderation. Though both processes suffered setbacks as citizens began to reject elite pacted transitions, they still highlight the relevance of sustained elite disposition towards democracy in post-transition contexts.

Extrapolating from these historical examples, but also from Poland and Hungary's history, it appears important that opposition parties in these countries elaborate credible ex-ante and ex-post coordination strategies around a long-term struggle for democratisation. The empirical discussion above illustrates the relevance of addressing divisions prior to and post elections, given that different dilemmas and obstacles emerge for opposition parties. When disagreements among a newly elected democratic government are too substantial and unfeasible to solve, given their heterogeneity, it might fall apart or cause disenchantment within the population. This, in turn, could revive longing for the authoritarian past and/or boost support for authoritarian successor parties. To prevent this from happening, elites can develop a series of formal and informal mechanisms, including cross-party parliamentary commissions, mutually beneficial portfolio distribution, and strategic senate pacts around shared objectives, that can help guarantee stability and collective success. Whether parties create one unitary bloc or multiple sub-alliances for upcoming elections, a shared elite commitment to a transition 2.0, that is, a return to upholding EU democratic principles, would also matter. In addition, democratic elites could pledge to collectively address long-standing economic inequalities, expressed through generational, educational, and urban-rural divides. Relying on high EU acceptance among Polish and Hungarian citizens, democratic parties can craft depolarizing pragmatic campaigns to connect with citizens tired of incumbent-induced polarisation and those hurt by the pandemic and economic crisis. Clearly, distinguishing a democratic programmatic offer from incumbents' illiberal and conservative platform may help parties reinforce value-driven politics.

50 Larry Diamond and Juan Linz, 'Class Inequalities, Elite Patterns, and Transition to Democracy in Latin America' in: Etzioni-Halevy (n. 49), 297.

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IV. The European Context: A Two-Level Game

The main lesson that we draw from the Latin American experience is that for transformative politics to work, we need this to operate both at the level of political elites, through the formation of a democratic bloc based on a shared commitment to democratic principles and an institutional structure guaranteeing constitutional rights and checks and balance; and at the level of ordinary citizens, promoting a democratic culture based on dignity and mutual respect, a free civil society, and a sense (however contested) of the public good. In the rest of this section, we look at some particular aspects of transformative strategies in the European context.

1. The social dimension – Boosting democratic performance from below

In the second section of this essay, we have argued that transition 2.0 within the European context requires a double-pincer strategy, recognising the importance of both the constitutional and the political dimensions and the way in which these may operate at both national and supranational levels. But it is important to stress that an essential condition for any democratic transformative strategy is what we call the 'social dimension.' In order for transformative constitutionalism and transformative politics to produce democratic outcomes, it is essential that politics and the legal-constitutional framework matter and are seen to matter to the citizens and their well-being. Hence, the legitimacy of democratic politics and constitutional democracy rests both on formal and substantial grounds, as well as on the input and output of democratic governance.

The process of constitutional and democratic backsliding that has been observed in Hungary and Poland, and the similar tendencies observed in other EU Member States, as well as in the post-Brexit UK, needs to be put into the broader socio-economic context of the last thirty years in Europe, a context also determined by the shaping of the EU as a multi and inter-state kind of polity. The financial crisis of 2008 represents the moment when many of the problems of the social and institutional model of the EU came to the fore, posing questions for both democracies at the national and supranational levels. Arguably, and in spite of its foundational principles and values, the way in which the EU's quasi-constitutional structure has developed is anything but neutral in terms of policies and their effects on the social fabric of national societies and on the states' capacities

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for positive, not just negative types of intervention. Philippe van Parijs[51] describes the development of the EU, as an inter-state federal structure with a common economic market, as being caught in what he calls the 'Hayek Trap': on the one hand, there is the weakening of the constraining and social protection functions of the state and other collective forms of organisation resulting from the common market of goods, services, capital, and labour; on the other, the multinational character of the union weakens some of the identitarian mechanisms on which modern states relied to develop more solidaristic and redistributive kind of policies.

Even though these 'traps' and asymmetries do not tell the whole story of the EU's policies and their social effects (different stories can be told about environmental and consumer protection and social and equality-promoting rights); it remains the fact that these policy choices have affected macro political economy in the EU area, contributing both to a general trend towards social and economic inequality, and the erosion of the capacities of the European national states to provide social protection and a balance between private and public freedom. While for a while, up to the start of the 21st century, an overall positive assessment of the EU's output legitimacy was regarded as sufficient for the justification of the European integration project, this is no longer the case in view of the deterioration of some of the economic benefits attributed to integration. The EU and its policies can therefore be considered as partly responsible for increasing both economic inequality and social deprivation, contributing to a diffuse resentment against political and technocratic elites who seem to have gained from the integration process and market globalisation, while at the same time have failed to protect ordinary citizens from some of the effects of those very same processes. Addressing and reversing the turn towards authoritarianism in Europe may therefore require a more substantive idea of some of the social policies characterizing the European model besides the re-establishment of the principles and practices of formal constitutional democracy.

2. The political-institutional dimension

The argument about the importance of a transformative strategy that addresses the social malaise that has contributed to populist and anti-political forms of protest and mobilisation reinforces our argument that a primar-

51 Philippe Van Parijs, 'Thatcher's Plot and How to Defeat It', Social Europe (2016), https://www.socialeurope.eu/thatchers-plot-defeat.

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ily legal-constitutional transformative process is on its own incapable of turning the authoritarian tide. A renewed institutional politics, as well as a new social vision and citizens and civil society's direct involvement, are all requisite for a transformative strategy. But, within the EU context, the interplay between the national and the supra- and inter-state levels may play a significant part in articulating such a strategy.

As we argued in section II, transformative strategies need an assessment of what needs to be transformed into what, but also of how this transformation is possible and who are the likely agents of such a transformation. In the present constitutional architecture of the EU, democratic politics has a weak capacity for mobilization at a supranational level, limited to the subordinate way in which the European Parliament can participate in the legislative process. Moreover, the 'thin' kind of citizenship of the present EU structure is insufficient on its own to be an effective medium for mobilising political agency. The more readily available kind of agency available at the European level is that of the institutions. The CJEU, therefore, in what could be described as its role as the guardian of Treaties, may be considered the most likely candidate to promote and safeguard the EU constitutional principles and defend them against attacks coming from Member States. In this respect, an activist Court is something to be welcomed, but we think that there are two important qualifications that such activism should keep in mind. One is that any effective mobilisation at the European level needs to involve a horizontal dialogue between the European institutions so that any intervention of the Court can gain authoritativeness as seen as the result of coordinated actions between different institutional players at the European level; and, perhaps more importantly, that the Court needs to engage in a vertical dialogue with national courts, something that it is already happening. This is something that goes beyond the particular questions of stopping and reverting the turn towards more authoritarian forms of politics and constitutions but regards the very conception of constitutionalism in Europe.[52]

With the political failure of the Constitutional Convention, even though this resulted in the Lisbon Treaty, a more *processual* and open-ended conception of constitutional construction in Europe prevailed. One of the

52 Cf. Koen Lenaerts, 'Upholding the Rule of Law through Judicial Dialogue', Yearbook of European Law 38 (2019), 3–17; Alison L. Yong, *Democratic Dialogue and the Constitution* (Oxford: Oxford University Press 2017), Ch. 8 'Dialogue between Courts', 255–294.

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implications of this is the recognition of the interaction between law and politics, thus producing a structural coupling between them so that constitutional politics results from various institutional dialogues. But horizontal institutional dialogue is not enough. Arguably, one other important element in the experience of recent European constitutionalism is that this needs to recognize that the European constitutional order is a plural one, operating both at the supranational and the national level and encompassing both the national and the EU constitutions.[53] As argued by Neil MacCormick: 'a pluralistic analysis... shows the systems of law operative on the European level to be distinct and partially independent of each other, though also partially overlapping and interacting'.[54] In itself, this is not a difficult state of affairs to perceive but it posed the difficult problem of how to conceive and operationalise conflict resolution in the context of constitutional pluralism. Although the resolution of this institutional problem is independent of the kind of action required to halt and revert the present turn towards authoritarianism, the solution of this crisis may greatly contribute to consolidating new institutional solutions for addressing that problem.

If a distinctive, transformative kind of *constitutional* politics has a central role at the European level, we believe that the main basis for a transformative strategy at the national level is to be found in *normal* democratic politics, which is more likely to provide the necessary agency to revert the authoritarian turn. This is because the full transference of the mechanisms of democratic politics to the European, supranational level is neither feasible nor convincing. If the main seat of democratic politics in the EU – the type of politics in which citizens can more directly participate, feel fairly represented, and able to control – remains taking place at the national level, it is here that we need to find the social and moral resources for building up and consolidating a democratic and constitutional culture in both the political elites and the citizenry, as we argued in section III. This is where transformative politics has its major role. It is important to understand that any intervention of the European Union and its institutions, or the other Member States, in promoting Transition 2.0, upholding the values of Article 2 TEU, and supporting a more pluralist understanding of democracy through the support of free media and civil society, will not

53 Bellamy and Castiglione (n. 15), Chapter 7 'Constitutional Politics in the European Union', 187–190.

54 Neil McCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press 1999), 119.

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work if they are perceived as an external imposition. This would undermine the important constitutional principle of political autonomy. The kind of corrective interventions against 'systemic deficiencies' or the EU's '*mission civilisatrice*' may become counterproductive if they are not embedded in a multi- and inter-state democratic structure of which the European citizens become increasingly aware and in which they feel to have some meaningful representation. From this perspective, reverting the authoritarian turn in Hungary and Poland should be seen as part of the attempt to build such a new democratic structure, whose function would also be halting or preventing similar developments in other Member States.

The main principle of this multi- and inter-state democracy would be that of recognizing the foundational role still played by national democracy, but one capable of internalising inter-state externalities. This partly reflects what Robert Putnam[55] described as the logic of a two-level game, where governments agree amongst each other on an equal basis at the inter-state level while at the same time, they secure the long-term democratic agreement of their citizens. But this in itself is not enough, the EU must develop a set of institutional places where there is space for meaningful debate and deliberation between citizens either directly or through their national representative institutions so that the process of internalisation of externalities between Member States does not exclusively take place between governments but also between the citizens of the different Member States. It is only in this way that a true European constitutional and democratic culture can be fostered and regarded by the European citizens as their own. From an institutional perspective, this would involve going beyond the present institutional logic with the Council operating intergovernmentally, while the Commission, the EU Parliament, and the European Court more at a supranational level. What we would need to develop is a network of interstate institutions and dialogues, where, for instance, parties in the European Parliament should be linked more strongly to their national parties, and national parliaments gain a more direct and collaborative role in EU policy-making. Although the development of a more unified European public sphere is still only at an embryonal stage, the integration process has facilitated the development of a more European-wide civil society and inter-state collaboration in many sectors, from education to business. Something similar should be cultivated at a more institutional

55 Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', International Organization 42 (1988), 427–60.

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level with the involvement of citizens, thus providing a solid base for a democracy respecting the autonomy of the different states and societies and the specificity of some of their arrangements but ensuring meaningful co-operation and the internalisation of externalities and the cultivation of a sense of common European interest with respect to a number of areas such global environmental issues, immigration, the digital revolution and of course the basic principles of constitutional democracy.

V. Conclusions

The EU is founded on the principle of democracy. Article 2 of the TEU explicitly establishes the EU's commitment to the principles of human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, which implies that by signing all EU Member States are expected to uphold these principles and promote them within their own countries. Over the past decades, the EU has tried to actively promote democracy through institutions and policies , such as the European Parliament, the European Commission, and the European Court of Justice; as well as through a number of legal frameworks and mechanisms. Democratic backsliding in some Member States, however, shows that not all governments uphold the principles and values underpinning the EU at all times.[56]

Our chapter has argued that reversing the authoritarian turn in some of the Member States of the EU will require the implementation of wide-reaching 'transformative strategies' – social and political mobilisation –, what we here refer to as 'transformative politics.' We have underlined that reversing or preventing further democratic and constitutional backsliding in the EU can only succeed as a long-term multi-level strategy that goes beyond the law to incorporate politics. We paid close attention to the world of oppositions to highlight their crucial role in building democratic regimes. In authoritarian settings, opposition elites might agree on wanting to topple the ruling elite, but they may disagree on *how* to do it. An important component for oppositions to fight autocracy is to coordinate their actions, both ex-ante and ex-post. We showed that coordination is more than just about pooling resources to increase competitiveness; what really matters to make a coordination agreement viable over time is to commit to internal

56 R. Daniel Kelemen, 'The European Union's Authoritarian Equilibrium', Journal of European Public Policy 27 (2020), 481–499.

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rules that help make collective decisions and solve internal conflicts that will naturally arise. Although coordination should not be overestimated as a variable to explain successful transitions and/or democratic consolidation, the Chilean and Venezuelan cases helped illustrate the relevance of elites' initial pacts and negotiated agreements to implement policy as well as state reforms during their newly elected governments. This means that before the rule of law constitutional order can be re-established *ex post* a transition, opposition parties need to strategise and mobilise *ex-ante* to win the upcoming elections and be able to govern upon winning.

In the European context, we stress the importance not only of transformative politics along transformative constitutionalism but the way in which the national and European levels may need different configurations in the way in which these strategies interact or the role they actually play in the interaction. While we recognize that at the European level institutions, and particularly the European Court, may provide some agency in the process of transformation, we argue that at the national level democratic politics is the main vehicle for such a transformation. We also suggest that bringing the principles of constitutional democracy back in Hungary and Poland is only part of a wider European process that involves both a new European social vision and the progressive construction of a novel interstate democratic structure. Organising around shared democratic principles and building deep entrenchment in society in the period before and after elections are essential steps to craft a path towards democracy. This would not only facilitate transition 2.0, but also help prevent democratic and constitutional backsliding in other Member States.

Functional constitutional democracies do not merely rest on being formally enshrined in a constitutional text. They require that political elites and society constantly renew their commitment to following democratic practices, the rule of law and the fundamental constitutional principles underlying the Union. The challenges that Poland and Hungary are currently facing are shared by several countries within the EU, even if only to some extent. Paying close attention to the conditions that favoured democratic backsliding in some Member States in the first place and developing successful social, political, and cultural strategies to restore democracy in these countries might help foster a more egalitarian and democratic EU in the long run.

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Authoritarianism, Judicial Independence and Democratic Transition

Diego García-Sayán

I. Introduction 91
II. Major Global Threats to Judicial Independence 92
III. A Growing Threat of Authoritarianism and Regional Responses 93
IV. Corruption and Judicial Independence 96
1. General remarks 96
2. Colombia and Guatemala – case studies 98
3. UN Convention against Corruption 100
4. Specific role of transitional justice in the context of corrupted judiciary 101
V. Justice and Democratic Transitions 101
1. General remarks on democratic transitions 101
2. Role of truth commissions 103
3. Peru's success story – transition from Fujimori regime to democracy 105
4. Colombia – transition from FARC 107
VI. Final Remarks 110

Abstract
This paper evaluates major threats to judicial independence around the world, especially the threats of the growing wave of authoritarianism and corruption. Special emphasis is put on Latin American countries. Their problems, but also their transition from authoritarianism to democracy could be a good example for other countries facing similar challenges. Transitional schemes should not be limited only to institutional instruments, such as the composition of the judiciary. They have to address the issues of reparations, seeking for truth and reconcilitation. They have to take into account that the level of internal corruption within a judiciary and political system may require more intensive actions and support of international organizations.
Keywords: rule of law, Latin America, transitional justice, Peru, Colombia, Guatemala, El Salvador, truth commission, reconciliation, judicial independence, corruption, retirement age for judges, authoritarianism, democracy

I. Introduction

The rule of law implies the need for measures to ensure adherence to the principles of supremacy of the law, equality before the law, separation of powers, participation in decision-making, legality, avoidance of arbitrariness, and procedural and legal transparency. It requires a system in

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which judicial independence is guaranteed and ensured. However, the independence of the judiciary is currently under attack around the world and, including in Latin American countries.

Some challenges from Latin American countries may also appear in other continents, especially due to the growing wave of authoritarianism and corruption. In addition, certain countries face problems relating to transitional justice, when they come back to the family of democratic countries or after peace processes following internal armed conflicts.

The authoritarian wave that is sweeping the world dilutes the separation of powers. It subjugates the justice system to the political power. It impacts on judicial independence and includes significant attacks on judges and prosecutors. It also limits the free exercise of the legal profession in a wide range of countries.

The corruption and international organized crime is another phenomenon affecting judicial independence. Authoritarian trends and the concentration of power create favorable conditions for those threats. The devastating consequences of corruption on human rights have been proven. Corruption has a direct impact on the obligation of states to provide the maximum available resources to satisfy the economic, social, and cultural rights of the population. Rule of law is one of the most important weapons to fight against corruption.

But there are countries which could be portrayed as successful examples of transition from authoritarianism to democratic systems. This paper looks into some of the practices of transitional justice and considers to what extent they may be adopted in other parts of the world, particularly in those countries that are experiencing rule of law and democratic backsliding.

II. Major Global Threats to Judicial Independence

The judiciary is currently under attack and this is a problem not only of the "global south". This phenomenon has arisen due to the voracity of authoritarian currents or governments or by organized crime seeking impunity. Sometimes it also arises on account of a close and volcanic interaction between both.

There are extreme and even gruesome cases worldwide of attacks on justice, almost daily, such as assassination or harassment of judges or arbitrary dismissals with impunity. But also, the selection and appointment

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processes for judges are not always transparent, thus creating a space for politicians to have an influence on them.

Some time ago, independence of judiciary was subject of interest of mostly lawyers. Issues that were once perceived as "lawyerly"—such as the appointment of the high courts or compliance with their decisions—are increasingly seen as matters linked to the exercise of power. Now, this issue is increasingly putting societies on alert. There is a growing understanding that judicial independence is key to democracy.

Between political interference and the murderous hand, there is a wide range of grey areas. This includes the appointment processes of judges of the highest courts, which are sometimes the result of obscure and non-transparent negotiations under the table and contaminated by political "quotas". The general understanding of the need for judicial independence, including the choice of judges on the basis of their professional excellence and integrity, is limited among politicians.

As a result, the justice system has become an institutional target of growing authoritarian vocations and realities. This justice system is often dynamically linked to networks of corruption and human rights violations. But, in fact, there is no other way to prevent corruption and human rights' abuses than to rely on independent judiciary.

III. A Growing Threat of Authoritarianism and Regional Responses

An authoritarian wave now is sweeping across countries on different continents and has at its core the subjugation of justice by political power. There is one common element of this trend. Both global and regional international organizations have limited powers to stem the tide.

In the European Union, among many instruments there are financial instruments that were used with respect to Poland and Hungary.[1] The lack of respect for judgments of the EU Court of Justice results in significant fines and suspension of funds from the EU Recovery Plan. Nevertheless,

1 On 16 February 2022, CJEU delivered important ruling on so-called "Conditionality Regulation", C-156/21, *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, C-157/21, *Poland v Parliament and Council,* ECLI:EU:C:2022:98. The CJEU dismissed Hungary's and Poland's actions for annulment against the general regime of conditionality for the protection of the EU budget.

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there is still a question of the effectiveness of those measures.[2] In the Council of Europe, a prominent role is played by the European Court of Human Rights, which has taken important decisions on judicial independence. Nevertheless, practice of non-implementation of its judgements and interim measures continues.[3]

When it comes to Latin America, one should consider the example of El Salvador[4], where the demolition of judicial independence happened in three stages.[5]

First, in 2021, the arbitrary dismissal of all the members of the Constitutional Chamber of the Supreme Court and the Attorney General was accomplished. They did not have a right to defence or receive fair trial. The UN Special Rapporteur on Judicial Independence expressed its public concern on May 2021.[6] Second, laws have been passed that have swept away the principle of irremovability. As a result, 1/3 of judges have been removed from the bench. Third, the age limit for judicial posts has been lowered to 60 years or 30 years of service in the judiciary. At a time when retirement ages are tending to rise all over the world as life expectancy has increased, this measure can only be explained by the aim of getting rid of many

2 On standards and practical mechanisms to protect rule of law in the European Union: Armin von Bogdandy et al., *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Berlin: Springer 2021).

3 Since January 2022, the ECHR, has received a total of 60 requests for interim measures from Polish judges in 29 cases concerning the independence of the Polish judiciary. The Polish Government informed the Registry of the Court that interim measures ruled by the European Court of Human Rights on 6 December 2022 Court in the cases *Leszczyńska-Furtak v. Poland* (application no. 39471/22), *Gregajtys v. Poland* (no. 39477/22) and *Piekarska-Drążek v. Poland* (no. 44068/22) will not be respected. See press release issued by the Registrar of the Court No. 053 (2023) of 16 February 2023.

4 In March 16, 2022, a public hearing was held before the Inter-American Commission on Human Rights (IACHR) to address the situation of judicial independence in El Salvador. Petitioning organizations presented to this international body a reading of various decisions, facts and arbitrary reforms that occurred in 2021, as a strategy to capture the justice system, executed with the deliberate aim of neutralizing its ability to control power and protect human rights. On 3 June 2022, IACHR called on El Salvador to comply with its international committments regarding judicial indpendence. See press release of 3 June 2022, https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2022/126.asp [access: 12 June 2023].

5 Human Rights Watch, *World Report 2023 – Events of 2022*, New York, 2023, 199–207.

6 Press release: El Salvador: UN expert condemns dismissals of top judges and Attorney General, 5 May 2021, https://www.ohchr.org/en/press-releases/2021/05/el-salvador-un-expert-condemns-dismissals-top-judges-and-g?LangID=E&NewsID=27061 [access: 12 June 2023].

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judges or prosecutors who are considered distant or "alien" by the political powers[7]. As a consequence of those measures, at least 156 members of the judiciary in El Salvador were dismissed, most of them chamber magistrates or judges with a long track record, including several judges in charge of emblematic cases.[8]

Some financial mechanisms should be activated in case of such democratic threats in El Salvador. However, there are no signs in this direction. Moreover, there are no specific political and legal instruments being used at the level of Organization of American States to push for compliance with democratic standards. While in Europe the regional system has shown more financial "teeth", in the Latin American region this is practically non-existent.

The multilateral regional development bank, for example, could theoretically have some instruments to react. However, the Inter-American Development Bank (IDB) and the Development Bank of Latin America (CAF) have no reference to rule of law or democratic standards in their constitutive agreement. But there are some possibilities to act in other documents. In the case of the IDB, its current institutional strategy establishes that one of the three cross-cutting themes to be taken into account for strategic priorities is the rule of law, although this does not seem to operate as a condition. While the IDB does recognize the importance of good governance and rule of law, its operational capacity to directly address issues,

7 Early retirement of judges has been a weapon not only al El Salvador to attack independence of the judiciary in several countries, but also in Hungary. The Fundamental Law of Hungary, which entered into force on 1 January 2012, forced around 274 judges into early retirement, including six of the twenty court presidents at the county level, four of the five appeals court presidents, and twenty of the seventy-four Supreme Court judges. Gabor Halmai has emphasized that "it is not the termination of employment due to the retirement age which is unlawful, but its rapid execution without an appropriate transitional period". The issue was subject of attention of the CJEU in C-286/12, *Commission v. Hungary*, ECLI:EU:C:2012:687. However, according to G. Halmai, the CJEU "missed the opportunity to clarify the meaning of judicial independence in the Charter of Fundamental Rights of the European Union, and the criteria for the de facto dismissal of the judges". See on this Gabor Halmai, 'The Early Retirement Age of the Hungarian Judges' in: Fernanda Nicola and Bill Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge: Cambridge University Press 2017), 471–488.

8 For example, Jorge Guzmán, the judge in charge of the criminal trial for the army massacre in El Mozote became a problematic person. In his investigation, among other things, he asked the prosecutor's office to determine whether there had been a crime, when the military high command prevented him from accessing his files.

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such as judicial independence, is limited. Its interventions are primarily focused on infrastructure projects, education, health, and economic policy reforms.

On the other hand, since the Summit of the Americas in Quebec (2001), the importance of the relationship between democracy, development and its financing has been emphasised. The Summit proposed the urgent need to adopt an Inter-American Democratic Charter, to reinforce OAS instruments for the active defense of representative democracy.[9] Peru prepared the first text and the final version was adopted at the General Assembly of the OAS in Lima, Peru, on 11 September 2001.

The dynamics of threats to judicial independence are different in Europe and Latin America. But still, pressure by international organizations, courts and bodies do not seem to have had a decisive impact to change the course of things or the political decisions affecting judicial independence. If anything, they draw attention to serious facts. They ensure that those problems are not swept under the carpet. But what really matters is the internal political and institutional dynamics in each country, as well as the active and leading role of its citizens and institutions to respond to attacks on democracy.

IV. Corruption and Judicial Independence

1. General remarks

Corruption finds a very fertile territory in the context of authoritarian processes in which one of their patterns is the concentration of power by the executive. These sorts of processes have a reinforced impact on several aspects of human rights. At the global level, the economic losses caused by transnational crime amount to 1.5 % of the global GDP and close to 7 % of the world's merchandise exports.[10]

Corruption has a direct impact in the functioning of public institutions, in general, and for those organs responsible for ensuring the rule of law and

9 Declaration of Quebec City adopted during the Third Summit of Americas on 20-22 April, 2001, http://www.summit-americas.org/iii_summit.html [access: 12 June 2023].

10 A/72/140 Report to the General Assembly of The United Nations by the Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, 25 July 2017, https://www.ohchr.org/en/documents/thematic-reports/a72140-report-special-rapporteur-independence-judges-and-lawyers-note [access: 12 June 2023].

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the administration of justice, in particular. Corruption and organized crime are severely undermining the capacity of many States to promote systems of governance accountable to and compliant with human rights standards by diminishing the confidence of the citizens in the administration of justice. As it was stated by Kofi Annan "Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish."[11]

Seeking impunity, corrupt networks have not hesitated to influence high officials of Governments. The judicial system is the key instrument that can protect societies from corruption. Judicial corruption, at any stage of a judicial process, presents a substantial impediment to an individual's right to a fair trial and severely undermines the public's confidence in the judiciary. In this context, individuals working for the judicial system are targets for criminal groups, which attempt to interfere with their independence and impartiality to obtain impunity or legitimacy for their criminal activities.

Evidence of corruption in the judiciaries of many countries has been consistently growing in recent decades. According to one of the latest Latin American surveys carried out on this matter by Transparency International,[12] only 27 % of the population trust in the judiciary.[13] This is very sensitive considering that corruption among professionals in the judicial system and the prosecution service can be particularly damaging to the rule of law in countries going through a process of institutional reform or consolidation.

The two types of corruption that most often affect independence of the judiciaries and their proper functioning in a democratic society are (i) political interference in judicial processes, and (ii) abuse of power and impunity connected to bribery.

Political influence over the courts is nowadays a key component and source of judicial corruption. Decision-making processes become compromised when judges face potential reprisals, such as losing their post

11 Kofi Annan, UN Secretary General, *Foreword of the United Nations Convention against Corruption*, New York, 2004.

12 Barómetro Global de la Corrupción América Latina y el Caribe, Transparency International 2019, https://files.transparencycdn.org/images/Global-Corruption-Barometer-Latin-America-and-the-Carribean-2019-ES.pdf [access: 12 June 2023].

13 Ibid., 11.

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or being transferred to a remote area, if they hand down unpopular judgments.

Undue interference in the judiciary, however, may also be violent, especially in the contexts of authoritarian processes. In particular when it comes directly from members of organized criminal groups. Such interference is intended to secure specific outcomes, such as the dropping of a particular case or the acquittal of a specific individual. It is frequently accompanied by threats, intimidation and/or extortion.

Corruption of the judiciary extends from pretrial investigations and procedures through trial proceedings and settlements, to the enforcement of decisions by judicial or executive officers. Attempts are frequently made to corrupt judges in charge of criminal proceedings for a variety of objectives: avoid pretrial detention; prevent the commencement of a trial or obtain its delay or conclusion; or influence the outcome of a case, for instance by obtaining an acquittal or a lesser sentence, fine or term of imprisonment, by altering the location or type of prison involved — from maximum to minimum security — or by preventing a sentence from being applied.

Without prejudice to the crucial importance of preventive measures and policies, the key to the issue is to have an independent, energetic and courageous judicial and prosecutorial system. Without that, all will remain just in words, good intentions.

Judges and prosecutors are therefore the essential tools that society has to defend itself. They are crucial to the extent that they can act without undue interference, for which society should pay them more attention and support. The arbitrary and unjustified transfer of prosecutors or judges is, according to current international standards, undue interference with judicial independence and a violation of the principle of irremovability.

2. Colombia and Guatemala – case studies

Two examples from the practice of the UN Special Rapporteur on Judicial Independence should be mentioned here: Colombia and Guatemala.

In Colombia, the UN Special Rapporteur received an information in 2022, that prosecutor Monsalve had been investigating the city council of Bogotá for alleged serious acts of corruption, such as incompatibilities in public tenders and improper interest in the conclusion of contracts. Prosecutor Monsalve had charged a former Bogotá councillor and his two uncles with the crime of 'improper interest in public contracts'. The prosecutor

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managed to identify the two uncles as the real owners of a company that obtained the concession to collect payments for Bogotá's huge public transport service (Transmilenio). However, the Attorney General decided to transfer the prosecutor to Putumayo, a highly dangerous area far removed from the investigation she had been conducting. The life of the prosecutor was put in danger.[14]

In Guatemala, the Government has been intimidating various officials, especially prosecutors, involved in the anti-corruption task force. More than 30 prosecutors and judges have had to flee Guatemala over the past two years to avoid harassment, attacks or arrest. In January 2023, the Government took an additional and astonishing step announcing that it was investigating the former and respected Attorney General Mrs Thelma Aldana and Iván Velásquez, the current Colombian defence minister. Aldana has been exiled since 2019 in the United States. Velásquez led CICIG (International Commission against Impunity in Guatemala), a United Nations investigating body against corruption created for Guatemala in 2006.[15]

Thelma Aldana has denounced the "criminalisation" of the fight against corruption in the Central American country and said that many women have been forced into exile due to reprisals.[16] The current Attorney General, Mrs Consuelo Porras, and the current head of the FECI ("Fiscalía Especial contra la Impunidad"; Prosecutor office against Impunity), Rafael Curruchiche (appointed by Porras) are the key actors in these processes against former investigators against corruption, which include Velásquez and Aldana. Porras[17] and Curruchiche are now barred from entering the United States.

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14 *Policía confirma plan para atentar contra Fiscal Angélica Monsalve,* Revista Semana, 5 April 2022, https://www.semana.com/nacion/articulo/policia-confirma-plan-para-atentar-contra-fiscal-angelica-monsalve/202215/ [access: 12 June 2023].

15 *Comisión Internacional contra la Impunidad en Guatemala* (CICIG) was a United Nations-backed body established in 2006 to support the Guatemalan government in its efforts to combat corruption, strengthen the rule of law, and promote justice in the country.

16 Europa Press. https://www.europapress.es/internacional/noticia-ex-fiscal-general-guatemala-thelma-aldana-denuncia-criminalizacion-lucha-contra-corrupcion-20221125172057.html.

17 In the case of Porras, the US Department of State designated Attorney General of Guatemala Maria Consuelo Porras Argueta de Porres ("Porras"), as ineligible for entry into the United States. According to the US Department of State "During her tenure, Porras repeatedly obstructed and undermined anticorruption investigations in Guatemala to protect her political allies and gain undue political favor. Porras's

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3. UN Convention against Corruption

It is important to underline that Latin American countries have been enthusiastic in signing up to anti-corruption efforts. All of them are parties to the United Nations Convention against Corruption.[18] The Convention has a very clear operational objective, in that it assigns a central role to the justice system and international judicial cooperation so that it does not remain a dead letter. It is one of the most successful treaties in force, with 189 State parties.

For the Convention to have "teeth" and for it not to be merely decorative however, there is an obvious sine qua non-requirement: that there be an interaction between independent justice systems. Would a democratic country with an independent judiciary extradite an individual to a country where the judiciary has a noose around its neck from an authoritarian ruler? The conference of the States parties to the Convention has made a specific reference to the core UN instruments on judicial independence, has been included in the respective General Assembly resolution,[19] the Basic Principles on the Independence of the Judiciary of 1985[20] and the Guidelines on the Role of Prosecutors.[21]

In Article 11, paragraph 1 recognizes the crucial role played by the judiciary in combating corruption. The Convention also highlights the critical importance of international cooperation between judicial systems for that purpose. It, therefore, stipulates that the judiciary must not be corrupt, and in article 11, paragraph 1, each State party is called on to take measures to

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pattern of obstruction includes reportedly ordering prosecutors in Guatemala's Public Ministry to ignore cases based on political considerations and firing prosecutors who investigate cases involving acts of corruption." Press Statement of Anthony Blinken of 16 May 2022, https://www.state.gov/designation-of-attorney-general-maria-consuelo-porras-argueta-de-porres-for-involvement-in-significant-corruption-and-consideration-of-additional-designations/ [access: 12 June 2023].

18 The United Nations Convention against Corruption is the only legally binding universal anti-corruption instrument, General Assembly resolution 58/4 of 31 October 2003.

19 Our common commitment to effectively addressing challenges and implementing measures to prevent and combat corruption and strengthen international cooperation – General Assembly Resolution of 2 June 2021, A/RES/S-32/1.

20 Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985.

21 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 7 September 1990.

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strengthen the integrity and independence of the judiciary and to prevent opportunities for corruption among members of the judiciary.

One of the recommended measures is adopting a code of conduct for members of the judiciary. Article 11, paragraph 2, also recommends the elaboration and application of similar measures within the prosecution service in those State parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

4. Specific role of transitional justice in the context of corrupted judiciary

This problem—or challenge—has to do, obviously, not only with the situation that facilitates the development of immunity within anti-corruption systems, but also makes the transition to democratic processes much more difficult. Considering that in authoritarian regimes, several judges—especially at the upper level—tend to be part of the "group in power," they are a crucial component in blocking the transition to democracy. A corrupt judiciary creates robust structures of cooperation and networking. This places a challenge that transitional processes need to deal with, for instance, with vetting processes of corrupt and corrupted judges or Truth Commissions.

V. Justice and Democratic Transitions

1. General remarks on democratic transitions

Democratic transitions over the last decades have taken on various characteristics, modalities and outcomes. It is generally conceptually and historically impossible to determine standard "models" or processes that result in simple, schematic classifications. But while this is always a relevant issue, it is even more so in the current context of flourishing authoritarianism that will have to give way, in due course, to democratic transitions. This is a crucial issue with its complexities.

What is certain, in any case, is that certain constants have emerged from the historical development of these processes that have proved valuable and convenient for moving forward placing an independent justice as a crucial component and gradually constructing the concept of "transitional justice".

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In this way, the component of "truth", in its different possible meanings, is central and, with it, that of reparation for the victims.[22]

For "transitions", in and of themselves, are far from being a univocal concept. There is no standard "format" of transition from one common thing to another. Just as there are transitions from dictatorships or authoritarianism to democratic systems, there are also transitions from internal—or international—armed conflicts to peacebuilding, just as there can be transitions from a context of collapse or disruption of the state and institutions, in general, to the reconstruction—or construction—of institutions.

Each of these processes has historically obeyed particular routes, and their contents have often been built made by walking the path, as the Spanish poet Antonio Machado would have said. Many of the 20th-century transitions have yet to yield a successful balance in light of today's prevailing legal concepts and instruments of the 21st century; for instance, in the area of justice. This could be the case of some transitions from war to peace after international or national conflicts, which could leave—in retrospect—the feeling that something may have been lacking in terms of justice, truth or reparation.[23]

However, historical truth shows that in real social and political processes, its content, meaning and outcome do not respond to a "laboratory" or cabinet design but is the result of a complex mixture of expectations, possibilities and the impact of the articulations between social and political actors and the corresponding correlations of forces.

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22 Diego García-Sayán, The State of Democracy in Latin America: a Decade of Mix-ups and Progress in: *A Decade of Change. Political, Economic, and Social Developments in Western Hemisphere Affairs* (Washington DC: Inter-American Dialogue 2011), 71–88; Diego García-Sayán, *Cambiando el Futuro* (Lima: Lapix Editores 2017).

23 Among many publications on this topic please refer to: Guillermo O'Donnell and Philippe C. Schmitter (eds), *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press 2013); Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton & Company 2011); Jeffrey K. Staton and Emily Hencken Ritter (eds), *Judicial Power and Strategic Communication in Mexico* (Cambridge: Cambridge University Press 2010) – this book focuses on Mexico's judiciary and analyzes how strategic communication between judges, politicians, and the public affects judicial decision-making during political transitions; Agnès Hurwitz and Reyko Huang (eds), *Civil War and the Rule of Law: Security, Development, Human Rights (*Boulder, CO: Lynne Riener Publishers 2008) – the book explores the interplay between the rule of law and transitional justice in societies transitioning from conflict or authoritarian rule. It delves into the challenges and opportunities for the judiciary in promoting accountability and reconciliation.

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It is essential that responses are generated to implement adequate solutions that allow for progress towards democracy and reconciliation with an independent and effective justice, truth and reparations for the victims. Institutional formats and the type of challenges posed by the specific contents of transitional justice have particularities in each case.

The historical experiences of the last two decades make it possible to advance in constructing a definition of "transitional justice" in which the "truth" component is central. In this sense, it would be possible to work operationally the concept of transitional justice used in the United Nations, based on a report by the Secretary-General in 2004. In this report, transitional justice is defined as *"the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation. These may include judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof"*.[24]

In any case, this is far from being just a "turning the page" project without doing anything about the past or from being a mere "technical" process or confined to the legal sphere. Instead, it is a scenario in which the state and society are required to promote convergent processes that generate fertile ground for the three essential and interdependent ingredients of transitional justice—justice, truth and reparation—as the "package" of democratic reconstruction and reconciliation.

2. Role of truth commissions

In this context, the broad space of truth continues to have in truth commissions—since the first Truth and Reconciliation Commission of South Africa in 1996—a decisive and fundamental contributory element that interacts vigorously with that of justice.[25] Whether to fill gaps and slowness in the judicial machinery or to offer participatory spaces to society in which the truth of each individual can be narrated and known and reconciliation put on the agenda. And that—as happened, for example, in the South African

24 Report of the Secretary-General. The rule of law and transitional justice in conflict and post-conflict societies. S/2004/616, 27 August 2004, 6.

25 Miguel Giusti, Gustavo Gutierrez and Elizabeth Salmón (eds), *La Verdad nos Hace Libres* (Lima: Pontificia Universidad Católica del Perú 2015).

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experience—it could be one of the spaces in which those responsible for atrocities admit them and give information about them (for example, the location of graves or clandestine burials), express repentance and ask for forgiveness from the victims.

In this sense, the core component of truth with the participation of victims in its construction is complementary—and not competitive—with criminal justice and the "judicial truth" derived from it. Among other reasons, because truth-telling *"[...] provides recognition in ways that [...] rarely disclose facts that were previously unknown, they still make an indispensable contribution to the official acknowledgement of facts"*, as argued by Thomas Nagel, quoted by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff.[26]

As de Greiff pointed out,[27] truth commissions *"have proven capable of making significant contributions to transitional processes in the more than 40 countries that have instituted commissions since the 1980s."*[28] To achieve the ambitious goal of "social reconciliation", the institutions established must be *"reliable and truly embody the idea that each person is a rights-holder"*,[29] which, translated into a truth commission, requires, among other things, a good selection of commissioners and adequate staff and resources.[30] Of course, a crucial aspect to be resolved beforehand is the "national" or "international" character of the Commission.

One should underline the point by De Greiff on the relevance of highlighting and taking into account the "victims' perspective": *"Criminal prosecutions, particularly considering their scarcity, [...], can nevertheless be interpreted by victims as a justice measure, as something more than scapegoating, if other truth-seeking initiatives accompany them."*[31]

However, it should be borne in mind that truth-seeking and truth-telling need not be confined to truth commissions or similar entities. As an essential ingredient of judicial processes in the context of transitional justice

26 Pablo De Greiff, Theorizing Transitional Justice, in: Mellisa Williams, Rosemary Nagy and Jon Elster (eds), *Transitional Justice* (New York: New York University Press 2012), 43.

27 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff. A/HRC/24/42, 28 August 2013.

28 Ibid., 7.

29 Ibid., 15.

30 Ibid., 18.

31 De Greiff (n. 26), 37–38.

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policies and goals, "judicial truth" can also be a significant outcome of such methods. And as such, it interacts with other truth-telling processes. Especially if one imagines or envisions judicial processes in which mass atrocities can be analysed in a broader context of truth-telling and acknowledgements of responsibility by perpetrators.

In its jurisprudence, the Inter-American Court of Human Rights (IACHR) has established, for instance, that the pursuit of truth is a fundamental aspect of justice and the protection of human rights. The Court considers truth-seeking as an essential component of its mandate to investigate human rights violations, establish responsibility, and provide reparations to victims. The IACHR's jurisprudence has acknowledged the importance of transitional justice processes, such as truth commissions, in addressing systemic human rights violations.

3. Peru's success story – transition from Fujimori regime to democracy

Two Latin American transitions may be of particular interest for analysis. One, in Peru, from the autocracy/dictatorship of Alberto Fujimori's regime (1990–2000) to democracy.[32] The other notable transition process, from war to peace in Colombia, followed the peace agreement concluded in 2016 between the government and the armed group Fuerzas Armadas Revolucionarias de Colombia (FARC).[33]

The case of Peru and its democratic transition in 2000 is an excellent example of a creative combination of three concurrent factors: (i) the active role of a society mobilised to end an authoritarian and corrupt regime, (ii) a reasonably articulated democratic opposition, and (iii) a simultaneous presence of the international community—particularly the Organisation of American States (OAS)—to facilitate mechanisms of political dialogue that made a peaceful transition viable.

The fundamental contextual component was that of active mobilisation in the streets, of a press struggling to regain its freedom, and of a society which had become the victim of a justice system subjugated to political power that validated corruption and serious human rights violations. The internal process occurred in an international context, in which the OAS was a relevant reference point and progressively assumed decisive importance in favour of the democratic transition.

32 García-Sayán (n. 22, *Cambiando el Futuro*).
33 De Greiff (n. 26), 38.

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The OAS promoted the initiative to set up a High-Level Mission, chaired by the then Canadian Foreign Minister Lloyd Axworthy, from which emerged the so called "Dialogue Table" ("Mesa de Diálogo") between the government and the democratic opposition, which played a crucial role in the transition to democracy. The Mission set a 29-point agenda that included, in essence, the opposition's entire democratisation programme. Those points in the agenda included the cessation of intervention in the judicial system (terminating with the commissions or interventions by governmental appointees), the return of the seized television channels, the end of the regime's political police operations and the renovation of the subdued electoral system.

The OAS "Mesa de Diálogo" was attended by representatives of the government and the democratic opposition as well as, as observers, representatives of civil society, including churches, the National Human Rights Coordination organization[34] and representatives of business and labour unions. It became, for many purposes, a sort of "parallel government" with the legitimacy that the regime that had emerged from a fraudulent election lacked.

There, key steps were taken to advance the democratisation of the country. Among other aspects, fundamental criteria were discussed and agreed upon. They included renewing the Attorney General's office, given the incumbent's severe questioning, redefining the system for appointing judges, and overhauling a very biased electoral system. All these political agreements were then formalized or legally established by the Congress or the Government, depending on the nature of the matter.

When, amid this process, Fujimori fled the country at the end of 2000, and the transitional government was installed, important foundations were laid in the transition process for the institutional renewal that followed. After the collapse of the autocratic regime and the installation of the transitional government, in which I had the honour of accompanying President Paniagua and Javier Pérez de Cuellar, President of the Council of Ministers, as Minister of Justice, all along the Government for its eight months until it was replaced by a democratically elected President. During that short period of transition—Paniagua´s Government—it was not yet a time when the concept of "transitional justice" was routinely used. But that is what was being done. Unweaving the web left by corruption and authoritarianism

34 Coordinadora Nacional de Derechos Humanos – non-governmental organization from which several local human rights organizations coordinate their activities.

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and, on the other hand, establishing an independent justice system and building a transparent public administration.

The results were unprecedented for Latin American standards in its results in the fight against corruption, dismantling by judicial means—with recently re-assumed independence—a network of organised crime that had taken over the running of the state. At the same time, independent judicial institutions were able to operate to investigate and, if necessary, punish the grave human rights violations committed during the 1990s. Major processes began against former President Alberto Fujimori and his intelligence officers. Fujimori was finally convicted to 25 years in prison.

Part of the wide range of decisions and actions taken during the transition government was creating and installing the Truth Commission in June 2001, after an intense process of citizen consultation. The method of preparing the report was broadly participatory. The presentation of the report in 2003 constituted in fact—without using those terms—a space for "transitional justice" in Peru, thus providing an essential experience for Latin America and the world.[35]

4. Colombia – transition from FARC

The other transition process to which it is crucial to refer here is the transition from war to peace in Colombia following the 2016 peace accords, as well as the design and implementation of a transitional justice system and a Truth Commission. The Colombian government and the FARC-EP invited the Secretary General of the United Nations, the Criminal Chamber of the Colombian Supreme Court, the International Center for Transitional Justice, the Permanent Committee of the State University System in Colombia and the president of the European Court of Justice and Human Rights to appoint the members of the Commission in charge of operating as a selection panel for the Special Jurisdiction for Peace (JEP) and the Truth Commission.[36]

This Commission was the body in charge of choosing the 72 magistrates—even at the supreme court level—and judges that now make up

35 *Comisión de la Verdad y Reconciliación Informe Final*, report was officially concluded on 27 August 2003 and was composed of nine volumes, https://www.cverdad.org.pe/ifinal/ [access: 12 June 2023].

36 Author of this chapter has been appointed by the UN Secretary-General as member of the selection commission.

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the Special Jurisdiction for Peace (JEP) and the members of the Truth Commission. The latter completed its work and made its report public in July 2022. The JEP continues its activities and publishes permanently very valuable information about its activities presenting periodical the results being obtained.[37]

In the Colombian context, transitional justice is understood as a political and institutional process in which legal elements are inserted to balance the rights to peace and justice.[38] Five elements have been highlighted as components of transitional justice in operation in Colombia today.[39]

The first is an investigation so that those responsible for committing crimes, severe violations of human rights or international humanitarian law, are tried and, if necessary, punished by international standards of due process.[40] The second is the right to the truth, including *"both the right of the victims of gross violations of human rights and their families to know the facts and circumstances in which such violations occurred, and the right of society as a whole to know the reasons why such acts took place."*[41] The third element is integral reparation,[42] aimed at providing material and symbolic

37 Reports from activities are available at: https://www.jep.gov.co/Paginas/Informes-de-gestion.aspx [access: 12 June 2023].

38 Rodrigo Uprimny Yepes, María Paula Saffon Sanín, Catalina Botero Marino and Esteban Restrepo Saldarriaga (eds) *Justicia transicional sin transición? Truth, justice and reparation for Colombia,* (Bogota: Centro de Estudios de Derecho, Justicia y Sociedad 2006), 19, http://www.dejusticia.org/files/r2_actividades_recursos/fi_name_recurso.201.pdf [access: 12 June 2023].

39 Diego García-Sayán and Marcela Giraldo Muñoz, Reflexiones sobre los procesos de iusticia transicional, EAFIT Journal of International Law 7 (2016), 96–143, https://publicaciones.eafit.edu.co/index.php/ejil/article/view/4581 [access: 12 June 2023].

40 Guidance Note of the Secretary General: United Nations Approach to Transitional Justice, No. ST/SG(09)/A652, March 2010, 7, https://digitallibrary.un.org/record/682111 [access: 12 June 2023].

41 Rodrigo Uprimny Yepes and María Paula Saffon Sanín, Derecho a la verdad: alcances y límites de la verdad judicial, in: Rodrigo Uprimny Yepes et al, *Justicia transicional sin transición?* (Bogota: Dejusticia 2006), 143–144.

42 The concept of "integral reparation" derives from Article 63.1 of the American Convention on Human Rights ("ACHR" or "American Convention"). It encompasses the accreditation of material and non-material damages, and the granting of measures such as: investigation of the facts; restitution of rights, goods and liberties; physical, psychological or social rehabilitation; satisfaction through acts for the benefit of the victims, guarantees of non-repetition of the violations and compensatory damages for material and non-material injuries. Through this power, the IACtHR has ordered emblematic measures for many countries in the region. The jurisprudence of the IACtHR has referred extensively to the type of measures that make it possible to obtain full reparation, from its first judgment on reparations to its most recent

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benefits to the victims.[43] The fourth is institutional reforms so that those institutions that are part of the conflict become others aimed at sustaining peace and the rule of law. The last element refers to national consultation processes aimed at designing transitional measures.

The vigorous functioning of the JEP stands out, as it adopted decisions on several critical issues for the performance of its role in the complex situation of Colombia. Among them one should indicate the decision to hold all members of the former FARC secretariat responsible in the ongoing process for more than 20,000 kidnappings and the inhumane treatment they suffered. Another important decision concerned the case of more than 140 "false positives"[44] committed in the Catatumbo region, that were attributed responsibility for these acts to several high-ranking military officers.

The progress made in the judicial process in the JEP includes what Uprimny rightly describes as *"... two of the most atrocious crimes of the armed conflict: the kidnappings committed by the FARC and the so-called "false positives", that is, the assassinations by members of the army of young people to present them as guerrillas killed in combat."*[45] In both processes, the alleged perpetrators have accepted their responsibility in the severe events under examination.

Through the judicial examination of cases such as these, in which those responsible tend to admit their responsibility, the JEP *"...reconstructs, as no previous judicial decision has done, the magnitude of these crimes, their impact on the victims and their families, the evidence of responsibility of those charged and the dynamics that fuelled these atrocities and turned them*

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jurisprudence. In this regard, see for example: IACtHR, *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs,* judgment of 21 July 1989, Series C No. 7, para. 26, I/A Court H.R., *Case of Rodríguez Vera et al (Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*, judgment of 14 November 2014, Series C No. 287, para. 579.

43 Jorge F. Calderón Gamboa, *La reparación integral en la jurisprudencia de la Corte Interamericana de Derechos Humanos: estándares aplicables al nuevo paradigma mexicano* (Mexico: Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM Instituto de Investigaciones Jurídicas, Suprema Corte de Justicia de la Nación 2013), https://www.corteidh.or.cr/tablas/r33008.pdf [access: 12 June 2023].

44 Persons killed by military units were presented as FARC combatants but were innocent civilians not involved in guerrilla or violent activities.

45 Rodrigo Uprimny, 'JEP, kidnapping and false positives', El Espectador newspaper, 19 July 2021.

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into systematic attacks against the population, thus qualifying them not only as war crimes but also as crimes against humanity."[46]

VI. Final Remarks

Unfortunately, the international context has paved the way for authoritarian currents exercising public power, broad organized crime networks and corruption, with their corresponding manifestations in the violation of judicial independence and the fundamental rights of the population. These trends are occurring worldwide and not only in Latin American countries.

Outstanding challenges for the independence of judicial systems should be connected to the 2030 Agenda, the broadest initiative agreed upon at the global level for the elimination of extreme poverty, the reduction of inequality and the protection of the planet. It entails an essential commitment to human rights, justice, accountability and transparency as prerequisites for ensuring an enabling environment in which people can live free, secure and prosperous lives. The independence, impartiality and integrity of the justice system are indispensable components of the rule of law and the goal of ensuring that justice is administered fairly. During transition processes they turn out to be, in most cases, the most relevant component to measure the speed and relevance of the political transition.

The different measures taken to address the challenges posed relating to the administration of justice, namely authoritarianism and corruption, can only be articulated by promoting the institutions and principles governing the rule of law. To overcome these challenges and threats, strong political and institutional awareness and decisions are indispensable.

In this regard, robust links should be reinforced between "soft law" instruments, such as the Basic Principles on the Independence of the Judiciary or the Bangalore Principles of Judicial Conduct and—the international treaty—United Nations Convention against Corruption. Thus, with the prevailing updated approach to the Basic Principles, they should be interpreted jointly with the Guidelines on the Role of Prosecutors, the Bangalore Principles and the Convention to fill any gaps that may exist in any of these instruments.

Controlling the judiciary and ending or limiting its independence is a notable characteristic of all authoritarian processes. This has been the

46 Ibid.

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experience in Latin America and is the situation today in some countries of democratic Europe. For this reason, any steps taken by the political powers to limit this kind of authoritarianism deserve special attention and vigilance on the part of citizens and the international community. Conversely, the protection and defense of judicial independence is a crucial component in confronting authoritarianism and an issue that is always central to the agenda of democratic reconstruction. Moreover, Latin America countries' experience of transition from authoritarianism to democracy could serve as a good example for other countries facing similar challenges.

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EU Values as Constraints and Facilitators in Democratic Transitions*

Armin von Bogdandy and Luke Dimitrios Spieker

I. Introduction 114
II. Premise: Activation and Limits of Article 2 TEU 115
1. Activation 115
2. Limits 118
III. EU Values as Constraints on Democratic Transitions 120
1. Value compliance in process vs. value compliance in substance 120
2. Which way out? 122
IV. EU Values as Facilitators of Democratic Transitions 123
1. The Polish case: Restoring an independent judiciary 123
2. The Hungarian case: Breaking constitutional entrenchments 129
V. Faming the Transition 133
1. Transformative constitutionalism: Concept and practice 133
2. European transformative constitutionalism 137
VI. Fostering a Democratic Culture 139
1. On politicisation 139
2. On social support 140
VII. Conclusion 142

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

* This article uses parts from Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxembourg?', *Columbia Journal of European Law* 29 (2023) forthcoming; Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: OUP 2023).

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I. Introduction

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

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

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

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

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

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

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

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

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

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

II. Premise: Activation and Limits of Article 2 TEU

1. Activation

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

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

Many celebrated this decision as a constitutional moment heralding the judicial activation of EU values. According to Koen Lenaerts *ASJP* 'has the same significance as cases like *Van Gend en Loos*, *Costa/ENEL*, *Simmenthal* or *ERTA* – it's a judgment of the same order and we were absolutely aware of that constitutional moment.'[9] Importantly, this step enjoys much acceptance. With the conditionality regulation, all political EU institutions have endorsed the Court's mobilisation of Article 2 TEU: not only the Commission and the European Parliament, but also the national heads of state or government in the European Council as well as the responsible Member State ministers in the Council.[10]

Of course, the values of Article 2 TEU are indeterminate.[11] Therefore, there is particularly a tension with the criteria for direct effect, i.e. for the justiciability in domestic proceedings, which requires a provision of EU law to be clear, precise and unconditional. For that reason, even voices from within the Court doubt that the Court could apply the open-ended Article

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

7 Ibid., para. 32.

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

9 Koen Lenaerts, Upholding the Rule of Law through Judicial Dialogue, Speech at King's College London (21 March 2019), <https://www.youtube.com/watch?v=qBOeopzvPBY&t=37s> [min: 19:23].

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

11 Arguing against its justiciability, see e.g. Matteo Bonelli, 'Infringement Actions 2.0: How to Protect EU Values before the Court of Justice', EuConst 18 (2022), 30; Tom L. Boekestein, 'Making Do With What We Have: On the Interpretation and Enforcement of the EU's Founding Values', GLJ 23 (2022), 431 (437); Pekka Pohjankoski, 'Rule of Law with Leverage', CML Rev. 58 (2021), 1341 (1345 ff.).

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

So far, the Court has avoided using Article 2 TEU as a self-standing yardstick. With *ASJP* it rather chose to operationalize Article 2 TEU through more specific Treaty provisions. The Court starts with a systematic interpretation of Article 2 TEU in light of a more specific Treaty provision to substantiate these values. It then complements this step with a systematic interpretation of the specific provision in light of Article 2 TEU.[15] This reasoning can apply to all Treaty provisions that give specific expression to a value. In its ruling on the conditionality regulation, the Court stressed that 'Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which (…) are given concrete expression in principles containing legally binding obligations for the Member States'.[16] In this spirit, it noted that Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter of Fundamental Rights define the scope of the values of human dignity, freedom, equality, and respect for human rights, whereas Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men.[17]

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

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

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

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

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

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

17 Ibid., paras 157 ff.

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

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

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

While the operationalization of Article 2 TEU through specific Treaty provisions has become a consolidated practice, its self-standing application remains unresolved. The Maltese and Romanian judges' cases might indicate a further move in this direction. Though still employing Article 2 TEU and 19(1)(2) TEU as cumulative yardsticks, the Court placed Article 2 TEU at the centre. Member States are precluded from adopting measures that lead to 'a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU'.[20] Similarly, the Commission based its infringement proceedings against the Hungarian and Polish violations of LGBTIQ rights straight on Article 2 TEU: 'Because of the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU'.[21]

2. Limits

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

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

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

21 European Commission, EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people (15 July 2021), IP/21/3668.

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

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

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

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

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

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

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

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

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

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

III. EU Values as Constraints on Democratic Transitions

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

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

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

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

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

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

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

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

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

31 See, e.g., Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM (2017) 835 final, paras 19, 21, 29, 81, 83, 86.

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

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

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

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

2. Which way out?

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

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

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

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

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

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

IV. EU Values as Facilitators of Democratic Transitions

To substantiate a possible role of EU values as a facilitator of a democratic transition, we hypothesize that *PiS* in Poland or *Fidesz* in Hungary suffer an electoral defeat. No government lasts forever. Any new government must face the challenge of overcoming its country's systemic deficiencies, be it a messed-up judicial system or entrenched laws that favour the currently ruling party. Given their entrenchment, this agenda cannot be implemented overnight but will require a transition. In the following, we will assess how EU values can facilitate such transitions, taking the current Polish and Hungarian challenges as points of reference to develop our argument.

1. The Polish case: Restoring an independent judiciary

Any new Polish government will face the challenge of how to deal with the judicial system. Though the Luxembourg and the Strasbourg courts have established its deficiencies, the *PiS*-led government has continued appointing judges in open violation of EU law and the ECHR.[38] What are a new government's options to restore an independent judiciary that deserves the 'trust which the courts in a democratic society must inspire

38 These appointment procedures were subject of several decisions, see *Commission v. Poland (Régime disciplinaire des juges)* (n. 20), paras 95 ff. as well as *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of 6 October 2021, case no. C-487/19, ECLI:EU:C:2021:798, paras 138–152; *A.B. and Others*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, paras. 121 ff.; *A.K. and Others* (n. 38), paras 123 ff. Finding a violation of Art. 6 ECHR, see also *Reczkowicz v. Poland*, app. no. 43447/19; *Dolińska-Ficek and Ozimek v. Poland*, app. no. 49868/19 and 57511/19; *Advance Pharma sp. z o.o v. Poland*, app. no. 1469/20.

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

We suggest a much more constrained approach. To restore an independent judiciary and – in a broader perspective – the rule of law, it might suffice to remove the central perpetrators from the judiciary. To achieve this aim, we plead for the responsibility, criminal or disciplinary, of those judges who *seriously and intentionally violate EU values*. Establishing a disciplinary or criminal responsibility in fair proceedings would then justify their removal from office. In other words, the responsibility of judges who disrespect EU values can lead to a targeted restoration of the rule of law – *in full compliance with the principle of legality*. In the following, we will spell out this proposal on the terrain of criminal law. It should be noted, however, that similar results could be achieved through disciplinary proceedings.

Before diving into the specifics, we need to briefly explain why we suggest relying on violations of EU values – and not Polish constitutional law – to determine which judges should be removed from the judicial system. As many authoritative Polish judges and academics assert, the overhaul of the judiciary has taken place in blatant violation of the Polish Constitution. So why do we suggest EU values as a point of reference? One answer is that the Polish Constitutional Tribunal, the institution tasked to authoritatively interpret the constitution, has been captured by the *PiS*-led government. The ECtHR ascertained in *Xero Flor* that, due to its unlawful composition, the Tribunal cannot be regarded as a court 'established by law' under Arti-

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

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

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

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cle 6 ECHR.[42] The Tribunal's practice clearly demonstrates its descent to a loyal servant rubber stamping the government's agenda.[43] In this context, the Polish Constitution can hardly serve as a yardstick for the criminal responsibility of perpetrators. Another answer is that by relying on EU values, the new government can count on support from the European level. Other examples of transformative constitutionalism show that such support is crucial for a transition's success (see IV.1).

Exceeding public powers, even as a judge, is sanctioned under most legal orders (see e.g. Section 339 German StGB, Art. 434–7–1 French Code Pénal, Art. 323 Italian Codice Penale, Art. 446 f. Spanish Codigo Penal or Sections 305 and 306 of the Hungarian Criminal Code).[44] In this spirit, Article 231(1) of the Polish Kodeks Karny punishes the general excess of authority: 'A public official who, by exceeding his or her authority, or not performing his or her duty, acts to the detriment of a public or individual interest, is liable to imprisonment for up to three years.' This includes the activity of judges.[45]

Such an 'excess of authority' can arise from disregarding EU law. The principles of primacy and direct effect require a domestic judge to apply EU law in national procedures. This duty might entail to disapply or re-interpret conflicting national laws. It makes no difference whether a national judge disregards national or rather Union law: both can equally trigger the criminal responsibility of judges. Infringements of EU law must be punished under conditions 'analogous to those applicable to infringements of national law of a similar nature and importance.'[46] If it is a domestic

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

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

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

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

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

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criminal offence to disregard national law to the detriment of the person subject to the proceedings, the same must apply in cases where a national judge intentionally disregards EU law.

Judges may err. Non-accountability is core to judicial independence. At the same time, a judge must observe the law. Accordingly, judicial independence cannot justify the total exclusion of any disciplinary or criminal liability.[47] In balancing these two principles, all legal orders limit the criminal responsibility of judges to *extreme cases*.[48] While the specific threshold is a matter of national criminal law, EU law provides some guidance. With regard to disciplinary regimes for judges, the CJEU noted that the respective offences must be confined to 'serious and totally inexcusable forms of conduct … which would consist, for example, in violating deliberately and in bad faith, or as a result of particularly serious and gross negligence, the national and EU law'.[49] In this light, the criminal responsibility of judges may only arise where they *seriously and intentionally* violate the law to the detriment of a party in the proceedings.

When is this threshold reached? Some ardent federalists might think of penalizing national judges for disregarding the primacy of EU law. This could include, for instance, the Bundesverfassungsgericht's Second Senate after rendering its *PSPP* judgment or the Danish Højesteret for its decision in *Ajos*. It seems clear that such a conception would go too far. It would disincentivise national courts from engaging with EU law and severely jeopardize the idea of cooperation that underlies the European judicial system. For that reason, we plead for a much narrower conception. A serious infringement requires disrespecting Article 2 TEU. Even though its values are vague, and thus difficult to apply, this does not exclude their judicial applicability, especially when Article 2 TEU is operationalized through more specific Treaty provisions (see I.2). National law must be applied

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

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

48 This is particularly true in Poland, where judicial immunity is explicitly enshrined in the Constitution (see Articles 173, 180(1) and (2) and 181 of the Polish Constitution), see Trybunał Konstytucyjny, judgment of 28 November 2007, Case K 39/07; judgment of 2 May 2015, Case P 31/12. On the special procedure for lifting the judicial immunity, see Adam Bodnar and Łukasz Bojarski, 'Judicial Independence in Poland' in: Anja Seibert-Fohr (ed), *Judicial Independence in Transition* (Heidelberg: Springer, 2012), 667 (716).

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

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

Thus, judges might reach the threshold for criminal responsibility by interpreting the law in a way that blatantly violates the values protected in Article 2 TEU. This applies, in particular, to those judges who willingly become a tool of government repression. Such instrumentalized judges can be found in the Supreme Court's Disciplinary Chamber which has adjudicated many proceedings against those parts of the judiciary that seeks to defend its independence.[52] The case of Igor Tuleya stands out as a gloomy example. In 2017, he demanded that the public prosecutor's office initiate proceedings for unlawful obstruction of the opposition's work. Since then, a cascade of disciplinary proceedings was initiated against him.[53] Also beyond the Disciplinary Chamber, Polish judges might face cases that reach the severity of Article 2 TEU. Polish authorities have brought numerous civil suits against critical academics or journalists.[54] Wojciech Sadurski, for instance, faced several court cases brought by *PiS* and the government-controlled public television because of his vocal and often polemical criticism

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

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

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

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

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

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of the Polish government.[55] Judges who actively participate in this silencing of government critics might violate Article 2 TEU.

Certainly, any conviction requires proving the intention of the judge concerned, i.e. substantiating that he or she knew the relevant law and deliberately disregarded these values. Determining this intention falls to the trial judge. But here again, actions by EU institutions will be important. If a Polish judge intentionally disregards a decision in which the Court of Justice established the non-compliance of national legislation with EU values, a red line and, in all likelihood, the threshold of criminal responsibility are crossed.

This proposal meets two fundamental objections. First, the criminal responsibility of judges for infringements of Union law could be understood as an inadmissible harmonization of the Member States' criminal law. The German Constitutional Court, for instance, expressed strong reservations in this respect and considers substantive criminal law to be 'particularly sensitive for the ability of a constitutional state to democratically shape itself'.[56] Yet, in our proposal criminal justice firmly remains in national hands. The suggested criminal proceedings would be part of a national process to restore the rule of law, conducted before national courts in accordance with national criminal law.

Secondly, the Polish Constitutional Tribunal prohibits national courts from following the CJEU's decisions[57] and rather confirms the constitutionality of the judicial appointment processes.[58] This puts Polish judges in a difficult spot. The diverging pronouncements from Luxembourg and Warsaw may be considered as creating a situation of legal uncertainty that excludes criminal liability. However, the Tribunal is composed in manifest violation of Polish law and cannot be considered a 'tribunal established by law'. For that reason, decisions taken by the respective panels must be

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

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

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

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

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

The criminal responsibility of judges is a delicate topic as it sits uneasily with the requirements of judicial independence. Still, it must be considered in light of its alternatives, either doing nothing or removing all judges appointed illegally. Our approach targets few chief perpetrators who have accepted to become executioners of government repression. Moreover, these proceedings must conform by themselves with EU values.[60] Under these conditions, the criminal responsibility of judges might help restroring a judicial system in line with the rule of law.

2. The Hungarian case: Breaking constitutional entrenchments

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

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

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

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

62 For a concise overview, see e.g. Beáta Bakó, 'Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary', HJIL 82 (2022), 223 (236 ff.).

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

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How could a new majority overcome the cardinal laws and align the Hungarian legal order with European standards? Again, reliance on Article 2 TEU, operationalized by other Treaty provisions, could facilitate such reform and muster internal and external support. We argue that Article 2 TEU allows – in fact, even requires – a new Hungarian government to set aside constitutional provisions and cardinal laws that violate these values.[64] One example for a cardinal law that might conflict with Articles 2 and 10 TEU is Act CLXVII of 2020, which amended the Hungarian electoral laws. Adopted in a 'fast track process' without public consultation and during a state of emergency, this piece of legislation is at odds with EU values. Article 2 TEU requires 'a transparent, accountable, democratic and pluralistic law-making process'.[65] Both the Venice Commission and the OSCE noted that the respective amendments did not meet these standards and consider them to preclude fair elections.[66]

A Member State government must change or, if incapable thereof, disregard national laws that violate EU law. Primacy requires *all* Member State bodies to give full effect to EU law.[67] Accordingly, they must refrain from applying national legislation that is contrary to EU law, including constitutional provisions.[68] For sure, such an EU obligation sits uneasily with the principles of legality and legal certainty. At the same time, conflicts among norms are a regular feature in all legal orders. For that reason, there are rules governing conflicts of laws. The primacy of EU law constitutes such a rule that requires all public authorities to set aside conflicting national law.[69] There are exceptions to this rule based on 'overriding con-

64 A similar idea has been previously suggested by Kim Scheppele. Her proposal, however, concentrates on how the Hungarian Fundamental Law could permit disregarding those cardinal laws that violate EU law, see Kim L. Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', Verfassungsblog, 21 December 2021.

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

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

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

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

69 Considering primacy's role as a rule of conflict as its first and foremost function, see Clara Rauchegger, 'Four Functions of the Principle of Primacy in the ECJ's Post-Lisbon Case Law' in: Katja Ziegler et al. (eds), *Research Handbook: The General Princi-*

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siderations of legal certainty'.[70] Still, these exceptions would probably not apply once a violation of Article 2 TEU is established. Further, they require the respective Member State to take steps to remedy the illegality. If a new government does not reach the necessary majority for repealing the laws at issue, it must therefore set them aside.

How could the new government proceed? It could start by identifying the most problematic provisions and assessing their compatibility with Article 2 TEU. To that end, it could rely on decisions and reports by numerous European, international, and academic institutions. Following this assessment, the government could issue a reasoned decision declaring its intention to no longer apply the identified norms. To support this move, it could involve European institutions. It could start by requesting the Venice Commission to adopt a concurrent opinion. Though the Venice Commission cannot establish a violation of Article 2 TEU, it is accepted as a constitutional standard setter in Europe.[71] Pursuant to Article 1 of its Statute, its mission is to spread the 'fundamental values of the rule of law, human rights and democracy'. Its assessments are more than a 'useful source of information' in the context of EU law,[72] as they have an immediate bearing on the interpretation of Article 2 TEU. The Union's values must be interpreted on the basis of the Member States' common constitutional

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

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

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

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

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

A new Hungarian government could further ask the European Commission to initiate infringement proceedings against its own country. Such an invitation might sound counter intuitive. Usually, the infringement procedure under Article 258 TFEU is an adversarial procedure between the Commission and a Member State government. In our constellation, by contrast, both the Commission and the Hungarian government would represent the *same* side and pursue the same aim.

Yet, insights from the Latin American context support such an approach. Some governments have asked the IACtHR to issue decisions bolstering their policies. In May 2016, the Costa Rican government submitted a request for an advisory opinion on the issue of same-sex marriage with the goal of allowing it against a hesitant legislature. The Court issued a groundbreaking opinion in 2017 by holding that same-sex couples should enjoy all rights, including marriage, without discrimination.[75] Another example is the *Barrios Altos* case, although it was not the government that formally initiated the procedure.[76] The decision addressed an amnesty law that was enacted on the initiative of President Alberto Fujimori that shielded him and his henchmen after the so-called 'auto-coup' of 1992. When the proceedings reached the Inter-American Court, Fujimori's regime had fallen, and the new democratic government pleaded before the IACtHR to establish the illegality of that law in order to support the Peruvian democratic transition. The Court did so by declaring that the law lacked legal effects.

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

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

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

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

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V. Faming the Transition

1. Transformative constitutionalism: Concept and practice

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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2. European transformative constitutionalism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI. Fostering a Democratic Culture

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

1. On politicisation

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

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

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

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

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

2. On social support

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

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

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

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

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

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

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

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

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

104 On Poland, see in detail Barbara Grabowska-Moroz and Olga Śniadach, 'The Role of Civil Society in Protecting Judicial Independence in Times of Rule of Law Backsliding in Poland', Utrecht Law Review 17 (2021), 56; Łukasz Bojarski, 'Civil Society Organizations for and with the Courts and Judges – Struggle for the Rule of Law and Judicial Independence: The Case of Poland 1976–2020', GLJ 22 (2021), 1344; Claudia-Y. Matthes, 'Judges as activists: how Polish judges mobilise to defend the rule of law', East European Politics 38 (2022), 468. From Romania, see in particular Konrad Adenauer Stiftung and Asociația Forumul Judecătorilor din România, *900 Days of Uninterrupted Siege upon the Romanian Magistracy: A Survival Guide* (2020).

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

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

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VII. Conclusion

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

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

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

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

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II.
Constitutional Issues

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How to Return from a Hybrid Regime into a Constitutional Democracy? Hypothetical Constitutional Scenarios for Hungary and a Few Potential Lessons for Poland*

*András Jakab***

I. The Nature of the Hungarian Hybrid Regime 147
1. The role of law: formality vs. informality 148
2. The regime's hyper-pragmatism: adhocism and ideological agnosticism 151
3. Reasons explaining the formation of the regime 154
II. A Realistic and Responsible Scenario for the Return to Constitutional Democracy (Preferably without Breaking Legal Continuity) 159
1. Three stages 159
2. When and how might still be forced the new parliamentary majority to abandon the current legal system? 164
3. Objections 165
III. Radical Scenarios of Breaking Legal Continuity (i.e. Organising a Revolution in a Legal Sense) 170
1. Arguments for revolutionary solutions 171
2. What the supporters of a revolution can not or do not want to answer: questions about concrete procedural steps and the social costs of a revolution 204
3. Typical logical problems in revolutionary arguments 211
IV. General Questions 215
1. Can the rule of law only be built in a process conforming with the rule of law? 215
2. Legal academia and politics: tasks and responsibilities of legal scholars 216
3. Polarisation as part of the cultural problem 217
4. Optimism and pessimism in public speaking/writing 219
5. Is planning a revolution an offence under Hungarian criminal law? 220
V. Conclusions for a Future Hungarian Transition to Restore Constitutional Democracy 220
VI. Postscript on the Differences between Poland and Hungary – and a Few Potential Lessons for a Polish Transition 222

"*The time is out of joint: O cursed spite,*
That ever I was born to set it right!"
Shakespeare, Hamlet I.5.

Since 2010, the rule of law and democracy have been continuously eroding in Hungary. The following paper is based on the *hypothetical* situation that the united opposition achieves simple majority during the next general elections, but they do not receive enough votes to achieve a two-thirds constitution-amending majority in the Hungarian Parliament. The question would then be, how they could deal with the new situation, as most of the supposedly independent institutions (such as the Constitutional Court,

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the prosecutorial services etc.) are and will be in fact captured institutions protected by two-thirds majority rules,[1] and there would be a danger that they would act as a deep state of the *ancien régime* countering the new government.[2] Also certain constitutional provisions and qualified majority (cardinal) statutes would need to be amended, as they express one-sidedly the political rhetoric and policy preferences of the current government. The present paper discusses constitutional, political science, sociological and ethical issues of this hypothetical Hungarian transition process. As the Hungarian opposition has (yet again) lost the 2022 general elections, this hypothetical scenario is unlikely to become a reality in the near future. The dilemmas of this hypothesis are, however, also of theoretical interest, and certain conclusions are relevant also for other countries, *inter alia* for Poland.

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* The Hungarian version of this paper has been published as 'Hibrid rezsimből jogállamba' (30 January 2022) at SSRN: <https://ssrn.com/abstract=4021427>. Most references to Hungarian sources have been omitted in the present English version. For critical comments given to (parts of) the analysis and/or for literature advice I am indebted to Beáta Bakó, Petra Bárd, Larissa Bley, Kriszta Bodnár, László Detre, Gábor Filippov, György Gajduschek, Borbála Garai, Tamás Győrfi, Csaba Győry, Gábor Halmai, Dániel Hegedűs, András Jóri, Dániel Karsai, Krisztina Karsai, Zoltán Viktor Kazai, Lando Kirchmair, Linda Mézes, Zoltán Miklósi, Tamás Molnár, Balázs M. Tóth, Csongor István Nagy, András László Pap, Zoltán Pállinger, Werner Schroeder, Péter Smuk, Pál Sonnevend, Miklós Szabó, Zoltán Szente, Richard Szentpéteri Nagy, Zsolt Szomora, Péter Takács, Péter Techet, Csaba Tordai, Gábor Tóka, Renáta Uitz, Attila Vincze, Armin von Bogdandy and Edit Zgut. I dedicate this study to László Sólyom and Péter Tölgyessy, who had a great influence on my views concerning the state of Hungarian constitutionalism and who also inspired some of my thoughts expressed here.

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1 Amendments to the Fundamental Law 2011 require the support of two-thirds of *all* MPs [Article S(2) of the Fundamental Law], whereas amendments to cardinal laws require the support of two-thirds of MPs *present* [Article T(4) of the Fundamental Law]. In a politically tight situation (which is the hypothetical context of this paper), it can be expected that *all* MPs will be in fact *present* during the voting, therefore in practice the two-thirds of MPs *present* will mean the two-thirds of *all* MPs.

2 By *deep state* I mean those high-ranking public officials who cannot be legally removed by the simple parliamentary majority and the government, and who, according to the legal system, should be independent of party politics, but based on their activities so far, it can reasonably be feared that they would in fact rather sabotage the program of a new government along the lines of party politics.

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I. The Nature of the Hungarian Hybrid Regime

By now, according to most democracy indices, Hungary is not a fully-fledged (well-functioning, consolidated, embedded) democracy – but not a dictatorship either.[3] It is something in-between in the grey zone: an "electoral autocracy" (V-Dem), a "partly free" country (Freedom House) or a "defective democracy" (Bertelsmann Transformation Index). In the following, I am going to use the expression "hybrid regime", as this seems to be the most generic, fitting and widespread terminology for such cases.[4]

I avoid the terms "autocracy" and "authoritarian regime" in this paper, because in certain conceptualisations they are used as synonyms of "dictatorship", while in others they are defined more broadly (i.e. considering dictatorship as its worst case), and in some cases, they are even explicitly distinguished from it (i.e. in a graded category system, a regime one degree less oppressive than dictatorship). Unfortunately, the multiplicity of definitions of "autocracy" and "authoritarian regime" also allows some authors to alternate different meanings even within a single writing.[5] Using the name "hybrid regime" makes it easier to avoid such conceptual misunderstandings, which will hopefully contribute to the transparency of my argument.

3 Simplistic binary descriptions about Hungary (democracy vs dictatorship) are unsuitable for analytical purposes. For sophisticated evaluations you need graded systems, such as rule of law indices or democracy indices, see András Jakab and Lando Kirchmair 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way', German Law Journal 22 (2021), 936–955.

4 For further references on the terminological debate see András Bozóki and Dániel Hegedűs, 'An Externally Constrained Hybrid Regime: Hungary in the European Union', Democratization 25 (2018), 1173–1189. They characterise the Hungarian hybrid regime with 'the presence of one-sided and unfair political competition as well as the formal existence of a liberal constitution but with serious deficiencies in its actual functioning.'

5 For this reason I am not using the term "authoritarian enclave" either, and instead I am using the more generic term "deep state". On authoritarian enclaves in the Chilean context see Andrew Arato, 'Democratic legitimacy and forms of constitutional change', Constellations (2017), 447–455.

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1. The role of law: formality vs. informality

An essential feature of the Hungarian regime is "plausible deniability",[6] i.e. it is not using open and brutal methods of oppression, and also legal rules in most cases remain within the limits of Western constitutionalism (with a few exceptions →III.1.a) ix., which only explain a minor fraction of the erosion). There is no legal rule which would explicitly exclude the opposition from winning the elections, but a series of nasty and mostly illegal tricks (biased application of campaign finance laws, State-run propaganda machine, using the secret services to spy on opposition politicians, gerrymandering, etc.) make the playfield uneven and unfair.[7]

The nature of the regime cannot be understood based on its legal rules. Although there are indeed some problems with certain laws (and with certain provisions of the Fundamental Law),[8] the suffocating nature of the regime is not a direct and necessary consequence of its written laws, but rather stems from their application and from *de facto* practices by various officials, e.g., law enforcement agencies do not (or extremely slowly and incompetently) apply existing criminal laws to obvious corruption cases if they happen in the environment of politically shielded personalities.[9] The blatantly arbitrary disciplining practices of the Speaker of the Parliament applied to MPs,[10] or certain tax authority raids on political and economic opponents can also be cited as examples. Chasing away the Central Euro-

6 Erica Frantz and Andrea Kendall-Taylor, 'The Evolution of Autocracy: Why Authoritarianism Is Becoming More Formidable', Survival (2017/5), 57–68.

7 Or to put it differently, the elections are "free but not fair", see (without using the expression explicitly but describing in detail the phenomenon along these lines) e.g., Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights, *Limited Election Observation Mission Final Report on the Parliamentary Elections in Hungary 8 April 2018* (Warsaw, 27 June 2018).

8 For an overview of these problems see András Jakab and Eszter Bodnár, 'The Rule of Law, Democracy, and Human Rights in Hungary: Tendencies from 1989 until 2019' in: Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (New York: Routledge 2020), 105–118; András Jakab and Eszter Bodnár, 'Agonie eines jungen Verfassungsstaates. Die ungarische Verfassung 1989 bis 2019' in: Ellen Bos and Astrid Lorenz (eds), *Das politische System Ungarns* (Berlin: Springer 2020), 55–70.

9 See e.g. Erdélyi Katalin, 'Elszabotált nyomozások: 20 fontos ügy, ami megakadt az ügyészségen', 16 September 2021 <https://atlatszo.hu/kozpenz/2021/09/16/elszabotalt-nyomozasok-20-fontos-ugy-ami-megakadt-az-ugyeszsegen/> (22.03.2023).

10 Zoltán Szente, 'The Twilight of Parliament – Parliamentary Law and Practice in Hungary in Populist Times', International Journal of Parliamentary Studies (2021), 127–145.

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pean University was also carried out predominantly with such means (i.e. it did not follow from the text of the law itself that the university had to leave the country, but from the way of its application and from the political context it already did).[11] The Hungarian hybrid regime is – in addition to the concentration of financial resources – mostly about a combination of creative, occasionally illegal (selective) law enforcement, as well as informal, extra-legal (i.e. not legally prescribed, sometimes illegal) practices.[12] Compared to these, the problems that can be discovered in written laws are *relatively* minor.[13] The character of the regime as a whole is therefore not primarily determined by formal (legal) norms, but by informal practices.[14]

We can observe a growing gap between written laws and legal reality: the normativity of formal legal norms is slowly deteriorating in Hungary (especially in politically sensitive legal areas)[15] and informal extra-legal practices become stronger and stronger, often also contrary to existing laws. Specifically in the field of constitutional law, this means that the gap between constitutional law and constitutional reality is constantly growing: the normativity of Hungarian constitutional law is gradually fading. The

11 For a detailed example of how this works at the Constitutional Court through failure to act see Nóra Chronowski and Attila Vincze, 'The Hungarian Constitutional Court and the Central European University Case: Justice Delayed is Justice Denied: Decision of the Hungarian Constitutional Court of 6 July 2021 and the Judgment of the ECJ of 6 October 2020, Case C-66/18', European Constitutional Law Review (2021), 1–19.

12 See convincingly Beáta Bakó, 'Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary', Heidelberg Journal of International Law (2022), 223–254 (250).

13 See e.g., Zoltán Szente, 'The myth of populist constitutionalism in Hungary and Poland', International Journal of Constitutional Law (2023), 1–29 (27): 'the system of the separation of powers and the catalogue of basic rights of the Fundamental Law differ only slightly from the old Constitution - in fact, most problems stem from authoritarian constitutional practice.'

14 András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules. The Failure of Constitutional Institution-Building in Hungary', American Journal of Comparative Law 68 (2020), 760–800; on the role of formal legal rules see Kim Lane Scheppele, 'Autocratic Legalism', University of Chicago Law Review (2018), 545–583.

15 The situation is similar with regard to the Russian Constitutional Court, which is doing a decent work in politically irrelevant cases, but in politically important cases it is always a submissive servant of the Putin regime. See Alexei Trochev and Peter H Solomon, 'Authoritarian constitutionalism in Putin's Russia: A pragmatic constitutional court in a dual state', Communist and Post-Communist Studies 51 (2018), 201–214.

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forms are still there, but in practice they are slowly being hollowed out: liberal (or at least largely liberal) formal rules mask strongly illiberal everyday practices.[16] Captured institutions (such as the Constitutional Court or the prosecutorial services) are independent on paper, but in fact they act along with the wishes of the current government.[17] This behaviour can be manifested not only in formal acts (in their content and in the choice of decision-making form),[18] but also in deliberately failing to act,[19] and even in informal acts such as press releases, which can be assumed to have been created specifically on government orders, or at least with prior consultation with the government.[20]

For these situations, the classical black letter (doctrinal) methods of legal scholarship can only be applied to a very limited extent. It can also be observed in Hungarian legal scholarship that classical doctrinal works are losing popularity, and instead empirical, sociological or complex institutional analyses emerge.[21] If the legal system is gradually losing its normativity, then doctrinal analysis is gradually also becoming futile.[22] The admittedly mixed genre of the present paper also fits into this trend.

16 András Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge: Cambridge University Press 2021), 154, 255.

17 On the steps leading to the currently very strong correlation between the opinion of the government and the opinion of the Constitutional Court, see Zoltán Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014', Constitutional Studies 1 (2016), 123–149 with detailed empirical data. On the prosecuting services see above n 9.

18 A central and strong competence of any constitutional court is the annulment statutes. The Hungarian Constitutional Court still has this competence, but in practice its use became very rare. Instead, the Constitutional Court tends to use softer competences (such as declaring that the legislature omitted to act, and obliging the legislature to act within a deadline).

19 About various techniques delaying, avoiding or hollowing out decisions, applied by the Constitutional Court itself, to justify its own failures to act, see Petra Lea Láncos, 'Passivist Strategies Available to the Hungarian Constitutional Court', Heidelberg Journal of International Law (ZaöRV) 79 (2019), 971–993.

20 See e.g., the open letter by the President of the Hungarian Constitutional Court published on 14 December 2021 <https://www.alkotmanybirosag.hu/kozlemeny/az-alkotmanybirosag-elnokenek-allasfoglalasa-a-jogallamisag-vedelmeben>.

21 András Jakab and Miklós Sebők (eds), *Empirikus jogi kutatások* (Budapest: Osiris 2020).

22 András Jakab, 'Bringing a Hammer to the Chess Board: Why Doctrinal-Conceptual Legal Thinking is Futile in Dealing with Autocratizing Regimes', Verfassungsblog, 25 June 2020, <https://verfassungsblog.de/bringing-a-hammer-to-the-chess-board/>.

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2. The regime's hyper-pragmatism: adhocism and ideological agnosticism

In 2010, there was no detailed roadmap or systematic planning on how to build up the Hungarian hybrid regime. The end result is much more the result of a series of improvised decisions than the realisation of a systematic plan.[23] The only consistent pattern of behaviour of the regime has always been its trying to solve quickly and efficiently the power-politically most pressing current problems. The rest are narratives constructed only after the fact (i.e. *ad hoc*, for the specific task). Ideology is only an interchangeable 'political product'[24] for the regime.[25]

The regime also has a clear preference for innovations and norm-violations for their own sake (in fact, the latter is actually considered as a sign of charisma), which in the end constantly and necessarily erodes the rule of law.[26] This is only accompanied by some vague long-term visions, which would be an exaggeration to call a plan: e.g., "national sovereignty",[27] which in fact mostly means the PM's own personal sovereignty (i.e. it is rather the projection of the character of the main decision-maker onto politics). Of course, the fact that a single person's personality trait becomes one of the characteristics of the entire regime – although it can also be seen as evidence of his charisma – also says a lot about the nature of this regime.

The characteristic ideological elements only serve to enthuse the regime's own followers and to deliberately provoke the opposition (and thereby to increase polarisation, and as a result, to consciously damage the rational public discourse that would be necessary for effective democratic accountability). Despite the officially Christian rhetoric, the pro-government

23 On this style of politics, see Tilo Schabert, *Boston Politics. The Creativity of Power* (Berlin/New York: Walter de Gruyter 1989).

24 Explicitly so by an influential pro-government ideologue, public intellectual and journalist Gábor G. Fodor, '"A rendszer igazságait védem" – Interjú G. Fodor Gáborral', <https://magyarnarancs.hu/belpol/a-rendszer-igazsagait-vedem-93802>.

25 It is not simply "thin" ideologically (as populist politics in general), see Ben Stanley, 'The Thin Ideology of Populism', Journal of Political Ideologies (2008), 95–110, but its loud ideological elements are a self-contradictory bunch of *interchangeable* elements – none of which are actually meant substantively by the apex of the regime.

26 For more details see András Körösényi, Gábor Illés and Attila Gyulai, *The Orbán Regime. Plebiscitary Leader Democracy in the Making* (London: Routledge 2020).

27 See e.g., 'Orbán Viktor: A nemzeti szuverenitás ma is harcban áll a birodalmi törekvésekkel', <https://mandiner.hu/cikk/20210503_belfold_orban_viktor_lengyelorszag>.

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press regularly scolds and mocks the Pope.[28] The sovereigntist rhetoric is not disturbed by long-term indebtedness towards Russia or China with unfavourable conditions.[29] Despite the smear campaign against international capitalism, the government concludes so called strategic partnership agreements with the largest multinational companies,[30] whereby it provides them with privileges and the legal nature of the agreements is not clear.[31] While the government conducts the anti-Soros propaganda campaign with anti-Semitic overtones,[32] it allies itself with the populist Israeli right wing.[33] Even with official anti-immigration, the system of settlement bonds (financially benefitting cronies near to the government and allowing criminal and/or secret service elements from Russia and Arabic countries to acquire Schengen status) is maintained.[34] Illiberalism seems to be mixed with the language of liberal fundamental rights, and more recently, even the protection of sovereignty is derived from human dignity.[35] They mingle Marxist egalitarian statements with conservatism. They talk about the Ten

28 See Zsolt Bayer, 'A pápa esze', Mandiner, 2 August 2016, <https://kereszteny.mandiner.hu/cikk/20160802_bayer_zsolt_a_papa_esze>; Balázs Bozzay, 'Bencsik András: Ferenc pápa keresztényellenes, meg akarta alázni Magyarországot', telex, 8 June 2021, <https://telex.hu/belfold/2021/06/08/bencsik-andras-ferenc-papa-meg-akarta-alazni-magyarorszagot-es-keresztenyellenesen-viselkedik>.

29 See Bálint Ablonczy, 'Ezermilliárdos kínai adósság: a magyar szuverenitást veszélyezteti a Fudan és a Belgrád-vasút', 21 April 2021, <https://www.valaszonline.hu/2021/04/21/fudan-egyetem-kina-magyarorszag-adossag-geopolitika-elemzes/, https://www.napi.hu/magyar-gazdasag/paks-ii-hitel-orosz-hitel-tartozas-suli-janos.674586.html>.

30 As of today, there are officially 93 strategic partnership agreements; see the government website <https://kormany.hu/kulgazdasagi-es-kulugyminiszterium/strategiai-partnersegi-megallapodasok>.

31 See eg the analysis by Transparency International <https://transparency.hu/wp-content/uploads/2016/03/A-v%C3%A1llalatok-%C3%A9s-a-korm%C3%A1ny-k%C3%B6z%C3%B6tti-strat%C3%A9giai-meg%C3%A1llapod%C3%A1sok-Magyarorsz%C3%A1gon-Tanulm%C3%A1ny-a-lobbiz%C3%A1sr%C3%B3l.pdf>.

32 Lily Bayer, 'Hungary to take down controversial Soros posters', <https://www.politico.eu/article/hungary-to-take-down-controversial-soros-posters/>.

33 This included secret service help by Netanjahu against Hungarian journalists and opposition politicians, see Panyi Szabolcs and Pethő András, 'Hungarian journalists and critics of Orbán were targeted with Pegasus, a powerful Israeli cyberweapon', <https://www.direkt36.hu/en/leleplezodott-egy-durva-izraeli-kemfegyver-az-orban-kormany-kritikusait-es-magyar-ujsagirokat-is-celba-vettek-vele/>.

34 For concrete examples see 'Letelepedési kötvény-biznisz', <https://adatbazis.k-monitor.hu/adatbazis/cimkek/letelepedesi-kotveny-biznisz>.

35 The result is doctrinally quite confusing, but the aspiration is clear, see the decision of the Hungarian Constitutional Court 32/2021. (XII. 20.) AB. For a smart analysis, see

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Commandments in public, but behind the scenes they trample on all Ten Commandments (especially the Seventh and Eighth).[36] They pose as the international defenders of Western Christianity while openly bashing the West, regularly sabotaging its international (EU) institutions from within in line with Russian and Chinese interests,[37] and reproaching with the Christian-persecuting Chinese and Islamist Turkish regimes.[38] And of course, the all-pervasive cronyism[39] and systemic corruption (which, according to one of their ideologues, is their main policy)[40] best demonstrate the extreme pragmatism of the regime. Rhetoric and actual government action have little to do with each other: that is, they typically say something different than what they actually do. Those critics of the regime, who still treat the regime's occasionally deliberately provocative rhetoric and ideological fragments at face value (the specific *purpose* of which is to divert attention from the real government performance by provoking angry reactions), after thirteen years have still not understood the regime's profound cynicism.

That is why the use of labels such as "fascist", "Christian fundamentalist" or "nationalist" is fundamentally mistaken. With such categories, some

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Nóra Chronowski and Attila Vincze, 'Full Steam Back', Verfassungsblog, 15 December 2021, <https://verfassungsblog.de/full-steam-back/>.

36 See e.g. Reuters Staff, 'Hungarian ex-Olympic champion and mayor resigns over sex tape', Reuters, 6 November 2019, <https://www.reuters.com/article/us-hungary-fidesz-mayor-idUSKBN1XG1L8>; Nick Thorpe, 'Jozsef Szajer: Hungary MEP quits after allegedly fleeing gay orgy', BBC News, 1 December 2020, <https://www.bbc.com/news/world-europe-55145989>.

37 See e.g. Ariel Cohen, 'Viktor Orban's Goulash Energy Policy Makes Hungary Putin's Trojan Horse in Europe', Forbes, 17 May 2022, <https://www.forbes.com/sites/arielcohen/2022/05/17/viktor-orbans-goulash-energy-policy-makes-hungary-putins-trojan-horse-in-europe/>; Wilhelmine Preussen, 'Orbán backs China's Ukraine peace plan', Politico, 27 February 2023, <https://www.politico.eu/article/viktor-orban-hungary-ukraine-china-peace-plan-russia-invasion/>.

38 David A Andelman, 'Opinion: Putin's useful allies are throwing a wrench in the works', CNN, 18 May 2022, <https://edition.cnn.com/2022/05/16/opinions/putin-allies-orban-erdogan-europe-andelman/index.html>; Tamás Koncz, 'A kínai kereszténytyüldözésről kérdezték a kormányt, erre ledobták a Niedermüller-bombát', <https://nepszava.hu/3085730_a-kinai-keresztenyuldozesrol-kerdeztek-a-kormanyt-erre-ledobtak-a-niedermuller-bombat>.

39 See 'Viktor Orbán strengthens his crony state capitalism', Financial Times, 24 August 2022, <https://www.ft.com/content/41e3294c-60f8-4c9f-b58f-fddb61c86c8c>.

40 András Lánczi, 'Viccpártok színvonalán áll az ellenzék', Magyar Idők, 21 December 2015, <https://www.magyaridok.hu/belfold/lanczi-andras-viccpartok-szinvonalan-all-az-ellenzek-243952/>, 'What they call corruption is practically the most central policy of Fidesz.'

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authors increase the tempers in government-critical opinion bubbles and strengthen their status in their own discursive microcosm. Such agitation, at the same time, increases the level of hatred towards the regime in the opposition and towards the opposition in the pro-government camp. In other words, they are not simply incorrect in terms of content, but they also increase *polarisation* (they tease their own camp, insult the other camp), and thereby unwittingly strengthen the socio-psychological infrastructure of the regime →IV.3. Thus, paradoxically, those who shout "fascism" at the Hungarian hybrid regime actually become the regime's unintended helpers.[41]

The ideological elements used by the regime are in fact eclectic, inconsistent, contingent and essentially irrelevant. They are not held together by consistent ideological foundations, but only by the person of the PM: by his consciously nurtured personal charisma, by his inexhaustible energy, by his network of domestic and international contacts, by his three-decade-old political brand, by his immeasurable wealth controlled through his cronies and family members, and by the fact-resistant adoration of a significant mass of voters.[42]

3. Reasons explaining the formation of the regime

As with complex political changes in general, the formation of the Hungarian hybrid regime can best be understood as the result of several factors (and not just one single cause).[43] The erosion of democracy and the rule of law is a global phenomenon,[44] the general (economic, sociological, communication technology, geopolitical, etc.) causes of which cannot be discussed

41 Such regimes are especially embarrassed if we refuse their tribal-polarised logic. See the Istanbul mayoral election as an example Melvyn Ingleby and F. Michael Wuthrich, 'The Pushback against Populism: Running on "Radical Love" in Turkey', Journal of Democracy 31 (2020), 24–40.

42 On the person see the recent book by Zsuzsa Szelényi, *Tainted Democracy. Viktor Orbán and the Subversion of Hungary* (London: Hurst Publishing 2022).

43 For a literature overview see Katalin Fábián, 'Why Did Hungarian Politics Become Authoritarian? A Review of Competing and Complementary Responses', Hungarian Studies Review 2 (2021), 216–237.

44 See the sobering World Justice Project, 'Rule of Law Index 2022', <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf>, 8, 'The results in this report show that adherence to the rule of law fell in 61 % of countries over the past year.'

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here.[45] But it is necessary to address why the Hungarian deterioration was dramatically worse than the "average" deterioration.

(1) One of the reasons is a concretely identifiable error in Hungarian constitutional law, which arose from the interplay of two norms. The constitutional order before 2010 (a) included a disproportionate electoral system (for the sake of government stability), which (b) together with the comparatively low (two-thirds) constitution-amending majority, opened the legal door for unilateral amendments to the Constitution. However, the constitutional rules alone never explain the erosion of democracy and the rule of law, because they exert their effect together with sociological-political-cultural factors.[46] This does not mean that rules would not matter. But for a constitutional error (in our case: the combination of the disproportionate electoral system and the easily circumvented constitutional amendment procedure) to be really damaging, you need some unfortunate interplay with other factors.

(2) One of the key risk factors for Hungarian constitutionalism has been the legal political culture that failed to stop the erosion. The cultural context in all former socialist countries made the ice thin, which then broke both in Poland and in Hungary (due to specific political constellations).

Empirical surveys have also been carried out about this question, which have established that the Hungarian population is characterised by an

45 For further details see András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law', Constitutional Studies 6 (2020), 5–34, (8–12), with literature references.

46 The US Constitution, for example, has been a stable and functioning Constitution for 230 years now and withstood severe crises (even a civil war). It was, however, translated into Spanish and became the Argentine Constitution of 1853, under which Argentina was turned very quickly into a dictatorship. Or another example: according to one of the usual explanations, an error in the Weimar Constitution strongly contributed to the fall of the Weimar Republic: Article 48 of the Weimar Constitution gave the *Reichspräsident* very strong emergency decree powers, which was then used to undermine democracy. This provision was, however, later adopted by the French Fifth Republic in 1958, it became the Article 16 of the French Constitution – but the French Constitution has been working quite well, for more than 60 years. An even more fitting example is the current Austrian Constitution, adopted in 1920. This miserably failed in 13 years: by 1933/34, Austria has already become a fascist State (i.e. already before the *Anschluss*). Literally the same Constitution was then re-established in 1945, and since then Austrian democracy and the rule of law have been one of the strongest in the world.

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ambivalent (i.e. partially self-contradictory) attitude towards the law.[47] Citizens do not trust the State and the legal system, but at the same time they still expect the State and the legal system to solve all their problems. On the one hand, they want very detailed and strictly enforced regulations, but if it is specifically about them, they would rather find a smart way to evade the laws and expect privileged treatment. Their attitudes towards the law were embedded in a generally pessimistic, cynical and anomic social culture. The research also established that there is a lack of coherence concerning values in a large part of society, even in terms of the most basic principles. The interviewers asked, for example, whether fundamental rights should be made conditional on the fulfilment of obligations. Then, three questions later, the same question was asked in a slightly different way, and the vast majority of respondents contradicted their previous answers. There are characteristics that can be considered a legacy of socialism in Hungarian legal culture: for example, openness to paternalism or the general feeling of being a victim in an unjust world. There are also some that perhaps go back even earlier, e.g., the sociologically established fact that the average citizen does not dare to question the official action even in the case of obvious abuse indicates a much older lack of democratic values and the rule of law traditions. In other words, what we now consider to be the legal culture of the current Hungarian hybrid regime is only partially its own; rather, it is an inherited legal culture from which the current regime can feed as a breeding ground.[48] This cultural problem is of course also true for other former socialist countries, so it is no coincidence that the EU's so called "rule of law crisis" broke out in former socialist countries.

Unfortunately, healing from such cultural problems is difficult and slow (and in addition to the consensus of the domestic elite, external support is usually required). This is often described as some kind of path dependency, or more pessimistically, "institutional alcoholism".[49] Historical experience shows that cultural progress is possible, but there is always a significant

47 See György Gajduschek, 'Wild East and Civilised West? Some Indicators of Legal Culture in Hungary, Serbia and the Netherlands. An Empirical Comparative Assessment', Jahrbuch für Ostrecht 60 (2019), 165–184; György Gajduschek, 'Jogtudat és értékvilág – mint a magyar jogrendszer környezete' in: András Jakab and György Gajdruschek (eds), *A magyar jogrendszer állapota* (Budapest: MTA TK 2016), 95–115.

48 Péter Tölgyessy, 'Politika mindenekelőtt. Jog és politika Magyarországon' in: Jakab and Gajduschek (n. 47), 17–42 (32–33).

49 András Jakab, 'Institutional Alcoholism in Eastern Europe and the Cultural Elements of the Rule of Law' in: Antonina Bakardjieva Engelbrekt and Xavier Groussot (eds), *The Future of Europe* (Oxford: Bloomsbury 2019), 203–241.

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chance of falling back. There are also sad episodes of backsliding in the history of today's successful democracies that were explained by formerly unfortunate cultural factors. The cultural explanation is actually one of the usual explanations (among other factors) why constitutional democracy has failed in Austria or Germany between the two world wars ("democracies without democrats"). Therefore, one of the dangers in the case of Hungary is that even if the current hybrid regime were to end suddenly, unfortunately, it could easily happen that another hybrid regime of a similar nature (with different actors, possibly even using antipathy towards Orbán) would be created after it.

(3) And the third factor is the specific people who made political decisions that led to the current situation.[50] Therefore, these people bear at least a moral and historical responsibility. However, the human quality of individual people can never be separated from the cultural environment. Certain persons (due to the centralised nature of the Hungarian hybrid regime, mostly a single person, Viktor Orbán)[51] may have some influence on how that cultural environment develops (i.e. they can make it a little bit even worse), but the general framework is pre-defined also for them by the legal and political culture of the population. In other words, ultimately, the probability that voters or officials will behave in one way or another can be calculated with relative certainty from those cultural characteristics (hierarchy-accepting, paternalistic, forgiving corruption and nepotism, tribal-polarised →IV.3., viewing the world as unfair, seeing yourself as a

50 For the role of political entrepreneurs (i.e. someone who takes advantage of the opportunity offered by the political context) see Marianna Kneuer, 'Unravelling democratic erosion: who drives the slow death of democracy, and how?', Democratization 2021, 1442–1462. The fact that our deterioration of the rule of law and democracy is even more significant compared to other countries in the region resulted from the interplay of specific domestic political actors (esp. Viktor Orbán) and strong polarization (which is stronger than in the rest of the region) →IV.3. In addition, unfortunate coincidences also played a role (e.g., the economic crisis of 2008, global political changes in the 2010s) – or to put it differently: there were many worrying signs, but even compared to them, Hungary just got really unlucky to experience such a strong deterioration that we have seen.

51 The permanent volatility of the Hungarian regime (its instability and gradual deterioration) can largely be explained by the Prime Minister's personality traits. It is disputed in the literature whether by nature all hybrid regimes are necessarily unstable (and represent an unsustainable transitional stage between dictatorship and democracy). For the discussion, see e.g., Joakim Ekman, 'Political Participation and Regime Stability: A Framework for Analyzing Hybrid Regimes', International Political Science Review (2009), 7–31.

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victim but without the willingness to do something about it except for complaining), which can be empirically measured at the level of society.[52] This cultural profile characterises not only the supporters of the Hungarian hybrid regime, but the entire Hungarian society *on average* (i.e. to a large extent also opposition voters). Improvement is possible (if there is an elite consensus, international conditions are favourable, smartly designed formal institutions operate and the population experiences economic success), but it is always a slow process that takes decades.

The three factors listed above can only be meaningfully interpreted in relation to each other or in connection with each other. It was not fate that Hungary ended up in today's situation, but in medical terms, the "risk factors" were present. Moreover, with the EU accession, the instruments of effective external pressure (often called accession conditionality) also disappeared,[53] which supported the democratic constitutional system of 1989. The supporting scaffolding has disappeared, and parts of the building have unfortunately collapsed due to various inputs.[54]

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52 For more details see István György Tóth, 'Turánbánya? Értékválasztások, beidegződések és az illiberalizmusra való fogadókészség Magyarországon' in: András Jakab and László Urbán (eds), *Hegymenet. Társadalmi és politikai kihívások Magyarországon* (Budapest: Osiris 2017), 37–50.

53 Formally, there are (and always have been) legal instruments in the hands of the EU against hybrid(ising) regimes, but these always depend on political discretion at some point in the procedure (e.g., the Commission has no legal obligation to initiate infringement procedures), and since Hungary is already an EU member, its support was often needed in the internal EU decision-making mechanisms (in completely different matters). In other words, a skilfully manoeuvring Member State (e.g., with veto blackmail, supporting votes in other matters, etc.) can avoid the strict enforcement of EU law for a long time. See more on the topic András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: Oxford University Press 2017); András Jakab, 'Three misconceptions about the EU rule of law crisis', Verfassungsblog, 17 October 2022, <https://verfassungsblog.de/misconceptions-rol/>. The Hungarian hybrid regime has now run out of options to manoeuvre, mostly thanks to developments in Poland and the Russian aggression against Ukraine →VI.

54 Paradoxically, EU accession was *harmful* (!) even beyond this to the state of the Hungarian rule of law and democracy: (a) a significant part of the politically active citizens who are more sensitive to the values of constitutionalism migrated to the western part of the EU (and thus in the domestic democratic processes they are less present), (b) and the uncontrolled EU financial support essentially increased the public acceptance of the Hungarian hybrid regime, and helped to get over the erosion of the rule of law, and at the same time strengthened inherited the corrupt practices. See R. D. Kelemen, 'Appeasement, ad infinitum', Maastricht Journal of European and Comparative Law (2022), 177–181.

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II. A Realistic and Responsible Scenario for the Return to Constitutional Democracy (Preferably without Breaking Legal Continuity)

There is a way out of Orbán's 'constitutional prison'[55] without a revolution in the legal sense (i.e. without breaking the legal continuity),[56] but it is long, tiring, without theatrical grandstanding, difficult to sell as a campaign slogan, and moreover, it does not satisfy the emotions accumulated against the Orbán regime. However, from the point of view of the public good, this is still the way to go.

1. Three stages

Restoring constitutional democracy can legally be done in three stages. It is not necessary to suspend the two-thirds majority rules, cohabiting with them is possible. Overall, in terms of social benefits and risks, this scenario seems more appropriate – considering the currently existing legal framework (i.e. existence of two-thirds majority rules), the nature of the regime (i.e. hybrid regime) and the social context (i.e. strong polarisation).

a) First stage: things that can also be done with a simple majority

When the new government takes office, the use of the central state administration for party political purposes can cease (as an important element of this, new leaders can be appointed to head the tax authority, the police and the secret services, as a result of which the investigative authorities can investigate corruption cases of the Orbán Government). The new parliamentary majority can also create simple majority laws reforming the school system or the healthcare system. The arbitrary financial dependence of small villages (which can often extort almost full support for the incumbent governing parties in elections) can also be corrected immediately. The

55 Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', Verfassungsblog, 21 December 2021, <https://verfassungsblog.de/escaping-orbans-constitutional-prison/>.

56 In more detail, with additional references to the (Kelsenian) concept of a 'revolution in the legal sense', see Horst Dreier, 'Revolution und Recht', Zeitschrift für öffentliches Recht 2014, 805–853; András Jakab (ed), *Methoden und theoretische Grundfragen des österreichischen Verfassungsrechts. Eine Einführung für Fortgeschrittene* (Wien–Baden-Baden: Verlag Österreich – Nomos 2021), 62–70.

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new government can immediately disclose materials about the secret (and most likely corrupt) deals of the Orbán regime. The country can take a more EU and NATO-friendly foreign policy direction (instead of serving Russian and Chinese interests). And, of course, it is possible to stop the embezzlement of EU and national funds (which mostly happens through centrally distributed overpriced public procurements).

The possibilities of the new government would indeed be smaller than they should be under normal democratic conditions (for example, regarding the administration of most universities), but still very wide →III.1.c)ii. If there is a change of government, Fidesz will no longer be able to use the central state administration to win municipal or European Parliament elections (the maintenance of the propaganda machine is actually very expensive, the resources controlled by the deep state are insufficient).[57] Unless the new government overthrows itself (internal fights, etc.), then the rest of Orbán's power machinery awaits slow withering.

Officials close to Fidesz are often portrayed as fanatics, but it is rational to assume that a big part of them are *fallible* weak people who make bad compromises. Most of the Fidesz appointees will presumably only want to survive ("strategic defectors" →III.1.c)ii.), therefore their informal loyalty will also weaken over time (step by step, especially with each new – municipal, European Parliament etc – electoral defeat of Orbán's forces). Some of them will perhaps even be relieved to be able to do their jobs, while others will be cautious in their self-interest with further helping Fidesz (and working against the new government).[58] And maybe there will be those who actually want to sabotage the new government. We cannot know the exact numbers and ratios, but I think the problem will be of a much smaller calibre than the current opposition fears (more →III.3.f)). But even if this were an excessively optimistic expectation (I don't think it is), then at least the non-revolutionary way of transition *should be tried first* →II.2.

The new government must make it clear that it does not expect a "swap" or a "betrayal" from the officials appointed by Fidesz (in independent institutions and ministries), but "only" the performance of their legally

57 See Karácsony Gergely, 'A NER lebontásának programja', <https://web.archive.org/web/20220401073514/https://kilencvenkilenc.hu/a-ner-lebontasanak-programja/>.

58 Some deep state officials are what is called in behavioural ethics 'situational wrongdoers' who were morally weak, see Yuval Feldman, *The Law of Good People* (Cambridge: Cambridge University Press 2018), 61, and there is a good chance they could be useful officials of a new constitutional democracy as well. By threatening them in advance, they will be unnecessarily alienated.

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required work in *good faith* (the latter is always implied in legal duties anyway). The goal cannot therefore be to reflect the abuses of the Orbán regime on Orbán's officials, the Schmittian (us vs. them) logic would be very unfortunate. The new government owes it not to the officials of the Orbán regime, but to itself and the country, to be better than the Orbán regime (which, of course, does not exclude prosecution for the illegal acts of the Orbán regime, in fact, it should be explicitly strived for, but the nasty toolkit of informal practices and abuses experienced so far should not be used →I.1).

b) Second stage: achieving two-thirds majority in order to change two-thirds majority rules

As a second stage (probably only after yet another parliamentary election), a new two-thirds majority against the Orbán regime can be formed, thus making it possible to amend the Constitution (and to amend the cardinal laws). Transitional justice measures (including the recovery of assets obtained through corruption) can be partially taken already in the first stage or (in cases where the Fundamental Law or cardinal laws need to be amended) in this second stage.

The replacement of those officials (protected by two-thirds majority rules) can also take place in this stage, who during the first stage were proved not to have exercised their powers in good faith. If there is no explicit possibility of replacement by a two-thirds majority, then such rules can be created with the appropriate procedural guarantees (although the position of some officials is still protected by EU and international legal rules, which must be respected – see the condemnation of the measures of the Orbán regime for removing the Data Protection Commissioner and the President of the Supreme Court).[59]

59 For references see below III.1.a)ix.

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c) Third stage: adopting a new Constitution (timing, procedural steps and key provisions)

Finally, as a third stage (probably after yet a few more years), it is worth beginning to make a new Constitution. This must be done legally and involve all major political actors (possibly with the real and broad support of Fidesz or other future right-wing parties and right-wing voters). As long as this kind of joint work does not seem possible, the issue of the new Constitution should not be forced. With constitutional amendments (see the second stage →II.1.b) above) and reinterpretations, it is possible to change any constitutional *content* (both substantively or symbolic parts, such as the preamble), as we saw in Hungary in 1989 and after. However, the adoption of the new Constitution is a big symbolic act, the final touch in the process of restoring the rule of law. Forcing the issue at the beginning of the transition is counterproductive. Or to put it a little more poetically: the new Constitution is the fruit of a successful transformation process, one of the last steps, and not a means of dismantling the Orbán regime.[60]

Procedurally, it is worthwhile to consider various forms of popular participation (although the international experiences of popular participation in constitution-making processes do not typically carry the promise of success),[61] but there should be no haste, and it is also worth adopting the text by political consensus and a national referendum ritual. Direct popular participation mechanisms can only function meaningfully if they are supported or at least accepted by all relevant political forces (otherwise, the whole process will only generate further polarisation and/or a significant number of voters will abstain due to hostile feelings for the entire process).[62]

60 For more details of my argument see András Jakab, *When the Time is Not Ripe for Constitution-Making: Recommended Procedural Steps and Their Ideal Timing for Maximizing the Legitimacy of a New Constitution* (manuscript on file with the author).

61 Justin Blount, 'Participation in Constitutional Design' in: Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 40; Devra C. Moehler, *Distrusting Democrats. Outcomes of Participatory Constitution Making* (Ann Arbor: University of Michigan Press 2008); Alexander Hudson, *The Veil of Participation. Citizens and Political Parties in Constitution-Making Processes* (Cambridge: Cambridge University Press 2021).

62 Philipp Dann et al., 'Lessons Learned from Constitution-Making: Processes with Broad Based Public Participation', Democracy Reporting International 20 (2011), (2, 5).

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When considering the ideal content of a new Constitution, it is worth determining in what political environment and culture the given norms will operate, taking into account the Hungarian experience.[63] If we approach the question in this way, we have to think about what has gone wrong with Hungarian politics →I.3: what are the key problems in Hungarian legal and political culture for which formal rules could potentially offer a remedy, or at least some kind of support. The first such point, in my opinion, is the excessive acceptance of hierarchy, i.e. the fact that the population does not demand or require autonomy to the necessary extent. There are constitutional solutions to weaken the acceptance of hierarchy and to strengthen the demand for autonomy, e.g., in the form of personnel guarantees in public administration. Furthermore, it is very important to ensure the internal democracy and pluralistic structure of the political parties. We often talk about the danger that one party would dominate or homogenise the entire political landscape of the country, but the problem starts earlier when a party is internally homogenised by one single person. You need to nip this in the bud before the symptoms become overwhelming for the entire country. There are established, tried and tested legal rules for this, which were invented exactly for post-dictatorship situations in Germany.

The issue of transparency in party financing is also very important, which drives both corruption and oligarchisation (i.e. the back-and-forth transformation of political and economic power in the hands of a few). A further central topic is decentralisation through reinforcing local governments or even introducing federalism. It is interesting to compare the situation of democracy in Pakistan and India after British rule. Pakistan has tumbled from one military dictatorship to another, and India has been (until recently) more or less a functioning democracy. This is explained, among other things, by the fact that the constitutional structure in India has been federal, but not in Pakistan. If the constitutional structure is more unitary-homogeneous (i.e. not federal), it is much easier to establish centralised authoritarian regimes. In other words, the constitutional guarantee of the fragmentation of power is also a key issue.

63 For more details, with literature references supporting the suggestions mentioned here (and even more suggestions), see András Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law', Constitutional Studies 6 (2020), 5–34 (18–21). For a complete draft of a new Constitution, see András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-ORAC 2011), 70–163.

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Another suggestion would be to introduce a proportional electoral system, which would be useful for two reasons. It makes difficult for any political force to obtain even a simple majority on its own, much less a constitution-amending majority. But it is equally important that the culture of finding compromises is strengthened in proportional electoral systems, quite simply because you have to think in coalitions. If we see that one of the problems of a country is excessive polarisation, then we have to look for institutions that motivate political actors (and voters) to think in terms of compromises. Preferential (where the voter can rank candidates with numbers) or negative (where the voter can express both opposition as well as support) voting systems both favour compromise-seeking parties and reduce polarisation. (By the way, the large number of two-thirds majority laws – or with their current name: cardinal laws – does not help the search for a compromise, once the political space is already polarised. These cardinal laws only weaken government accountability when there is no two-thirds majority.)

There are further several detailed rules that could reinforce the guarantees of division/separation of powers. For example, many interpret judicial independence as the independence of the judicial branch from the government. But this is not really the key question, but how the individual judge can be independent even from his/her own court administration system in a concrete given case. This should also be strengthened.

2. When and how might still be forced the new parliamentary majority to abandon the current legal system?

If Orbán's deep state illegally tries to overthrow the new government (e.g., via the Fiscal Council's budget veto →III.l.c)i., or if the President of the Republic unconstitutionally refuses to sign the new laws), then Orbán's deep state loses the legality argument, and the deep state itself opens up the revolutionary path for the new government. The lawful possibilities of overthrowing the new government by the deep state are actually very narrow (despite all kinds of urban legends and constitutional misunderstandings →III.1.c)i.). If they did attempt an *unlawful overthrow* of the new government (essentially a coup – i.e. a minor illegality by a deep state official or body would not qualify), then the responsibility for breaking legal continuity (and for the likely ensuing physical violence) would clearly fall on Orbán's deep state. Moreover, beyond a certain point, the actions of Orbán's deep state would probably also qualify as crimes according to the

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Criminal Code (mirroring the scenarios analysed below →III.2.b),–II.2.c)), and this can also be applied to deep-state-officials *after* a possible failed coup.

Such a scenario cannot be completely ruled out, but I believe (and hope) that it is much less likely than many on the opposition side fear. If it were to occur, the response should be proportionate and gradual (e.g., a Fiscal Council veto does not justify actions against the Chief Prosecutor), because it is always easier to escalate the situation than to de-escalate it.

3. Objections

The above stage-by-stage, gradual recovery plan is not new,[64] and various objections have been raised against it.[65] Some of these also raise very exciting preliminary questions in constitutional theory, which I will examine in what follows.

a) "This is formalism"

One objection that sometimes comes up is that the above three-stage proposal would actually be "formalism". This is, however, a pejorative label that is conceptually mistaken in this context.

According to the usual jurisprudential terminology, there are no formalists in this debate. Opponents of breaking legal continuity (including me) are typically *realists*, because they argue/I argue that, taking into account the socio-political circumstances, the revolution either fails from the outset or leads to chaos. Formalist is a curse word in legal theory (especially for

64 András Jakab, 'How to Return from a Hybrid Regime to Constitutionalism in Hungary', Verfassungsblog, 11 December 2021, <How to Return from a Hybrid Regime to Constitutionalism in Hungary – Verfassungsblog>. In Hungarian: Jakab András and Dull Szabolcs, 'A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum!', telex, 17 Oktober 2021, <https://telex.hu/belfold/2021/10/17/jakab-andras-alkotmanyjogasz-interju-feles-tobbseggel-alkotmanyozas-alaptorveny-semmis-polgarhaboru>; Jakab András and Ónódy-Molnár Dóra, 'Ne borítsuk fel az asztalt előre, rizikós dolog a jogállami forradalom', Jelen, 20 May 2021, <https://jelen.media/interju/ne-boritsuk-fol-az-asztalt-rizikos-dolog-a-jogallami-forradalom-1797/>.

65 See below n. 78. At certain points, I further improved the objections because my goal was not the documentation of the complex discourse, but mainly the analysis of the abstract questions raised, see below on the approach →III.1. at the beginning of that chapter.

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implicit models of judicial decision-making),[66] mostly Langdell's conception of law at the end of the 19th century was branded as such by American legal realists (Hart also adopts this terminology in The Concept of Law).[67] However, the arguments against the revolution are distinctly realistic: considering the social context and the likely costs, it is *not worth* breaking legal continuity from the point of view of the public good.

The current debates cannot be well reconstructed along the formalist vs. realist frame,[68] because it is basically used to categorise approaches to legal argumentation (interpretation), and this question is not central here. The debates here can be reconstructed much more along the natural law vs. positivism frame →III.1.b). Using the latter frame, the approach of this paper is *positivist*. There are positivists who are also formalists (Otto Mayer, Paul Laband, Robert Walter), but the connection is by no means necessary (HLA Hart or Michel Troper, e.g., are anti-formalist positivists, just like the author of these lines). A formalist is, therefore, not someone "who believes that formal law must always be observed" (by the way, this is the statement of a specific extreme branch of positivism that I do not subscribe to in this form myself either →II.3.c)). The term "formal law" can best be used meaningfully in contrast to informality in this discourse →I.1.

Formalism is therefore a *theory of interpretation* (more precisely, an extreme theory of interpretation that completely denies the subjective factor),[69] but the current questions revolve around the *validity* (and/or binding force) of the law. The use of the word "formalist" in this debate is therefore conceptually mistaken.

66 Formalism as a syllogistic-deductive model of adjudication (and possibly a political attitude supporting it): Scott Veitch et al, *Jurisprudence* (London: Routledge 2007), 95–96.

67 Brian H. Bix, *A Dictionary of Legal Theory* (Oxford: Oxford University Press 2004), 69–70; formalism is sometimes used a synonym of either textualism or *Begriffsjurisprudenz*.

68 On the debate between realism and formalism see Michael D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th edn, Sweet and Maxwell 2001), 799–800; Brian Bix, *Jurisprudence* (4th edn, Sweet and Maxwell 2006), 179–180, with further references.

69 Raymond Wacks, *Understanding Jurisprudence* (Oxford: Oxford University Press 2005), 356: 'Formalism treats law like mathematics or science. Formalists believe that a judge identifies the relevant legal principles, applies them to the facts of the case, and logically deduces a rule that will govern the outcome of the dispute.'

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b) "This is legalism"

It is also said by the supporters of breaking the legal continuity that the rejection of the revolution would be "legalism". However, this label is also inaccurate. By legalism (according to Judith Shklar) we mean a *moral attitude* that attributes self-worth to following the law (regardless of the content of the law).[70] This is a characteristic that can be observed sociologically all over the world among lawyers (especially in hierarchical legal organizations).[71]

In other words, a legalist looks at the law without its social context, because this helps him/her to escape from personal moral responsibility (as a law enforcer, as a lawyer or as a citizen).[72] However, this cannot be applied to my three-stage proposal either. My proposal is primarily based on the social context, and it does indeed recommend maintaining legality, but not as a moral attitude, but based on weighing and balancing of costs and benefits in the light of the public good and the social context. So the debate here is not about legalism or legalists in the usual sense of legal theory.

c) "This is blindness to the moral content of the legal system"

It has also been suggested that my three-stage plan is actually "blindness to the moral content of the legal system". This is a misunderstanding. My plan reflects a clear position condemnation of certain legal rules, and also a moral condemnation of certain informal practices. But this is not the same as accepting revolutionary natural law.

On the one hand, the expected social costs associated with a revolution are morally unacceptable in the Hungarian context →III.2.e). This is the logic of the so-called ethical positivism (so the justification of positivism is not methodological, but *moral* in the interest of the public good).[73] It is possible to imagine a situation where revolutionary natural law would be

70 Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press 1986).

71 Scott Veitch et al, *Jurisprudence* (London: Routledge 2007), 37–38.

72 Veitch (n. 71), 38.

73 Tom D Campbell, *The Legal Theory of Ethical Positivism* (London: Routledge 1996); Niel MacCormick, 'A Moralistic Case for A-Moralistic Law', Valparaiso University Law Review 20 (1985), 1–41; Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press 1999). For a more detailed explanation of my theoretical ap-

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the appropriate moral choice, but the current Hungarian hybrid regime is not one of these situations →I.1.

Lawyer can translate moral aspects into legal terms in general – and specifically in today's Hungarian situation – through legal interpretation (conceptualised as objective teleological interpretation) and not through the concept of validity (which would be natural law).[74] The concept of the rule of law, for example, in the contemporary German understanding also includes a minimum degree of justice (i.e. it could be understood as a requirement of the rule of law that laws be interpreted in such a way that transitional justice measures are effective).[75] But to set aside the validity of a constitutional system by simply referring to the requirements of justice is a natural law argument: such arguments are mostly used after the end of dictatorships, so I consider this kind of answer as disproportionate. In my opinion, this cannot be called moral "blindness".

d) "Legal positivism is untenable: the Nazis also legally introduced the dictatorship"

The argument has already been made, according to which "positivism is outdated, because the Nazis came to power in Germany legally, and the Nazi lawyers were also positivists". However, these claims are factually false.

Contrary to urban legends, the Nazis came to power in Germany through a revolution in the legal sense (the *Ermächtigungsgesetz* violated the Weimar Constitution both in terms of its content and its adoption

proach with further references to the academic literature see András Jakab, 'Begriffe und Funktionen des Rechts' in: Jakab (note 56), 5–36.

74 Methodologically, this was one of the most important doctrinal achievements of the Sólyom Court compared to the period before it: it used creative objective-teleological reasoning, avoiding the two extremes of both the textualist approach of socialist normativism and the natural law approach resulting in legal uncertainty. See more details Jakab András and Kazai Viktor Zoltán, 'A Sólyom-bíróság hatása a magyar alkotmányjogi gondolkodásra' in: Győrfi Tamás, Kazai Viktor Zoltán and Orbán Endre (eds), *Kontextus által világosan: a Sólyom-bíróság antiformalista elemzése* (Budapest: L'Harmattan 2022), 115–137.

75 See the critique of the decision of the Hungarian Constitutional Court 11/1992. (III. 5.) AB with further references András Jakab, 'Decision 11/1992. (III. 5.) AB – Retroactive Transitional Justice' in: Fruzsina Gárdos-Orosz and Kinga Zakariás (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court* (Baden-Baden: Nomos 2022), 85–102.

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procedure).[76] Nazi jurists tended to be anti-positivists (e.g., Ernst Forsthoff, Ernst Rudolf Huber, Karl Larenz, Carl Schmitt, Otto Koellreutter, Herbert Krüger, Ernst von Hippel), and contemporary positivists tended to be democrats (e.g., Richard Thoma, Gerhard Anschütz, Hans Nawiasky, Hans Kelsen).[77] The legend about the positivism of the Nazis was born in West Germany after the Second World War: the jurisprudential narrative that the doctrine of positivism was responsible for Nazi crimes was much more convenient for German legal academia than looking for personal moral responsibility amongst themselves.

e) "Why are we so sure that the deep state will not sabotage the newly elected democratic government?"

Of course, nothing can be predicted with absolute certainty. However, legal rules not only prescribe, but also usually show behavioural probabilities. It is, therefore, much more likely that the prosecutor's office and the Constitutional Court will take action against the *illegal* revolutionary measures than that the prosecuting services and the Constitutional Court will take action against the *legal* measures of the new government. Of course, such predictions are subjective to a certain degree, and even express optimistic hopes →IV.4., but they also reflect realism (inferred from the polarised public life and the perceived determination of some political actors so far). The above three-stage proposal is based on perceived probabilities and risks →III.2.e).

76 Christoph Guys, *Die Weimarer Reichsverfassung* (Tübingen: Mohr 1997), 161. This constitution-ranked law empowered the government to adopt statutes and, with certain limitations, even to amend the *Reichsverfassung*.

77 See e.g., Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung. Methodenentwicklungen in der Weimarer Republik und ihr Verhältnis zur Ideologisierung der Rechtswissenschaft im Nationalsozialismus* (München: Beck 1994); Kathrin Groh, *Demokratische Staatsrechtslehrer in der Weimarer Republik* (Tübingen: Mohr 2010); Mandred Gangl (ed), *Die Weimarer Staatsrechtsdebatte. Diskurs- und Rezeptionsstrategien* (Baden-Baden: Nomos 2011).

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f) "If we wait until the deep state check mates the new government, it will be too late"

I am going to refute this objection in detail below when I discuss the arguments "the country will be ungovernable" →III.1.c)ii. and "we have to act quickly" →III.1.c)iii.

g) "A fascist regime does not deserve to follow its rules"

This objection is unconvincing for several reasons. First, the Orbán regime is not a fascist regime: it is not a dictatorship →I.1 nor is it ideological →I.2. Second, the problem is not primarily with the legal order, but with the informal practices →I.1. And third, it is not the legal order (or the Orbán regime) that should "deserve" the observance of the rules, but in the light of the consideration of social benefits and risks, it would be wrong from the point of view of the public good to break legal continuity →III.2.e).

h) "There is no rule of law here, as the recent case X shows, so we don't have to follow the legal rules in force"

This objection wrongly implies a binary separation between the rule of law/democracy and dictatorship, even though it is actually a multi-grade scale. Indices are used to measure the rule of law precisely so that they can aggregate a lot of data (I talked about all of this in more detail above at the very beginning of chapter →I.).

III. Radical Scenarios of Breaking Legal Continuity (i.e. Organising a Revolution in a Legal Sense)

If the democratic opposition wins with a simple majority, then the issue of the governability of the country can be a real problem and the behaviour of Orbán's deep state is a real risk (although the probability and weight of this risk can be judged differently). However, the various revolutionary (meaning: breaking legal continuity, i.e. revolutionary in the legal sense) solutions are wrong answers. These proposals are not simply illegal (i.e.

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they disregard two-thirds majority rules), but their practical feasibility is also questionable (as well as there is a good chance they would involve violent acts), and they also cause long-term damage (both to the political context by further strengthening polarisation and to the legal culture by creating a precedent of illegal regime change). They certainly cannot be implemented as easily and smoothly as it appears from various statements. And they are *not worth* it and, therefore, should not be carried out brutally and violently, since all things considered, in the long run they cause more trouble than they solve (cf. the grim Hungarian joke: "the surgical intervention was successful, but the patient died").

Revolutions are very expensive from the perspective of the public good, and by their very nature, they can only be planned to a very limited extent. Or to put it differently: the interruption of legal continuity (i.e. a revolution in the legal sense) is a legal nuclear bomb – such a weapon does exist, but its deployment should be avoided if possible, because it would cause much more social and economic destruction than the supporters of the idea see or want to see. The application of the revolutionary method is thus disproportionately harsh compared to the problem to be solved, and the collateral damage would be most likely too great – both in the short and the long term.

1. Arguments for revolutionary solutions

In the following, I will present the most important arguments in favour of a revolution (in the legal sense), some of which also raise exciting, sometimes rarely discussed preliminary questions in constitutional theory. My aim is *not* to reconstruct who said what when in the Hungarian debates (some participants of the debate have changed their opinions during the debates), because the focus here is not on the history of the Hungarian political and constitutional discourse. Instead, I tried to reproduce the arguments expressed in various formulations in a way that reflects the essence and in their best form (i.e. wherever I could, I even further refined the pro-revolutionary arguments), because in this context the *content of the arguments in their possibly best form* matters.[78] Therefore, I am not going to attribute

78 For a correct summary of the pro and con arguments in the debate, with precise references to the authors, see Viktor Z. Kazai, 'Restoring the Rule of Law in Hungary. An Overview of the Possible Scenarios', Osservatorio sulle Fonti 3 (2021), <https://www.osservatoriosullefonti.it/archivi/archivio-saggi/fascicoli/3-2021/1675-restoring-t

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the various revolutionary arguments to specific statements or interviews of specific politicians, public intellectuals or scholars in the past: the purpose is here merely to test arguments for future use.

a) "Written (positive) law allows two-thirds majority rules to be disregarded"

According to the first group of arguments that were used in the debates, positive law allows two-thirds majority rules to be disregarded. If the positive legal arguments were correct, breaking two-thirds majority rules would not entail a break in legal continuity (revolution) – however, since these arguments are in fact legally all mistaken, acting on them would lead to a revolution in the legal sense; therefore I will call the arguments in favour of them as "revolutionary arguments". There is only one exception to this (arguments under EU law and international law →III.1.a)ix.), which is doctrinally correct (that's why I won't even use the term "revolutionary"), but its scope is in fact very narrow.

i. "The 'right to resist' authorises action against the Fundamental Law"

Revolutionary argument: *"Certain two-thirds majority rules can be disregarded because they contradict the prohibition of acting with the aim of exercising exclusive power, and anyone has the right (and even the duty)*

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he-rule-of-law-in-hungary-an-overview-of-the-possible-scenarios/file>. Kazai quotes the arguments of Andrew Arato, Zoltán Fleck, Gábor Halmai, András Jakab, Dániel Karsai, Balázs Majtényi, László Majtényi, László András Pap, Balázs M. Tóth, András Sajó, Tibor Sepsi, Attila Gábor Tóth and Imre Vörös. From the Hungarian debates, I also included in the analysis Attila Antal, Péter Bárándy, Imre Forgács, Péter Hack, János Kis, Domokos Lázár, Zoltán Miklósi, Péter Róna, György Péter Rózsa, András Schiffer, László Seres, Richard Nagy Szentpéteri, Renáta Uitz and Vincze Attila's opinions. The following special issue of the *Verfassungsblog* also provides a good summary of the various arguments see <https://verfassungsblog.de/category/debates/restoring-constitutionalism/>. The special issue was initiated and organised by Andrew Arato and András Sajó, and is not only about the Hungarian transition, but discusses more general theoretical questions as well. In addition to the already mentioned authors, Beáta Bakó, Rosalind Dixon, Csaba Győry, Johanna Fröhlich, Gábor Halmai, Bogdan Iancu, David E. Landau, Sanford V. Levinson, Michael Meyer-Resende, László Pap András, Kim Lane Scheppele, Luke Dimitrios Spieker, Mark Tushnet, Renáta Uitz and Armin von Bogdandy contributed. For a summary of the *Verfassungsblog* special issue see András L Pap, 'Constitutional restoration in hybrid regimes: The case of Hungary and beyond', Intersections EEJSP 8 (2022), 191–207.

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to resist/take action against it." The provision on the right to resist was Article 2(3) of the Constitution 1989[79] and Article C(2) of the Fundamental Law 2011.[80] Sometimes we also find a reference (presumably to strengthen the authority of the argument) to the medieval *ius resistendi* known from Hungarian legal history. In its best form, the argument does not simply refer to the prohibition of exercising exclusive power, but to the fact that, according to the text of the norm, it is also prohibited to "act with the aim" to achieve it (that is, the possible election victory of the opposition would not in itself deny that this right can be triggered).

Rebuttal: First of all, it is worth pointing out that this provision does not have a direct origin in Hungarian legal history. The *ius resistendi* existed indeed from the Golden Bull of 1222 (with interruptions) until 1687, when the Hungarian estates, in their joy over the expulsion of the Turks, renounced this together with their right to freely elect a monarch.[81] But since 1687, such a thing has not existed in the Hungarian legal system. In the text of the 1989 Constitution, the relevant Article 2(3) was mostly inspired by Article 20(4) of the German *Grundgesetz*. The wording was also more similar to the German model (although the Hungarian version additionally includes the restriction that it is only possible to act "in a lawful way") than to the ancient Article 31 of the 1222 Golden Bull. The 1989 provision was then adopted essentially unchanged (with slight stylistic polishing) as Article C(2) of the 2011 Fundamental Law.

The dominant position in the German legal literature is that Article 20(4) of the *Grundgesetz* is only a symbolic provision, a quasi-testament on the part of the Constitution: it could only be applied if the basic law had already failed and lost its normativity.[82] However, if it already has lost its normativity, then it does not matter legally what is in the text anyway. In other words, no substantive practical legal consequences can be linked to the provision. The Hungarian legal literature argued similarly, already

79 Formally, it was the Act XX of 1949, but in 1989 it was entirely re-codified into a democratic Constitution (its content changed entirely, only the structural shell remained), therefore I call it Constitution 1989.

80 Text currently in force: 'No one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way.'

81 Alajos Degré, 'Az ellenállási jog története Magyarországon' in: Alajos Degré, *Válogatott jogtörténeti tanulmányok* (Budapest: Osiris 2004), 61–69.

82 See e.g., Michael Sachs (ed), *Grundgesetz. Kommentar* (3rd edn, München: C.H.Beck 2003), 866, with further references.

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in connection with the 1989 constitutional text.[83] The meaning (interpretation) of certain words of a constitutional provision and the normative status (applicability) of the given provision are two different things. The 'right to resist' in the Hungarian legal system has never had a directly applicable legal consequence on its own, it can be used as an aid to legal interpretation at most (emphasising the principle of separation of powers).[84] But even if it were a directly applicable provision (NB it is not!), the clause "in a lawful way" in the text would expressly exclude it from being the basis for breaking legal continuity.

By the way, it is worth noting that violating the two-thirds procedural rules with a simple majority would itself be close to aiming at exercising power "exclusively", i.e. the provision could be a double-edged sword if it were actually activated. It could therefore even be used against revolutionary plans on the part of Orbán's deep state, if this provision was considered as a directly applicable rule of action (but it is not!) – in fact, it could be used even against the losing opposition formation by Orbán, if revolutionary ideas are considered as "aiming" at exclusive power.

ii. "The adoption of the Fundamental Law 2011 violated the four-fifth majority rule"

Revolutionary argument: *"Law XLIV of 1995 inserted into the text of the 1989 Constitution a four-fifths majority requirement [as Article 24(5)] for the adoption of a new Constitution.*[85] *However, since there was not a four-fifths majority in 2011, the new Fundamental Law is procedurally invalid, and therefore the various two-thirds requirements prescribed by the Fundamental Law can also be disregarded."*

Rebuttal: This argument is flawed on two counts. First of all, the aforementioned four-fifths rule was no longer in force in 2011.[86] It is true that such a

83 Tamás Győrfi et al, '2. § [Constitutional principles, right to resist]' in: Jakab András (ed.), *Az Alkotmány kommentárja* (2nd edn, Budapest: Századvég 2009), para. 341–368.

84 In constitutional texts, there can be norms that cannot be applied directly on their own (e.g., state goals), see for more details András Jakab, *A magyar jogrendszer szerkezete* (Budapest–Pécs: Dialóg Campus 2007), 131.

85 'The adoption of the parliamentary resolution on the detailed rules for the preparation of a new Constitution requires the vote of four-fifths of MPs.'

86 In his textbook published in 2002, József Petrétei also claims that the provision is out of force, see Petrétei József et al, *Magyar alkotmányjog I.*, Volume 1 (Budapest–Pécs: Dialóg Campus 2002), 67. The issue was not even discussed in the Hungarian consti-

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constitutional provision did exist from 1995 until 1998. Law XLIV of 1995 inserted a new Article 24(5) into the 1989 Constitution, and its § 2 stipulated that "this law [...] shall expire upon the termination of the mandate of the Parliament elected in 1994". It is also true that the repeal of the amending Act does not repeal the amendment itself.[87] Therefore, we could argue in a formalistic way that Law XLIV of 1995 itself was repealed with effect from 18 June 1998, but Article 24(5) of the Constitution introduced by it was not. However, this argument would ignore the fact that the purpose of the new Article 24(5) of the Constitution was the self-restraint of the two-thirds majority coalition at the time (also according to the official explanatory notes). Therefore, the term "this law" in § 2 of Law XLIV of 1995 must be interpreted purposively and broadly, including also Article 24(5) of the Constitution. That is why Article 24(5) of the Constitution was no longer in force after 1998. The confusion was only caused by the fact that in 2009 the 1989 Constitution was 're-published with the current text in force' by the Ministry of Justice and Home Affairs in the Hungarian Gazette *(Magyar Közlöny),* and in this Article 24(5) was wrongly stated as being in force.[88] The two-thirds majority in 2010 was so frightened by this that 'just in case', they once again repealed (with a two-thirds majority) Article 24(5) of the Constitution.[89] In my opinion, this was unnecessary overkill; although it did not have a harmful legal effect, in any case, the uncertainty that might have existed concerning the requirement of a four-fifths majority was eliminated by the summer of 2010 at the latest.

The other problem with this revolutionary argument is that the content of the four-fifths rule did not refer to the need for a four-fifths majority to adopt the new Constitution, but rather to adopt the detailed procedural rules for the adoption of the new Constitution. In other words, for possible additional detailed rules of procedure, the absence of which is not an obstacle to the adoption of a new Constitution (since in such cases the general rules of procedure for adopting a new Constitution can be applied).

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tutional literature for a long time, because it was tacitly and unanimously considered out of force until 2009. I am not aware of any opinion prior to 2009 that said it was valid or even doubted the issue. Kukorelli marked it as an uncertain question in 2009, see István Kukorelli, 'Húsz éve alkotmányozunk', Közjogi Szemle 3 (2009), 1–10.

87 Jakab (n. 84), 120 (n. 386).

88 Magyar Közlöny 2009/50 (23 October 2009). Re-publication with the current text in force has no binding force or any legal consequences; it is only informative (just like a restatement of the law in a common law country).

89 Article 2(2) of the 5 July 2010 amendment to the Constitution: 'Article 24(5) of the Constitution shall be repealed.'

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By the way, I note that if there had been a procedural error resulting in invalidity during the adoption of the Fundamental Law (which, I emphasise: in my opinion, it did not happen), then the entire Fundamental Law would be invalid, and it would not be possible to distinguish among the provisions according to which provision is considered democratic and which is not (as is sometimes done by some authors supporting a revolution in a legal sense).

iii. "The adoption procedure of the Fundamental Law did not comply with the Act of Legislation in force at the time"

Revolutionary argument: *"§ 1 (3) of the Law CXXX of 2010 on the legislation (the Act of Legislation at the time) provided that the Act's provisions regarding the preparation of the legislation shall also be applied to the new Fundamental Act, and these (e.g., concerning the preparation of an impact assessment) were not observed. Accordingly, the Fundamental Law is actually invalid, and therefore the two-thirds majority rules it imposes can also be disregarded."*

Rebuttal: This argument is mistaken. In fact, the named rule has always been a *lex imperfecta* (i.e. a norm, for the violation of which there is no punishment foreseen). The obligation to prepare an impact assessment existed in the case of motions by individual MPs (the Fundamental Law itself was submitted as a motion by individual MPs), but it was no longer an obligation to present it (it is not known that an impact assessment was prepared, meaning that the violation of the Act of Legislation probably really occurred). But according to the longstanding case-law of the Constitutional Court, a violation of a *generic* obligation by the Act of Legislation in itself (in the absence of a violation of an express procedural provision of the Constitution, which was here not the case) never resulted in the invalidity of the legislation.[90]

Each legal system regulates itself (for example, through the case-law of its Constitutional Court and/or relevant legislative rules) what the legal consequences of legislative errors are. This is what we call *Fehlerkalkül*,[91] of

90 See e.g., 38/2000. (I. 31.) AB decision of the Hungarian Constitutional Court (ABH 2000, 303, 313).

91 See Walter Antoniolli and Friedrich Koja, *Allgemeines Verwaltungsrecht* (3rd edn, Wien: Manzsche 1996), 559–560, based on the work of Adolf Merkl, *Die Lehre von der Rechtskraft, entwickelt aus dem Rechtsbegriff* (Leipzig-Wien: Deuticke 1923). The *Fehlerkalkül* contains the minimum conditions for legislation (i.e. those under which

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which strongly simplified, the following categories can be distinguished according to the traditional (i.e. pre-hybrid-regime) Hungarian constitutional doctrine:[92] (1) There are errors for which there is no sanction (for example, general consultation obligations according to the Act of Legislation, the violation of which has no legal effect on the validity of the resulting norm). (2) There are errors that can be easily corrected (for example, typographical errors in the Hungarian Gazette), which can be corrected without repeating the legislative procedure (in the example mentioned: via reprinting the text correctly in the Hungarian Gazette). (3) There are errors of medium weight (e.g., more significant procedural errors or, in the case of statutes, substantive unconstitutionality), which make acts open to challenge (in this case, the Constitutional Court can typically annul them). (4) And finally, there are errors so gross that in their case the norm cannot even be challenged (a typical example of this is the failure to publish), and in such cases, we simply consider the norm as non-existent ("null and void") (that is, not even worthy of annulment).

iv. "The Fundamental Law (or a part of it) is substantively unconstitutional"

Revolutionary argument: *"The Fundamental Law (or a part of it) is unconstitutional substantively (i.e. not procedurally, but concerning its content), and therefore the unconstitutional provisions of the Fundamental Law (which require two-thirds majority voting) can simply be disregarded."*

Rebuttal: Such arguments are doctrinally unconvincing. We speak of unconstitutionality when e.g., a legal provision – which is below the Constitution in the hierarchy of norms – is contrary to the Constitution. However, in the Hungarian legal system, the Fundamental Law is at the level of the Constitution, i.e. it is the Hungarian Constitution, so in terms of content, it cannot be unconstitutional. It is conceptually impossible to claim that the standard itself does not meet the standard. The Hungarian Constitution has never been a multi-layered Constitution. The situation is different regulations in other legal systems: in Germany, e.g., the so-called eternity clause

the legal act still exists) and the maximum conditions (under which the legal act is completely flawless), see Rainer Lippold, *Recht und Ordnung. Statik und Dynamik der Rechtsordnung* (Wien: Manz 2000), 407–420.

92 In more detail with additional references and additional subcategories, see e.g., Jakab (n. 84), 69–71; 99–101.

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states which provisions cannot be changed and constitutional amendments contrary to this are unconstitutional [Article 79(3) *Grundgesetz*]. Or, in the Austrian Constitution, the basic principles of the Constitution can only be changed with an additional referendum [Article 44(3) *B-VG*]. In principle, this constitutional supra-layer could even be created by judicial practice (like in India),[93] but this has never happened in Hungary.[94]

v. "The Fundamental Law is null and void"

Revolutionary argument: *"The Basic Law (or any of its provisions) is null and void, and therefore the two-thirds decision rules prescribed by it can be disregarded."*

Rebuttal: This kind of argument is doctrinally mistaken. Being null and void is an exceptionally serious, special form of unconstitutionality (see above *Fehlerkalkül*→III.1.a)iii.). Substantive unconstitutionality cannot be null and void; this can specifically only apply to special cases of formal (procedural) errors. We are talking about those cases when such a serious, almost absurd procedural error was made during the creation of the norm that it cannot even be challenged or annulled. This is the case, for example, if a law is not promulgated. Such a law would not even exist (i.e. it is not actually a 'law'), so it could not even be challenged in the Constitutional Court, because it would simply not exist ('null and void').

However, the constitutional provisions that are currently targeted by revolutionary ideas (i.e. those prescribing cardinal laws and concerning personnel questions) are not unconstitutional (neither procedurally nor

93 Richard Albert and Bertil Emrah Oder (eds), *An unamendable constitution?* (Berlin: Springer 2018).

94 This has been an unbroken case-law of the Hungarian Constitutional Court since 1994 (see order AB 293/B/1994, ABH 1994, 862), but the question arose also after 2010, e.g., in the Decision 61/2011. (VII. 13.) AB, which, referring back to the previous 1994 case, with similar result. Those who would say that the 2011 decision was already made by a captured institution should consider the following facts: the petition was judged by eight Constitutional Court Judges elected before 2010, one before 2010 but re-elected after 2010 (Bihari) and one after 2010 (Stumpf) (and only three out of ten judges dissented from the decision). The Hungarian Constitutional Court has only ever reviewed constitutional amendments from a formal-procedural point of view (i.e. mainly whether two-thirds was present). The question was raised a year later, in the Decision 45/2012 (XII. 29.) AB as well, for a critical analysis of this 2012 decision (also quoting further Hungarian literature), see Zoltán Szente, 'Az Alkotmánybíróság döntése Magyarország Alaptörvényének Átmeneti rendelkezései alkotmányosságáról', Jogesetek Magyarázata 2 (2013), 11–21.

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substantively), as we have already established. And the particularly serious case of unconstitutionality, being null and void, is even less the case for them. By the way, since being null and void can only be for a procedural reason, it would not be possible to speak meaningfully about certain provisions of the Fundamental Law being null and void in the first place, but only about the entire Fundamental Law (or one of its amendments) being null and void.

Once a legal act has been published in the Hungarian Gazette,[95] it will not be null and void just by a political announcement or a public outcry. In the legally prescribed procedure, by the legally prescribed body, with the legally prescribed voting ratios, the act must be removed from the legal system. If we publicly announce that a legal act is unfair or disgraceful, that does not make it "null and void", at least not in a legal sense.

vi. "The Fundamental Law declares its own legal basis to be invalid, therefore it is also invalid"

Revolutionary argument: *"Since the Fundamental Law itself declares the invalidity of the (previous) Constitution, but its validity derives from it, the Fundamental Law actually declares is own invalidity. Therefore, the two-thirds voting ratios required by the Fundamental Law can also be disregarded."*

Rebuttal: The relevant provision of the Fundamental Law is mistaken (it actually makes no sense).[96] However, this does not affect the validity of the Fundamental Law.

The Fundamental Law does contain a logical self-contradiction, when in the preamble it speaks of the invalidity of the former 1989 Constitution (formally, Act XX of 1949), and according to point 2 of the Final Provisions, the validity of the Fundamental Law is derived from the former Constitution.[97] However, the part of the text stating the invalidity is included in the preamble (and preambles only have a weak normative value), while the legally meaningful version is in the binding part of the text (among the Final Provisions). We must therefore assume that the Fundamental Law just

95 The Fundamental Law was published in no. 2011/43 of the Hungarian Gazette (Magyar Közlöny).

96 Jakab (n. 63), 183.

97 Doctrinally, instead of "invalid" the correct term would have been "not in force". For a detailed demarcation of the two concepts see András Jakab, *A jogszabálytan főbb kérdéseiről* (Budapest: Unió 2003), 27–79.

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"repeals" the previous Constitution (this is explicitly contained in point 3 of the Final Provisions), and it does not actually declare the "invalidity" of the former Constitution. The wording in the preamble is probably the result of the drafters being carried away by rhetorical fervour and therefore worded it doctrinally imprecisely. This inaccuracy has, however, no legal consequences.

But even if we were to accept that the preamble has full normative value (as in fact it has not, since it is only an aid of interpretation),[98] this would not result in the invalidity of the Fundamental Law, since the Fundamental Law can only "invalidate" the former Constitution only after itself is already valid and effective. So the derivation of validity cannot be affected by the question.[99]

vii. "In order to restore the rule of law in a substantive sense, certain requirements of the rule of law in a formal sense must be disregarded"

Revolutionary argument: *"Since the rule of law in a substantive sense (including fundamental rights protection, separation of powers) is violated by the current Fundamental Law, its formal (procedural) rules do not have to be followed, since the purpose of the formal rule of law is actually to ensure the substantive rule of law. Therefore, the two-thirds procedural rules can be disregarded if this is necessary to restore the substantive rule of law."*

Rebuttal: This type of argument (as long as it is not understood as a natural law argument →III.1.b)) shows doctrinal confusion regarding the concept of the rule of law. The purpose (*telos*) of the rule of law is to prevent the arbitrary exercise of state power.[100] In order to achieve this, a list of requirements has historically been developed,[101] which now includes both the formal rule of law requirements (clarity, stability, enforceability of the

98 Liav Orgad, 'The preamble in constitutional interpretation', International Journal of Constitutional Law 8 (2010), 714–738; Lóránt Csink, 'A preambulum szerepe egyes alkotmányokban', Collega 2 (2005), 6.

99 I am grateful to Dániel Karsai for this argument.

100 András Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 117–122, with further references.

101 See the analyses by the Venice Commission: *CDL-AD(2011)003rev-e Report on the rule of law. Adopted by the Venice Commission at its 86th Plenary Session* (Venice, 25–26 March 2011), para 41; *CDL-AD (2016)007revRule of Law Checklist. Adopted by the Venice Commission at its 106th Plenary Session* (Venice, 11–12 March 2016). The World Justice Project Rule of Law Index also works with a similar list-like concept (aggregating the individual list elements without weighting). The dominant position of the relevant literature is that the concept can best be defined as a list of

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rules, actual compliance, etc.) and the substantive rule of law requirements (fundamental rights protection, division of powers). However, there is no hierarchy between the individual elements of the list, and in the event of a potential conflict, there is no conflict resolution rule which would follow from the concept of the rule of law itself. Violations of the requirements of the formal rule of law will therefore not become acceptable if they are done in order to restore the substantive rule of law. (And, of course, the reverse is also true: just because something is adopted in rules that meet the requirements of the formal rule of law, it will not automatically meet the requirements of the substantive rule of law.)

viii. "Referendums are only prohibited on amendments to the Fundamental Law, not on a completely new Constitution"

Revolutionary argument: *"Article 8(3)(a) of the Fundamental Law only names the amendment of the Fundamental Law as a prohibited referendum subject, so a referendum could actually be held on a completely new Constitution."*

Rebuttal: Logically, the aforementioned prohibited subject area also includes the referendum on a completely new Constitution, since it is "more" than the amendment. In legal reasoning, this is called *argumentum minori ad maius*, i.e. if the smaller thing is already explicitly forbidden, then the prohibition of the bigger thing is implied in the rule.[102] That is, if it is forbidden to give one slap, then it will be even more forbidden to give two slaps. It can be demonstrated even without elegant Latin expressions: if a referendum on the amendment is prohibited but a referendum on a completely new Constitution is still allowed, then the rule would be completely meaningless since it could be circumvented very simply by allowing a referendum on a "new" Constitution that would only differ from the "previous" Constitution in a single provision (i.e. the provision that we wanted to amend).

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requirements, see e.g., Katarina Sobota, *Das Prinzip Rechtsstaat. Verfassungs- und verwaltungsrechtliche Aspekte* (Tübingen: JCB Mohr 1997); Lord Bingham, *The Rule of Law* (London: Penguin 2010).

102 For details on the topic of the *argumentum a fortiori* (of which the *argumentum a minori ad maius* is a subcategory), see Thomas Kyrill Grabenhorst, *Das argumentum a fortiori* (Frankfurt am Main: Peter Lang 1990).

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ix. "In order to fulfil the obligations under EU and international law, we are disregarding and/or suspending certain two-thirds majority rules of the Hungarian legal system"

An argument for disregarding certain two-thirds majority rules: "*Several rules of the Hungarian legal system currently contradict EU law and the country's international legal (especially international human rights) obligations. This can provide a legal basis for overcoming the two-thirds hurdle in certain cases, even in the absence of a two-thirds parliamentary majority.*"

Rebuttal: Among the arguments that have been discussed so far that disable two-thirds majority rules, this is the only argument that is actually working from a legal doctrinal point of view. Moreover, it is not actually revolutionary in the sense that it would result in a break in legal continuity. In some cases, therefore, in principle, it can really indeed help to resolve the blockade stemming from two-thirds majority rules (i.e. it could be combined with my above three-stage plan →II.1). However, its scope of application is very narrow, much narrower (and in part it also works much slower procedurally) than some authors expect, i.e. it will not solve the majority of the problems indicated at the beginning of this chapter (or only partially and much slower than desired). This method is not suitable for the removal of Orbán's deep state officials, but rather for remedying certain human rights violations.

In order to clarify exactly when, how and for what these legal arguments can be used, it is worth dividing the question into two parts: (1) Hungarian legal provisions that contradict EU law and (2) Hungarian legal provisions that contradict international law (for example, the European Convention on Human Rights). The legal nature of the two cases is very different.

Ad (1). EU law has supremacy (i.e. primacy) over national law. This means that in the event of a conflict, the national organs (judges, administrative agencies) must apply EU law without formally repealing Hungarian law, national law shall simply be set aside.[103] The national legislation that

103 The ability of private parties to invoke an EU law norm in front of the courts (and, as a result, direct applicability by the courts) is also called direct effect, which, however, also requires that the EU law rule is clear, unconditional and does not require further national detailed rules. See ECJ, *Van Gend en Loos*, judgment of the 5 February 1963, case no. 26/62, ECLI:EU:C:1963:1; ECJ, *Lütticke*, judgment of the 16 June 1966, case no. 57/65, ECLI:EU:C:1966:34. The clarity of the EU norm (e.g., Art 2 TEU) necessary for direct applicability can ultimately also be created by the case law of the ECJ. However, the ECJ case law on Art 2 EUV has not (yet)

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has not been applied remains valid and effective according to national law, but it must not be applied. The supremacy exists not only with respect to national laws (even cardinal laws), but also with the national constitution (i.e. Fundamental Law)[104] and even with the decisions of the Constitutional Court.[105]

However, supremacy does not mean authorisation to create the necessary national legislation. The national legal order and the EU legal order are two separate autonomous legal orders. In other words, the majority requirements required in the national legislative procedure or the authorised legislative body do not change based on EU law. So if there is no parliamentary majority to implement an EU directive (on a topic that would require constitutionally an implementation by an Act of Parliament), the failure to implement is a clear violation of EU law but this does not mean that the implementation could be done now just by government regulation (unconstitutionally, with reference to EU law).

Nor does it follow from supremacy that a body that (even regularly) violates EU law could be dissolved on the basis of EU law (its members could be replaced, notwithstanding the domestic legal procedures, etc.). For example, the German Federal Constitutional Court has already made a decision that expressly and obviously violates EU law,[106] yet it has not yet

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reached the stage where it can offer the hoped-for solution. For the current state of the ECJ case law, see Luke Dimitrios Spieker, *EU Values before the Court of Justice* (Oxford: Oxford University Press 2023). The case law of the ECJ has developed rapidly in recent years, so future changes in this regard cannot be ruled out. On future perspectives (including some doubt about these perspectives) see e.g., Matteo Bonelli and Monica Claes, 'Crossing the Rubicon? The Commission's use of Article 2 TEU in the infringement action on LGBTIQ+ rights in Hungary', Maastricht Journal of European and Comparative Law 30 (2023), 3–14.

104 ECJ, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstellt für Getreide und Futtermittel*, judgment of the 17 December 1970, case no. 11/70, ECLI:EU:C:1970:114.

105 On 21 December 2021, the CJEU established this against the Romanian Constitutional Court in the following cases: ECJ, *Euro Box Promotion and others*, judgment on the 15 March 2022, case no. 357/19, ECLI:EU:C:2022:200; joint cases with ECJ, DNA-Serviciul Teritorial Oradea, case no. 379/19, ECLI:EU:C:2021:174; ECJ, *Asociația "Forumul Judecătorilor din România*", judgement on the 18 May 2021, case no. 547/19, ECLI:EU:C:2021:393; ECJ, *DNA-Serviciul Teritorial Oradea*, C-379/19; ECJ, *FQ and others*, C-811/19 and ECJ, *NC*, C-840/19.

106 András Jakab and Pál Sonnevend, 'The Bundesbank is under a legal obligation to ignore the PSPP Judgment of the Bundesverfassungsgericht', Verfassungsblog, 25 May 2020, <https://verfassungsblog.de/the-bundesbank-is-under-a-legal-obligation-to-ignore-the-pspp-judgment-of-the-bundesverfassungsgericht/>.

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occurred to anyone (not even EU lawyers) that the German Government would have the right to disrupt the German Constitutional Court with a bunch of policemen because of this, or that they could just retire the Constitutional Court Judges with immediate effect (with reference to EU law). In the case of the Romanian Constitutional Court, the Court of Justice of the European Union recently concluded that the case-law of the Romanian Constitutional Court that violates EU law should be disregarded, but it did not establish legal consequences for the organisation of the Romanian Constitutional Court either.[107]

This means that in the Hungarian case, the amendment of the two-thirds rules with a simple majority or the replacement of bodies belonging to Orbán's deep state cannot be based on EU law either. It is indeed possible not to apply Hungarian legal (cardinal or even constitutional) provisions that contradict EU law, or even Constitutional Court decisions (e.g., to disregard the annulment of a statute). However, supremacy works in a decentralised manner:[108]*in individual cases*, it provides an opportunity for organs applying the law, but law-making authorisation cannot be directly derived from it.

It is debatable whether national constitutional law can impose limitations on the supremacy of EU law. On the one hand, according to EU law, this kind of limitation is not possible (I agree with this perspective),[109] on the other hand, however, national Constitutional Courts, referring to national constitutional identity or to the lack of national authorisation given to the EU (*ultra vires* EU acts), sometimes reserve such powers for themselves or at least that is what they are trying to do.[110]

107 ECJ (n. 105).

108 ECJ, *Amministrazione delle finanze dello Stato v Simmenthal*, case no. 106/77, judgment of 9 March 1978, ECLI:EU:C:1978:49.

109 'Luxemburg locuta, causa finita', see Jakab (n. 84), 249.

110 See e.g., the Decision of the Hungarian Constitutional Court 22/2016. (XII. 5.) AB. From the academic literature see Federico Fabbrini and András Sajó, 'The dangers of constitutional identity', *European Law Review* 25 (2019), 457–473; Beáta Bakó, 'The Zauberlehrling Unchained? The Recycling of the German Federal Constitutional Court's Case Law on Identity-, Ultra Vires and Fundamental Rights Review in Hungary', Heidelberg Journal of International Law (HJIL) 78 (2018), 863–902; R. Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', Cambridge Yearbook of European Legal Studies 21 (2019), 59–74; Attila Vincze, 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Euro-

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Since, according to some opinions, constitutionally it is possible to refer to limits of the supremacy of EU law, the situation should be unquestionable at least in terms of EU law. And this is only the case if a CJEU decision can be presented for the given question (i.e. a report by the European Parliament[111] or the European Commission[112] is not enough for this, since the CJEU is the only authentic interpreter of EU law),[113] which practically can arise in two types of procedures: national court (even the Constitutional Court) initiates a preliminary ruling procedure (i.e. referring to the content of the Hungarian legal act, but not to the specific Hungarian act, formally interpreting EU law based on Article 267 of the TFEU) or an infringement proceeding (i.e. specifically judging the conformity of a Hungarian legal act or practice with EU law based on Articles 258 and 260 of the TFEU). The former procedures take an average of 15–16 months (to this must be added the time necessary for the national judge to initiate the CJEU procedure in the first place), the latter takes an average of 40 months,[114]i.e. none of these represent a quick solution (in the second case, the incumbent Hungarian Government can have a more significant influence on the speed and outcome if it intentionally fails to defend itself or does not use the full deadline for certain procedural steps). In the absence of a CJEU judgment, not applying politically disputed (two-thirds majority) rules is pretty risky. On the one hand, if even the EU legal situation is not completely clear,[115]

parechts in der Rechtsprechung des ungarischen Verfassungsgerichts', Europäische Grundrechte-Zeitschrift 2022, 13–21.

111 The Sargentini report (2018) was prepared in the frame of an Article 7 TEU procedure against Hungary in the European Parliament, see European Parliament, 'REPORT 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', <https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_HU.html?redirect>.

112 See European Commission, '2022 Rule of law report. Country chapter on the rule of law situation in Hungary', 13 July 2022, <https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf>.

113 The reports of the EP and the Commission concerning the rule of law in Hungary typically do not make much effort to name the *specific* sources of EU law, which could have supremacy over the contested Hungarian norms.

114 Petra Bárd and Anna Śledzińska-Simon, 'Rule of law infringement procedures', CEPS Paper in Liberty and Security, 2019-09, 12, <https://www.ceps.eu/wp-content/uploads/2019/05/LSE-2019-09_ENGAGE-II-Rule-of-Law-infringement-procedures.pdf>.

115 For the sake of *legal certainty*, Article 267 TFEU provides for the preliminary decision procedure in case of interpretation doubts.

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domestic enforceability problems can be guaranteed, and on the other hand, if in the end, the CJEU is not in favour of a radical solution (i.e. it does not provide EU legal authority for it), then the revolutionary step either has to be undone, or the illegal behaviour belies the rhetoric of restoring the rule of law.[116]

It should also be noted that although in the 2010s the Commission was particularly (even cynically) lenient towards the Hungarian Government, this trend has changed in the last two or three years: in other words, where it was possible to launch an infringement procedure, there is a good chance that the Commission has already done so, the judgment of the CJEU has been issued, or at least the case is ongoing. Therefore, it cannot be expected that after the change of government, EU law will suddenly be able to find an effective grip on the legal order of the Hungarian hybrid regime in many new cases. The incumbent national government has no *direct* influence on the initiation of the infringement procedures, but informally it might encourage procedures against itself – this would, however, most likely not result in a solution to the deep state problems because of the above (i.e. timing and scope).

In some of the cases, there is a CJEU judgment condemning Hungary, but the issue is related to a simple majority law, which means that there is no need for the supremacy of EU law to disregard two-thirds majority rules (refugee rights, anti-NGO legislation, chasing away the Central European University).[117] In other cases, the removal of an official (judge, data protection commissioner) was in violation of EU law,[118] but this does not automatically result in the authority to reinstate the former official: in some cases, the violator Member State has other options (e.g., paying reparations

116 The astonishingly honest words by the former (2002–2004) socialist Minister of Justice Peter Bárándy, see 'Alkotmányos jogállam és büntető igazságtétel 2.', Népszava, 20 November 2021: 'Three or four years later, the European Court of Justice might condemn us. That should be our biggest problem.', <https://nepszava.hu/3138449_alkotmanyos-jogallam-es-bunteto-igazsagtetel-2>.

117 ECJ, *Commission v Hungary*, judgment of 18 June 2020, case no.78/18, ECLI:EU:C:2020:476; ECJ, *Commission v Hungary*, judgment of 6 October 2020, case no.66/18, ECLI:EU:C:2020:172; ECJ, *Commission v Hungary*, judgment of 16 November 2021, case no.821/19, ECLI:EU:C:2021:930; ECJ, *Commission v Hungary*, judgment of 17 December 2020, case no.808/18, ECLI:EU:C:2020:1029.

118 ECJ, *Commission v Hungary*, judgment of 6 November 2012, case no.286/12, ECLI:EU:C:2012:687; ECJ, *Commission v Hungary*, judgment of 8 April 2014, case no. 288/12, ECLI:EU:C:2014:237, paras 63–65 could have served as a legal base for questioning the mandate of the president of the new data protection authority NAIH (at least during his first mandate).

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to those affected, like in the case of the early retirement of Hungarian Judges), and in other cases there could be an obligation of the Member State to reinstate the official following from Article 4(3) TEU (e.g., in the case of the removal of the Hungarian data protection commissioner, even though the case eventually never reached procedurally this phase), but only according to the Member State's own domestic procedural provisions.

The removal of the President of the Supreme Court at the end of 2011 was indeed illegal, but not according to EU law, but according to a decision of the European Court of Human Rights (and ECHR law does not enjoy the supremacy of EU law over national law),[119] and since then there has been another change at the head of the Supreme Court (now called *Kúria*). Neither the CJEU nor the ECtHR ruled on the personnel capture of the Hungarian Constitutional Court (as opposed to Poland →VI.). There is no specific EU rule regarding the necessary competences of the Constitutional Court (i.e. restoring the *actiopopularis*, restoring the competence to review of financial laws), and if, for example, we were to try to restore this competence under the general principle of non-regression,[120] it would actually strengthen Orbán's deep state (i.e. personally captured institutions would re-acquire competences). There is no CJEU judgment (or even ECtHR judgment)[121] that obliges Member States that the legal form of registered homosexual partnerships must be "marriage"; the issue of non-discrimination (i.e. specific statutory rights contained in a registered partnership) lies in the legislative competence of the simple parliamentary majority. A constitutional preamble with nationalist rhetoric does not violate EU law either (I note that if it did, several EU Member States would be in trouble).

There is no CJEU ruling on the Hungarian electoral system either. Hungarian gerrymandering, for example, is an obvious phenomenon, but the extent to which it is an issue of EU law is highly debatable (rather not, or

119 On the basis of infringement of freedom of speech, i.e. not judicial independence, see ECtHR, *Baka v Hungary*, judgment of 23 June 2016, no. 20261/12. A specific violation established by the ECtHR does not automatically (e.g., based Article 6(3) TEU) become a violation of EU law, but requires EU competence on that matter. In case of doubt, a CJEU decision is required here as well.

120 ECJ, *Repubblika v Il-Prim Ministru*, judgment of 20 April 2021, case no.896/19, ECLI:EU:C:2021:311. Mathieu Leloup, Dimitry V. Kochenov and Aleksejs Dimitrovs, 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru', European Law Review 46 (2021), 687.

121 ECtHR, *Schalk and Kopf v. Austria*, judgment of 24 June 2010, no. 30141/04; ECtHR, *Chapin and Charpentier v. France*, judgment of 9 June 2016, no. 40183/07.

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only at a very-very abstract level), and even if it were, there is still no alternative map of electoral districts that could be applied by the force of EU law. The much criticised issue of extreme disproportionality in the electoral system (rewarding winners, which in a slightly different form is also known in the Italian and Greek electoral systems, and if the current Hungarian opposition wins, may even help them) is also a national competence.

And where it is not the (two-thirds majority or simple majority) law itself, but only its application violates EU law, there is no need to amend the law to comply with EU law.[122] In general, as I noted at the beginning of this chapter: the basic values of constitutionalism (which are also the values of the EU according to Article 2 TEU) are not primarily violated by the formal rules of the Hungarian hybrid regime (although this also happens rarely), but mostly by informal practices. And to further clarify: my argument is *not* that only the legal content of those CJEU judgments is applicable to Hungary, where you have "Hungary" in the title. My argument is that (1) considering the *current* political situation in the EU, it is unlikely that there would not be at least a pending case against Hungary wherever there is a fair chance of winning, and (2) considering the *hypothetical* political situation in Hungary (as the main hypothesis of the present paper), it is practically not advisable to disregard domestic two-thirds majority laws without an undisputable legal opinion (i.e. CJEU judgment).

Referring to the supremacy of EU law is, in theory, indeed an option to turn off certain two-thirds majority rules, but so far I have not yet found a single specific case where there is *currently* a case in which this would practically help (although I admit, I have not systematically examined all possible issues of the entire Hungarian legal system).[123]

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122 ECJ, *Illégalité de l'ordonnance de renvoi*, judgment of 23 November 2021, case no.564/19, ECLI:EU:C:2021:949.

123 It would help a lot in solving national rule of law problems if the CJEU finally recognised the direct applicability of the EU Charter of Fundamental Rights to purely national cases. Unfortunately, this has not happened until now (with reference to Article 51 of the EU Charter of Fundamental Rights), see András Jakab and Lando Kirchmair, 'Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights', Cambridge Yearbook of European Legal Studies (2022), 239–261; András Jakab and Lando Kirchmair, 'Zwei Wege zur Vollendung der Europäischen Grundrechteunion: Änderung oder Neuinterpretation von Artikel 51 der EU-Grundrechtecharta', Europäische Grundrechte-Zeitschrift (2023), 188–199; András Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases', in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values:*

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Ad (2). Promulgated international treaties have an intermediate rank in the Hungarian legal system between the Constitution (Fundamental Law) and statutes (including cardinal laws). According to Article 24(2)(f) of the Fundamental Law, the Constitutional Court reviews the compatibility of Hungarian laws with international treaties, and according to Article 24(3)(c) of the Fundamental Law it *may* annul laws or provisions that conflict with international treaties. Compared to EU law, there are several differences:

(a) a supra-constitutional rank is out of the question here (the situation of international treaties is weaker in this respect, because in the case of EU law, at least according to some opinions, this exists),

(b) in the case of sub-constitutional legal acts, a formal annulment may take place (i.e. the Hungarian legal act or legal provision that violates an international treaty may totally disappear from the Hungarian legal system, in this respect its position is stronger than that of EU law),

(c) the occurrence of the former is, however, not necessary, but depends on its *discretion* of the Constitutional Court (so the Constitutional Court does not have a legal obligation to annul the domestic norm, in contrast to the supremacy of EU law, which is the obliges domestic state organs to disregard the domestic norm that contradicts EU law), and

(d) as opposed to ensuring the supremacy of EU law vis-à-vis the national legal system, the procedure here is centralised, i.e. only the Hungarian Constitutional Court is authorised to trigger this possibility in the Hungarian legal system (and not ordinary courts or executive organs).

In particular, the latter two characteristics weaken this type of method for turning off the two-thirds majority rules, although it does not make it completely impossible. Concerning point (d), it should be emphasised once again that the method of resolving the conflict of norms is basically determined by the Constitutional Court. This may be the annulment of the internal legal norm (cardinal law), but it may also be just obliging the Parliament to resolve the conflict of norms by setting a deadline (e.g., by amending the cardinal law). However, this latter obligation does not mean that this would change the possible two-thirds majority requirement to a simple majority in the Parliament. The government itself can initiate the procedure before the Constitutional Court, but the Constitutional Court

Ensuring Member States' Compliance (Oxford: Oxford University Press 2017), 252–262.

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has no time limit in such procedures, and may even sit on cases for several years.

Compliance with EU treaties cannot be reviewed in such a procedure – since this group of norms is not "international law" in the sense of Article Q) of the Fundamental Law, but rather "European Union law" in the sense of Article E) of the Fundamental Law.[124] For ensuring compliance with the European Convention on Human Rights (promulgated by Law XXXI of 1993), however, this could be a meaningful route.[125]

Based on Section 13(1) of Law L of 2005, "[w]hen interpreting an international treaty, the decisions of the body with jurisdiction to decide legal disputes related to the given international treaty must also be taken into account". This means that the decisions of the ECtHR[126] must also be taken into account when interpreting the ECHR by Hungarian state organs (including the Constitutional Court),[127] but e.g., the domestic legal relevance of the opinions of the Venice Commission does not become stronger this way. In the light of the above, there are, e.g., some cardinal laws about secret surveillance[128] and religious freedom,[129] in which cases the annulment by the Constitutional Court with reference to ECHR would be ideal and legally absolutely doable (but these steps cannot be legally enforced by the government or a simple parliamentary majority either).

124 This case-law pre-dates the Fundamental Law, see the decisions of the Constitutional Court 1053/E/2005. AB and 72/2006. (XII. 15.) AB.

125 On methods for ensuring compliance see Tamás Molnár, *A nemzetközi jogi eredetű normák beépülése a magyar jogrendszerbe* (Budapest–Pécs: Dialóg Campus – Dóm 2013), chapter VII.

126 Scheppele (n. 55).

127 For itself, the Constitutional Court has determined even more strict obligations about considering ECtHR decisions and their weight in the constitutional interpretation of fundamental rights. See the Constitutional Court decision 61/2011. (VII. 13.) AB – according to which, following the principle of *pacta sunt servanda*, the Constitutional Court must follow the ECtHR case-law even if this does not necessarily follow from the Hungarian Constitutional Court's own former decisions.

128 ECtHR, *Szabó and Vissy v. Hungary*, judgment of 12 January 2016, no. 37138/14.

129 ECtHR, *Magyar Keresztény Mennonita Egyház v. Hungary*, judgement of 8 April 2014, no. 70945/11, 23611/12, 26998/12.

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b) "The two-thirds majority rules can be disregarded on the grounds of morality/natural law/legitimacy"

In order to disregard the two-thirds rule, some authors are not looking for positive legal but moral arguments. Arguments questioning the validity (and/or legal binding force) of positive law on moral grounds are called natural law theories in legal philosophy. Political philosophers and political scientists conceptualise these problems in terms of "legitimacy" (i.e. being worthy to be followed).

i. "The adoption procedure of the Fundamental Law was not fair, therefore the two-thirds majority rules contained in the Fundamental Law can be disregarded on the grounds of morality/natural law/legitimacy"

Revolutionary argument 1: *"They did not indicate their intention to adopt a new Constitution before the 2010 elections, so the Fundamental Law 2011 and the two-thirds majority decisions entrenched in the Fundamental Law can be disregarded."*

Revolutionary argument 2: *"Even though the legally required two-thirds parliamentary majority was behind the adoption of the Fundamental Law, the purpose of the rule about the necessary majority is to reach a consensus with the opposition, but it was not there. In other words, this is only the constitution of Fidesz, it was adopted unilaterally. Therefore, the two-thirds majority was actually not enough for the adoption of the Fundamental Law, and as a result, the Fundamental Law and the two-thirds majority decisions based on it can be disregarded."*

Revolutionary argument 3: *"The Fundamental Law is not even a real constitution, because it was not approved by the people (in a referendum)."*

Rebuttal: It is indeed true that the 2010/11 constitution-making process was not entirely fair. Before the elections, it was not made clear that a new Constitution would be adopted if a two-thirds majority was obtained. The opposition was indeed only apparently involved (which, after realising this, withdrew from the process, because it understandably did not want to play along without having any meaningful say). And it would indeed have been better if a referendum had been held on the Fundamental Law (although there are many successful and highly respected Constitutions in the world that were not subject to a referendum when they were adopted, and the constitutional regime already before 2010 expressly forbade a referendum

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on a new Constitution →III.2.d)). All of these provide a basis for why it would be worthwhile to (legally) create a new Constitution one day again, but the authorisation to create a Constitution illegally does not follow from this.

First of all, it is worth establishing once more: the above-mentioned arguments do not affect the legality of the adoption of the Fundamental Law according to Hungarian law. The argument here is that despite being legal according to positive law, the Fundamental Law could be disregarded because it was adopted via morally unfair procedural steps (or omissions). To put it differently: we admit that the Fundamental Law was created legally according to Hungarian law (since the necessary two-thirds majority of MPs supported it in the legally prescribed procedure),[130] but we still say that it can be disregarded. This only makes sense if we also say that "there is a natural law requirement, higher than Hungarian law, to hold a referendum, to announce our intention before the election or to involve the current opposition".[131]

This argument cannot be falsified or proven in this form. The characteristic of natural law arguments is precisely that they are not valid because they are written somewhere in law, but rather stem from the nature of the world, society or human beings (for the sake of simplicity: from nature –

130 The Constitution (in the formal sense) always provides the legal framework for the simple parliamentary majority, which is why we require a larger majority. In Hungary, since 1949, this required majority has been two-thirds of all MPs, and this was also maintained after the 1989/90 regime change. In international comparison, this is a fairly standard ratio requirement for unicameral parliaments (i.e. where there is no upper house). Legally, in 2011, not Fidesz, but two-thirds majority of MPs voted for the Fundamental Law. Politically, these two happened to coincide, as the voters gave the representatives of Fidesz such a strong authority (according to the old electoral system, which has not been questioned by the current opposition) that Fidesz achieved a constitution-making majority (with which they could legally adopt a new Constitution and even override decisions of the Constitutional Court).

131 The argument that "the meaning/purpose of two-thirds majority requirement is consensus, therefore if a single party already has two-thirds majority, then in fact an even larger majority is needed" is *not* a purposive interpretation (where we would choose the one closer to the *telos* among various interpretation versions), but replacing a clear procedural rule (defined as a number) with another (higher-ranked and unwritten) rule, i.e. applying a new natural law rule ("consensus is required for constitution making") and denying the validity of the original procedural rule ("two-thirds majority is required for constitution making"). By the way, in my opinion, consensus is indeed required for constitution-making →II.1.c), but this is a *political-moral* requirement in the interest of the public good, and not a legal provision.

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hence the name: *natural* law). This type of argument has been relegated to the background in modern constitutional law because the historical experience in politically controversial issues is that political actors typically discover very different natural law rules, especially in conflict situations. If we, however, hope that constitutional law will provide a peaceful framework for political differences of opinion, i.e. it will settle conflicts in peaceful procedures instead of violence, then we must rely on what is valid as a positive legal rule, because it is not as easily disputed as a starting point for arguments.[132]

If, for example, the current democratic opposition says: "without a referendum, there is no Constitution (according to natural law)", but the supporters of the Orbán regime, on the other hand, say: "there is no need for a referendum when adopting a new Constitution (not even according to natural law)", then a mere statement stands against another mere statement. Basically one-to-one. What peaceful method can be used to decide the dispute between the two points of views?[133] If the conflict should be decided on the basis of constitutional law, then the supporters of the Orbán regime are clearly right: according to Hungarian law, a referendum was not required (and is still not required) for a new Constitution. And if we say that the real decision between the two competing claims of natural law will be what the voters say in the next parliamentary elections, then in fact this is no longer the original "procedural natural law" argument, but the question of any legal limitation of the will of the people and thus the denial of the possibility of formal constitutional law. This is also a natural law argument ("the will of the people is stronger than the written law"), but this is no longer about the procedural issues of 2011, i.e. it is actually a new and different kind of argument, which I will return to separately below →III.1.b)iv.

ii. "The content of the Fundamental Law is unacceptable to the extent that it makes it possible to disregard the two-thirds majority rules on moral/natural law/legitimacygrounds"

132 On constitutional law 'taming' political conflicts see András Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 5–7, 45–46, 53, 238 with further references.

133 The list of natural law theories is very long, in which everyone can always find the right one to their liking (and according to their current political needs): secular or religious, supporting an absolute monarchy or supporting democratic revolution, conservative or liberal, right-wing or left-wing, old or new, understandable or confusing. And, of course, they usually see themselves as the only true and right one.

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Revolutionary argument 1: *"The Fundamental Law is not even a real constitution, because its content does not comply with the principles of democracy and the rule of law."*

Revolutionary argument 2: *"Radbruch has already established that such an unjust legal system does not have to be followed."*

Revolutionary argument 3: As a hypothesis: *"And if it were written into the Fundamental Law that Viktor Orbán would remain Prime Minister for the rest of his life, would the opposition have to accept that as well?"*

Rebuttal: In the intellectual history of legal philosophy, there are indeed thinkers who believe that the names 'law' or 'constitution' cannot be used for norms that do not meet certain minimum content (correctness, moral) criteria.[134] However, these types of arguments do not apply to the current Hungarian legal system. There are minor problems with the text of the Fundamental Law, but overall a constitutional democracy could be operated even based on this text. As András Sajó put it in 2021: "There are no particular problems with the Fundamental Law (apart from some of its ideological provisions and the lack of certain constitutional guarantees), one could actually live with this text in a democracy."[135]

134 In constitutional history, the best-known example of this is Article 16 of the Declaration of the Rights of Man and of the Citizen (1789): 'A society in which rights are not guaranteed, nor the separation of powers defined, has no constitution at all.' The vast majority of modern constitutional theories, however, have worked with a positivist concept of the constitution, which is independent of the correctness of the content of the norm. See e.g., Georg Jellinek, *Verfassungsänderung und Verfassungswandlung* (Berlin: Häring 1906), 8: 'a higher degree of formal legal force' *(erhöhte formelle Gesetzeskraft)* differentiates it from ordinary laws. The *written* Constitution is an innovation that has been used by both democratic and non-democratic regimes since the 18th century, see Linda Colley, *The Gun, the Ship and the Pen. Warfare, Constitutions, and the Making of the Modern World* (New York – London: Liveright 2021).

135 András Sajó, 'Hogyan lehet új alkotmány a kormányváltás után?', Magyar Narancs, 7 November 2021, <https://magyarnarancs.hu/publicisztika/hogyan-lehet-uj-alkotmany-a-kormanyvaltas-utan-243259>. In April 2011, László Sólyom had a similar opinion (although the text has deteriorated somewhat since then) in an interview: 'This Constitution is like the new building of the National Theatre. It has nothing to do with modern theatre architecture, it is eclectic, tidal, which was forced through the word of power despite the unanimous protest of the architectural profession. But that still makes it possible to play good theatre if there are good actors, a good

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Natural law (as an argument to refuse positive laws) is usually referred to after major cataclysms, wars or genocides. The Hungarian hybrid regime is, however, not a genocidal totalitarian regime, but rather a tricky, corrupt hybrid regime that is gradually eroding the rule of law. In this regime, with exceptions, the formal legal rules meet the standards of Western constitutionalism →I.1. In other words, the hypothesis of revolutionary argument 3 not only does not happen to hold, but it *cannot* hold due to the operational logic of the regime known so far ("plausible deniability").

In order to understand Radbruch's irrelevance for the current Hungarian situation, it is worthwhile to consider not just one or two of his short writings,[136] but the context of his oeuvre. He created his own theory to deal with the past of the Nazi totalitarian genocidal dictatorship (immediately after the Second World War), not for a hybrid regime like Hungary now. The reference to Radbruch in the context of the Hungarian hybrid regime also indicates similar jurisprudential misunderstandings as the arguments about the right to resist discussed and refuted above →III.1.a)i. Indeed, the Radbruch formula does not provide legislative authority, but defines an exception for citizens and the judge from the application of an "unbearably" unjust norm.[137] Radbruch himself warned against the arbitrary nature of references to natural law that can endanger legal certainty, and therefore limits their scope only to the most extreme cases (giving as an example the complete denial of human rights).[138] If he were still alive, he would certainly be astonished that in the Hungarian context some people are trying to justify breaking legal continuity with him.[139] (But even if his teachings would fit the Hungarian situation, it is still not clear why the work of a deceased German legal philosopher would be decisive for us. Several other,

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script and a good director.' See András Stumpf, 'A kétharmad nem törtszám – Interjú Sólyom Lászlóval', Heti Válasz 16 (21 April 2011).

136 See e.g., Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)', Oxford Journal of Legal Studies 26 (2006), 1–11; Gustav Radbruch, 'Five Minutes of Legal Philosophy (1945)', Oxford Journal of Legal Studies 26 (2006) 13–15.

137 For details, with further references (considering Radbruch's arguments as a theory of adjudication) see Brian H Bix, 'Radbruch's Formula and Conceptual Analysis', American Journal of Jurisprudence (2011), 45–57.

138 On the issue of *Maßfrage* in Radbruch's work see e.g., Carsten Bäcker, *Gerechtigkeit im Rechtsstaat* (Tübingen: Mohr 2015), 69–83, with further references.

139 The currently best analyses on Radbruch's formula are the following: Martin Borowski (ed), *Modern German Non-Positivism. From Radbruch to Alexy* (Tübingen: Mohr Siebeck 2019). I would also recommend this classic piece in German to those interested: Horst Dreier, 'Gustav Radbruch und die Mauerschützen', Juristenzeitung (1997), 421–434.

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intellectually more exciting and more significant, legal philosophers (legal positivists or natural lawyers) could be named, who in different ways would say something different about such situations. But I would emphasise once again: in fact, Radbruch himself would most likely be doubtful about the applicability of his own natural law theory to Hungary.)

But applying natural law arguments to the Hungarian hybrid regime is not only disproportionate, it is in fact even a double-edged sword. I wonder what opposition politicians (some of whom are proposing to disregard the two-thirds majority rules by referring to natural law arguments) would say if Viktor Orbán, with a simple majority after the elections, did the same by referring to "justice" (which of course he himself would recognise alone)? Due to the nature of natural law arguments, he would obviously also be able to find such arguments (I would refrain from giving him specific ideas).[140]

iii. "Political practice based on the Fundamental Law is unacceptable to the extent that it allows disregarding two-thirds majority rules on moral/natural law/legitimacygrounds"

Revolutionary argument: *"A legal system in which this or that state organ (Constitutional Court, government, police, etc.) behaves in such a way does not conform to the principles of democracy and the rule of law. Therefore, we do not have to respect its rules."*

Rebuttal: Unfortunately, there are indeed serious problems with political practice in Hungary. However, the question of the rule of law and democracy is not binary, but gradual, and the Hungarian regime is in the intermediate grey zone (i.e. it is a hybrid regime →I.1). There are indeed outrageous cases, but we need an overall assessment, which is why various indices are used in political science and nowadays in legal scholarship as well to measure this.[141] The argument not only wrongly implies that the question is binary, but also implies that there is already a dictatorship in Hungary. However, this is factually not true at the moment.

Furthermore, Hungarian problems do not primarily stem from the rules of the legal system, but largely from the disregard of legal rules and from certain informal practices. In other words, the simplest way to improve the rule-of-law and democracy situation is to improve the observance (and enforcement) of the current rules, at least in the first round (and in some

140 The situation would be different if, after a lost election, Fidesz tried to retain power by force. In my opinion, the probability of this is very small, see below n. 149.

141 Jakab and Kirchmair (n. 3).

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cases lower rank rules in ordinary laws or government regulations could also be changed, instead of two-thirds majority rules).

iv. "Popular sovereignty is stronger than written law"

Revolutionary argument 1: *"If we tell the voters in advance that we will do this, then obtaining a simple majority is enough, because we will specifically receive our authorisation from our voters to disregard the two-thirds majority rules."*

Revolutionary argument 2: *"Referring to the constituent power of the people (via referendum) is always stronger than any written laws."*

Revolutionary argument 3: *"The incumbent Parliament is always sovereign, and cannot be bound by previous Parliaments."*

Revolutionary argument 4: *"If there is overwhelming social support, a revolution cannot be stopped by written legal rules."*

Rebuttal: The fact that we announce a violation of the law in advance ("we tell the voters in advance that we will do this") does not make the act in question legal. If, for example, our neighbour repeatedly makes a noise at an unlawfully high volume at night, it does not mean that we can smash his door (or his head) with an axe as punishment the next morning, even if we announce this to him in advance.

According to the current Hungarian constitutional rules, a political force receives the authorisation from the people to make a Constitution if it obtains enough votes to achieve a two-thirds majority in the Parliament.[142] From this point of view, it does not matter at all whether the new government is supported by 52 % or 62 % of the seats in the Parliament: what matters is whether they have 67 % of the seats (i.e. two-thirds majority in the Parliament). If there was truly "overwhelming social support" behind the revolutionary plans, then the opposition would achieve a two-thirds majority in the Parliament, and then there would be no need for a revolution in the legal sense (i.e. the revolutionary argument Nr. 4 implies false facts, or to put it differently, it does not satisfy its very own triggering condition).[143]

142 See above n. 130.

143 Tóka Gábor, 'Milyen parlamenti patkót ígérnek a közvélemény-kutatások? 3. rész: Nyerhet-e parlamenti többséget az ellenzék?', vox populi, 29 December 2019: 'Fidesz-KDNP can gain two-thirds majority of the seats in the parliament with a

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And if we say that the incumbent simple parliamentary majority can do anything, in case it is moral according to the majority's own interpretation (restoring democracy, etc.) and has requested authorisation in advance, then we actually deny the idea of a Constitution in the legal sense. In constitutional theory, this is a possible position (it is known as "democratic centralism" and was a central element in the constitutional doctrine of socialism),[144] and in the case of Western democracies, the idea of British parliamentary sovereignty is close to it (but this would also mean that, for the future, all new Parliaments, even a simple Fidesz majority would be legally just as unrestricted).[145] However, the moment of model change would undoubtedly be illegal under the current legal system. An additional referendum would not remedy the illegality of the constitution-making. Legally speaking, a referendum is not "more" but "different" than the two-thirds majority vote in the Parliament.

In the last couple of decades, it happened a few times in South America that the will of the people (as a natural law trump) was referred to as a reason for the open violation of positive constitutional rules. This is nothing more than overthrowing the entire constitutional system from the inside with openly illegal means in possession of government power. It is no coincidence that the Spanish term *autogolpe* is used for this also in the English-language literature.[146] Sometimes it is successful, as in Peru in 1992, and sometimes not, as in Guatemala in 1993.

With such a step, Hungary would, unfortunately, dig itself even deeper out of an already bad situation. The polarisation process that began in 1990 (which can be described as a negative self-reinforcing spiral) would

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slightly smaller vote margin of 13 %, but the opposition would also only need a vote margin of over 14 % (say an opposition 55 %, Fidesz-KDNP 40 % vote distribution) to achieve a similar parliamentary superiority.' The text and the mathematical details can be downloaded here: <https://kozvelemeny.wordpress.com/2019/12/29/milyen-parlamenti-patkot-igernek-a-kozvelemeny-kutatasok-3-resz-nyerhet-e-parlamenti-tobbseget-az-ellenzek/>.

144 András Jakab and Miklós Hollán, 'Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary', Journal of East European Law (Columbia University) 2–3 (2004), 95–122 (104–108), with further references.

145 Following Dicey and Austin, see Jeffrey Goldsworthy, *Parliamentary Sovereignty* (Oxford: Oxford University Press 1999); Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press 2004), 33–37.

146 See e.g., David Landau, 'Constituent Power and Constitution-Making in Latin America' in: Hanna Lerner and David Landau (eds), *Comparative Constitution-Making* (Edward Elgar Press 2019), 567–585.

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continue, during which those on the opposite side of the barricade cross new and new borders, previously thought to be impassable, citing violations of norms committed or believed to be committed by opponents.[147] We would create a precedent that could be called upon by the new winner at every parliamentary election in the future – possibly even citing exactly the revolution in question as something justifying a new future revolution again.

c) "From a practical political point of view, there is no other choice but to disregard certain two-thirds majority provisions"

i. "The Fiscal Council will overthrow the new government within a few months"

Revolutionary argument: "*The Fiscal Council will overthrow the new government within a few months. They themselves can cunningly/creatively calculate the increase in public debt necessary to veto the new budget. If we want to avoid this, we have to disregard certain two-thirds majority rules.*"

Rebuttal: There is a good chance that Orbán's deep state will be unfriendly to the new government, and they might even take illegal steps in some cases (and thus make life difficult for the new government), but in the current constitutional system there is only one body that can formally overthrow the government: the Fiscal Council. However, fears about this are exaggerated, and the above revolutionary argument is mistaken in several ways. (1) Vetoing the yearly Budget Act is only possible according to Articles 36–37 of the Fundamental Law for one single reason: because of its public debt-increasing nature. Regarding the national debt calculation method, the relevant cardinal (Law CXCIV of 2011) refers to the relevant EU rules, i.e. the Fiscal Council cannot "cunningly/creatively" calculate the national debt. (2) If, in spite of everything, the Fiscal Council were to veto the budget (even though it would not actually increase the state debt -- and the Hungarian economy is not in recession, when the budget could even increase the debt), it would be illegal. Procedurally, after such an

147 In the end, the main question is not what kind of wrongdoing the other side has committed, but what kind of country we want to live in. A democrat, therefore, does not behave towards the opposition as they behaved towards him/her during his/her opposition days – but as s/he would like the current government to behave towards him/her as an opposition in the future.

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illegal Fiscal Council veto, the Parliament would presumably (referring to the illegality of the veto) still adopt the bill. The President of the Republic then has two options: (a) Either s/he can send it back to the Parliament for re-consideration [Article 6(5) of the Fundamental Law], but if the Parliament adopts the same, then s/he must sign it. (b) Or if s/he considers it unconstitutional, s/he sends it to the Constitutional Court, and in this case the Constitutional Court has 30 days to make a decision (Article 6(4) and (6) of the Fundamental Law). However, according to Article 37(4) of the Fundamental Law, the Constitutional Court does not currently have the authority to examine the yearly Budget Act (with the exception of one or two exceptional violations of fundamental rights, which are conceptually out of the question here). If the Constitutional Court were to examine the budget despite the obvious lack of competence (and would also judge the illegal Fiscal Council veto as legal), then Orbán's deep state would be breaking the legal continuity, i.e. the revolution in the legal sense would actually be triggered by Orbán's deep state →II.2. And a final remark: it is not possible to organise new elections with a government that considers the calling of elections illegal. But even if the new government were to organise this, it could be politically very risky for Orbán's forces and their illegal move could easily backfire at the polls.

ii. "The new government will not be able to do anything: the country will be ungovernable"

Revolutionary argument: *"So many things are entrenched in two-thirds majority rules, or in the hands of deep state officials who are protected by two-thirds majority rules (who will obviously sabotage everything), that it will simply be impossible to govern (the country becomes ungovernable). In essence, the new government will be unable to act: it will be a lame duck. If we want to avoid this, we have to disregard certain two-thirds majority rules."*

Rebuttal: The situation of the new government will be difficult indeed. There are indeed some (specifically public policy) subject areas that should be in a simple majority legislative competence because their being subject to two-thirds majority rules weakens democratic political accountability structures.[148] And the deep state officials will probably really not sympathise

148 András Stumpf, 'Ilyet az MSZMP művelt – Jakab András a fideszes vagyonátmentés indokolhatatlanságáról', valasz online, 28 April 2021, <https://www.valaszonline.hu

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with the new government (by publicly threatening them that they will be replaced illegally only makes this worse). The Hungarian hybrid regime has also made a conscious effort to lower the stakes of the elections.[149]

However, it is factually not true that the new government and the simple parliamentary majority cannot do anything. The majority of public administration positions (such as the police, the military, secret services, ministerial bureaucracy, county-level government offices, etc.) will be under their control (with the right to replace high officials, and give them orders and instructions). Simple majority laws (including the yearly Budget Act, tax laws etc.) and government decrees can regulate the vast majority of subject areas. It is theoretically conceivable that one day we will get to the point where the competences of the simple parliamentary majority and the government will really be emptied.[150] But at the time of writing this study, we are certainly not there yet. The stakes of the parliamentary election are still very high (even with the maintenance of legal continuity).

Supporters of breaking legal continuity do not define the concept of "governability", yet they place this amorphous goal above all else, which would sanctify even breaking legal continuity. What would be the point at which "ungovernability" is realised? If the Constitutional Court annuls a law (which would really be its task in the given case), then can we establish "ungovernability"?

Furthermore, we currently do not and cannot know exactly how the deep state will actually function if Orbán were to be forced into opposition. This will also depend on compliance with certain informal norms and expectations. There is indeed an effort on the part of the current government to

/2021/04/28/jakab-andras-ketharmad-alapitvanyi-kiszervezes-allami-vagyon-interju/>.

149 From the point of view of electoral fraud (including holding on to power despite losing the election), entrenching more and more issues in two-thirds majority rules is actually a good sign. This indicates that Orbán is counting on the possibility of losing the parliamentary majority as a realistic chance, i.e. a massive Belarusian-style election fraud is not expected. This also follows from the nature of the regime →I.1: it pays attention to appearances ("plausible deniability"), but many unfair (and partially illegal) tricks can be expected, i.e. we can expect in Hungary "free but not fair" elections in the future.

150 However, overdoing this could also be risky for Orbán, as this could make it difficult to operate the power machinery (perhaps not immediately, but in the medium term) if Fidesz only obtained a simple majority. This would only be rational on their part if they were sure of losing the elections – however, at the moment of closing the manuscript, this is by no means the case.

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build a deep state, but I dare say it will work less effectively than they hope. The unconditional loyalty of the deep state officials is far from certain if the political gravitational field changes (strategic defection).[151] In any case, the opposition at least needs to give it a try to play along the rules.

iii. "The remnants of the hybrid regime must be wiped out as long as we have the impetus (i.e. we have to act quickly)"

Revolutionary argument: *"The remnants of the hybrid regime must be wiped out as long as we have the impetus (i.e. we have to act quickly), because if we wait, the new democratic coalition might fall apart due to internal struggles and Orbán's hybrid regime will continue."*

Rebuttal: By itself, "impetus" is of no use. Rushing into chaos and street violence out of impetus is not a good idea, even if the alternative is cumbersome governance. And the fact that the governing coalition is breaking up due to internal struggles is absolutely no reason to break legal continuity. One cannot ignore the absurdity of this argument: it is no longer Orbán's conspiracy to build a deep state, but the clumsiness and internal struggles of the new democratic coalition that would justify the breaking of legal continuity (i.e. the democratic coalition's own potential mistakes would be used as a justification for the revolution).

iv. "If Fidesz refuses to participate in the process of making a new constitution after the elections, then it proves its bad faith"

Revolutionary argument: *"If Fidesz refuses to participate in the process of making a new Constitution after the elections, it proves its bad faith. Consequently, after Fidesz rejects a good faith invitation to participate in the process, Fidesz's Fundamental Law can be replaced, even illegally."*

Rebuttal: First, the main problem is not the rules of the Fundamental Law. Second, an *ultimatum* to Orbán's supporters ("if you do not cooperate in the legal replacement of the Fundamental Law, then we will do it illegally anyway, also without you") would be such an aggressive and unnecessary threat that would certainly increase the already pathologically high level of polarisation. It is not clear why Fidesz would cooperate with such an ag-

151 For details about similar situations with examples from Argentina see Gretchen Helmke, 'The Logic of Strategic Defection: Court–Executive Relations in Argentina under Dictatorship and Democracy', American Political Science Review (2002), 291–303.

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gressive new government that threatens illegally dismantling the two-thirds majority rules and replacing the deep state officials who sympathise with Fidesz. If someone shouts in front of the door, "open the door on request, otherwise I'll break in by force", then the rational behaviour is "I'm definitely not opening it, I'll lock it and even barricade it". Such a brutal threat would push the chance of a new Constitution into the even more distant future, and even make it impossible for the foreseeable future. And if the new Constitution were to succeed in the end, it would be just another "anti-Fundamental Law" and not a common Constitution for the nation as a whole.

At the end of the day, this would only be an insincere ritual pretending to involve Fidesz, which would show that "we tried", but in fact the argument is actually the same as the one discussed above in point III.1.c)ii.

d) "Several excellent constitutions (which conform to high standards of the rule of law and democracy) have been adopted procedurally illegally in foreign constitutional history"

Revolutionary argument: *"New Constitutions in world history have usually been adopted illegally. This is completely normal, nothing to see here. We will just do the same."*

Rebuttal: Indeed, constitution-making processes have often taken place around the world in an illegal manner.[152] In fact, some of the constitutions born in this way have been particularly successful (and conform to requirements of democracy and the rule of law). But I specifically dispute that in the current Hungarian situation this would be a sensible way to go.

In Hungary, there was no cataclysm, collapse, loss of a war or street revolution that overthrew a dictatorship, after which you would draft a new Constitution. The hypothetical context of the debate (and this paper) is exactly the opposite: some would try to break legal continuity in order to overthrow an existing legal order – in a situation in which a significant part of the electorate would explicitly and possibly even violently oppose this. In addition, the maintenance of (old) legality would be supported by a well-organised political force. In such a situation, the unilateral and illegal imposition of a new Constitution would lead to increased polarisation and

152 See e.g., Michael Klarman, *The Framers' Coup: The Making of the United States Constitution* (Oxford: Oxford University Press 2016).

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likely to chaos and street violence. I will detail these specific procedural issues and dangers below →III.2.

2. What the supporters of a revolution can not or do not want to answer: questions about concrete procedural steps and the social costs of a revolution

Revolutionary plans (adopting two-thirds majority rules with a simple majority) are mistaken not only because they are unconvincingly justified →III.1, but also because of what they do not contain. It is not clear what specific procedural steps (when, how, by whom etc) could be taken to implement these ideas, what could be done in response to the expected reactions of other constitutional organs, and how chaos and street violence could be avoided.[153] Only some fragments of the plan have emerged and these fragments were not realistic, such as the idea of a revolution to be announced solemnly on the very first day of the new Parliament's session. Verbal radicalism, moral posturing and philosophical expositions cover up the lack of both practical feasibility and thoroughly considered small print.

Hungarian politics is sick, and the Orbán regime plays a very important (negative) role in this. But the problem is not only with the Orbán regime: if it were to end suddenly tomorrow, Hungary's problems would not be solved either, since they are based on a culture that is unfavourable for democracy and the rule of law (the regime can also be explained to a large extent by this culture →I.3). The revolutionary brainstorming is very similar to the situation when a patient turns to "quack doctors" promoting unorthodox methods in the hope of a sudden, miraculous recovery. However, as with severe sicknesses often, there is no quick cure here, and this kind of "cure" can actually cause even more damage than the original underlying disease.

153 On the question of which provisions of the Fundamental Law and cardinal laws are incompatible with constitutional democracy, a consensus can probably be reached within the opposition between supporters and opponents of breaking legal continuity. There are enough constitutional experts in Hungary who could draft relatively quickly a new Constitution, for such a draft see e.g., Jakab (note 63), 70–163. The bigger challenge is rather what procedural steps can be taken to *peacefully* create a functioning and effective new Constitution. This is one of the key issues where (within the democratic opposition) opponents of the revolution disagree with proponents of the revolution.

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a) The legal form of the parliamentary decision, the signature of the President, and publication in the Hungarian Gazette

First of all, it is not clear what exactly would be the legal form of a (simple majority) parliamentary decision that would formally disregard the two-thirds majority rules. All parliamentary laws and constitutional amendments must be signed by the President of the Republic [Article S(3) and Article 6(3) of the Fundamental Law]. The President will obviously not sign the constitutional amendment or the parliamentary law repealing two-thirds majority rules by simple majority, and will send the bill to the Constitutional Court – and rightly so. This means that the law or the constitutional amendment cannot even be published in the Hungarian Gazette, i.e. it would not become a valid legal rule. If, for some reason, the publication hurdle could be overcome (e.g. the new government would publish the norm in the Hungarian Gazette without the signature of the President, i.e. illegally), then the rule would certainly be challenged before the Constitutional Court within the shortest possible time (fifty MPs, the president of the Kúria, the chief prosecutor or the ombudsman would all have the standing to challenge it), and the Constitutional Court would certainly establish the unconstitutionality with extreme speed. Rightly so, again.

In the event that the form of the decision was a so-called parliamentary normative decision not requiring the signature of the President of the Republic (this is an internal legal act, it cannot have external legal effects, see section 23 Act of Legislation), the Constitutional Court would say so with similar speed, that it has no legal effect outside the organisation of the Parliament. And finally, if it is a solemn political declaration (according to section 82 Standing Order of the Parliament), then it cannot have any legal effect whatsoever.[154]

From the point of view of the mentioned procedural problems, it does not matter whether we talk about disregarding a provision of the Funda-

154 There has already been such a revolutionary political declaration: *1/2010. (VI. 16.) OGY parliamentary political declaration on National Cooperation*. Orbán's hybrid regime began in this way in 2010 with a solemn parliamentary political declaration (in addition, of course, the declaration ended the corrupt past and promised a bright future): 'In the spring of 2010, the Hungarian nation gathered its strength again and carried out a successful revolution in the voting booths. The Parliament declares hereby that it recognizes and respects this revolution fought within the constitutional framework. ...'. Legally, there are of course no obstacles to such symbolic solemn declarations, but they also have no legal effect whatsoever.

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mental Law or a provision of a cardinal law by a simple majority. Just as it does not matter whether the rules in question are formally repealed, annulled, declared null or their application suspended (whether for a short or long time). Although some of the categories are doctrinally mistaken (declaring certain two-thirds majority rules or the entire Fundamental Law "null and void" →III.1.a)v.) or linguistically unusual (e.g., in the case of legislation, "annulment" is usually reserved for acts by the Constitutional Court), but the meaning of the parliamentary decision would still be clear, and (if the new democratic parliamentary majority really wanted to achieve an external legal effect, then) the unconstitutionality of the parliamentary decision would also be obvious.

b) The Constitutional Court

It is also not clear how the supporters of breaking legal continuity plan to handle the expected reaction of the Constitutional Court. If they simply refuse to publish the court's decisions in the Hungarian Gazette (this was, for example, PiS's method for deactivating the Polish Constitutional Court), the Hungarian Constitutional Court would certainly publish the decisions on its own website in the same way (if the government shut down the court's website, then the court could quickly create a new website, or you could even send the decisions to ordinary courts, government offices, etc. in a round-email – in an endless cat-and-mouse game).

In case the government decides to close down Constitutional Court building, then this would be of course illegal, and even the issuance and execution of such an order raises the possibility of a 'crime against the state' (since a necessary element of the order is the "threat of violence", cf. section 254 of the Criminal Code), and on the part of government members and police leaders, who participate in the decision, also an 'abuse of office' (section 305 of the Criminal Code). By the way, it doesn't really help if the government closes the building of the Constitutional Court with the police, since then the body can even make decisions while sitting in a private apartment.[155] Of course, further similar scenarios can be invented up to the point of arresting constitutional judges, although there would really be no legal basis for this, and the issuance and execution of the relevant order

155 It would be possible even by video conference, see section 48/A of the Act on the Constitutional Court: 'The full session of the Constitutional Court, as well as the session of a chamber, can also be held using an electronic communication device

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would constitute the above-mentioned crimes. In the case of these crimes, the prosecution services (which are in Hungary an agency organisationally independent from the government) would obviously take action against the new government (and this action would be entirely legal). Moreover, due to the risk of committing further crimes while not arrested, the arrest would be justified against those issuing revolutionary orders [Section 276(2)(cb) Criminal Procedural Code].

I have not yet come across any proposal solving these problems by supporters of breaking legal continuity. Complete legal uncertainty would erupt among law enforcement agencies, the majority of ordinary courts and prosecutors would probably side with the Constitutional Court, and the majority of those working in the central state administration (because of the chain of command in the police etc) would side with the new government – but islands (enclaves) would probably occur on both sides.[156] I will return to the question of the police below →III.2.c) Practicing lawyers and private persons/companies would consider different rules as authoritative depending on which law enforcement agency follows which legal order. The result of such an action would ultimately be that two parallel legal systems would emerge in Hungary. There would be overlaps in many places (e.g., company law, civil procedure law, inheritance law, consumer protection law), but in constitutional law very significant differences between the two legal systems would emerge within weeks.[157]

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if the President [of the Constitutional Court] decides so.' This was actually the practice during the Covid epidemic.

156 The Orbán regime also anticipates a possible violent mass demonstration scenario (either in connection with the elections or in a situation that is the subject of this study): Law CXXXIV of 2021 amended the Section 256(1) of the Criminal Code. Since 1 March 2022, the definition of "rebellion" has been expanded to protect also the Constitutional Court: 'Whoever participates in a mass disturbance, the direct purpose of which is [...] e) to obstruct the Constitutional Court in the exercise of its powers defined in the Fundamental Law by force or by threat of force, or to force it to take action, shall be punishable by imprisonment from two to eight years for a felony.' According to the official explanatory notes to the bill, the Constitutional Court itself initiated the amendment. In the case of rebellion, the Criminal Code also order the 'preparation of rebellion' to be punished [section 256(3) Criminal Code].

157 Due to the existence of a Constitutional Court and its judicial review, there is no such thing as 'breaking the legal continuity just a little bit' (i.e. we cannot limit the illegality of the transition just to a few provisions of some cardinal laws or of the Fundamental Law). If legal continuity breaks even just a little bit, then for this to be successful, the Constitutional Court protecting the hierarchy of norms must also

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c) The duplication of the legal system: conflict between law enforcement agencies and chaos

The greatest danger in revolutionary ideas is the doubling of the legal system and the fact that it will not be clear to law enforcement agencies which one to follow (or one part of them will follow this, and another part will follow that).

The idea (mentioned by some supporters of breaking legal continuity) that a "parallel" chief prosecutor should be appointed is also a clear sign of confusion concerning practicalities. It remains unclear why subordinate prosecutors would accept this. Such an appointment could only happen in an unconstitutional law with a simple majority (and we have already arrived at the question of what to do with the Constitutional Court →III.2.b)). If we were to set up a complete second organisation of prosecuting services in parallel, then it remains unclear which prosecutors will be able to bring charges in criminal cases. If the courts do not accept the indictments of the "revolutionary prosecuting services", then a "revolutionary court" system may also become necessary. And, of course, the most dangerous aspect: if different police units are facing each other (one following the revolutionary legal system, the other following the old legal order), it is not clear what kind of *peaceful* conflict resolution method could be applied to the situation.

The main danger is not that the population would take up arms in such a conflict situation. The danger is that some of the armed state agencies (police, military and secret service) stand on the opposite side of the conflict, following two separate and partially opposing legal systems. According to the old legal order, the new government and the new police leadership[158] are punishable under section 254 of the Criminal Code (because they give orders for physical coercion, thus the "threat of violence" element of the

be switched off, which, however, is only possible by switching off the prosecuting services, etc. In political practice, it is, therefore, possible to try to contain the escalation (but due to the unpredictability, this can only be contained to a limited extent, which is why it is dangerous and irresponsible to trigger it →III.2.c)), but doctrinally, the interruption of legal continuity is conceptually binary.

158 Some supporters of the interruption of legal continuity argue that the legal revolution must be launched on the very first day of the newly elected Parliament. Others would, however, wait for a later, "appropriate" moment. Legally there is no difference between the two. In practice, however, the difference is whether the acting police chiefs were appointed by the Orbán regime or by the new government.

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crime is realised), on the other hand, according to the new legal order, officials of Orbán's deep state commit the same crime.

If the new (actually illegal, i.e. according to the old legal order: fake) prosecuting services ordered an arrest, it would be a crime (depending on the specific organisational position of the prosecutor according to section 194, 304 or 305 of the Criminal Code). And very soon, the motion to arrest the new "alternative" chief prosecutor would arrive at the court from the "real" (original) prosecuting services. Legally speaking, rightly so.

d) Organising a referendum

The above problems cannot be solved by the referendum either. First of all, according to the legal rules currently in force, it is not possible to organise a referendum on amendments to the Fundamental Law or on a new Constitution →III.1.a)viii., and this rule itself can only be changed by a two-thirds vote (the ban is old, not from the Orbán regime).[159] Therefore, it would be possible to organise a referendum only after the legal continuity has already been broken (i.e. to "remedy" the illegality), but practical problems and, in all likelihood, violent situations would arise even before it could be held. Moreover, in polarised societies (like the Hungarian one), referendums with their binary choices are likely to increase polarisation and escalate the conflict.[160]

e) Weighing costs and benefits: potential number of victims, setting a precedent, increasing polarisation

The public figures who support the revolutionary proposals have either not played through the individual steps in their heads, or they do not honestly reveal to the public that this plan will predictably lead to violence. The

159 Constitutional Court decisions 2/1993. (I. 22.) AB, 52/1997. (X. 14.) AB.

160 The polarizing effect can best be avoided if there is a consensus among the relevant political actors, and the referendum can be experienced as a nationwide ritual (rather than a sharp decision), as happened in the case of Hungary's EU and NATO accession. On the basis of the Swiss experience, on the potential polarising effect of referendums (and the responsibility of political elites in this regard), see Wolf Linder and Sean Mueller, *Swiss Democracy. Possible Solutions to Conflict in Multicultural Societies* (4th edn, Cham: Palgrave 2021), 156–158.

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revolutionary road is actually a scenario for heating up the polarised politics into physical violence, for venting the accumulated emotions. Scenes that seem unimaginable at the moment would await Hungary, such as we have seen in Kiev and Tbilisi in recent years. In the heightened mood after elections, in highly polarised public life, with well-organised and significant mass support, to act against legally independent institutions with an *illegal* constitutional reform or constitution-making (in the current state of the Hungarian legal system and according to our current knowledge) would be a dangerous, unnecessary and irresponsible mistake.[161]

Moreover, we cannot even be sure that the revolutionary government would win the violent street conflict. But even if they did win, it wouldn't be worth it considering the overall social costs and benefits. I wonder how much of a sacrifice it is worth, according to the supporters of breaking the legal continuity, to replace the chief prosecutor? Or does it cost what it costs?

It is also worth considering that such a step could easily have a precedent-setting effect. In the future, the possibility would arise essentially after every change of government. (The content of the justification for the revolution is still lacking →III.1, and such low-quality arguments can be fabricated at any time for anything. Let's say that against the now planned "illegal revolution", the idea of a pro-Orbán counter-revolutionary "restoration of the rule of law" could also emerge.) Do we want to pay the social costs for this also?

And finally, it is also worth considering that a unilateral revolutionary constitution-making attempt, whether it succeeds or not, would significantly increase the already abnormally high level of polarisation in Hungary. Moreover, the public discourse about it, the threat of it, in itself (without actually happening) has already the effect of increasing polarization →IIi.1.c)iv.

161 Therefore, it would be a rather weak answer to our concern that a civil war did not break out when Fidesz eroded Hungarian democracy. It was basically *legal* →I.1, it took place in small steps, and there was no unified and well-organised opponent on the other side.

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3. Typical logical problems in revolutionary arguments

a) Stepping out of the legal system, stepping into the legal system

There is a serious internal contradiction in the proposals supporting the interruption of legal continuity. On the one hand, they want to come to power (to win an election, to take office) according to the legal rules currently in force, but on the other hand, they want to abandon the legal system (or selectively certain parts of it) from the position of power. In terms of its structure, this instrumental understanding of the legal order sadly reminds us of what Turkish President Erdogan said about democracy when he was mayor of Istanbul: "Democracy is like a tram. You ride it until you arrive at your destination, then you step off"[162] In other words, we use the institutional system of modern constitutionalism as long as it helps our goals, after which we move on.

It would be a possible principled position if someone considered the current legal order to be so reprehensible (unjust, anti-democratic, illegitimate, etc.) that he does not accept it as a valid legal system (see natural law approaches →III.1.b) above). But some opposition politicians still consider the current legal order to be valid, since they are running for offices in elections, exercising their mandate as MPs or mayors, collecting their salaries, or even submitting motions to the Constitutional Court.[163] In light of this, it is very problematic to say they actually consider some of the basic rules of the legal system to be invalid. Of course, the practical considerations are clear: starting a revolution from the opposition is much more risky, and gaining full (or in other words: exclusive) power from a government position is easier. However, this approach is not principled, it rather reminds us of the hyper-pragmatism of the Orbán regime, in which logical problems do not matter, and depending on our position of power,

162 Ozan O. Varol, 'Stealth Authoritarianism in Turkey' in: Mark A. Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford: Oxford University Press 2018), 339.

163 According to the website of the Constitutional Court: <https://www.alkotmanybirosag.hu/ugykereso>, e.g., in 2021 there were five Constitutional Court decisions that were initiated by a quarter of all MPs. Submitting a motion implicitly acknowledges the validity of the relevant rules on the part of the signatories. For an empirical analysis of the MPs' motions to the Constitutional Court between 2012–2020 see Kazai Viktor Zoltán and Karsai Dániel, 'Ellenzéki petíciók az Alkotmánybíróság gyakorlatában', *Fundamentum* (2020), 60–75.

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any time the exact opposite can be said of what we said yesterday. In other words, if we accept this, then the basic logic is primarily the Schmittian "us vs. them".[164] Certain logics should, however, not be learned from the Orbán regime if the ambition is to build a better country.

b) Orbán's deep state is both strong and weak

According to the revolutionary plans, Orbán's deep state is a very curious entity that is both strong and weak at the same time. It is strong, as even from an opposition position it can overthrow the new government, while it is also pretty weak, as it cannot prevent the *illegal* adoption of new two-thirds majority rules. I don't rule out that there is an explanation for this, but I haven't seen one yet.

c) We will not tell you the procedural details of how we plan to disregard the two-thirds majority rules, so that Fidesz does not build up new two-thirds majority defences against our plan

Sometimes it is also said that the supporters of breaking legal continuity do not say more about the procedural details of how they are planning to deactivate the two-thirds majority rules, because this would allow the Orbán regime to pre-emptively build up new two-thirds majority defences to protect the deep state. This makes no sense: if we want to disregard the two-thirds majority rules, then by definition it is not possible to protect them with more two-thirds majority rules. Keeping the list of exact legislative changes a secret is only worthwhile if you want to stay within the legal framework (as this chapter is based on), since the entrenchment into two-thirds majority rules is only an obstacle if you want to stay legal.

Of course, it can be said that we are not giving out details of our plan so that Fidesz cannot prepare, but this preparation cannot, by definition, mean entrenchment by two-thirds majority rules. However, since certain procedural fragments have already leaked out (and they are not convincing at all →III.2), it can be assumed that the concrete, practical steps of the revolution are not known because they are not feasible. In other words, the

164 Beáta Bakó, 'Újraírni, vagy csak betarta(t)ni kellene az Alaptörvényt a NER után?', Közjogi Szemle (2021), 59–66, (60).

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claim of the supporters of the interruption of legal continuity that "we are being secretive about the plan so that Fidesz cannot prepare with further two-thirds majority rules" actually serves to cover up their bewilderment. There is no hidden plan (only incoherent fragments), because no peaceful plan is possible in the Hungarian context if you want to break legal continuity. Of course, I wouldn't even dare to think that anyone would plan violence.

d) We advise the public and the politicians on how to organise the transition – but we only talk about philosophical foundations, without the question of practical feasibility

Sometimes the proponents of breaking legal continuity deflect questions about practical implementation by saying that it is not their task, because they are only interested in the theoretical foundations (philosophical questions, etc.). There is no problem with such an approach in itself, but then why are they trying to advise the public and politicians on what to do? This is an eminently practical question.[165]

e) Problems related to the timing of the revolution: having it early is not smart, having it late is not useful

At first, the supporters of breaking the legal continuity said that they would announce a "revolution in the legal sense" on the very first day of the new Parliament →III.2. However, the practical impossibility of this plan quickly became clear even to the most bewildered supporters: the new government

165 This attitude is similar to what Georg Lukács described a hundred years ago: 'It is not our intention here to deal with the possibilities of the practical feasibility of [...], nor the beneficial or harmful consequences of its possible coming to power. Apart from the fact that the writer of these lines does not feel at all competent to decide such questions, it seems appropriate for once, for the sake of the clarity of the question, to completely disregard the consideration of the practical consequences: the decision is anyway – as in all important questions – of a moral nature, the immanent clarification of which, precisely from the point of view of pure action, it is a top priority task.' For example, "revolution" or something else can be substituted in the underlined part. For the original text, see Lukács György, 'A bolsevizmus mint erkölcsi probléma', Szabadgondolat (1918), <https://www.marxists.org/magyar/archive/lukacs/bmep.htm>.

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must take office (the full handover process takes several months), obviously there would be a change of leadership at the police, secret services, etc. If they also wanted to organise a referendum (which, by the way, cannot legally be done on constitutional amendments or on a new Constitution →III.1.a)viii., but possibly on some relevant issue, for example anti-corruption measures), the procedural and logistical preparation for that could be measured in several months. However, if the new democratic government was not overthrown by Orbán's deep state during these several months, there is probably no need for a revolution to protect against it anyway. We have not yet received a convincing explanation for this time paradox either.

f) The deep state officials are all fanatical blind followers of Orbán, but we will quickly convince the Fidesz voters with rational arguments that they should participate in our constitution-making process (against the Fidesz that they voted for)

Supporters of breaking the legal continuity usually paint various deep state officials as if they blindly follow Viktor Orbán to the bitter end. At the same time, they plan to involve Fidesz voters in the drafting of the new Constitution – Fidesz voters are supposed to be convinced by rational arguments that it will be good for them to get involved in innovative forms of popular participation for the sake of the country.

However, I believe it is exactly the other way around.

(1) A very significant part of the deep state officials actually do not believe in the Orbán regime[166] and are only temporarily loyal to it out of self-interest (the role of former communist secret agents in the current regime, as well as maintaining the secrecy of communist secret services lists, is not a coincidence).[167] In any given case, most of them ("strategic defectors" →III.1.c)ii.) would be willing to move on from the old networks of the Orbán regime without any problems (not suddenly, but gradually). Some of them would not even experience this as a swap via cognitive dissonance reduction mechanisms – and this should be welcomed for the sake of a peaceful transition (we do not and cannot know the exact proportions in advance).

166 This is an important difference between Poland and Hungary that many Western observers fail to recognise →6.

167 Krisztián Ungváry, *A szembenézés hiánya* (Budapest: Jaffa 2017).

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(2) However, a very significant part of Orbán's voters really believe almost anything that the regime propaganda tells them, sometimes even despite their own everyday experiences. The closer one sees the reality of the cynical and kleptocratic operation of the Orbán regime, the less one can believe in its moral character. In any case, it does not seem realistic that the already extremely distrustful Fidesz voters would be willing to participate in an illegitimate constitution-making (and this distrust would actually be rational on their part →III.1.c)iv.).

IV. General Questions

1. Can the rule of law only be built in a process conforming with the rule of law?

Although this question has already been raised in this paper, it is worth summarising here my opinion concerning the famous 1992 dictum of the Constitutional Court, according to which "[t]he rule of law cannot be implemented through violation of the rule of law (especially of legal certainty)".[168]

In order to answer this question, we should break it down into three sub-questions: (1) Is it theoretically possible to build a rule of law with steps that are (partially) illegal? (2) Is it necessary to break the legal continuity (i.e. to organise a revolution in the legal sense) in order to dismantle the Orbán regime? (3) Is breaking legal continuity a possible scenario during the dismantling of the Orbán regime?

Ad (1). The answer to the first sub-question: yes, it is *theoretically* possible to build a rule of law with steps that are (partially) illegal. In other words, the Hungarian Constitutional Court's classic statement that the rule of law can only be built with rule of law instruments is not entirely correct. Historically, there are many examples of this, in fact, a significant part of the successful Western Constitutions were created illegally →III.1.d) And of

168 For a detailed critical analysis of the decision see András Jakab, 'Decision 11/1992. (III. 5.) AB – Retroactive Transitional Justice' in: Gárdos-Orosz and Zakariás (n. 75), 85–102.

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course counter-examples can be collected in a good number where illegality eventually resulted in a non-democratic regime.[169]

Ad (2). The answer to the second sub-question: it is not (more precisely: probably and hopefully not) necessary to break legal continuity (i.e. organising a revolution in the legal sense) to dismantle the Orbán regime. The Orbán regime is basically not built by laws but by informal practices →I.1, and I think the deep state will be much less effective than many people believe (they fear or hope →III.1.c)ii.). And if, later on, if the public mood changes, and a strong majority of the country believes that the Orbán regime will not return (e.g., following additional elections, parliamentary, municipal or European Parliament), then the deep state will wither away. Dismantling the Orbán regime is a multi-stage process →II.1., the real challenge is to prevent another hybrid regime from being built (with different rhetoric, with different people).

Ad (3). And finally, the answer to the third sub-question: yes, it is possible to imagine a break in legal continuity during the dismantling of the Orbán regime, but this should be avoided if possible. If it cannot be avoided, then the representatives of Orbán's deep state must clearly bear the responsibility for this (e.g., by trying to unlawfully overthrow the new government). In other words, breaking legal continuity requires more than the democratic legitimacy obtained in the elections, as the opposition parties cannot conceptually request/receive authorisation for this in elections →III.1.b)iv.

2. Legal academia and politics: tasks and responsibilities of legal scholars

According to my personal experience (I admit: this is not representative in a sociological sense), Hungarian constitutional lawyers are much less divided on the issue of the possible interruption of legal continuity than it might seem to the Hungarian public. I myself perceive that even among colleagues who are very critical of the Orbán regime, there is a significant

169 See e.g., Dmitry Kurnosov, 'Beware of the Bulldozer: What We Can Learn from Russia's 1993 Extra-Constitutional Constitution-Making', Verfassungsblog, 7 January 2022, <https://verfassungsblog.de/beware-of-the-bulldozer/>: 'Today we are used to seeing Russia as an example of an authoritarian constitutional structure, especially since last year's amendments that removed most of the liberal pretense. It is easy to forget that initially the country's basic law has been the outcome of extra-constitutional constitution-making (in 1993) that emphasized popular sovereignty, democracy, and human rights.'

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majority of those who hold views close to what is being said in this chapter (i.e., who are fundamentally sceptical of revolutionary arguments).

Constitutional lawyers' opinion has recently become interesting for the (remainders of free) press, and it feels like having a national brainstorming, in which not only lawyers without specific expertise in constitutional law, but also completely everyday people participate. This is partly gratifying, but partly the wildest (often factually false) thoughts reach the public unfiltered, disguised as professional opinion. In such a situation, professionals have a patriotic duty to speak up, and this motivated also the writing of this study. Nevertheless, the institutional environment of a hybrid regime unfortunately makes it understandable if several experts actually stay silent.[170]

3. Polarisation as part of the cultural problem

One of the most serious problems in Hungarian public life is extreme polarisation. This not only creates a bad mood, makes citizens less rational and bewilders them (although these would be big enough problems in themselves), but also damages democratic accountability structures. If the other side is the devil himself, then the vices of one's own side must be swallowed. But in a democracy, political accountability is about if the politicians are dishonest (or just plain clumsy), then we replace them during the elections. However, if there is a tribalistic war, if Schmittian "us vs. them" fight is going on, then the embezzling a few million (hundred million or even billion) forints does not seem such a terrible act anymore. After all, this is still better than "them" being/staying in power.

The Orbán regime itself largely feeds on this polarisation:[171] it demonises the current opposition (or György Soros, the EU, etc., whose "agent" the opposition is). Pushing the agenda of identity politics issues instead of public policy issues is a conscious effort to strengthen polarisation and to divert attention from real government performance and corruption (i.e. to immunise against performance measurement, thereby destroying democratic accountability). Ideological polarisation is a *tool* in the hands of the

170 András Jakab, 'Moral Dilemmas of Teaching Constitutional Law in an Autocratizing Country', Verfassungsblog, 15 July 2020,<https://verfassungsblog.de/moral-dilemmas-of-teaching-constitutional-law-in-an-autocratizing-country/>.

171 This is generally characteristic for populist regimes, see the Turkish example: F. Michael Wuthrich and Melvyn Ingleby, 'Pushback against Populism: Running on 'Radical Love' in Turkey', Journal of Democracy 31 (2020), 24–40.

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Orbán regime, even though the Orbán regime itself is not ideological in nature →I.3.

However, this polarization logic characterises also the opposition and even the Hungarian debates on the restoration of constitutional democracy. This includes, e.g., the description of the regime as a dictatorship (a symptom of this could be the ambiguous terminology of "authoritarian" or "autocrat" instead of the clearer "hybrid regime" →I.1), so that the exaggerated negatives of the Orbán regime can justify the planned illegal revolutionary steps. In the name of the fight against the dictatorship, legally unlimited power can be claimed in the elections for the "definitive and complete defeat" of the other side. This is why the deep state now becomes a fanatical army →III.3.f), even though these are obviously fallible people who unfortunately made bad moral choices at critical moments (but their loyalty to the Orbán regime is far from unlimited and unconditional).

Following James Madison, we usually say that Constitutions are based on the idea that men are neither angels nor devils.[172] The promise of "give me unlimited power, I won't abuse it in the slightest" usually doesn't end well (although many of the supporters of discontinuing legal continuity actually imply exactly this), because we are all fallible. We should not assume that everyone in the group opposite us is a quarrelsome villain or perhaps a marionette figure. If public life is dominated by Manichean thinking, according to which "we" are morally angels, while "they" are morally hellish, then it doesn't matter what kind of clever constitutional text we draft, whether adopted legally or illegally, it won't work. It is therefore important to emphasise that the logic of hatred is not "the nature of politics", but merely a specific (harmful) political practice of current Hungarian politics.[173]

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172 Madison originally spoke of the government, see Federalist Nr 51: 'If Men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.'

173 Politics is *not* primarily about gaining power ("us vs. them" fight →III.1.c)iii.), but about the common good. Unfortunately, the various revolutionary proposals in their current form ultimately do not serve the public good: they lead to further polarisation (referendums, for example, are tools for further polarisation →III.2.d)), and their expected social costs exceed their social gains →III.2.e). And horribly boring, frustrating, slow and complicated legal procedures are still the relatively best way to find the common good. As an alternative, you can of course imagine

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A direct consequence of this Schmittian approach is the logic that a simple majority is apparently enough for "us" to amend the Constitution, but not even two-thirds majority is enough for "them". However, if the described procedural rules do not matter anyway, then ad absurdum actually a simple majority would not even be necessary: it would be enough to "announce" the new constitutional rules that we consider ideal. Moreover, one should not even win an election, since it is not possible to obtain legitimate power from the illegitimate procedures of an illegitimate regime anyway→III.3.a).

Unfortunately, the political situation and the public mood in Hungary are so polarised and feverish to such an extent that no matter what happens in the next elections (whether the incumbent party wins or not), further escalation is in the air. That is (also) why we should not inflame the tempers with half-baked revolutionary proposals.

4. Optimism and pessimism in public speaking/writing

A public speech, an interview, an op-ed, or, as in the case of this article, the publication of a study intended for public opinion are actually all political actions that not only describe but also shape their subject. If someone writes about – and especially if this remains on the agenda – what the worst case scenario is, that person inflames the tempers of his/her own camp. And if s/he writes about how brutally (and illegally) s/he would act against the other side, then s/he inflames the tempers of the other side. In other words, publicly voiced pessimism and negative expectations regarding the escalation of the conflict also strengthen polarisation and are partially self-fulfilling. One of the country's most important problems is precisely the increasing degree of polarisation →IV.3. Instead of complaining about the worst case scenario and scaring yourself with it (the probability of which, in my opinion, is overestimated anyway), the discourse should be focused on the possibilities (and not complaining about what cannot be done). These considerations also played a role in how I wrote the original Hungarian version of this paper.

philosophical exchanges or the law of fists: unfortunately, historical experience shows that in the absence of legal procedures, the last option is usually what you get in practice.

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5. Is planning a revolution an offence under Hungarian criminal law?

In the course of public debates, the question arose as to whether planning the revolution (i.e. breaking legal continuity) is a crime under the current Criminal Code. In my opinion, it is *not*. In the case of the most relevant crime (Section 254 of the Criminal Code, violent change of the constitutional order), "violence" or "threat of violence" should be intended. I have found so far no proof of such intentions in the materials available to me. Although the preparation of this crime is also punishable according to Section 254(2) of the Criminal Code, but this would require specific and directly committed actions according to the dominant doctrinal opinion,[174] so mere revolutionary speculation is not 'preparation' in itself. In other words, in my view, revolutionary brainstorming in Hungary is political irresponsibility, but it is not a crime.[175]

V. Conclusions for a Future Hungarian Transition to Restore Constitutional Democracy

At the beginning of the article, I presented the nature of the Hungarian hybrid regime, and I suggested that in its current state it is neither a dictatorship nor a constitutional democracy, but is located in the grey zone between the two. It is a hybrid regime that operates illiberal political practices behind the veil of formal legal rules that mostly correspond to Western liberal constitutional standards (its formal rules violate these standards only in a few cases). From an ideological point of view, it is agnostic, its official rhetoric and real actions are incoherent, it actually only uses ideology as a tool (in some cases with a particularly provocative, agenda-setting, distracting and polarising purpose). There are various reasons for its emergence, in this text I have mostly emphasised cultural factors.

One of the possible scenarios after the next parliamentary elections is that the current opposition will win with a simple majority, but will not have a two-thirds majority necessary to amend the Fundamental Law and cardinal laws. This means that the new democratic government might face cohabitation with Orbán's deep state. In order to solve this problem, vari-

174 Szomora Zsolt, 'Btk. 11. §' in: Karsai Krisztina (ed.), *Nagykommentár a Büntető Törvénykönyvhöz* (2nd edn, Budapest: Wolters Kluwer 2019), 68.

175 To the crime of 'rebellion' according to the Criminal Code see above n. 156.

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ous suggestions for breaking legal continuity (i.e. organising a revolution in the legal sense) have emerged. I refute almost all of these,[176] because revolutionary ideas in the polarised Hungarian political reality threaten the remainder of social peace and can easily lead to violence. These plans are themselves symptoms of polarisation. Moreover, the various revolutionary justifications are unconvincing as to their content. The procedural details of such a move concept have not been worked out either, and what has been revealed so far is legally and/or practically unfeasible in that form. The long-term consequences of the possible implementation of such plans would also be very unfavourable: they would further increase polarisation, and with each future change of government, the possibility of breaking legal continuity would increase significantly.

On the one hand, revolutionary suggestions are *too pessimistic* regarding the transition of power, because they start from the assumption that informal relationships will function in the new political gravitational field just as they do now. I am convinced that the deep state will operate significantly less efficiently than its illiberal planners and the current opposition actors believe. Of course, the exact extent of this cannot be foreseen, but efforts should be made to maintain legality as far as possible, and in my opinion, the associated difficulties of cohabitation should not be exaggerated.

On the other hand, revolutionary ideas are *too optimistic* with regard to the legal-political culture, because they want to quickly solve a problem that is not primarily of a formal-legal type with the tool of formal law. The key issue is the legal-political culture, changing which will be a much longer, slower and more difficult process. If we want real change (i.e. if we want not only the faces/characters to change), then certain methods must be abandoned. Courage is needed not to use certain methods, but on the contrary: to refrain from them, to get out of vicious circles.

If it took with two-thirds parliamentary majority more than a decade to build the Hungarian hybrid regime, then it cannot be dismantled with-

176 The only non-revolutionary way of disregarding two-thirds majority rules is based on EU law (in the present volume the chapters of Armin von Bogdandy and Luke Dimitrios Spieker, Kim Lane Scheppele, Werner Schroeder, Pál Sonnevend) that could also be combined with my three-stage plan →II.1. The practical applicability of these EU law solutions in the Hungarian context (where mostly informality runs the regime and the majority of the remaining legal obstacles is in simple majority laws) is, however, in fact very narrow →III.1.a)ix. The scope, e.g., concerning replacing national office holders, might change in the future if EU law itself changes (via new case-law, treaty amendments or secondary law).

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in two months with a simple majority. For dismantling it, I presented a three-stage plan that could be implemented over several years. In this I am not talking about a Gordian knot, which we could cut to solve suddenly the problems, because in my opinion such a Gordian knot does not exist. Instead of expecting a miracle, it requires slow and tiring – partly political – nitty-gritty work, with a lot of well-designed technical details, carried out according to a strategy that has been thought and planned with a cool head. If one day Viktor Orbán is gone, the way out will still be long and difficult for the country.[177]

VI. Postscript on the Differences between Poland and Hungary – and a Few Potential Lessons for a Polish Transition

From the outside, the regimes in Hungary and Poland may seem similar: in both places, the situation of the rule of law and democracy has deteriorated significantly in recent years (which in both cases led to conflicts with the EU), and the Christian-conservative (anti-migrant, anti-LGBTQ, traditional Christian, illiberal) rhetoric may also seem similar (although anti-Russian rhetoric is absent from the Hungarian regime). The Polish governing parties have learned some measures that undermine the rule of law specifically from their Hungarian friends (e.g., gaining influence in the court system by lowering the retirement age of judges). In addition, in European politics (especially EU affairs), the two countries behave as close and permanent allies (again, except for the relationship to Russia and recently especially the Russian aggression against Ukraine). In reality, however, there are also significant differences, mostly in the internal operating logic of the two regimes. I would like to draw the attention to three differences:

(1) The Hungarian regime is deeply permeated by centrally organised corruption (which, according to one of the ideologues of the Orbán regime, is the "central policy of Fidesz").[178] In this form, this is not true for the Polish regime, although there are also corruption phenomena.[179]

177 On the political and social future of Hungary as an uphill difficult road see Jakab and Urbán (n. 52).

178 See above n. 40.

179 For a comparison of corruption in Poland (which distributes positions in state-owned companies and in the public administration on the basis of political loyalty)

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(2) For the most part, the operators of the Polish regime really believe what they say (this is clearly demonstrated by their insistence on otherwise unpopular strict abortion regulations). In other words, they are not characterised by the kind of cynicism that characterises the Orbán regime →I.3.

(3) In the Polish case, the erosion of the rule of law took place to a significant extent (also by a domestic constitutional standards) using illegal means.[180] However, since the prosecuting services there are not legally independent (but subordinate to the Ministry of Justice, since 2016 the Minister of Justice is basically the chief prosecutor at the same time), therefore, there have been no criminal charges for these illegal moves, and in the Hungarian revolutionary scenarios, a dangerous duplication of the legal system could not occur in a future transition →III.2.c). However, enclaves of the "old" liberal legal order were formed, and legal uncertainty has existed to this day regarding the ordinary court system. Since PiS did not have the constitution-amending majority, but still imported the legal technique from Hungary, the erosion happened in a more brutal and primitive manner (in addition, being a much larger EU Member State that did not court German car-making investors either), this earned the anger of EU institutions.

The Orbán regime, ironically, seems to have been endangered by its own "success": Orbán's model was imported by his Polish colleagues,[181] who provoked the ire of the EU, and this ire then was widened onto the Hungarian Government as well (although for years, the EU institutions assisted with cynical inaction in the erosion of the rule of law and democracy in Hungary). The behaviour of the Hungarian regime towards the EU could best be described with the metaphor of a corner lawyer playing dirty tricks, while the Poles, on the other hand, behaved like beaters with baseball bats.[182] If you like, all those who are concerned about the Hungarian rule

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and Hungarian (which also conquers complete private economic sectors with legislative instruments and converts state or EU money into private money through public procurement), see Edit Zgut, 'Tilting the Playing Field in Hungary and Poland through Informal Power', German Marshall Fund Policy Paper 2021, <https://www.jstor.org/stable/resrep31802>.

180 For details see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

181 On this topic in general see Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing. Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press 2021).

182 See also the contrast between the Polish Constitutional Tribunal's (K 3/21, October 7, 2021) and the Hungarian Constitutional Court's [32/2021. (XII. 20.) AB] judgments on the relationship to the EU legal system. Nóra Chronowski and Attila

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of law can be grateful to PiS for provoking external pressure from the EU against the Orbán regime as well.

The three differences above also have consequences for what should be done when the current Polish illiberal regime comes to an end.

Ad (1). Since corruption is less central there, after the restoration of constitutional democracy, dealing with such cases will be less important than in Hungary.

Ad (2). Since the operators of the Polish regime for the most part really believe in the moral character of the regime, it is less likely that the officials installed by PiS will find a modus vivendi with the new democratic government (although there might be cases of strategic defection there too, but probably less often than in Hungary, as their degree of loyalty is expected to be stronger to the Polish illiberal regime there).

Ad (3). To this day, a significant number of Polish officials continue to exercise their office illegally according to domestic constitutional law, and this is also evidenced by ECtHR and CJEU judgments,[183] which allows for tougher action against them in case of a transition (and since there are no cardinal, i.e. two-thirds majority, laws there, and the PiS never had a constitution-amending majority either, the dilemmas related to two-thirds majority rules similar to the Hungarian situation will not arise in Poland).[184]

Vincze, 'Full Steam Back: The Hungarian Constitutional Court Avoids Further Conflict with the ECJ', Verfassungsblog, 15 December 2021,<https://verfassungsblog.de/full-steam-back/>.

183 The Polish Constitutional Tribunal does not meet the requirements of a 'tribunal established by law', see ECtHR, *Xero Flor v Poland*, judgment of 7 May 2021, no. 4907/18. About the Polish ordinary court system: ECJ, *Commission v Poland*, judgment of 6 October 2021, case no.204/21, ECLI:EU:2021:834; ECJ, *Commission v Poland*, judgment of 15 July 2021, case no.791/19, ECLI:EU:C:2021:596; ECtHR, *Broda and Bojara v. Poland*, judgment of 29 September 2021, nos. 26691/18 and 27367/18; ECtHR, *Reczkowicz v. Poland*, judgment of 11 July 2021, no. 43447/19.

184 In this form, this is missing in the Hungarian situation, since (a) the illegal removal of András Baka (illegal according to the ECtHR, but not according to domestic law) was a freedom of speech issue before the ECtHR, and since then the current Curia President is already the second successor (Baka's original mandate would have expired long ago). There is no ECtHR judgment stating that the Curia in its current form is not a "tribunal established by law" either. (b) The early retirement of judges was conceptualised as age discrimination before the CJEU, and the Hungarian Government subsequently formally complied with this CJEU decision (although this did not change much in substance, as it largely paid compensation to the judges involved). In the Hungarian situation, there is therefore no CJEU (or ECtHR) judgment which, like in the Polish situation, would prove the domestic illegality

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Very similar are, however, the pre-democratic cultural heritage and the dynamics of spiralling polarisation, both of which are risk factors of backsliding and should therefore also be warning signs that erosion might happen also in Poland again and again in the future. Erosion is not a one-off accident, but a sign of weak cultural immune system that is going to keep us on edge for a long time even after the current illiberal regimes in Poland and Hungary end.

of the changes in the court system based on judicial independence (therefore in Hungary, Article 6 ECHR and Article 47 EU Charter of Fundamental Rights do protect the illiberal judicial appointments, as opposed to Poland). Concerning the Constitutional Court, there has been no ECtHR or ECJ rulings that would question its independence or classify the institution's political capture as illegal. Moreover, the ECtHR has even considered the Hungarian constitutional complaint as an effective remedy on several occasions (this is an even narrower category than being a "court", i.e. its absence would not in itself mean the denial of being a court either). See ECtHR, *Mendrei v. Hungary*, judgment of 15 October 2018, no. 54927/15; ECtHR, *Szalontai v. Hungary,* judgment of 4 April 2019, no. 71327/13. Under certain circumstance, the ECtHR denied that complaints to the Hungarian Court are an effective remedy, but never with reference to the Hungarian Constitutional Court's independence or illegal personnel composition, see e.g., ECtHR, *Sándor Varga and others v. Hungary,* judgment of 17 June 2021, nos. 39734/15, 35530/16 and 26804/18. For the sake of completeness, I also note that the independence of the Hungarian prosecuting services is not protected by EU or ECHR rules, but both the Hungarian and the Polish data protection authorities and central banks are protected by EU law. For exact references to the judgments implied or mentioned in this fn. see also above III.1.a)ix.

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The Constitutional Trap

Mirosław Wyrzykowski

I. Preliminary Remarks 228
II. The Constitutional Authorities Destroying the Constitutional Order 230
III. The Status of the President 231
IV. The Status of the Constitutional Tribunal 232
V. The Mortal Sins of the Constitutional Tribunal 233
VI. The President as a Detractor of the Constitutional Order 236
VII. Scope of Destruction of the Constitution 237
1. Civil service 237
2. Freedom of media 239
3. Deformation of judiciary 239
4. Scope of deformation of judiciary 240
VIII. The Real Risk of a Constitutional Clinch 240
IX. Irremovability of the Judges 241
X. Three Types of Unconstitutional Judicial Appointments 242
XI. A Final Caveat 243
1. General remarks 243
2. Disciplinary responsibility of the judges of the Constitutional Tribunal? 245
3. State-organized corruption 246
4. Excessive radicalism? 247
XII. The Higher Loyalty 248

Abstract:
Beginning with the taking of political power by the Law and Justice party at the end of 2015, there has been a continuing process of destruction of both the Polish constitution and attempts to undermine the legal foundations of the European Union. The process of destroying the Polish constitutional order is taking place through the actions of the constitutional organs of the state: the parliament, the president, the government, the president of the Council of Ministers, the attorney general and the constitutional court. By staffing the Constitutional Court exclusively with dependents of ruling party members, control of the constitutionality of the law has been deactivated. This has allowed a hostile takeover of the constitutional order without amending the constitution, only through parliamentary laws. Of fundamental importance is the destruction of the judiciary as a result of the unconstitutional appointment of judges of common courts and the Supreme Court. The action of the European Union bodies, particularly the European Commission and the ECJ, is met with a response from the Polish Constitutional Court in the form of declaring the fundamental norms of the TEU and TFEU unconstitutional with the Polish Constitution. The restoration of constitutional order after a possible change of parliamentary majority will be confronted with a constitutionally hostile attitude of both the President and the Constitutional Court,

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whose permanence of status and irremovability is guaranteed by the Constitution. The President will veto laws repairing an anti-constitutional legal order, the Constitutional Court will declare laws, which would restore constitutionality, unconstitutional. The Constitution may be a trap for attempts to restore constitutionality. A real dilemma will arise: whether it is possible, in order to restore constitutionality, to use methods that will be questionable from the perspective of their constitutionality. From another perspective: whether the constitution must be an irremovable obstacle to the restoration of its essence. Consequently: whether the political villainy that the destruction of the state's constitutional order by unconstitutional and anti-constitutional accomplished facts has become must remain permanent simply because the restoration of constitutionality could be linked to the use of those wicked methods that led to the collapse of the constitutional state.

Keywords: Constitution, Poland, Constitutional Tribunal, Rule of law, European values, Constitutional backsliding

I. Preliminary Remarks

The discussion below takes place within the framework of a broader problem entitled Transition 2.0: Addressing Systemic Deficiencies within the European Framework. To begin with, some preliminary assumptions.

First, the consideration will focus on the case of Poland as a member state of the European Union. The process of destroying European rules and values takes place mainly in two countries, namely Poland and Hungary. However, there is a sufficiently serious difference between Poland and Hungary, from the perspective of constitutional regulations, to make the aforementioned limitation.[1]

Second, the process of destroying constitutional and European values in Poland has reached such a level that we are dealing with systemic violations

1 On the constitutional developments in Poland after 2015, cf. in particular: Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019); Miroslaw Wyrzykowski, 'Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland', Hague Journal on the Rule of Law 11 (2019), 417–422; Adam Bodnar. 'Polish Road Toward an Illiberal State: Methods and Resistance', Indiana Law Journal 96 (2021); Aleksandra Kustra-Rogatka, 'The Hypocrisy of Authoritarian Populism in Poland: Between the Facade Rhetoric of Political Constitutionalism and the Actual Abuse of Apex Courts', European Constitutional Law Review 19 (2023), 25–58; Adam Ploszka, 'Shrinking Space for Civil Society: A Case Study of Poland', European Public Law 26 (2020), 941–960.

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of these values, in particular the rule of law and judicial independence.[2] The systemic nature of the violations has been confirmed by the rulings of European courts, that is, the ECJ and ECHR.[3]

Third, the mechanism for destroying the constitutional order in Poland has occurred gradually and consistently through the creation of unconstitutional or even anti-constitutional laws.[4] This process, initiated in the fall of 2015, involves all political constitutional bodies. First and foremost, the parliament, that is, the Sejm (the lower, but decisive chamber in the law-making process) and the Senate in 2015–2019 and the Sejm in 2019–2023. The Senate in 2019–2023, staffed by a small majority of the democratic opposition, opposed, unsuccessfully due to the scope of the powers of each chamber of parliament, the process of destruction of the constitutional state[5].

2 On the similarities and differences between the processes that took place in these countries, cf. in particular: Gábor Halmai, 'The making of "illiberal constitutionalism" with or without a new constitution: the case of Hungary and Poland' in: David Landau and Hanna Lerner (eds), *Comparative constitution making* (Cheltenham: Edward Elgar Publishing 2019), 302–323.; Tímea Drinóczi and Agnieszka Bień-Kacała, 'Illiberal constitutionalism: The case of Hungary and Poland', German Law Journal 20 (2019), 1140–1166.

3 A list of cases concerning the rule of law crisis in Poland, currently under examination, and those in which judgments have been delivered, both by the ECHR and the CJEU, can be read here. https://euruleoflaw.eu/rule-of-law/rule-of-law-dashboard-overview/polish-cases-cjeu-ecthr/. Cf. also: Katarzyna Gajda-Roszczynialska and Krystian Markiewicz. 'Disciplinary proceedings as an instrument for breaking the rule of law in Poland', Hague Journal on the Rule of Law 12 (2020), 451–483; Michał Krajewski and Michał Ziółkowski, 'A. Court of Justice: EU judicial independence decentralized: AK', Common Market Law Review 57 (2020), 1107–1138; Adam Ploszka '(In)Efficiency of the European Court of Human Rights Priority Policy. The Case of Applications Related to the Polish Rule of Law Crisis' in: Adam Bodnar and Jakub Urbanik (eds), *Περιμένοντας τους Βαρβάρους. Law in a Time of Constitutional Crisis* (München: Verlag C.H.Beck 2021), 539–554.

4 Cf. Maciej Bernatt and Michal Ziołkowski, 'Statutory Anti-Constitutionalism', Wash. Int'l LJ 28 (2019), 487–526.

5 Mirosław Wyrzykowski and Michał Ziołkowski, 'Illiberal Constitutionalism and the Judiciary' in: András Sajó, Renáta Uitz and Stephen Holmes (eds), *Routledge Handbook of Illiberalism* (London: Routledge 2022), 517–532.

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II. The Constitutional Authorities Destroying the Constitutional Order

The Sejm has turned into a well-oiled mechanism for mechanically passing laws proposed by the parliamentary majority represented by the Law and Justice party and its ally the Solidarna Polska party.

The second organ of the process of destroying the constitutional order through laws is the state president, who obediently implements the legislative program of the parliamentary majority by promulgating unconstitutional laws.

Finally, the third organ of this closed mechanism is the Constitutional Court, the first victim of the 2015–2016 constitutional crisis.[6] After the statutory regulation of the Court was amended at the end of 2016 and the entire 15-member composition was filled with persons designated by the parliamentary majority, the Constitutional Court changed its constitutional role. From the role of guardian of the constitutional order, it became an important link in the mechanism of destruction of the constitutional state.[7]

The mechanism for creating laws that violate the constitutional order of the state has been closed: the parliament creates an unconstitutional law, which is accepted by the president (promulgation of the law) and confirmed, if necessary, by the Constitutional Court. At the same time, the Court has taken on the bizarre role of "guardian of the Constitution". This is expressed, for example, in declaring unconstitutional a law enacted before 2015 at the request of the parliamentary majority, which could change the challenged law without special difficulties.[8] Political opportunism, and often political cynicism, decides to refer the case to the Constitutional Court and shift political and constitutional responsibility to the Court.

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6 Cf. Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux', Review of Central and East European Law 43 (2018), 116–173.

7 Cf. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule of Law 11 (2019), 63–84.

8 A good example of this is the Constitutional Tribunal judgment of 22 October 2020, ref. K 1/20 issued upon the motion of a group of Law and Justice MPs. In this judicial decision the Tribunal declared unconstitutional the provision of the Act on permitting the performance of abortion for embryopathological reasons. Cf. in more detail: Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The judgment that wasn't (but which nearly brought Poland to a standstill): "Judgment" of the Polish Constitutional Tribunal of 22 October 2020, K1/20', European Constitutional Law Review 17 (2021), 130–153; Tomasz Tadeusz Koncewicz, 'When Legal Fundamentalism Meets Political Justice: The Case of Poland', Israel Law Review 55 (2022), 302–359.

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Another example is the referral of motions to declare a law unconstitutional by the Attorney General, who is also the Minister of Justice and therefore a member of the government. Finally, the third example is motions to declare European law unconstitutional, primarily the Treaty on European Union, the Treaty on the Functioning of the European Union and the European Convention on Human Rights. These motions are filed by the Prime Minister, the Attorney General, or by Supreme Court judges appointed under a new procedure (as of 2018) deemed by the ECJ as not meeting the conditions of judicial independence. All of these requests have been taken into account by the Constitutional Court resulting in the constitution of the creation of legal prerequisites on the road to Polexit.

III. The Status of the President

So let's look behind the main systemic changes in the Polish constitutional order. They will only be named, without detailed analysis, but naming them seems necessary to get as complete a picture as possible of the consequences of the application of the technological sequence that is the indicated legislative procedure.

Therefore, let's consider the status of the President and the status of the Constitutional Court – at the level of constitutional regulations, but, above all, at the level of the formative political practice of the functioning of these constitutional organs of the state in recent years. Attention will be focused on the process of lawmaking and control of the constitutionality of laws.

Function of the President. Poland is a state of parliamentary democracy. The president performs constitutionally defined functions, in particular, in terms of relations with other organs of the state (government, parliament, judiciary), classical powers of the highest representative of the state in international relations, defense and security of the state and supremacy over the armed forces, lawmaking and appointment to certain positions and functions.

The issue of lawmaking, i.e. the president's participation in the legislative process, is crucial to restoring constitutional order. The President has the right to initiate legislation[9], but this is a competence rarely used in constitutional practice. Once a law is passed, it is presented for signature by

9 Article 118 of the Constitution of the Republic of Poland.

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the President, whose signature (or refusal to sign), i.e. the execution of an official act, is an act not subject to the Prime Minister's countersignature. If the President approves the law, he should sign it within 21 days of receiving it and order its promulgation in the official (publication) gazette. However, the president may disapprove the law, and within the period of the aforementioned 21 days he then exercises one of two options for vetoing the law. In the case of constitutional objections, he refers a petition to the Constitutional Court indicating that the law's provisions violate the Constitution. This is a constitutional veto, which has the character of a so-called preventive control of the law's constitutionality. If the Constitutional Court does not share the president's position on the unconstitutionality of the law then the president is obliged to sign it immediately and order its publication. But another situation can also arise, where the president – despite his reservations about constitutionality – signs and promulgates the law and then directs a request for an examination of the law's constitutionality (the so-called follow-up control of the law's constitutionality).[10]

At the same time, the President may have objections to a law submitted to him, only that they are not of a constitutional nature, but of a political nature. He may then return the bill to the Sejm, indicating his objections in the grounds. The Sejm is then obliged to reconsider the law and may reject the president's objections if the law is re-enacted by a 3/5 majority vote in the presence of at least half (i.e. 230) of the statutory number of deputies. After re-enactment of the law, this time by a qualified majority, the president is obliged to sign and promulgate the law.[11]

IV. The Status of the Constitutional Tribunal

The other key body in the legislative process is the Constitutional Court, which rules, among other things, on the constitutionality of laws and international agreements. A request for review of a law or international agreement may be submitted by the President, the Speaker of the Sejm, the Speaker of the Senate, the Prime Minister, 50 deputies, 30 senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the President of the Supreme Audit Office and the Ombudsman. The review initiated by these entities

10 Article 122 of the Constitution of the Republic of Poland.
11 Ibid.

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(subject to the President's constitutional preventive veto) has the character of an abstract follow-up review.[12] The Court's rulings have the character of universality and are final.[13]

One more competence of the Court should be signaled, namely the settlement of competence disputes between the central constitutional organs of the state.[14] The organs indicated in the preceding paragraph, requesting the task of determining the constitutionality of a law or international agreement, with the exception of a group of deputies and senators, the Prosecutor General and the Ombudsman, may apply for the resolution of a dispute. The signaling of this competence of the Court is a consequence of its abuse by political constitutional bodies (actually and realistically the dispute does not exist) to achieve their goals (e.g., attempting to deprive the Supreme Court of the right to interpret the law under the pretext that the interpretation made creates a new legal norm, and that only the parliament has the authority to legislate).[15]

V. The Mortal Sins of the Constitutional Tribunal

For many years, there has been a discussion in Poland about what methods would be required to restore the constitutional order of the state, particularly the rule of law and the independence of the judiciary as the two most damaged pillars of the constitutional state. In fact, the deliberations have been going on uninterruptedly since 2016, and each time a disclaimer is made that the proposals for repair relate to the legal state of affairs at the time and the Court's practice at the time. This means that the same caveat should be made at the time of drafting this text, i.e. the beginning of 2023.

So what is the summary of this element of the destruction of the constitutional state? In other words, what deadly legal sins are on the tribunal's conscience? To put it in the necessary nutshell, the following circumstances should be noted.[16]

12 Article 188 and 191 of the Constitution of the Republic of Poland.
13 Article 190.1 of the Constitution of the Republic of Poland.
14 Article 189 of the Constitution of the Republic of Poland.
15 Leszek Garlicki and Marta Derlatka, 'Constitutional Courts in the abusive constitutionalism' in: Pierre-Alain Collot (ed), *Le constitutionnalisme abusif en Europe* (Le Kremlin-Bicêtre: Mare and Martin 2023), 313–323.
16 Cf. in more detail: Mirosław Wyrzykowski, 'Antigone in Warsaw', in: Marek Zubik (ed), *Human rights in contemporary world. Essays in Honour of Professor Leszek Gar-*

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First, the flaws in the staffing of the Tribunal. Since 2015, the Tribunal has been staffed by three persons who were elected to the seats of duly elected judges, from whom the president, in violation of the Constitution, did not take the oath of office. These persons (and their successors due to the death of the originally illegally elected ones), known as "understudies," are not judges not only from the perspective of the Polish Constitution (relevant Court rulings in 2015 and 2016) as in the sense of European law (ECHR Flor ruling[17]). This means at the same time that 1. the Court's rulings issued with the participation of persons who cannot be treated as judges are flawed, 2. the participation of these persons has caused, as stated by the Supreme Administrative Court, that the Court has been infected with lawlessness and "has therefore entirely lost, in a material sense, its ability to rule in accordance with the law."

The defects in the staffing also apply to the staffing of the position of President of the Court, who was appointed to the position by the President, but without the necessary condition of presenting the relevant resolution of the General Assembly of the Court. Without such a resolution, the act of appointment is defective. Also legally flawed is the situation in which the President of the Court, after the expiration of his six-year term, continues to believe that he will end his function as President on the day his term as a judge ends (i.e., two years longer than the statutorily prescribed term).

Second, surprisingly dramatic are the situations related to the functioning of the Court and the President's violations of its internal rules of operation. To give an example of just a few of these kinds of events, these include arbitrary changes in the panel of judges assigned to hear a case; arbitrary changes in the judge-rapporteur; failure to schedule preparatory hearings for many years to decide a case; failure to schedule a hearing for many years ("freezing" cases); scheduling a hearing without first discussing the decision and reasons at a preparatory hearing; unequal distribution of cases for individual judges; manipulation of the appointment of the panel of judges depending on the nature of the case; repetitive assignment of a particular type of case to selected judges; creating a situation in which more than a year passes between the announcement of the verdict and the

licki (Warsaw: Kancelaria Sejmu. Wydawnictwo Sejmowe Kancelaria Sejmu 2017), 372–437; Mirosław Wyrzykowski, 'The Vanishing Constitution', European Yearbook on Human Rights (2018), 3–46; Ewa Łętowska and Aneta Wiewiórowska-Domagalska, 'A "good" Change in the Polish Constitutional Tribunal?', OER Osteuropa Recht 62, (2016), 79–93.

17 ECtHR, *Xero Flor v. Poland*, judgment of 7 May 2021, no. 4907/18.

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announcement of the statement of reasons, when there is a 30-day deadline for the announcement of the statement of reasons.

Third, the tribunal not only fails to participate in the judicial dialogue, nationally and internationally, but has turned the dialogue into a duel. In the event of a ruling by the ECHR or ECJ that is inconvenient or unfavorable to a political power or to the court itself, a request is immediately made by one of the political entities entitled to initiate proceedings before the court on a particular European court ruling. For example: when the ECHR found that the presence of an "understudy" in the composition of the tribunal's adjudicators results in a violation of the rule of Article 6 of the European Convention, because such a composition of the court results in it not being a court due to a defect in the composition of the bench. Immediately, the Attorney General challenged this ECHR ruling, arguing that it is ultra vires, for the Court is not a court within the meaning of Article 6 of the Convention. The Court expressly granted the Prosecutor's request and – making a kind of coming out, despite the fact that public opinion had for a long time denied the Court the attribute of an independent and undue court – stated that the Court is not a court within the meaning of Article 6 of the Convention (K 6/21)[18].

The second example is the ruling, at the request of the prime minister of the government, on the incompatibility of the European Union's treaty basis with the provisions of the Polish constitution (K 3/21).[19] The judgment denies the principles of the primacy of EU law, enforcement of ECJ rulings and loyal cooperation. Moreover, the judgment is said to overrule the implementation of member state obligations under Article 19(1) of the TEU, in particular the state's obligations to uphold standards of judicial independence and independence of judges and their disciplinary responsibility. I point to this most famous and most curmudgeonly judgment of the court on European law, but after all, it is only the culmination of a

18 Polish Constitutional Tribunal judgment of 24 November 2021, delivered in case ref. K 6/21. On the circumstances of this judgment its causes and consequences cf. Adam Ploszka, 'It Never Rains but it Pours. The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional', Hague Journal on the Rule of Law 15 (2023), 51–74.

19 Polish Constitutional Tribunal judgment of 7 October 2021 delivered in case ref. K 3/21. Cf. more: Mirosław Wyrzykowski, 'Duel instead of duet. An unortodox judicial dialog' in: Claudia Seitz, Ralf Michael Straub and Robert Weyeneth (eds), *Rechtsschutz in Theorie und Praxis. Festschrift für Stephan Breitenmoser* (Basel: Helbig Lichtenhahn Verlag 2022), 161–179.

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series of rulings (again, just by way of example, U 2/20[20], Kpt 1/20[21], P 7/20[22]) a line of jurisprudence contrary to the EU Treaties and the ECJ and ECHR rulings. To sum up, the tribunal has done such a suicidal job of total institutional and moral discredit so effectively that the European Commission initiated anti-violation proceedings in December 2021.[23] This is the first anti-violation proceeding against a member state's constitutional court.[24]

VI. The President as a Detractor of the Constitutional Order

The next constitutional body whose function is to uphold the constitution is the president. As in the case of the court, the president has also not only passively embezzled his constitutional duty to uphold the constitution, but is actively participating in the mechanism for the destruction of the constitutional state. The president's anti-constitutional actions and omissions are, unfortunately, many, and as before I will point out the most blatant examples: refusal to take the oath of office from three duly elected tribunal judges; taking the oath of office from three tribunal judges elected to seats already filled (understudies); legislative initiative to amend the law on the Supreme Court and the National Council of the Judiciary (2017) resulting in the ECJ and ECHR declaring these regulations in violation of the standards of union law; the pardon of two politicians, sentenced to absolute imprisonment for violations of the law, in a situation where the judicial proceedings have not been completed the effect of which is the "cessation" of the obstacle to the appointment of these politicians to the government after the 2015 elections., so much so that the president can only exercise the right of clemency against a person with a final conviction in judicial proceedings. Added to this is the participation in the creation of unconstitutional law in the form of signing and promulgation of dozens of laws that are blatantly unconstitutional.

20 Polish Constitutional Tribunal judgment of 20 April 2020 delivered in case ref. U 2/20.
21 Polish Constitutional Tribunal decision of 21 April 2020 delivered in case ref. Kpt 1/20.
22 Polish Constitutional Tribunal judgment of 14 July 2021 delivered in case ref. P 7/20.
23 Press release: Rule of Law: Commission launches infringement procedure against Poland for violations of EU law by its Constitutional Tribunal, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_7070.
24 Detailed Wyrzykowskiand (n. 19), 167.

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Outlining the status and operation of the designated two constitutional organs of the state was necessary as a framework for discussing a possible transition after a possible change in political configuration as a result of parliamentary elections in the fall of 2023.[25] The assumption of consideration is the assumption of political power by today's parliamentary opposition. The certainty in further considerations is the persistence of the president/constitutional order destroyer until the May 2025 elections, and the preservation of a majority in the composition of the tribunal's judges on the recommendation of the Law and Justice party until 2028.

VII. Scope of Destruction of the Constitution

1. Civil service

The fundamental question posed by legal circles, legal practitioners and theoreticians is the following: if Poland is a constitutionally failed state in 2023 (if it is not already a constitutionally failed state), then will it be possible to restore Poland as a constitutional state, and under what conditions? And the second question is whether it is possible to restore the constitutional state with the exclusive use of measures and mechanisms that correspond to the standards of the rule of law in a situation where the destruction of the constitutional state was followed by unconstitutional and anti-constitutional measures. In other words, would it be permissible to apply, even to some extent, those methods that we condemn, but whose application was, after all, a condition for the destruction of the constitutional order?[26]

For the scope of necessary changes to the Polish legal order will be very broad. Once again, only by way of example, it is necessary to point to those issues that have their anchoring in the Constitution and that have been "deconstitutionalized" as a result of the signalled actions of the constitutional state bodies.

By enacting the Law on Amendments to the Law on the Civil Service and Certain Other Laws on December 30, 2015, the parliament made

25 Mirosław Wyrzykowski, '"Wrogie przejęcie" porządku konstytucyjnego' in: Maciej Bernatt, Agata Jurkowska-Gomułka, Monika Namysłowska and Anna Piszcz (eds), *Wyzwania dla ochrony konkurencji i regulacji rynku. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Skocznemu* (Warsaw: C.H.Beck 2017), 831–853.

26 Mirosław Wyrzykowski, 'Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland', Hague Journal on the Rule of Law 11 (2019), 417–422.

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fundamental changes to the constitutional model of the civil service. The new civil service model, implemented within the express time of 30 days from the date of entry into force, is based on five basic principles, which are the sins of the constitutional system of forming the civil service corps. First, open and competitive recruitment for senior civil service positions has been replaced by appointment, which has the lowest level of protection against dismissal or change in conditions of employment. Second, qualification requirements for applicants for senior civil service positions were drastically reduced. The requirement for a minimum length of service, and the requirement for those appointed to senior positions in the civil service to have any work experience, have been abolished. Knowledge of any foreign language is not required in the foreign service. Thirdly, the competition procedure has been eliminated, which means there is no possibility of controlling access to the civil service on an equal basis. Thus, the mechanism for verifying the correctness of the constitutional requirement to fill senior positions in the civil service in a way that guarantees the professional, reliable, impartial and politically neutral performance of the state's tasks has been eliminated. Fourth, citizens have been deprived of the right to information about vacancies covered by the category of senior positions in the civil service has been eliminated. Information about vacant positions is now not public information and is available only to a very narrow group of politically trusted candidates. The fundamental principles of openness, transparency and equality for selection to the civil service have been violated. Fifth, a violation of the constitutional principle of legal certainty and the legal security of the individual is the regulation providing for the expiration of employment relations with all persons holding senior positions in the civil service after 30 days from the date of entry into force of the law, if new conditions of work or pay are not offered to them before that date.

The conclusion: the civil service has become a spoil of political power and has been turned into a party nomenklatura familiar from the socialist period.[27]

27 Detailed: Mirosław Wyrzykowski, 'Bypassing the Constitution or changing the constitutional order outside the constitution' in: Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems in Central, Eastern and South-Eastern Europe in 1989–2015, Liber Amicorum in Honorem Prof. Dr. Dres. H.C. Rainer Arnold* (Gdansk: Gdańsk University Press 2016), 159–178.

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2. Freedom of media

The media is increasingly subordinated to the Law and Justice party. In 2016, the National Media Council was established by law and delegated to it the powers of the constitutional body that is the National Broadcasting Council with regard to the right to appoint the heads of central and field radio and television units. The National Media Council is composed exclusively of PiS appointees. The practice of the existing public media has shown that they have become government-party media. What's more, the state-controlled oil and energy company Orlen has bought most of the local magazines and newspapers and access to more than 17 million users of Internet portals from a foreign investor operating in Poland.

3. Deformation of judiciary

Another element in the process of degradation of the constitutional state was the so-called reform, and indeed deformation of the judiciary. It took place on four levels. The first concerned the merger of the functions of the Minister of Justice and the Prosecutor General, which resulted in a dramatic change in the figure of the equilateral triangle: court – prosecutor – litigant. The prosecutor general was given unlimited influence over all prosecutors' decisions at both the pre-trial (investigation) and trial stages. The same person supervises the prosecutor's office and supervises the courts.[28] An example of the effect: the initiation of disciplinary proceedings against a judge who disregarded a prosecutor's procedural request.[29] The second level concerned the change in the status of the National Council of the Judiciary as an entity that gives opinions on candidates for judicial positions. The 25-member composition includes 15 incumbent judges elected by peers, i.e., judges of the courts of each judicial level. As of 2018, judges who are members of the Judicial Council are elected by the lower house of parliament, the Sejm. The politicization of the judiciary has reached another stage. The third tier is the changes to the Supreme Court, including

28 Cf. the critical and comprehensive opinion of the Venice Commission: Opinion no. 892/2017 on the Act on the public prosecutor's Office as amended adopted by the Venice Commission at its 113th Plenary Session (Venice, 8–9 December 2017).

29 On the scale of disciplinary proceedings initiated against judges, cf. in more detail: Jakub Kościerzyński (ed.), *Justice under pressure—repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019* (Warsaw: Iusticia 2020).

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the establishment from scratch of two chambers, the Disciplinary Chamber and the Public Affairs Chamber, entirely staffed by party nominees. The judges of these chambers, as confirmed by the ECHR and ECJ, do not meet the conditions of independence and independence, and thus both chambers cannot be recognized as courts under European law.

4. Scope of deformation of judiciary

And there is another aspect of the judicial drama. It concerns the appointment in the last five years of some 3,000 new judges (or promotions of judges previously appointed), whose appointment involved the National Judicial Council shaped by the 2018 law. This law is unconstitutional and inconsistent with the standards of European law and, as such, disqualified as a properly formed element of the mechanism for appointing judges. The appointment of judges in a procedure involving the National Council of the Judiciary is so seriously flawed that judicial participants and judges appointed before 2018 are increasingly effectively challenging their status as judges. In parallel, there is a growing wave of questioning of these persons' fulfillment of the condition of independence and independence, resulting in their exclusion from the bench.

VIII. The Real Risk of a Constitutional Clinch

Crucial to the mechanism of the juridical transit from an authoritarian state, as Poland has become, to a constitutional state again, will be the behavior of the two organs of constitutional bodies, namely the president and the tribunal. So let's look at the "day after..." i.e. a hypothetical situation in which the incumbent opposition wins a majority in both houses of parliament and begins the process of repairing the state. But we should add a fundamental caveat – although the parliament is the first body in the law-making process and its activity is a prerequisite for the start of the legislative procedure, but there are two more bodies involved in this procedure. These are the president, a representative of the political option that is destroying the constitutional state, whose term expires in the spring of 2025, and the Constitutional Court, in which those appointed by the current political power will have a majority until 2028

This means that a constitutional clinch is to be expected, as the transition will involve restoring the constitutional essence of the institutions, mechan-

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isms and ideas that were destroyed with the active participation of the president and the court. So, as some would like, can we hope that after the change of political alignment these two organs of state will "convert" to the Constitution? To do so, they would have to recognize their past practice as harming the fundamental interests of their own state through behavior that is in the nature of a constitutional tort. However, the determination to destroy, the scale of the mockery of constitutional values and the offense to the majesty of the state is so great that it would be naive to expect a change in the behavior of the president and the court. This means that the next premise of this analysis is that the president and the tribunal should be so active that the goal and effect will be to prevent changes that restore constitutional order in Poland.

This is a key assumption because at the level of legislative (statutory) changes in most situations, the restoration of constitutionality will be a relatively easy task. Of course, it is not a matter of applying the construction of actus contrarius, but of systemic regulation of the destroyed institutions and procedures, including appropriate compensation for those harmed by the consequences of unconstitutional law. However, the restoration of the public character of the media (radio and television) or the restoration of the essence of the civil service will be facilitated insofar as there are no – apart from the expected behaviour of the president and the tribunal – constitutional constraints on the legislature at the starting point.

IX. Irremovability of the Judges

However, the situation regarding the judiciary is different, including in particular the situation of judges appointed since 2018 in a manner that is both constitutionally flawed and defective by European law standards. The Constitution provides for irremovability as a guarantee of their independence. Article 180 para 1 of the Polish Constitution provides that "judges shall not be removable," while "recall of the judge from the office, suspension from the office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in a statute." The question then arises how to restore the state of affairs in accordance with the Constitution without violating the constitutional guarantee of the irremovability of judges?

This issue has two aspects. First, the need to create a mechanism that would lead to the rectification of defects in the appointment of a judge.

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Second, it is expedient to differentiate the situation of three groups of judges appointed after 2018. The first issue is relatively easy to resolve. The "Iustitia" judges' association, in preparing a project to repair the judiciary, proposed that all judges appointed from 2018 onward and thus under the opinion and application procedure of the unconstitutional National Council of the Judiciary should be re-evaluated by the council and reappointed by the president. The opinion would be of a substantive nature, also taking into account the correctness of the performance of the functions of a judge since the first flawed appointment. If this concept were adopted then there would remain an organizational problem to be solved: the creation of such an opinion mechanism that would lead to the healing of this fragment of the judiciary in a relatively short period of time.

X. Three Types of Unconstitutional Judicial Appointments

At the same time, two more caveats are necessary. The first concerns the two categories of judges who would be subject to this mechanism of re-evaluation and appointment. This is because it would apply to judges first appointed to the courts of first instance and judges who have been promoted to higher court positions. The former, having completed their law studies and studies and practice as part of their four-year studies at the National School of the Judiciary and Public Prosecution, had, in fact, no other opportunity to begin practicing as judges.

The second group are judges who, knowing that the procedure was flawed, decided to seek promotion to a higher court. In this group there are various judges, both those whose promotion does not raise any doubts due to their professional and moral qualifications. But there are also those who, under normal circumstances, would not have received a positive opinion from the Council and would not have been appointed as a judge. In this entire group of judges, the substantive evaluation of their professional achievements after 2018 will be of particular importance.

The third group is made up of judges appointed for the first time as judges, so much so that they are immediately appointed to the Supreme Court or the Supreme Administrative Court. This includes both judges appointed to the two new Supreme Court chambers created in 2018. (the Disciplinary Chamber and the Chamber for Public Affairs and Extraordinary Complaints) as well as judges appointed to previously existing Supreme Court chambers. All of these individuals were not judges until

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their appointment. They are either former prosecutors (who enjoy full political trust due to their past professional stance) or law faculty professors. These individuals should return to their previous positions, without the possibility of reapplying for the position of Supreme Court judge. Their participation in an unconstitutional procedure, due to the stature of the Supreme Court/Supreme Administrative Court and the expectations of the legal and moral qualifications of Supreme Court judges clearly eliminate them from the possibility of practising as Supreme Court judges.

XI. A Final Caveat

1. General remarks

In view of the constitutional value of legal security and stability of legal relations, despite the defective staffing of the court resulting from the procedure used to appoint judges after 2018, rulings made by or with the participation of these judges remain in force. They enjoy a presumption of legality and legitimacy. The resumption of proceedings in cases terminated by a final judgment issued under the circumstances indicated could only take place in special cases, provided for by the relevant regulations of civil procedure and criminal procedure.

At the same time, the solution indicated above assumes that an adequate legal basis will be created for the procedure for reviewing and re-evaluating and appointing defectively appointed judges. Here, however, serious obstacles are to be expected. The first is the attitude of the president, without whose signature and promulgation of the law, the mechanism cannot function. We are talking not about the status of the president, but about his political attitude of eight years in office. It is difficult to imagine a situation in which laws amending fundamentally unconstitutional laws previously signed by the president will, under changed circumstances, receive his approval. It is possible to imagine a situation in which today's democratic opposition obtains a 2/3 majority of seats which would make it possible to reject the president's political veto. The president is then obliged to sign the bill. But the way is then still open for the president to apply to the Constitutional Court to examine, by way of follow-up control, the constitutionality of the signed law. Just as there always remains the possibility for the president, without signing the law, to refer the law to the tribunal in the mode of preventive control. And yet, the practice of the tribunal's

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operation proves that then such a law would wait a very long time to assess its constitutionality.

Thus, we arrive at another constitutional trap, which is the permanence of the Constitutional Tribunal's staffing, with the majority of judges (until 2028) appointed by the Law and Justice party. I make the assumption, based on observation of the views of the tribunal's judges as expressed in the most important rulings related to the Polish constitutional order, including their understanding of the place and role of international law in Poland (the previously indicated tribunal rulings), that there is no basis for expecting that in the event of a change in the political situation in Poland, these judges will activate that part of their "critical mind" that would allow them to understand their past mistakes and juridical and moral incompetence, expiate and promise to improve. This is a naive assumption in the context of the damage done to the constitutional order by this court and its judges. In this context, it is more likely to assume that they will defend with all the more determination and persistence the lost cause that is their current behavior as judges, and thus as reasonable citizens.

Since the assumption has been made that the president and the tribunal in its current composition, which has a legitimacy in the constitution, will be fundamental obstacles to creating a legal basis for the restoration of the constitutional state, it is necessary to consider possible scenarios for resolving this dilemma. Putting the problem differently, the question of whether constitutional norms are an insurmountable obstacle to restoring the essence of the constitution should be answered.

Let us therefore consider the problems that arise from the constitutional guarantees of the non-removability of judges, a principle that also applies to tribunal judges[30]. The first issue is the status of understudy judges, i.e., judges who were elected sworn in when parliament duly elected three judges, but the president refused to take the oath of office from them. It seems that the solution to this problem is easier than the next, since these persons were not judges. This follows from both the rulings of the Polish Constitutional Court and the Xero-Flor v. Poland ruling issued by the ECHR. In such a situation, the President is authorized and obliged to accept the oath of office from duly elected judges. If any of the judges there

30 Marcin Matczak, 'Ktoś, kto nie odróżnia Adolfa od Donalda, może nie widzieć różnicy między puczem monachijskim a rtęciowym', Gazeta Wyborcza, 26.08.2022,https://wyborcza.pl/magazyn/7,124059,28827386,ktos-kto-nie-odroznia-adolfa-od-donalda-moze-nie-widziec-roznicy.html.

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were not interested, after waiting more than 8 years to be sworn in (age, health or other personal reasons), then the Sejm is obliged to elect three judges. Those who have not been duly elected are not entitled to the status of either a judge or a retired judge. They have the right to return to their previously held position (all of them are law professors) and continue their career path.

The remaining judges, 12 out of 15, were duly elected. The behavior of some of them drastically violated the standards of judicial ethics, and in such a situation it would be appropriate to assess their conduct under the disciplinary liability procedure. However, the disciplinary procedure for tribunal judges assumes that both the disciplinary ombudsman and the disciplinary court are composed exclusively of tribunal judges, and the disciplinary court applies the provisions of the Code of Criminal Procedure. The problem, however, is that in its response to the ECHR's ruling in Xero-Flor v. Poland, the tribunal stated that it is not a court within the meaning of Article 6 of the European Convention.[31] If the tribunal is not a court, then – consequently, even more so – it cannot be recognized as a court of disciplinary composition. It will have no legal effect in a situation where, for example, it ruled on the punishment of the judge's removal from office.

2. Disciplinary responsibility of the judges of the Constitutional Tribunal?

One proposal is that the panel of judges would be composed of drawn retired tribunal judges, but this concept would first have to become law, which neither the president nor the tribunal itself, as a result of a review of the constitutionality of such a law, would certainly not allow.

The idea that all the tribunal's judges violated the law in such a way that they knowingly sat on a panel of understudy judges, and thus participated in the issuance of a ruling by a panel that was not a tribunal, and thus violated the law applicable to them[32], is under consideration.

This is a political strategy adopted by the tribunal's judges, the features of which are 1. The recognition of the primacy of politics over the law, including the constitution; 2. It is carried out deliberately and intentionally,

31 See supra n. 16.

32 Jerzy Zajadło and Tomasz T. Koncewicz, 'Wykładnia wroga Konstytucji. Odbudowa polskiego Trybunału Konstytucyjnego jako przestroga I wierność wartościom Konstytucji', https://monitorkonstytucyjny.eu/archiwa/24606.

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to satisfy the political power's expectation that any violation of the constitution should be subsequently accepted and confirmed by the tribunal as a constitutional action; 3. The rejection of all previous rules of law interpretation and the use of interpretive tricks that create the appearance of rationality and interpretive correctness.

But such a qualification of their behavior would have to be expressed in a decision of the disciplinary court and an order of removal from office. The position of both legal analysts and the recent justification of the Supreme Administrative Court's ruling that, through the participation of the understudies, "the tribunal has been infected with lawlessness, and has entirely lost its ability to rule in accordance with the law"[33] is convincing, but from this accurate observation neither the invalidity of the tribunal's rulings nor, naturally, the automatic liability of the judges leading to their removal from office. We return to disciplinary proceedings with all the baggage of the objections mentioned.

The conclusion is rather grim: the mechanism of disciplinary responsibility for the accountability of judges currently serving on the tribunal is an illusory hope for solving the problem of their continuance on the tribunal.

3. State-organized corruption

In the case of the liquidation of the unconstitutional Disciplinary Chamber of the Supreme Court and its transformation into the equally unconstitutional Chamber of Professional Responsibility, the mechanism used was no longer that of a golden but a platinum umbrella. Well, the judges of the liquidated Disciplinary Chamber, an instrument of harassment of independent judges, were offered either the opportunity to continue working in another chamber of the Supreme Court, or to retire. The platinum umbrella consists in the fact that those who decide to retire (5 of the 11 decided to be retired) receive 100 % of the salary of a Supreme Court judge until the age of 65, and after the age of 65 75 % of the salary, i.e. an "ordinary" judicial pension. This solution is wrong from every point of view, violates the principles of social justice and is immoral. A reward for obedience to political power and for the harm done to both individual judges and the administration of justice. The old Roman principle of *ex iniuria ius non oritur* has been forgotten.

33 Supreme Administrative Court judgment of 16 November 2022, delivered in case ref. III OSK 2528/21.

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But since such a step has already been taken, it cannot be ruled out that a similar proposal may also be formulated for the tribunal's judges: resignation from the continuation of the status of active judge and retirement. The lesser of two evils?

So let's look at the second concept of solving the problem which is the constitutional court as an obstacle to the restoration of the constitutional state. This is the radical concept of "zeroing out" or otherwise extinguishing the current composition of the tribunal.[34]

Before I present the details of this concept, I would like to point out what the two concepts have in common – as a starting point: the first is the dismissal of understudies and a change in the rules of disciplinary proceedings against the tribunal's judges, and the second is precisely the zeroing out/extinguishing of the tribunal. This is an assessment of the situation, which is the starting point for the concept of rectifying the existing state of affairs. For the constitutional court has turned from a guardian of the constitution into an instrument for the implementation of political ideas that are – in the sphere of systemic issues – unconstitutional and anti-constitutional in nature. The Court in its current composition, so organized and providing numerous examples of unconstitutional and politically instrumentalized jurisprudence, is an insult to the rule of law (KZ). There has been a contamination of the entire tribunal and the entire jurisprudence, as understudies or non-judges have participated in the panels.

4. Excessive radicalism?

At the same time, the concept of zeroing out is based on additional arguments. It does not accept the likelihood that judges will adapt to the new constitutional order and change their juridical and moral bones. It also treats as unlikely the possibility that they will be held disciplinarily liable, both from the point of view of the possibility of qualifying their conduct as a disciplinary tort, and the participation of retired tribunal judges in the panels of the disciplinary court.

Zeroing out the tribunal is an attractive concept, as it removes the most serious obstacle to restoring constitutionality. At the same time, it is a risky concept, because it is associated with a violation of the existing principles

34 Wojciech Sadurski, 'Zerwijmy z prawniczym pięknoduchostwem. Polemika z Marcinem Matczakiem', Gazeta Wyborcza, 29.08.2022, https://wyborcza.pl/7,75968,28843876,zerwijmy-z-prawniczym-pieknoduchostwem-polemika-z-marcinem.html.

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of the judiciary, including the tenure of court judges and the irremovability of judges. Admittedly, the destroyers of the constitutional state have violated many other constitutional norms and values, but they will always be able to argue: look, those who say they are restoring the constitutional state are doing so by violating the Constitution. This is part of the political discourse. At the same time, there is no doubt that this argument will be used by those who have built a mechanism to protect them from accountability. This is also the trap, this time concerning the legitimacy of pro-constitutional actions.

XII. The Higher Loyalty

I have tried to show the state of constitutional affairs in Poland in 2023 from the perspective of a possible change in the political alignment after the elections. However, it is necessary to add a few caveats. The first is related to the experience of recent years, namely, the description of the situation made at a given moment will in all likelihood not correspond to the reality at the time when the ordering of the state would take place. Second, the situation created in recent years is an extraordinary situation, and all indications are that ordinary legal instruments will not be effective in achieving the intended goal. An extraordinary situation requires extraordinary measures. In full knowledge that they will be precedent-setting and will be associated with high costs in all dimensions. It should be recognized that we are dealing with an extraordinary unconstitutional state, and an extraordinary state requires extraordinary measures. The higher loyalty of loyalty to the Constitution is an argument that legitimizes extraordinary measures, including when their legality may be in dispute. This dispute will continue uninterrupted. And it will take place within the framework set by the dogma of the various legal disciplines. The end result, however, will be the creation of a new dogmatics, part of which will be the assumption that one must choose between lesser and greater evils. There are no free lunches. This is especially true when the ghost of an authoritarian state stands at the door of your home.[35]

35 Mirosław Wyrzykowski, 'The Ghost of an Authoritarian State Stands at the Door of Your Home', VerfBlog, *26.02.2020,* https://verfassungsblog.de/the-ghost-of-an-authoritarian-state-stands-at-the-door-of-your-home/, DOI: 10.17176/20200226–105246–0.

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Asymmetric Rupture: Stabilizing Democratic Transitions 2.0 with Transnational Law

Kim Lane Scheppele

I. The Transnational Law of Democratic Transitions 1.0 250
II. The Challenges of Transition 2.0 256
III. Enforcing Directly Applicable Transnational Law 261
IV. Erga Omnes Effects of Transnational Law 266
V. Supererogatory Effects of Transnational Law 270
VI. Asymmetric Rupture: Breaking the Law to Establish the Rule of Law in Recovering Democracies 273

Abstract:
Transitions away from autocratic capture of formerly democratic states in Europe will be different from the transitions of these states to democracy out of 20th century dictatorships. That is because the autocrats of today will still be at the table – backed by their supporters – and will not give up power voluntarily, in contrast to their predecessors. Moreover, today's backsliding democracies are now members of clubs that they only dreamed of entering at the time that the 20th century dictatorships collapsed. But both of these differences can be turned into advantages by deploying as a guide to democratic transformation the hard and soft law of European institutions that now binds these countries. If the new democrats first comply with the directly binding law of the transnational web of institutions that their countries have joined, then consider the *erga omnes* effects of a broader swath of this law and finally take on board supererogatory commitments from the soft law that these transnational bodies offer, newly restored democracies can restore the 'rule of law writ large,' even if it sometimes means violating 'the rule of law writ small.' Deploying external standards like these prevents domestically aspirational autocrats from gaming the rules because they cannot control those rules. As a result, Transitions 2.0 can use European rule of law to stabilize domestic rule of law in formerly rogue states.
Keywords: International law; transnational law; enforcement; international actors; ruptures; discontinuity; values; Hungary; Poland; European Court of Human Rights; Court of Justice of the EU; recovering democracies

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I. The Transnational Law of Democratic Transitions 1.0

Twentieth century dictatorships left such a devastating trail of horror and death in their wake that they provoked the creation of new international organizations and new international law, all dedicated to the proposition of 'never again.' Globally, the United Nations emerged from the rubble of WWII, devoted to the stabilization of international borders and the creation of mechanisms for preventing and punishing transgressions. The great human rights conventions – from the Universal Declaration in 1948 to the twin conventions honouring civil and political rights and then social, economic and cultural rights – were born out of the recognition that the tactics of twentieth century dictators must never be repeated. The rights in those conventions are practically checklists that protect against the specific atrocities that twentieth century dictators had committed. International humanitarian law, already spurred on by the savagery of the First World War, was strengthened after the Second World War, eventually being realized through a set of provisional courts and then a permanent court for trying war crimes. The architecture of international law and international organizations that we see today was shaped by a rejection of these twentieth century dictatorships that shook – and almost destroyed – the world.

The Second World War pushed Europe to develop a set of interlocking institutions to guarantee the peace, rebuild from the catastrophic destruction and to ensure the recognition of democracy and human rights as the core values of the devastated continent. The formation of the North Atlantic Treaty Organization (NATO) was to ensure Europe's security along with the later-formed Organization for Security and Cooperation in Europe (OSCE).[1] The creation of the Coal and Steel Community – which eventually grew up into the European Union (EU) – provided a framework for economic cooperation.[2] The Council of Europe (COE) with its increasingly powerful human rights court was to provide support for democracy and human rights.[3] Slightly different sets of countries joined each club, but the overlap was sufficient to create both the sense and the reality of a Europe knitting itself back together after being torn so violently apart.

1 Jane E. Stromseth, 'The North Atlantic Treaty and European Security After the Cold War', Cornell Int't. L.J. 24 (1991), 479–502 (480–483).

2 Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union* (New Haven: Yale University Press 2013).

3 Martyn Bond, *The Council of Europe: Structure, History and Issues in European Politics* (New York: Routledge 2012).

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When the last of these twentieth century dictatorships in Europe finally fell, first loosening its grip on its 'satellite' states in 1989 and then falling apart altogether in 1991, the democratically aspirational governments emerging out of the collapse of the Soviet Union found themselves in the midst of the rich tapestry of international and transnational resources which they used freely as they rejected their authoritarian pasts and built a new democratic future in which governments would finally respond to the will of their peoples and guarantee the protection of human rights. International and transnational law – made more accessible through then-new institutions like the Venice Commission[4] – guided transitions from dictatorship to democracy.

The newly independent countries of 'Eastern Europe'[5] eagerly joined the Council of Europe, the first international organization on offer.[6] Becoming a signatory state to the Council of Europe meant these new democracies were subject to the jurisdiction of the European Court of Human Rights (ECtHR) as well as to a number of international agreements designed to protect rights in more specific ways. The new constitutional courts of the region – and almost all of the new democracies growing out of the former Soviet Union established constitutional courts – looked to ECtHR

4 The European Commission for Democracy through Law (the Venice Commission) was founded in 1990 as a Council of Europe body. Its founding charter states in Article 1(1) that the Venice Commission 'shall be a consultative body which co-operates with the member states of the Council of Europe and with non-member states, in particular those of Central and Eastern Europe. Its own specific field of action shall be the guarantees offered by law in the service of democracy. lt shall fulfil the following objectives: a) the knowledge of their legal systems, notably with a view to bringing these systems closer; b) the understanding of their legal culture; c) the examination of the problems raised by the working of democratic institutions and their reinforcement and development.' Committee of Ministers, Council of Europe, Resolution (90) 6 on Partial Agreement Establishing the European Commission for Democracy Through Law (10 May 1990), https://rm.coe.int/on-a-partial-agreement-establishing-the-europe an-commission-for-democr/1680535949.

5 The states that had been under Soviet influence, including those that had constituted the Soviet Union itself, were collectively 'Eastern Europe' and at the start of this transition process, it wasn't clear how many would become integrated into the European trio of NATO, COE and EU. In the end, the states that came to call themselves 'East-Central Europe' were admitted to all three, while the states to the east of them were only integrated into the COE. Through this chapter, I will refer to all state that had been part of the Soviet orbit as Eastern Europe and the states that were integrated into NATO and the EU as East-Central Europe.

6 Mary Elise Sarotte, *1989: The Struggle to Create Post-Cold War Europe* (Princeton: Princeton University Press 2009).

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jurisprudence for how to understand the rights newly written into their new constitutions. In fact, many of those rights in the new constitutions were copy-pasted straight from the European Convention or the other international human rights treaties that Soviet-dominated countries had made a practice of signing to look better than they were. The ECtHR provided guidance to the newly formed constitutional courts, which both stabilized their jurisprudence by linking it to an institution that their own governments could not control and also gave their constitutional courts a rich history of case law that they could use to build their own.[7]

NATO membership typically came next for these states in Transition 1.0.[8] Because it worked so invisibly, I think we tend to underestimate the difference NATO made in the development of democracies in the region. NATO took what had been Soviet-trained militaries and embedded them in a transnational alliance devoted to ensuring civilian and constitutional control of the armed forces. Unlike in Latin America, where an international military alliance never developed, the countries of East-Central Europe have not generally had to worry about militaries overthrowing civilian governments or upending delicate constitutional balances. For all of the criticisms one might make of NATO (for example, NATO bombing of Serbia almost immediately after Hungary entered certainly caused Hungary second thoughts),[9] integration of the region's militaries into a transnational alliance has tamped down the threats that these militaries might well have posed to fragile new democracies.

The Conference on Security and Cooperation in Europe (CSCE) was institutionally a latecomer to the European family of transnational organizations, founded only in 1975. But this institution, renamed the Organization for Security and Cooperation in Europe (OSCE) in 1995, was created to provide a human rights framework for the states under Soviet influence and a forum for Eastern and Western Europe to engage. With the end of the Cold War, OSCE has expanded its mandate and its powers to become an

7 At both Constitutional Courts where I worked during this democratic transition (Hungary from 1994–1998 and Russia in 2003), offices within those courts were tasked with summarizing the relevant ECtHR jurisprudence on point for every major case so that the national courts could incorporate this jurisprudence into their decisions.

8 James M. Goldgeier, 'NATO Expansion: The Anatomy of a Decision', Wash. Q. 21 (1998), 83–102.

9 William Drozdiak, 'NATO's Newcomers Shaken by Airstrikes', Wash. Post, 12 April 1999, https://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/stories/nato041299.htm.

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important human rights monitor for its 57 Member States and 11 Partner States. Its influential Office for Democratic Institutions and Human Rights (ODIHR) became perhaps the world's premier election monitor. OSCE was the only one of the transnational institutions whose East European members joined at the time of the organization's founding and as it has grown and deepened its commitments to democracy, the rule of law and human rights, it has brought these countries along with it.[10]

Finally, the EU. While the post-communist states of Eastern Europe may have wanted to join the European Union first, since they saw future economic prosperity as invariably following from membership, EU accession was often the last step in joining the full framework of European institutions on offer. The big bang accession in 2004, fully 15 years after most of the countries that entered in that year emerged from Soviet domination, required a long period of tutelage, during which time the candidate countries not only had to meet the Copenhagen Criteria demonstrating that they had established both democracies and free market economies, but also had to prepare their national law to receive the whole bulk of the *acquis communautaire*.[11] Of the quartet of European institutions, the EU's legal system reaches the deepest into national legal systems through the principles of primacy and direct application of Union law. And the EU has the most wide-ranging set of competencies to ensure Member States abide by their treaty obligations.

If we think of these transitions from communism to capitalism and from dictatorship to democracy as Transition 1.0, then it is clear that the web of European institutions played a vital role in moving these transitional states toward democracy and the rule of law. In fact, if anything, the argument at the time was that these new democracies had been stunted in their growth precisely because they were incorporated into the COE, NATO, OSCE and the EU so quickly that they never had time or experience to decide whether their peoples were really committed to all of the rules of all of those organizations.[12] If law comes ready-made from the international

10 It's worth recalling that Russia, newly liberated from the Soviet Union, proposed that CSCE become the defense cooperation organization for Europe since the end of the Cold War meant (at least to Russia) that there was no longer a need for NATO. Sarotte (n. 6).

11 Christophe Hillion, 'The Copenhagen Criteria and Their Progeny' in: Christophe Hillion (ed.), *EU Enlargement* (Oxford: Hart Publishing 2004).

12 Kristi Raik, 'EU Accession of Central and Eastern European Countries: Democracy and Integration as Conflicting Logics', E. Eur. Pol. & Soc. 18 (2004), 567–594.

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organizations that a country joins, does that country properly learn how to engage in democratic law-making?

As we can now see in hindsight, the oversight provided by the COE, NATO, OSCE and the EU as they guided these transitions did not probe deeply enough inside each country to understand that the transitions were in many ways superficial.[13] Former communist elites grabbed much of what was on offer in the mass privatizations that occurred, generating resentment from those who never had a chance to benefit from the spoils of regime change.[14] Inequality rocketed through what had been relatively equal societies, as publics were told through the Washington Consensus of the day that massive redistribution was not consistent with mandatory capitalism.[15] Societies that had experienced a fair amount of solidarity during the communist time quickly divided into camps dominated by cosmopolitans on the one hand, who welcomed the changes that finally made them global citizens, and nationalists on the other hand, who felt that they finally had the opportunity to recover their countries' pre-communist values but saw that all they had finally clawed back was being abandoned yet again as their countries lurched into transnationalism.[16] Throughout the region, the precise detail of what signing onto these transnational institutions and their laws meant was hardly ever debated. What was common instead was the near-universal desire among East Europeans that their newly independent states would become 'normal countries.'[17] Being fully accepted members of the quartet of European institutions was part of what it meant to be normal.

Fast forward one decade into EU accession and several of these post-communist states are running afoul of the rules of the quartet. Hungary has fallen from being a consolidated democracy in the 1990s through the status of flawed democracy in the 2000s until now it is fully a hybrid regime

13 Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer 2008).

14 Gábor Scheiring, *The Retreat of Liberal Democracy: Authoritarian Capitalism and the Accumulative State in Hungary* (London: Palgrave 2020).

15 Dani Rodrik, 'Goodbye Washington Consensus, Hello Washington Confusion?', J. Econ. Lit. XLIV (2006), 973–987; Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (New York: W.W. Norton & Company, 2012).

16 Federico Vegetti, 'The Political Nature of Ideological Polarization: The Case of Hungary', Annals AAPSS 681 (2018), 78–96.

17 Andrei Shleifer and Daniel Treisman, 'Normal Countries: The East 25 Years After Communism', Foreign Aff. (2014), https://www.foreignaffairs.com/articles/russia-fsu/2014-10-20/normal-countries.

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with autocratic elements dominating democratic ones.[18] If a consolidated democracy is a country in which democracy is 'the only game in town,'[19] a hybrid regime is one that goes through the motions of democracy (holding elections, convening parliaments) but that offers no hope that the public can get rid of leaders it no longer wants through peaceful means.[20] Poland, which was the first to break through Soviet control but the last in the region to enact its new constitution, has a government that has disabled its Constitutional Tribunal, compromised its independent judiciary and now flaunts its hard-won constitution with openly anti-constitutional behaviour.[21] While it is not hopeless that the opposition can still win elections in Poland, they are playing on a decidedly non-level playing field. Romania has persistent rule-of-law problems[22] but so far has pulled itself back from the autocratic brink several times.[23] Bulgaria remains stuck at the bottom of almost every ranking in the EU that measures democratic health, without ever falling fully into dictatorship.[24]

Lest we think that autocratic threats are unique to the countries that experienced Transition 1.0 on their way to joining the EU, however, some

18 The Varieties of Democracy project, V-Dem, downgraded Hungary to an 'electoral autocracy' in 2020, explaining, 'Hungary is no longer a democracy, leaving the EU with its first non-democratic Member State.' Varieties of Democracy Institute, *Democracy Report 2020: Autocratization Surges – Resistance Grows* (2020) (4), https://v-dem.net/documents/14/dr_2020_dqumD5e.pdf. Freedom House also downgraded Hungary from a democracy to a 'transitional/hybrid regime' in 2020, explaining that Hungary's decline has been the most precipitous ever tracked in the Nations in Transit Report on post-communist states. Hungary had been one of the three democratic frontrunners as of 2005, but in 2020 it became the first country to descend by two regime categories and leave the group of democracies entirely. Freedom House, *Nations in Transit 2020: Dropping the Democratic Façade* (2020), 2, https://freedomhouse.org/sites/default/files/2020-04/05062020_FH_NIT2020_vfinal.pdf.

19 Alfred Stepan and Juan Linz, 'Toward Consolidated Democracies', J. Democracy 7(2) (1996), 14–33 (15).

20 Kim Lane Scheppele, 'How Viktor Orbán Wins', J. Democracy 33(3) (2022), 45–61.

21 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019). See also the essay by Miroslaw Wryzykowski in this volume.

22 In ECJ: *Euro Box Promotion e.a.*, judgement of 21 December 2021, Joined cases nos. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034, the Court of Justice instructed the ordinary courts to disapply decisions of the Constitutional Court where those decisions violated EU law.

23 Vlad Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', I.CON 13 (2015), 246–278.

24 Evgenii Dainov, 'How to Dismantle a Democracy: The Case of Bulgaria', Open Democracy, 15 June 2020, https://www.opendemocracy.net/en/can-europe-make-it/how-dismantle-democracy-case-bulgaria/.

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of the stalwarts of the EU – France, Italy, Spain and even now Sweden, Finland and the Netherlands – are just one bad election away from having autocratic parties dictating substantial swaths of public policy and aspiring to move their countries away from their European constitutional-democratic commitments. The UK, which left the EU because it was unwilling to be constrained by EU rules, is now also eyeing departure from the Council of Europe, amid deep instability in its own domestic constitutional order. So while the post-communist states are on the forefront of the European slide from democracy to autocracy, even the established democracies are not rock-solid. It has become harder for the self-confident democracies to lecture the democratic newcomers about the importance of constitutional values when they themselves are not invariably honouring them.

II. The Challenges of Transition 2.0

Transition 2.0 – from autocracy to democracy *within* European institutions – comes at a time when those transnational institutions are being challenged all around. It will be a more difficult transformation in many ways than was Transition 1.0.

Looking back, we can now see that Transition 1.0 was relatively easy despite all of the dislocations and difficulties it posed for those who went through it. The authoritarian party that had monopolized government agreed to put itself up to a vote, and when it lost (and sometimes even before it lost), it voluntarily agreed to give up power.[25] There was no real challenge after those first elections from a party determined to stay in office and there was no significant support in the population for maintaining the previously autocratic status quo. The only way out was forward, and everyone knew that 'forward' meant changes in a constitutional and democratic direction. At the end of the communist period, dictatorship as a set

25 Of course, part of what animates the governments in Hungary and Poland today is their conviction that the 'post-communists' – meaning the successor people and parties to the communist parties – are still pulling the strings behind the scenes and threatening to upend the new people's democracies. Empirically, this accusation has little support. In Hungary, if anything, those who had been openly affiliated with the Hungarian Socialist Workers' Party (MSzMP) are more likely to be found in the ranks of Fidesz (the current governing party) than in the ranks of the technical successor party, the Socialists. In Poland, the 'post-communists' seem to include all those on the left according to those on the right.

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of practices and policies faded away as if it had never been there. And there was only one exit door from communism that came well marked.

In Transition 1.0, therefore, those who had supported the *ancien regime* accepted their defeat as historic and complete. The future of Eastern Europe was inevitably enmeshed in the European quartet of transnational institutions with conditions for membership that the East European states were eager to accept. As a result, these newly independent states committed themselves to democracy, human rights and the rule of law under constitutional government. The realization of these goals may have been bumpy, incomplete and fragile, but there was little disagreement on where the transition was going or about what it would take to get there.

Transition 2.0 is completely different. Those who have tried to destroy a constitutional-democratic order within their states still have substantial support in their publics and these leaders will not simply walk away. In any Transition 2.0, these anti-constitutional powers will be still forces to be reckoned with. If Transition 1.0 started from political competition among parties that were all committed to democracy and human rights, Transition 2.0 doesn't have that advantage. Transition 2.0 will have to be navigated with the autocrats still at the table with their substantial number of supporters behind them.

In addition, states going through Transition 1.0 were still on the outside of European institutions clamouring to get in. Transition 1.0 was therefore guided by conditionalities attached to admission to these exclusive clubs. Because the recently transformed autocracies were outside the institutions and the existing members were solid democracies, Transition 1.0 featured a great deal of unity among the states already in those clubs on what those prices of admission were. Those seeking to get in knew that they were rule-takers in this process and they wanted entry into the exclusive clubs so much that they were willing to accept the rules on offer as the price of admission.

But Transition 2.0 starts with the troublemakers inside the club instead of banging on the doors to enter. As a result, the rogue states can lobby from the inside to lower the standards of club membership even while they are calling the bluffs of their colleagues by breaking the rules of the club in their home states and daring their colleagues to stop them. Any transitional guidance now must attempt to prevent the corruption of transnational rules that backsliding states are eager to undermine, and this guidance will therefore also have to deal with the potential corruption of

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the transnational institutions themselves as they seek to enforce their rules because the rulebreakers have a vote at the table. We saw a preview of this in the attempts by Hungary and Poland to use their veto power on the Multi-Annual Financial Framework (EU budget) in order to block the adoption of the Conditionality Regulation (conditioning the receipt of EU funds on Member State compliance with the rule of law) at the end of 2020.[26] Because the Conditionality Regulation did not require unanimity to pass, the rogue states did not have the power to block its enactment. But the EU budget, going through the legislative process at the same time, did require unanimity so the rogue states used their vetoes over the budget to extract concessions on the Conditionality Regulation. The European Council made a series of unholy bargains to unblock these vetoes, which resulted in the Conditionality Regulation not being used to stop the flow of funds to rogue state Hungary until nearly two years after it came into force which was (conveniently enough for the Hungarian government) after its fourth consecutive re-election. Plus, the European Council violated European law as it did this by inserting itself into the legislative process, even if they did it in order to try to enforce European law in the long run.[27]

Transition 2.0, therefore, starts with very different challenges than Transition 1.0.

All that said, Transition 2.0 starts with an important advantage. Because the rogue states are now Member States of the European Union and signatories to Council of Europe treaties, the binding rules of those two transnational institutions in particular can be used to bring wayward states back into compliance through disciplinary procedures organized from inside the institutions. As a first matter, the rogue states will have to comply with EU and COE law as it applies directly to them. For example, they must honour the decisions of the ECJ and ECtHR that have already been made in cases involving their states, something they have so far been unwilling to do in the spirit of sincere cooperation.[28] They therefore much engage in what

26 Daniel Boffey, 'EU Faces Crisis as Hungary and Poland Veto Seven-Year Budget', Guardian, 16 November 2020, https://www.theguardian.com/world/2020/nov/16/eu-hungary-veto-budget-viktor-orban.

27 Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising *on* the Rule of Law', Verfassungsblog, 13 December 2020, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

28 For example, on 17 February 2023, the Polish government notified the ECtHR that it will not honor judgments of that court. 'Poland Informs European Court It Will

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I will call *direct compliance*. Then, as I will argue, Transition 2.0 should build out from there to bring Member States into compliance with Union and ECHR law more generally, not just in the cases that have already been directly brought against them but also in the spirit of the law that applies to all members of these organizations. I call this *erga omnes compliance*. Finally, I will argue that rogue states should accept the transnational principles of the quartet beyond the boundaries strictly required in a binding sense, by applying these principles to domestic arrangements that normally transnational law would not reach. I call this *supererogatory compliance* with European values.

As states go through Transition 2.0 to restore democracy, human rights and the rule of law, they may find that honouring transnational law requires breaking national law. Since the autocrats who are being displaced in Transition 2.0 have broken the letter and/or the spirit of transnational law in order to concentrate power in their hands, these autocrats and their supporters can (and surely will) say that rupturing national law to restore democratic institutions is simply a political tit-for-tat that is no different from what they did. The autocrats will argue that the democrats are violating the domestic legal order simply to insert their political preferences, just as the democrats once accused the autocrats of having ruptured the legal order by 'careening' into a democratically precarious situation.[29]

As I will argue here, however, rupturing a domestic legal order in order to bring it into line with European principles is not the same rupturing a domestic legal order to move it away from European principles. That is because the rule of law must be understood across multiple levels of legality. The domestic legal order may have its own integrity and rules of the game constituting a coherent rule-of-law-based system, but so does the transnational level. When the domestic and transnational levels embrace contradictory principles, tensions erupt in the rule of law as actors bound by both levels of law are pulled in different directions by contradictory

Not Comply with Order to Reinstate Judges', Notes from Poland, 17 February 2023, https://notesfrompoland.com/2023/02/17/poland-informs-european-court-it-will-not-comply-with-interim-order-to-reinstate-judges/

29 Dan Slater has usefully developed the concept of 'democratic careening' to cover the situation in which governments engage in 'a variety of unpredictable and alarming sudden movements, such as lurching, swerving, swaying, and threatening to tip over. It suggests a bandying back and forth from side to side, with no clear prospect for steadying in sight. It thus captures rather well the sense of endemic unsettledness and rapid ricocheting that characterizes democracies that are struggling but not collapsing.' Dan Slater, 'Democratic Careening', Wld. Pol. 65 (2013), 729–763.

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obligations. When the domestic and transnational levels are guided by principles that are in harmony with each other, then the rule of law operates as it should, by bringing legal certainty to daily life. Domestic legal changes that break with the transnational order in which a state is enmeshed will eventually cause disruption and disorder in the set of legal obligations to which people and institutions are subject. Domestic legal changes that align legal obligations across these levels will restore the rule of law.

As a result, ruptures in legality – changes that may be formally illegal when they are carried out – may be justified when they bring a domestic legal order into compliance with transnational principles. Because these ruptures restore legality at the transnational level, they do not violate the rule of law in a broader sense. Ruptures through which the national legal order broke with transnational legal commitments in the first place in order to enact contrary legal rules are repaired when the state in question moves back into compliance with transnational law. In short, I will be arguing in favour of *asymmetric rupture*. Even though a pro-democratic rupture may look formally similar to an anti-democratic rupture, they can be clearly distinguished by their relationship to the values embedded in transnational law. Pro-democratic national legal ruptures may be justified as compliant with 'the rule of law writ large' if they bring the states in question back into compliance with transnational law even if they violate 'the rule of law writ small' by breaking anti-democratic national law when they do so. Anti-democratic ruptures may have been strictly legal in national law but because they rupture the relationship between national and transnational law as they are being brought into force, breaking the laws that were put in place in this manner should not be considered rule of law violations.

In this volume, we are asked to assume that the democratic opposition has won an election in a democratically backsliding state in the European Union and that it is now confronted with the question of how to restore democracy, human rights and the rule of law in their country. I have my doubts about whether it would be possible to change the government of Hungary through elections, since the election system has been so distorted that it guarantees victory to the governing party almost no matter what its level of public support is.[30] Between being able to change the rules, threaten voters with dire consequences, hand out favours and generate fake votes through an election machinery that it controls, the governing party in Hungary will almost surely never allow itself to lose an election. In

30 Scheppele (n. 20).

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Poland, the government has not yet made it impossible for the democratic opposition to win elections, but of course, the essence of autocratic power is its ability to change the rules at any time to accomplish whatever it wants and so it is not beyond imagination that the current Polish government will try to rig the rules to make their own re-election more likely. That said, it is nonetheless a useful exercise to imagine how a new government in a damaged democracy can act to restore democracy, rule of law and human rights, once it is in power. Just how a democratic successor government gets into power through rigged election rules is another topic. For now, let's just assume that they can.

III. Enforcing Directly Applicable Transnational Law

Once a new government is in power, how should it begin the transition back to constitutionalist norms? States that are members of the family of European organizations – the EU, Council of Europe, the OSCE and NATO – are already enmeshed in a dense web of legal obligations that were designed to promote democracy, human rights and the rule of law. In the case of the EU, the principles of direct effect and primacy mean that Union law is already binding inside the national legal orders of its Member States. With the COE, decisions of the ECtHR are binding in the narrow sense that the just satisfaction awarded to the petitioners who brought the cases must be paid and in the broader sense that general measures must be taken by the offending state within its domestic legal order to put an end to the continuing violations found by the Court.[31]

If new governments were elected in backsliding European democracies, the first order of business should be to bring national legal systems into compliance with the law that is already directly binding on their states through judgments about their states that their prior governments flouted. In the case of Hungary and Poland, the two countries of primary concern, there are backlogs of ECJ judgments that are still not honoured. Complying with those decisions should be an uncontroversial place to start to restore the rule of law in these countries.

31 ECtHR, *Guide on Article 46 of the European Convention on Human Rights: Binding Force and Execution of Judgments,* 31 August 2022, https://www.echr.coe.int/Documents/Guide_Art_46_ENG.pdf.

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In Poland, these judgments primarily concern the structure and independence of the judiciary.[32] For starters, complying with the judgments would mean replacing the Disciplinary Chamber of the Supreme Court with a truly independent body and reinstating the judges who have been inappropriately disciplined.[33] It should also mean reconfiguring the National Judicial Council so that the political influence in the selection of members of the body that appoints judges is reduced.[34] The procedures under which judges are disciplined for making preliminary references to the ECJ must be reformed.[35] And so on, through the growing set of judicial independence cases of the ECJ, comprising both the infringement decisions and the judgments based on preliminary references.

In Hungary, the unenforced ECJ judgments affecting the restoration of constitutionalism primarily concern the application of EU asylum rules,[36] measures that must be taken to ensure the free operation of civil society and universities,[37] and ensuring the judges can continue to make preliminary references to the ECJ.[38] And of course, a Member State does not

32 I have detailed the set of judgments against Poland brought as the result of infringement actions by the European Commission in Kim Lane Scheppele, 'Treaties without a Guardian: The European Commission and the Rule of Law', Colum. J. Eur. L. 29 (2023), 93–183, https://cjel.law.columbia.edu/files/2023/04/9.-SCHEPPELE-PROOF.pdf.

33 ECJ, *Commission v. Poland (independence of judges),* judgement of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596.

34 ECJ, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, case no. C-585/18, ECLI:EU:C:2019:982, para. 140.

35 ECJ, *Miasto Łowicz & Prokurator Generalny*, judgement of 26 March 2020, joined cases nos. C-558/18 & C-563/18, ECLI:EU:C:2020:234, para. 58. Because the underlying legal issue before the judge referring the case did not directly invoke EU law, the Court held that the questions sent by the referring judge were inadmissible. But in dicta, the Court made it abundantly clear that threats to punish judges for referring questions to the ECJ were unlawful.

36 ECJ, *Commission v. Hungary (Accueil des demandeurs de protection internationale),* judgement of 17 December 2020, case no. C-808/18, ECLI:EU:C:2020:1029.

37 ECJ, *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile*), judgement of 16 November 2021, case no. C-821/19, ECLI:EU:C:2021:93; ECJ ; *Commission v Hungary (Enseignement supérieur)*, judgement of 6 October 2020, case no. C-66/18, ECLI:EU:C:2020:792.

38 ECJ, *I.S.*, judgement of 23 November 2021, case no. C-564/19, ECLI:EU:C:2021:949. For a detailed explanation of the judgment and the back story, see Kim Lane Scheppele, 'The Law Requires Translation: The Hungarian Reference Case on Reference Cases, Case C-564/19, *I.S.*, Judgment of the Court of Justice (Grand Chamber), 23 November 2021', CML Rev. 59 (2022), 1107–1136.

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have to wait for an ECJ judgment to rectify specific problems that the Commission has identified. Hungary could get out ahead of the ECJ rulings by addressing the Commission's complaints with regard to the enactment of a discriminatory law against LGBTIQ+ community members[39] and the refusal to relicense *Klúbrádió,* Hungary's last independent radio station, as independent media in Hungary face extinction,[40] among other things.

With the coming into effect of the Conditionality Regulation as well as the fiscal conditionalities attached to the Recovery and Resilience Fund and to all funds covered by the Common Provisions Regulation,[41] Member States against whom these conditionalities have been triggered have an additional set of requirements specifically addressed to them that they must meet before they can receive EU funds. To ensure the proper spending of the EU budget, conditions have been attached to the receipt of EU funds that include mandatory measures to fight corruption (in the case of Hungary),[42] detailed requirements for the restoration of the structural independence of the judiciary (in the case of both Hungary and Poland)[43] and specific changes to domestic law and practice to ensure the realization

39 The Commission decided to refer Hungary to the ECJ in July 2022 over its law to prevent children from contact with any media portraying gay couples. European Commission, July Infringement Package: Key Decisions, 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/inf_22_3768.

40 The Commission referred Hungary to the ECJ in July 2022 over its denial of a broadcast license to Klubrádió, the last remaining independent radio station. European Commission, Media freedom: the Commission refers Hungary to the Court of Justice of the European Union for failure to comply with EU electronic communications rules, 15 July 2022, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688.

41 These three legal bases for funding conditionalities are spelled out in Kim Lane Scheppele and John Morijn, 'What Price Rule of Law?' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 29–35, https://www.sieps.se/globalassets/publikationer/2023/2023_1op_digital.pdf.

42 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 325/94, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022D2506.

43 Council Implementing Decision of 5 December 2022 on the approval of the assessment of the recovery and resilience plan for Hungary, Interinstitutional File: 2022/0414 (NLE), https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf; Council Implementing Decision of 14 June 2022 on the approval of the assessment of the recovery and resilience plan for Poland, Interinstitutional File: 2022/0181 (NLE), https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf.

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of rights protected by the Charter of Fundamental Rights, which include gender equality rights (in the case of both Hungary and Poland) as well as asylum rights (in the case of Hungary).[44] Conditionalities that come with this newly passed set of laws are specific to specific backsliding countries, specify in detail what a Member State must do to remedy the problems and come with oversight and enforcement mechanisms to ensure that Member States meet their legal obligations. Surely in thinking through what EU law requires of Member States, these very specific and targeted requirements must also be included among the changes that any new democratic government in a formerly rogue state must enact.

While the Council of Europe has much weaker enforcement powers than does the EU, the decisions of the European Court of Human Rights (ECtHR) are binding on signatories to the European Convention on Human Rights. Increasingly, particularly in regard to violations that are likely to produce repeated cases, the Committee of Minister of the COE has been insisting on structural reforms to laws and has opened enhanced supervision procedures against delinquent signatory states to ensure that they do more than simply pay just satisfaction awards to the applicants.

Here, the so-far-unheeded major ECtHR decisions with regard to Hungary include an open case requiring the protection of judges both from arbitrary dismissal and in regard to their free speech rights,[45] a number

44 Regulation (EU) 2021/1060 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, 30.06.2021, 159–706. The Partnership Agreements for each EU Member State are published in the national languages (only) from links available here: https://commission.europa.eu/publications/partnership-agreements-eu-funds-2021-2027_en.

45 Shortly after the Orbán government won election in 2010, then-Supreme Court President András Baka was removed from office, three years before the end of his lawful term. His removal occurred through the operation of a new law, which renamed the Supreme Court the *Kúria* and created new qualifications for serving on this 'new' court, namely that all *Kúria* judges have at least five years of judicial experience on the ordinary courts in Hungary. Because President Baka had only three years of judicial experience in Hungary and his 17 years as a judge on the European Court of Human Rights did not count under the law, he was disqualified, the only Supreme Court judge who was removed by the new qualification. His case at the European Court of Human Rights challenging his dismissal confirmed that he had been punished, in violation of his Convention rights, for having criticized the government's changes to the judiciary. ECtHR, *Baka v. Hungary*, judgement of 23

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of cases with regard to discrimination against Roma, the abuse of pretrial detention and the creation of an unlimited surveillance system without legal constraints.[46]

Poland has an even worse track record at the ECtHR, compounded by the fact that it gave formal notice in February 2023 that it would refuse to comply with any interim measures decisions of that Court.[47] As of that time, the ECtHR had received 60 requests for interim measures against Poland for matters involving the non-independence of the judiciary with 323 cases pending on this issue before the Court.[48] The ECtHR has found, among other things, that the Constitutional Tribunal, the Disciplinary Chamber of the Polish Supreme Court and Extraordinary Chamber of the Polish Supreme Court are not independent and impartial tribunals established by law due to the presence of judges appointed irregularly either by the Parliament (in the case of the Constitutional Tribunal)[49] or by the politically tainted National Judicial Council (in the case of the Supreme Court chambers).[50] Any new Polish government must address these issues by changing the structure and membership of these institutions, guided by decisions of the ECtHR.

June 2016, no. 0261/12, ECLI:CE:ECHR:2016:0623JUD002026112. This decision has still not been honored by Hungary, which remains under enhanced supervision on the matter. In a hearing in September 2021, the Council of Europe's Committee of Ministers noted 'a continuing absence of safeguards in connection with *ad hominem* constitutional-level measures terminating a judicial mandate' and pressed the Hungarian government to adopt 'effective and adequate safeguards against abuse when it comes to restrictions on judges' freedom of expression.' Committee of Ministers Decision CM/Del/Dec(2021)1411/H46–16, Supervision of the Execution of the European Court's Judgments, H46–16 *Baka v. Hungary* (App. No 20261/12), paras 314–16 (16 Septembre 2021), https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

46 You can see a list of the major pending cases awaiting execution by Hungary at the Committee of Ministers: https://rm.coe.int/mi-hungary-eng/1680a23c92.

47 European Court of Human Rights, Non-Compliance with Interim Measures in Polish Judiciary Cases, ECHR 053 (2023), 16 February 2023, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7573075-10409301&filename=Non-compliance%20with%20interim%20measure%20in%20Polish%20judiciary%20cases.pdf.

48 Id.

49 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgement of 7 May 2021, no. 4907/18, ECLI:CE:ECHR:2021:0507JUD000490718.

50 ECtHR, *Advance Pharma v. Poland*, judgement of 3 February 2022, no. 1469/20, ECLI:CE:ECHR:2022:0203JUD000146920; ECtHR, *Reczkowicz v. Poland*, judgement of 22 July 2021, no. 43447/19, ECLI:CU:ECHR:2021:0722JUD004344719; EctHR, *Dolińska-Ficek & Ozimek v. Poland*, judgement of 8 February 2022, nos. 49868/19 and 57511/19, ECLI:CE:ECHR:2021:1108JUD004986819.

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In considering how Hungary and/or Poland might recover its compliance with European values, then complying with these decisions and direct recommendations would be an important place to start.

IV. Erga Omnes Effects of Transnational Law

While complying with the direct decisions of European courts and direct actions taken by the European Commission will begin the process of recovering European values in the rogue Member States, compliance with only the few concrete decisions issued against any particular Member State will not be enough for these states to fully restore the rule of law in the domestic legal order. The Commission, in particular, has been very slow to recognize the damage that these rogue governments have done to their constitutional institutions and has therefore not flagged even the major issues that have been responsible for the most serious backsliding.[51] As a result, new governments in these countries would not have the dense case law from the Court of Justice that would be helpful in specifically guiding particular states back to the path of the rule of law. In some cases, we have ECtHR decisions that fill some of these gaps, but the case-by-case way that the dismantling of constitutional government has been treated in European law means that there is not a complete blueprint of what should be done by these rogue states to come back into compliance with European values, at least not if one looks only at the cases and directions that have the proper name of the particular states attached.

Thus, it will be important for rogue Member States on their way back into the good graces of European law to consider the way that European law – both Union law and human rights law – has been applied in respect of other states and to take on board reforms that would be necessary to comply with this law even when the rogue state in question has never been singled out for its violations. Any new government in a formerly rogue state should assess all of its laws against this thick background of European law to see what must be changed to bring the national law into compliance. The *erga omnes* effects of all ECJ decisions are well documented;[52] the

51 I detail the many key issues missed by the Commission in Scheppele (n. 32).

52 *Erga omnes* authority of EU law can be traced to Article 4(3) TEU in which obligates Member States to refrain from any measure that would frustrate the realization of EU objectives. See also ECJ, *SpA International Chemical Corporation v Amministrazione*

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erga omnes effects of ECtHR decisions have been persuasively argued to be implied in the Convention itself.[53]

The Commission largely ignored the consolidation of power in the hands of the governing party over the 13 continuous years that the Orbán government has been in office, and as a result, there are no ECJ judgments directly bearing on the most crucial features of Hungarian autocracy, like the capture of formerly independent institutions like the media authority, election office, data protection office or the central bank.[54] Nor are there cases about three years of emergency rule in which government decrees have had the capacity to overwrite statutes, a period which extends to eight years if one counts the more targeted 'migration emergency' that began in 2015. Nor are there cases challenging the way in which markets have been manipulated to reduce pluralism in the media and to stifle competition in state contracts for matters of 'strategic national importance.' And, perhaps most shockingly, Hungary has compromised the independence of its judiciary in a myriad of ways that the Commission has never criticized until it imposed some limited conditionalities under the Recovery and Resilience Regulation, nor have ECtHR decisions in Hungarian cases directly challenged many of these moves. Moreover, national courts have been cowed into submission by a domestic constitutional provision that puts certain topics off limits for preliminary reference questions[55] and for which judges have already been

delle finanze dello Stato, judgement of 13 May 1981, case no. 66/80, ECLI:EU:C:1981:102, paras 11–13.

53 Oddný Mjöll Arnardóttir, 'Res Interpretata, Erga Omnes Effect and the Role of the Margin of Appreciation in Giving Domestic Effect to the Judgments of the European Court of Human Rights', EJIL 28 (2017), 819–843.

54 The Commission was active in some of these areas in 2011 when the takeovers began and ultimately the Commission initiated infringement procedures over the independence of the data protection officer who was fired in 2011 and over the independence of the central bank when the Orbán government tried to fire the sitting central bank governor. But in both cases, the Commission only challenged treatment of the incumbent occupants of those offices and not the qualifications and structural positions of their replacements.

55 Hungary, Fundamental Law, Article E(2):
With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and *shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure.*(Emphasis

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disciplined.[56] As a result, much of the damage already done to the Hungarian judiciary has not been the subject of any legal proceeding ordering Hungary to fix it.[57]

For example, in the Omnibus Act of 2019, the newly appointed president of the Hungarian Supreme Court (*Kúria*) was given the power to assign any case to a newly constituted panel of judges selected just for that particular case.[58] Given that the Supreme Court president had himself been elected in a process that bypassed peer review by his fellow judges and installed him in office without the basic qualifications required by law (until an exception was made for him under the same Omnibus Act),[59] his ability to channel individual cases to specific judges represents a threat to judicial independence of the highest order. But we know from the Polish cases that the standard of judicial independence used by the ECJ would surely be violated by this practice. In its account of judicial independence, the ECJ has emphasized both a court's *external* independence from forces outside the court seeking to control the outcome of cases and a court's *internal* independence ensuring that its daily operation is:

> linked to impartiality and seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[60]

Having a politically appointed President of the Court assigning particular cases to particular judges raises at least the appearance even if not the reality of partiality because it would be so easy to abuse this arrangement

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added.)The Hungarian Supreme Court (*Kúria)* has interpreted this italicized clause to mean questions touching on those subjects may not be the subject of preliminary references.

56 For more detail, see Scheppele (n. 38).

57 The 'super milestones' built into the Recovery Plan in order for Hungary to receive the relevant EU funds require judicial reforms, but the list of specific items that the Commission requires is not sufficient to restore judicial independence in its entirety.

58 Hungarian Act CXXVII of 2019, Article 45.

59 Hungarian Helsinki Committee, 'The New President of the Kúria: A Potential Transmission Belt of the Executive Within the Hungarian Judiciary', 22 October 2020, https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf.

60 ECJ, *Commission v. Poland (irremovability of judges*), judgement of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 73.

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if the President sought to achieve particular outcomes of judgments. As a result, even though the Commission has not yet directed a specific recommendation to Hungary with regard to this aspect of judicial independence, nor has an ECJ decision issued on this subject in regards to Hungary, one might expect a new government in Hungary to change this practice as it creates the appearance of partiality forbidden as part of the *erga omnes* effects of EU law.

With regard to Poland, the Commission and ECJ have focused primarily on judicial independence where there have been many specific binding instructions. But there are signs that Poland is also in breach of other important legal obligations, particularly with regard to non-transparent and unjustifiable surveillance of the political opposition using stealthy software that infiltrates cell phones.[61] Pegasus software has been in documented use in both Hungary and Poland, but so far only Hungary is under direct decisions of the ECtHR to bring its legally unlimited surveillance program under legal control so that the right to private life under Article 8 ECHR is respected.[62] If Poland is committing the same violation – using technical tools to spy on the political opposition outside meaningful legal constraints

61 'Polish Leader Admits Government Bought Spyware', DW, 1 July 2022, https://www.dw.com/en/poland-top-leader-admits-government-bought-pegasus-spyware/a-60361211.

62 The cases decided by the ECtHR so far predate the discovery of the cellphone-infiltration software Pegasus in Hungary, but the legal authorizations under which Pegasus was used do not meet ECtHR standards. For the standards, see ECtHR, *Szabó & Vissy v. Hungary*, judgement of 12 January 2016, no. 37138/14, CE:ECHR:2016:0112JUD003713814. The European Court of Human Rights again confirmed in September 2022 its finding that the Hungarian government has no meaningful checks on domestic surveillance, ECtHR, *Hüttl v. Hungary*, judgment of 29 September 2022, no. 58032/16, CE:ECHR:2022:0929JUD005803216. More recently, the Hungarian government admitted to using Pegasus against journalists and government critics, but the data protection officer determined that the use of Pegasus was legal under Hungarian law. Nemzeti Adatvédelmi és Információszabadság Hatóság (Hungarian National Authority for Data Protection and Freedom of Information), Findings of the Investigation Launched Ex Officio Concerning the Application of the 'Pegasus' Spyware in Hungary (2022), https://www.naih.hu/data-protection/data-protection-reports/file/492-findings-of-the-investigation-of-the-nemzeti-adatvedelmi-es-informacioszabadsag-hatosag-hungarian-national-authority-for-data-protection-and-freedom-of-information-launched-ex-officio-concerning-the-application-of-the-pegasus-spyware-in-hungary. Since the initial exposé of the Pegasus surveillance, new investigative reporting has uncovered evidence that the Hungarian government has purchased from foreign sellers a whole range of deep surveillance tools beyond Pegasus. Szabolcs Pányi, 'Boosting of Spying Capabilities Stokes Fear Hungary is Building a Surveillance State', Balkan Insight, 13 October 2022, https://bal

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that honour Convention rights – then it too should modify its laws to comply with the ECtHR standards, even absent a direct judgment about its own particular practices.

Of course, establishing the *erga omnes* effects of the huge body of law that constitutes EU and ECHR law will not be easy or quick. Among other things, it first involves an analysis of what EU and ECHR law requires with enough specificity to guide law-making of a restored democratic government. But the principle is still worth defending. As new democrats try to recover constitutional democracy in their countries, they should be guided by what it would take to bring their governments into line with the law that already binds them.

V. Supererogatory Effects of Transnational Law

Beyond directly applicable binding law exists a web of best practices and general standards – soft law – that could also provide useful guidance for a Transition 2.0. Within the OSCE, for example, the web of human rights rapporteurs and election monitors make recommendations and assessments that may not be binding on governments in the strict legal sense but that assess the particular country conditions in a nuanced way and provide recommendations for how to improve national law on particular subjects. The Venice Commission of the Council of Europe also assesses particular laws of particular states and makes specific recommendations grounded in its understanding of transnational legal requirements. Rogue states have already been evaluated under these various rubrics and transnational bodies of neutral experts have found fault with the laws and/or practices of the states in question.[63] Bringing a state into compliance with these reports and recommendations would not be strictly legally required but such compliance would be a sign that a state was eager to demonstrate its commitment to European values.

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kaninsight.com/2022/10/13/boosting-of-spying-capabilities-stokes-fear-hungary-is-building-a-surveillance-state/.

63 As of this writing, the Venice Commission has issued 22 opinions with regard to Hungary since Viktor Orbán came to power in 2010 and began his constitutional revolution and it has issued six opinions with regard to Poland since the PiS government came to power in 2015. See https://www.venice.coe.int/webforms/documents/by_opinion.aspx?v=countries.

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This *supererogatory* effect of transnational law – supererogatory because the standards so elaborated are the authoritative opinions of bodies that have the power to counsel but not to enforce – would be particularly useful in areas of law that must be changed to ensure that the return to European values is robust, but that neither the EU nor the ECHR have within their remit to insist upon in a strict legal sense. Election law, for example, is not clearly under the jurisdiction of the EU save with regard to some general parameters of European parliamentary elections (for example, proportional representation) and with regard to some rules that apply in national elections at local level in which EU citizens have the right to vote (for example, European non-discrimination principles with regard to citizenship).[64] And while there is a growing body of case law at the ECtHR interpreting Protocol 1, Article 3 on the right to vote,[65] that jurisprudence has not yet reached the point of giving legally binding guidance on technical questions like the proper constitution of the electoral administration bodies,[66] the rules for campaign spending, how to draw legislative districts, what method are acceptable for counting 'lost votes' in proportional representation schemes and other such issues. By contrast, however, the Venice Commission has elaborated detailed standards for elections[67] and the Office of National Institutions and Democratic Rights of the OSCE (ODIHR) has compiled

64 That said, arguments are now being made that Article 10(2) TEU requires Member States of the EU to remain democracies. See, for example, John Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council', EL Rev. 46 (2022), 69–84 and Luke Dimitry Spieker, 'Beyond the Rule of Law How the Court of Justice can Protect Conditions for Democratic Change' in: Södersten and Hercock (n. 41.), 72–78, https://www.sieps.se/globalassets/publikationer/2023/2023_1op_digital.pdf.

65 ECtHR, *Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights*, 31 August 2022, https://www.echr.coe.int/Documents/Guide_Art_3_Protocol_1_ENG.pdf.

66 The African Court of Human Rights is out ahead on this question. See ACtHR, *The Matter of Actions Pour la Protection des Droits de l'Home (APDH) v Côte d'Ivoire*, judgement of 18 November 2016, app. 1/2016, https://www.eods.eu/elex/uploads/files/5c38a52a38460-JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf. In this case, Court found that an election monitoring body composed of eight representatives of government and four of the opposition out of a total of 17 representatives was not independent or impartial, or compatible with requirements of equal treatment.

67 For a list of the various standards that the Venice Commission has developed in the field of election law, see https://www.venice.coe.int/WebForms/pages/?p=01_01_Coe_electoral_standards.

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elaborate international standards for elections[68] which it uses as the basis for monitoring elections and issuing recommendations to the specific states it has observed.[69] Taking on board these recommendations would be a good way to move election law from being tilted toward the former governing party to creating a more level playing field.

As a formerly rogue state attempts to restore the rule of law, guidance from the European quartet on the rule of law itself may be particularly useful in marking out the important parameters of domestic legal change. In particular, the Venice Commission has developed a *Rule of Law Checklist* that could guide just such an effort.[70] Its definition of the rule of law as 'a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures',[71] can provide overarching guidance to what a domestic legal system must strive to accomplish and its more specific benchmarks identify achievable steps on the way to producing such a system. For example, to take one problem that has arisen in a particularly vivid way in Hungary as the country enters its third year under a series of states of emergency in which the prime minister has the power to override any law by decree, the Venice Commission standards ensure that exceptions to the supremacy of legislation remain limited in time and scope and that any delegations of lawmaking power to the executive are explicitly defined.[72] As the Venice Commission says directly:

> Unlimited powers of the executive are, de jure or de facto, a central feature of absolutist and dictatorial systems. Modern constitutionalism

68 For a list of the international standards for elections of the ODIHR, see https://www.osce.org/odihr/elections/66040.

69 ODIHR has monitored elections in Hungary for decades, see https://www.osce.org/odihr/elections/hungary. It has also monitored elections in Poland for decades, see https://www.osce.org/odihr/elections/poland. The specific recommendations in each report could be used to improve on the democratic responsiveness of each electoral system.

70 Venice Commission, *Rule of Law Checklist* (2016), https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

71 Id. at 10.

72 Id. at 20.

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has been built against such systems and therefore ensures supremacy of the legislature.[73]

Rule by decree would have to be abolished if these guidelines were followed. And so on through the very helpful checklist.

Supererogatory compliance with European standards does not mean that a new government would be simply making up good things to do on its own remit. As the examples of election law and the rule of law checklist make clear, standards already exist to ensure that democratic, human-rights-respecting, rule-of-law governments can be created and maintained and they have a definite content that is precise enough to guide domestic law-making. These standards gain strength in the process of restoring democratic government precisely because they stand outside the domestic constitutional order and therefore cannot be changed, gamed or bargained by the parties to the domestic transition. External standards ensure that there can be no bargains in these transitions in which one side gets to maintain control of the courts in exchange for the other side being able to control the media, for example. Standards must all be met in their entirety and not gamed in the transitions back to democracy. As guidelines external to the process of democratic transition, they maintain their ability to serve as rules of the game that cannot become part of the game itself.

VI. Asymmetric Rupture: Breaking the Law to Establish the Rule of Law in Recovering Democracies

The standards used to guide countries in Transition 1.0 put newly democratizing states in the role of rule-takers, which did not always seem consistent with the restoration of democratic self-governance. But as we have seen by elaborating what new democratic governments would have to do to restore democracy, human rights and the rule of law in Transition 2.0, external standards may be even more important in guiding democratic transitions now. These recovering democratic governments would still be operating within the institutional framework established by the outgoing rogue government, a framework that was put in place to limit the scope of robust democratic decision-making. Moreover, the rogue leaders are likely to have seats at the table (or at least in the parliament) after they have already

73 Id.

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shown themselves to be willing to compromise key democratic principles in exchange for maintaining power.

When the ordinary law-making process has been corrupted by an all-controlling party that is not democratic to its core, enforcing principles external to the system may be crucial in preventing those who are losing power from using whatever leverage they still have to prevent a full restoration of democracy. This would include, for example, deploying the supermajority rules that they themselves put into place to ensure that they could block change with a minority vote after they have lost elections. With a seat at the table and a track-record of undermining democracy, the rogue governing parties must be bound by these external standards without the opportunity to undermine them by dangling unseemly benefits to others at the table that may tempt the new democrats to sell out. In short, Transition 2.0 crucially needs European standards to guide the restoration of democracy and to hold these rogue parties in check precisely because those standards cannot be gamed by rogue domestic actors.

Depending on how far the rogue governments have compromised the formerly democratic institutions, restoring democracy may require breaking the domestic law in order to ensure European legality. This is where it is worth recalling that the rule of law in its formal sense may exist at multiple levels simultaneously. What I have called the 'rule of law writ large' assesses rule of law compliance across multiple levels at the same time – domestic, European, transnational, international – by examining the way that the levels complement and reinforce each other. The rule of law writ large exists when different levels do not pull in different directions, putting those who are simultaneously bound by those different layers of law into a bind of conflicting legal obligations. By contrast, the 'rule of law writ small' considers only one level at a time ignoring the others, so that a domestic legal system can be coherent, consistent and engaged in explicit legal-rule-following but nonetheless in tension with other levels that remain outside the scope of examination. Autocracy can maintain some version of the rule of law as long as the domestic legal system is not required to justify itself at an international level.

Sometimes rogue governments in non-democratic states create what I have elsewhere called 'autocratic legalism'.[74] Autocratic legalism is a species of constitutional malice in which liberal legal institutions are deliberately undermined by illiberal reforms designed to ensure control of government

74 Kim Lane Scheppele, 'Autocratic Legalism', U. Chicago L. Rev. 85 (2018), 545–583.

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by a particular governing party off into an indefinite future without substantial checks on its power. When autocratic legalism becomes entrenched, legal forms are instituted to maintain the entrenchment of the current rulers; when people and institutions follow this autocratic law, this law maintains their power. For example, election law designed to unfailingly return the governing party to power will reinforce the governing party's hold on power precisely when it is followed. Breaking with that law by enacting new election laws that permit free and fair elections would break the stranglehold of the governing party. It would also nominally break the rule of law writ small, considering national law alone. When autocracy becomes entrenched through law in this way, it may become necessary – and justifiable – to break that law to restore democracy again by considering the rule of law writ large.

From a distance, moves that may be taken by a democracy-restoring government may look just like the moves that were already taken by a democracy-crashing government. After all, didn't the rulers who brought in rogue government change the laws rapidly, fire incumbents who got in their way and in general restructure the constitutional system so that the independence of all political and judicial institutions was subordinated to the political ideology of the governing party? A new democratizing government that changes the laws rapidly, fires incumbents who get in the way and restructures independent institutions to their liking may appear to be doing the same thing. Tit for tat.

But this is where transnational law makes all the difference. Changing the law rapidly, firing incumbents and reconfiguring independent institutions breaks the rule of law writ large when it is done by those who are destroying democracy while those same activities restore the rule of law writ large when it is done by those who are committed to bringing the national legal system into harmony with the transnational one. In short, while both kinds of moves can produce ruptures in the domestic constitutional order – and some of those ruptures may even be accomplished illegally under domestic law – they do not have the same objective justifications. The ruptures are *asymmetric* in that one direction brings *more* rule of law across levels of legality and the other one brings *less*. Asymmetric ruptures can be justified in ways that symmetric ruptures cannot.

If a new democratic government is going to break domestic law in order to restore transnational law within the jurisdiction, then it needs to be both careful and public about what it is doing, maintaining a democratic spirit throughout the process even if it tramples on formal legality along

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the way. The restoration of democracy should not be done furtively, so to speak. Law-breaking in the service of the rule of law writ large should be used sparingly as a last resort when there is no legal way to harmonize domestic and European values. But if necessary, then it should be done overtly, with an explanation to democratic publics about why irregular procedures or other legal violations may be required in order to comply with basic principles of democracy, human rights and the rule of law in the long run. Of course, the new democrats must put themselves before their publics in free, fair and regular elections to get periodic endorsements of their approach.

New democratic governments may want to start with bringing their systems into compliance with directly applicable law first, as this will pose the fewest challenges to basic legality given that the results are already binding law. Then, the new democratic governments may want to move to *erga omnes* compliance, all of the while making public why they are changing the domestic rules, on what basis and to what end. Finally, the new democratic governments may want to tackle supererogatory compliance as that would involve adopting soft law measures as binding domestic law. All the while, however, newly democratic governments may have to break with the law created by the past rogue governments, even while the rogues are still players in the domestic political system.

One cannot foreclose the possibility short of party bans or other political disqualifications that the rogues will one day come back. If and when that happens, however, one might hope that a public educated in how a transparent, accountable and democratic government actually works will soon tire of the rogues and realize that in the long run, a government that respects European values and respects its own citizens is a government that they should want to fight to keep.

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Centralized Judicial Review and the Problem of its 'Over-Centralization'

Zdeněk Kühn

I. The Dreams of New Constitutionalism 278
II. Illiberal Revolution and the Abuse of Constitutional Courts 283
III. The Struggle for the Autonomous Role of Ordinary Judges to Promote Constitutionalism 287
IV. Empowering Ordinary Courts as a Rule of Law Counterrevolution 290
V. Conclusions 295

Abstract:
The article first describes the process of empowerment of constitutional courts after the fall of the Iron Curtain in 1989. It shows the problems that led illiberal politicians to take over the constitutional courts. Second, it explains how and why some of the constitutional courts in the region of Central and Eastern Europe were captured by the new authoritarian rulers. It seems that strong centralized courts pose a threat to democracy and the rule of law when captured by authoritarians. Finally, the paper calls for the empowerment of ordinary judges and shows how this process might work.
Keywords: constitutional courts; ordinary judiciary; democratic backsliding; rise of authoritarian democracies; centralized judicial review; decentralized judicial review

In this article, I argue that the empowerment of ordinary judges is one of the most effective ways to contain the new wave of illiberalism. In the first part, I briefly describe the process of empowerment of constitutional courts after the fall of the Iron Curtain in 1989. I will show the problems that led illiberal politicians to take over the constitutional courts. Second, I describe how some of the constitutional courts in the region of Central and Eastern Europe were captured by the new authoritarian rulers. Third, I show that strong centralized courts pose a threat to democracy and the rule of law when captured by authoritarians. Finally, I call for the empowerment of ordinary judges and show how this process might work. I argue for a more restrained exercise of constitutionalism by (all) judges because this is the only (albeit insufficient) way to separate the legal from the political. Strengthened ordinary courts can also greatly help in removing the consequences of illiberal politics.

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I. The Dreams of New Constitutionalism

At first glance, the fall of socialism in Central and Eastern Europe in the late 1980s meant the complete eradication of the previous legal and constitutional values. New constitutions and laws were adopted, and old textbooks were discarded. Moreover, the collapse of communism in 1989 was accompanied by the rise of the judicial branch, in general. In post-communist Europe, the 1990s saw a shift towards judicialization and the creation of a conflict society. The judiciary had its old competencies restored, including the power to carry out judicial review of executive actions.

Most importantly, however, constitutional courts have been established in all post-communist states. Even in the few countries (Poland and the former Yugoslavia) where the constitutional courts existed before the fall of socialism, their role expanded after 1990. The actual functions of these constitutional courts were limited by authoritarian governments prior to 1990, and consequently, they lacked any significant political influence until the fall of the authoritarian regimes. It was only after the collapse of the socialist dictatorships that the constitutional courts in Poland[1] and the successor states of the former Yugoslavia[2] began to serve as a real check on the government.

The post-communist constitutional courts were designed as powerful institutions capable of protecting the rule of law and fundamental rights against the will of the parliamentary majority. Their most important powers include the review of constitutionality of the legislation and in some jurisdictions (some of the successor states of the former Yugoslavia, the Czech Republic, Slovakia, and more recently Hungary)[3] also the review of constitutionality of decisions of ordinary courts.

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1 In Poland, the Constitutional Tribunal was created by a law of 1982; it started to operate in 1986. For the description of the Polish Constitutional Tribunal prior to 1990, see Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (2nd edition, Berlin: Springer 2014), 4–13.

2 The Federal Constitutional Court of Yugoslavia was established in 1963, along with the state constitutional courts of the individual republics. For an early socialist description of those courts, see Dimitrije Kulic, 'The Constitutional Court of Yugoslavia in the Protection of Basic Human Rights', Osgoode Hall L J 11 (1973), 275–284. The Federal Constitutional Court of Yugoslavia disappeared with the disintegration of Yugoslavia and the subsequent violent civil war of the 1990s.

3 In Hungary, the Court was granted the power to review constitutional complaints as late as in 2012, within the new Constitution enacted at the beginning of the Orbán

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Initially, the post-socialist constitutional courts were seen as successful examples of institutions introducing new notions of the rule of law, separation of powers, and liberal democracy. The original practice of constitutional review of the 1990s and early 2000s was associated with judicial activism, unrestrained and seemingly unchallenged judge-made law. The constitutional courts of Central Eastern Europe acted as agents of social change towards New Constitutionalism[4] in their respective national legal systems.[5] Moreover, in some of these systems, they sought to transform the entire concept of law, to Westernize the post-communist application of the law, and to teach the new proper methods of its interpretation. They did this by mentoring and criticizing ordinary judges for not taking the constitution and human rights seriously enough. In this role, the constitutional courts often effectively replaced the legal academia.[6]

When analysing the early phase of post-communist constitutional courts in the course of the 1990s, one should not neglect the consensus on liberal constitutionalism that prevailed among the elites of the post-communist transition. The constitutional courts emphasized the primacy of the individual over the state.[7]There was a strong consensus that new democratic constitutions should restrain the parliamentary majority and the executive, and through their counter-majoritarian functions, ensure adherence to the basic law of the state. Constitutions and their application were believed and presented to be essentially non-political and capable of restraining crude

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era. See the Constitution of Hungary of 2011, available at http://www.kormany.hu/en/news/the-new-fundamental-law-of-hungary. In Slovakia, the institute of constitutional complaint was introduced in 2001, following the successful Czech example. On Slovakia, see Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (Budapest, New York: CEU Press 2002), 189.

4 In this article I understand New Constitutionalism in the way described by Ran Hirschl. See Ran Hirschl, 'The Political Origins of the New Constitutionalism', Indiana J Global Legal Studies 11 (2004), 71–108; or Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press 2007).

5 For some early jubilant views, see e.g. Gábor Halmai (ed.) *A Megtalált Alkotmány? A Magyar Alapjogjagi Bíráskodás Elsö Kilenc Éve /The Constitution Found? The First Nine Years of Hungarian Constitutional Review on Fundamental Rights* (Budapest: INDOK 2000); Procházka (n. 3); W. Sadurski (ed.), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (The Hague: Kluwer Law International 2002).

6 I tried to show this transformative potential of some constitutional courts in Zdenek Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden and Boston: Brill 2011), chapter 5.

7 E.g. judgment of the Czech Constitutional Court of 18 October 1995, no. Pl. ÚS 26/94.

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politics. However, too many decisions of the constitutional courts sided with neoliberal policy solutions and prescriptions and generally preferred neoliberal ideology in the interpretation of their constitutions.

The constitutional liberalism of the 1990s was linked to the 'The End of History' thesis, i.e. the ultimate triumph of liberal capitalism, often presented through its neoliberal array and a plethora of free market policies.[8] No one dared to question 'the only possible' path to the future. In their neoliberal zealotry, the post-communist constitutional courts' case law was often one-sided, especially when compared to the application of similar principles in Western jurisprudence.[9]

Moreover, the political elites of the 1990s often seemed to be unaware of the enormous political power vested in the constitutional courts. In the 1990s, the concept of law was understood in a non-political way, and the law was seen as a logical set of rules and principles to be applied by endowed professionals who were able to follow the logic of the law. Constitutional courts initially faced little external criticism or opposition to their decisions, resulting in whatsome scholars have called the 'liberal government of judges'. Mainstream political ideology provided a protective veil for the constitutional courts' activities, hiding even the most radical examples of judicial lawmaking.[10] Although judicial activism was criticized by local legal academia and the majority of ordinary judges, it was relatively easy to downplay this kind of criticism as a reaction of conservative scholarship and judiciary, associated with the former regime.[11]

These circumstances often shaped the environment for unbound judicial activism of constitutional courts. The President of the Hungarian Constitutional Court in the 1990s Sólyom once (in)famously remarked that the genuine purpose of the Court was to read '*the invisible constitution*'.[12]

8 Adam Sulikowski, 'Government of Judges and Neoliberal Ideology' in: Rafal Mańko, Cosmin Cercel and Adam Sulikowski (eds), *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Oxford: Counterpress 2016), 16–31.

9 Cf., for an analysis of the Hungarian Court, Catherine Dupré, *Importing The Law In Post-Communist Transitions: The Hungarian Constitutional Court And The Right To Human Dignity* (Oxford: Hart 2003), 126–127.

10 Sulikowski (n. 8).

11 See Kühn (n. 6), 229 (and the sources quoted in footnote 143).

12 See Sólyom's concurring opinion in the Death Penalty Case, decision 23/1990 of 31 October 1990 (translated in: Laszló Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: The University of Michigan Press 2000), 126). This conception has been criticized for blatant activism (What is 'invisible constitution'; are judges above the lawmakers

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Although other constitutional courts were less open about their judicial legislating, judicial activism became a common phenomenon in the 1990s and the early 2000s.

Most importantly, the constitutional courts often styled themselves as the sole and indispensable guardians of the New Constitutionalism, entering the scene as a sort of *deus ex machina* to resolve issues that could not be decided by other bodies. As a result, one of the most fundamental problems that emerged after 1989 was the 'over-centralization" of constitutional review. By this, I mean that the continuing guarantee of the rule of law was completely centralized and concentrated in the constitutional court, while the powers of the ordinary judiciary were correspondingly limited.[13] If the constitutional court then comes under the control of one political faction, as was the case in the Orbán Hungary after 2010 and in Poland after 2015, the gates are wide open for systemic change, while the guardians of the constitution (other than the captured constitutional tribunal) are effectively absent.

The first important change began when politicians realized what their constitutional courts were capable of and that they were not only legal institutions but also important political players capable of influencing national politics. An early example of this phenomenon was the way the Polish Constitutional Tribunal made its decisions during the first government of the conservative Law and Justice Party (PiS) in the period 2005–2007, which effectively frustrated many of the conservative reforms.[14] The Tribunal openly defended classical liberal concepts of the rule of law. This made the Tribunal a political actor ('politicized it") in the eyes of the conservatives (PiS) and its supporters. Conservative hostility to the Tribunal culminated in the realization that if their policies were to be put effectively into practice, they would first have to remove an obstacle represented by

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and are they the only legitimate power to read it?) and neither the Court nor its President has ever used this expression again. Cf. András Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary', Oxford J Legal Studies 15 (1995) 253.

13 Cf. Zdenek Kühn, 'Making Constitutionalism Horizontal: Three Different Central European Strategies' in: András Sajó and Renata Uitz (eds), *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International Publishing 2005), 217–240.

14 Sadurski (n. 1), 8–9.

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the Constitutional Tribunal.[15] '*The Constitutional Tribunal was trying to play the role of a sovereign, i.e. to break the principle of the sovereignty of the people, the principle of democratic state of law (the rule of law), and the principle of balance of power; these are all constitutional principles*,' claimed J. Kaczyński, the leader of PiS,[16] in line with his view that the law and legal argumentation were only a continuation of politics by other means.

Politicians realized that if the constitutional courts were instrumental in the liberal reforms of the 1990s, they could also be used in the illiberal reforms of the 2010s and 2020s. This danger is related to the fact that the success and strength of the legal transitions of the 1990s and the early 2000s were quite dubious. While the books of the old era were discarded, laws were repealed and new institutions were created, we should not underestimate the continuing strength of the old values, principles, and legal thought in general. After all, the authors of those discarded books remained in academia, even as they seemingly began to produce new writings virtually overnight. Along with the academics, the entire legal personnel of the old era survived the systemic change, and this contributed to the persistence of the spirit of the old legal culture. Even though much of the 'other Europe' became part of the European Union, it would be too simplistic to assume that the region became part of the Western European political and legal landscape with the fall of the Berlin Wall.[17] The deepest layers of the old legal culture are inherently resistant to sudden change. Moreover, the most persistent features of the legal culture are often those associated with the

15 Tomasz Tadeusz Koncewicz, 'The Polish Constitutional Crisis and "Politics of Paranoia"', VerfBlog, 3.11.2016, https://verfassungsblog.de/the-polish-constitutional-crisis-and-politics-of-paranoia/.

16 Dawid Bunikowski, 'The Crisis in Poland, Schmittian Questions, and Kaczyński's Political and Legal Philosophy', 18.10.2017, 10. Available at SSRN: https://ssrn.com/abstract=3055443.

17 Alas, the region disappeared from the scrutiny of comparative scholarship. The old 'Socialist Legal Family', which most comparative law treatises had posited, was seemingly replaced by a legal black-hole. Cf. Rafal Mańko, 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective', European L. J. 11 (2005) 527, 547–548, discussing the fact that the most recent edition of Zweigert and Kötz' treatise on comparative law simply discarded the Socialist Legal Family 'without writing anything in their place'. For more recent elaboration by the same author, see Rafal Mańko, 'Survival of the socialist legal tradition? A Polish perspective', Comparative LR 4 (2014), 1. Some more recent treatises on comparative law started to take into account Eastern European legal culture again as a distinct entity. See Uwe Kischel, *Comparative Law* (Oxford: Oxford University Press 2019), 533–553, discussing at length specific features of Central and Eastern European legal systems.

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region's illiberal and authoritarian pre-communist past, although they were modified during the socialist era.[18]

II. Illiberal Revolution and the Abuse of Constitutional Courts

The imported notion of judicial activism seems to be slowly dying out in the region. As I mentioned at the beginning, during the socialist period, the region's idea of constitutional courts – if they existed at all (Poland, Hungary) – was the idea of self-restrained constitutional courts, with crude politics taking precedence over so-called socialist legality. This idea is slowly regaining ground in the region. By contrast, the revival of activist constitutional courts in the 1990s could be seen as a short-term deviation from the established rule. Last but not least, some constitutional courts have lost much of their operational autonomy because they have been captured by the new elites willing to reshape the political system.

The constitutional tribunal could be captured in many ways. One extreme possibility is blatant illegality, i. e. violation of the rules of election or appointment of judges. In Poland at the initial stage of the Constitutional Tribunal's crisis, the tribunal's decisions were openly disregarded until the control over the Tribunal was achieved through questionable judicial appointments and open violation of the electoral process in 2015 and 2016. This path to a captured tribunal is the easiest to deal with legally. That is why the European Court of Human Rights can question the composition of the Polish Constitutional Tribunal and its character of being 'a tribunal established by law' within the meaning of Article 6 of the Convention.[19]

In yet other countries, the constitutional court fell under the control of illiberal majorities peacefully and lawfully, due to the long-term dominance of one political party in the Parliament, quite often combined with packing

18 Ironically, the most solid democratic traditions in Central Europe before World War II are those from the old Austro-Hungarian Empire (1867–1918). See Martin Putna, *Obrazy z kulturních dějin Střední Evropy* [Images from the cultural history of Central Europe] (Prague: Vyšehrad 2018) (author, a renowned Czech cultural historian, travels in his literary, political and historical wanderings throughout the wide territory of the former Austro-Hungarian Empire, from Bohemia, Moravia and Silesia through Austria, Hungary to Transylvania, Croatia, Dalmatia, Galicia, etc.).

19 For a detailed analysis of the Polish development after 2015, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

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the court, i.e. expanding the number of judges and appointing friendly ones to the bench (Russia, since the mid-1990s; Hungary, after 2010[20]).

In fact, the composition of constitutional courts has inevitably become a political issue in many developed Western democracies too. In the Central and Eastern European region, however, this is in conflict with the ideological foundations of the 1990s, i.e. those of non-political legal reasoning. Moreover, even though Western democracies are aware of the political nature of constitutional decision-making, the need to reach a compromise and consensus on candidates effectively produces good candidates who share the basic vision of the rule of law. In short, a shared vision among Western European political elites of what makes a good lawyer will eliminate nominees who are profoundly ideological, but mediocre lawyers at best.[21]

Even in those Central European countries where constitutional courts still operate autonomously, the level of judicial activism is not comparable to what it used to be during the first two decades after the fall of the Iron Curtain. The Czech Republic could serve as an example. The reasons for the strength of the Czech constitutional system and its ultimate guardian are partly institutional and partly purely accidental. The institutional reasons lie in a unique model of judicial appointments to the constitutional court, inspired by the United States (the President appoints with the consent of the Senate). This model (especially the Senate, which has traditionally been sceptical of Czech Presidents and their attempts to expand their power) has made it difficult for populist presidents since 2003 to appoint judges of their ideology who would be subservient to the demands of those in power.[22]

But even the Czech model carries obvious risks for future development. The Czech Constitutional Court has willingly pushed itself into a role that does not belong to it – into the role of a kind of super-review court that

20 Sadurski (n. 1), 10–13.

21 However, the fact that justices of different ideologies share a basic consensus on legal reasoning and basic constitutional principles can also be seen by critics as further evidence that they are ultimately part of the same establishment or 'Deep State'.

22 On the Czech system, see Zdenek Kühn, 'The Czech Constitutional Court in times of populism. From judicial activism to judicial self-restraint' in: Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Populist Challenges to Constitutional Interpretation in Europe and Beyond* (London: Routledge 2021). Cf. Hubert Smékal, Jaroslav Benákand Ladislav Vyhnánek, 'Through Selective Activism towards Greater Resilience: The Czech Constitutional Court's Interventions into High Politics in the Age of Populism', International Journal of Human Rights 26 (2022), 1230–1251.

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ultimately assesses the correctness and fairness of each and every individual decision made by ordinary courts (via constitutional complaint). The Court did its best to centralize the constitutional review of the legislation and to limit the power of the ordinary courts in this respect. The Court insisted that it alone had the power to review the constitutionality of the legislation.[23] In doing so, the Court deprived the general judiciary of its most effective power to resist any legislation that is in sharp conflict with the rule of law.

It is unlikely that Central and Eastern European constitutional courts will be completely abolished in the foreseeable future. The effects of the global rise of constitutional adjudication still control the mainstream political rhetoric. New authoritarians do not want to be seen as autocrats running wild. Today's authoritarians are more resourceful in this regard than were pre-1989 communist rulers. Indeed, they can also make good use of the constitutional judiciary. By controlling the constitutional court, they can shift the constitutional system even without the power to amend the constitution. You do not need the legislative supermajority to change the constitution if you control the ultimate interpreter of the constitution.

The captured court can become a welcome tool for politicians in power in their efforts to dismantle constitutional guarantees and structures. M. Kovalčík calls this 'instrumental abuse of constitutional courts', which can include various techniques by which populists can use the constitutional court as an instrument to gain control over the entire legal system. These techniques include the 'governing, do not disturb' technique (not annulling laws that are by all means unconstitutional); the legitimation technique, through which populists justify their actions (e.g. the tribunal annuls the laws from the old era as unconstitutional, thus providing the populists with an excuse to enact a new and controversial law); the extra-legal technique, which involves using the authority of judges in the media etc.[24]

When the Polish Constitutional Tribunal came under the full control of the Law and Justice Party (PiS) in December 2016 (I repeat, this was done by very questionable means, most likely in direct conflict with the Constitution and the Constitutional Tribunal Act), the Tribunal immediately began to side with the ruling party. The new Chief Justice, who controls the

23 Cf., for a broader regional trend in the same direction, Sadurski (n. 1), 35.

24 Michal Kovalčík, 'The Instrumental Abuse of Constitutional Courts: How Populists can Use Constitutional Courts against the Opposition', International Journal of Human Rights 26 (2022), 1160–1180.

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allocation of cases, prevented the judges elected by the previous parliamentary majority from deciding important cases. Interestingly, the PiS deputies challenged several laws as unconstitutional (although they could have easily repealed the laws themselves, given their majority in the Parliament), and the Tribunal quickly provided the answer the PiS needed.[25]

The Hungarian ruling party, on the other hand, does not need this kind of assistance, because since 2010 (with a brief pause) it has enjoyed a qualified supermajority in the Parliament, which is necessary to adopt or to amend a new Constitution and to select the personnel of all important political institutions. The actual practice of the Hungarian Constitutional Court, after it became fully dominated by people close to the ruling Fidesz party, is self-restraint in relation to the legislature. From an illiberal perspective, any law passed by the ruling majority in the Parliament can never be unconstitutional, because that is what the people represented by the deputies actually want. Legal arguments cannot be used to assess the constitutionality of legislation, because this could easily turn into supplementing one (legitimate) political opinion with another (illegitimate) one, made by unelected judges.[26]

In yet another role, constitutional courts could also protect the national constitutional values and principles from encroachment by supranational courts. After all, it is much more stylish for a national constitutional court defending national constitutional identity to reject rulings of the Strasbourg or Luxembourg Courts than for a national government to do the same.[27] The steps taken by the Polish Constitutional Tribunal since January 2017 are a certain variation, or rather a caricature, of the same.[28]

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25 See W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule of Law (2018), 1–22 (explaining how the Tribunal started to protect the government from laws enacted long before PiS took power).

26 Sadurski (n. 1), 12.

27 For a nice example of Russia and its complex relations with the European Court of Human Rights Alexei Trochev, 'The Russian Constitutional Court and the Strasbourg Court: Judicial Pragmatism in a Dual State' in: Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge: Cambridge University Press 2017), 125–149.

28 See the judgments of the Polish Constitutional Tribunal of 7 October 2021, K 3/21 (proclaiming judgments of the EU Court of Justice ultra vires), and of 24 November 2021, K 6/21 (doing the same with regards judgments of the European Court of Human Rights).

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Finally, there is another danger. The captured constitutional court could eliminate any threat to the new political regime from the ordinary judiciary, especially if it is equipped with the power to review the decisions of the ordinary courts. The Constitutional Court could provide a welcome means of controlling the decentralized judicial decision-making of the ordinary (general) courts within a single body composed of a few judges who have been ideologically vetted through political appointments (as opposed to the much less ideologically predictable ranks of ordinary judges).

III. The Struggle for the Autonomous Role of Ordinary Judges to Promote Constitutionalism

The new Hungarian Constitution of 2011 introduced a long-awaited constitutional complaint against decisions of the ordinary courts. Individual constitutional complaints replaced the previous *actio popularis*, which allowed virtually anyone to challenge any Hungarian law (but not a court decision).[29]

On the one hand, this change seems positive, as it brings Hungarian law into line with the mainstream position in Central Europe (constitutional complaints against decisions of the ordinary courts exist in Germany, Czechia, Slovakia, Slovenia, etc.). On the other hand, this reform could also serve other purposes. First, it could give a meaningful purpose to the captured Constitutional Court, which had lost its primary mission — to be a real check on the legislature and effectively review the constitutionality of legislation. More importantly, it could also provide a much-needed check on the decentralized judicial decision-making of the ordinary courts. This control would be exercised within a single court composed of judges who have undergone ideological control in the form of political elections in Parliament.

The Hungarian example is one of the many similar trends empowering constitutional judiciary and disempowering the ordinary courts. Since the 1990s, the institutional settings of the Central European constitutional systems have made it very difficult for ordinary courts to uphold the rule of law. Over the past decades, constitutional courts in the region have done

29 Fruzsina Gárdos-Oros, 'The Hungarian Constitutional Court in Transition – from Actio Popularis to Constitutional Complaint', Acta Juridica Hungarica 53 (2012), 302–315.

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their best to centralize the constitutional review of legislation and to limit the power of ordinary courts in this regard. The constitutional courts insisted that they alone should have the power to review the constitutionality of legislation (compliance with both the Constitution and international human rights treaties).[30] In doing so, they deprived the general judiciary of its most effective power to resist any legislation that would be in sharp conflict with the rule of law.

This is no doubt due to a widespread feeling that ordinary judges are not competent to elaborate complex constitutional doctrines. However, this exclusionary approach may further alienate ordinary judges and increase their reluctance to cooperate and explain constitutionalism.

In Central Europe, one may too often find the idea that ordinary judges should not engage in constitutional reasoning, that they are incapable of taking constitutional rights and values seriously, and that the constitutional court is not a 'court' but a special and unique body outside the judicial power.[31] Under such conditions, centralized constitutional review runs a clear risk of being 'over-centralized'; constitutionalism is only a vague and in practice selectively applied idea (only when the case reaches the constitutional court). If the central role of constitutional courts in building the rule of law is overemphasized, ordinary courts have a strong tendency to disappear from the story. While the nature of centralized post-communist constitutional courts is exclusive (they are the main forum for constitutional arguments, they and only they can annul the law and formal annulment, by which the law ceases to be valid, as opposed to setting law aside, is something that matters a lot in Central Europe), their argumentation must include the ordinary courts, and the ordinary courts must be invited to engage in the rule of law building.

The complete centralization of the review of the constitutionality of laws (including the review of their compliance with international human rights treaties), contrary to the prevailing view in the 1990s and early 2000s, may

30 Sadurski (n. 1), 35 ff.

31 For this view in Poland Walerian Sanetra, 'W sprawie związania sądówpowszechnie obowiązującą wykładnią ustaw' [On the impact on the ordinary courts of the generally binding interpretation of statutes], Przegląd Sądowy 6 (1996), 3, at 8–9, arguing that the Constitutional Tribunal is not a court and, therefore, the judges cannot be bound by the decision of such a non-judicial body. For the view that after the enactment of the new Constitution of 1997 the Tribunal is clearly a 'court' see Lech Garlicki, 'Trybunał Konstytucyjny a sądownictwo' [The Constitutional Tribunal and the Judiciary], Przegląd Sądowy 8 (1998), 3, at 4.

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actually weaken the rule of law and the protection of rights. For example, by monopolizing the review of the conformity of laws with human rights treaties, the Czech Constitutional Court has paradoxically weakened the possibilities of defending democracy in the future.[32]

Against this background, the Polish regular judiciary has always seemed more open to the protection of constitutionalism and the rule of law. Since the Constitutional Tribunal cannot review the constitutionality of the decisions of the ordinary courts, the Polish ordinary courts, and especially the higher courts of the ordinary judiciary (the Supreme Court and the Supreme Administrative Court), took their role in the protection of individual rights very seriously. They developed a new constitutional doctrine, they practiced horizontal constitutionalism,[33] and they dealt with sophisticated issues of intertemporal effects of law or methodology of individual rights. The Supreme Court, for example, dealt extensively with the new 1997 Constitution in more than 60 decisions in less than two years after the Constitution came into force.[34] The reasoning of Polish courts is often instrumental and pragmatic.

This is also an explanation of why the Polish ruling elites turned against the Polish ordinary judiciary in general and the Supreme Court in particular in 2017, immediately after gaining full control over the Constitutional Tribunal. Faced with the independent actions of the Supreme Court in early 2017, the new ruling elites were well aware that without control over the Supreme Court (and subsequently the lower courts), they would not have full control over the judiciary. Mere control of the Constitutional Tribunal (which, unlike in the Czech Republic or Hungary, does not have the power to overturn decisions of ordinary courts) is not enough.

32 In Czechia see judgment of the Constitutional Court of 25 June 2002, No. Pl. ÚS 36/01, which – despite the clear wording of the Constitution – found out that the 'constitutional order' includes international treaties on 'human rights' – thus depriving ordinary courts the power to set aside the domestic legislation which is in conflict with such an international treaty. This judgment, too, is intertwined with scepticism towards ordinary courts and their ability to protect international commitments against the legislature.

33 For a long list of these decisions Anna Wyrozumska, 'Direct Application of the Polish Constitution and International Treaties to Private Conduct', Polish Yearbook of International Law 25 (2001), 5.

34 Procházka (n. 3), at 113.

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IV. Empowering Ordinary Courts as a Rule of Law Counterrevolution

This brings us to the central question of this paper. What chance do ordinary courts have of defending the rule of law against the rising authoritarian regime, especially when it controls the constitutional tribunal?

First, we could recall that in the 1990s, the ordinary judiciary in the region initially resisted the pressure of constitutional courts aimed at truly protecting fundamental rights and the Constitution.[35] It could be expected that three decades after the transition to democracy, this attitude of ordinary judges has already changed and many of them (most likely the majority) have actually internalized the principles of the rule of law. In other words, the judiciary has become part of the democratic political system and protects its values. To give an example, at least some of the Polish ordinary judges after December 2016 (when the Constitutional Tribunal was captured by the new political elite) were ready to enforce the principles of the rule of law instead of the incapacitated Constitutional Tribunal.[36]

However, we must also bear in mind that the judiciaries of Central and Eastern Europe are a part of the traditional continental model. Judges in the continental model of civil law resemble bureaucracy in terms of style, thinking and decision-making. They embrace a formalist and bureaucratic model of law, including its characteristic style of judicial reasoning. For a judge-bureaucrat, any appeal to a defence of the rule of law and its basic principles has little charm. Furthermore, because of the hierarchical nature of continental judiciaries, there is also a way how to get ordinary judges under control. What is needed in this regard is simply to replace court presidents with loyal jurists who will do what is expected of them. The courts' presidents have control over the allocation of cases and have many 'sticks and carrots" at their disposal throughout the court. All in all, the power to appoint the president of a court amounts to (sort of) control over the entire court.[37]

35 In the 1990s and early 2000s, this occasionally turned into clashes with constitutional courts. For more on this, see Kühn (n. 6), chapter 5. Cynically speaking, we could say that in the 1990s the ordinary judges also protected the system, even if it was the old and failed system of the communist power.

36 See Sadurski (n. 19), 96–131.

37 In fact, this was the second step taken by the Polish PiS party after it assumed control over the Constitutional Tribunal. The so-called 'judicial reform' they introduced comprised the replacement of a significant number of the Polish general courts' presidents by the Minister of Justice. The Minister of Justice replaced 149 out of the

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Despite these setbacks, it is clear that the existence of an independent judiciary (against the backdrop of the captured Constitutional Court) provides some important channels for decentralized judicial review and more robust protection of the rule of law. We cannot expect a full-scale defence of the rule of law, after all, it is neither necessary nor desirable (and the nature of the legal process before the ordinary courts does not allow it). The case-by-case approach of the ordinary courts (responding to legal problems presented by real cases) would rather enable small incremental advances. Their formalistic conception of law and emphasis on legalism gives ordinary judges some important advantages: for example, their work appears non-political, which gives them more chances to block formal violations of the rule of law. This is the essence of 'defensive legalism,' which emphasizes the formal legal criteria for protecting key principles of the rule of law (as opposed to the more substantive approaches of the constitutional judiciary, which could be more easily accused of being visibly politically biased).[38]

Ordinary courts have several important ways of protecting the rule of law. The first principle is called the principle of constitutionally conforming interpretation. This principle, which originated in Germany,[39] is well known in Central Europe. By its very nature, this principle cannot be centralized only in the constitutional tribunals, and it provides important avenues for ordinary judges to engage in debates about the proper meaning

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total number of 730 presidents and vice-presidents of the courts over a period of six months. As explained by the Polish Association of judges, *Iustitia*, for instance, the court's president could influence his or her judges by not extending deadlines for drafting judgments and, in case of a subsequent delay, he/she can initiate disciplinary action against the given judge. See Iustitia: *The Response to the White Paper Compendium on the Reforms of the Polish Justice System*, available at https://www.iustitia.pl/informacje/2172-re-%20sponse-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-repub-%20lic-of-poland-to-the-european-commission.

38 Cf. interesting remarks Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries', Eur. Pub. L. 14 (2008), 99–124.

39 Cf. Germany, where it is referred to as the principle of the constitutionally conforming interpretation (*Verfassungskonforme Auslegung*). Peter Sachs (ed.), *Grundgesetz: Kommentar* (München: C.H.Beck 1996), 61–62. The Federal Constitutional Court held that '*if a rule allows several readings, but only one reading leads to a constitutionally permissible construction, the reading consistent with the Basic Law is obligatory.*' BVerfGE 49, 148 (157). In Germany, the first decision which established this doctrine was BVerfGE 2, 266 (282), quoted in Sachs at 61, n. 61.

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of constitutional principles (and, if necessary, to disobey overly politically driven opinions of their domestic constitutional courts). As a leading expert on comparative constitutionalism has noted, bringing interpretation into line with fundamental rights is often much more durable and far-reaching than simply striking down the law as unconstitutional.[40] This is for the simple reason that interpretation (unlike annulment) would often go virtually unnoticed by other important political actors.

The second is the power of the ordinary courts to protect international treaties in general and human rights treaties in particular. The ordinary court cannot annul national legislation because it is in conflict with an international treaty – but it can set aside the legislation in an individual case. Setting aside is a more subtle instrument than its formal derogation (annulment). Depending on the circumstances, it may mean only partial inapplicability of legal regulation to certain types of situations, with the result that the legal regulation is fully applied to other types of situations.

Third, there is the direct effect of EU law and its primacy over national law. In practical terms, what matters most for the purposes of this paper is that when implementing EU law, the national authorities of the Member States, including the courts, are bound by EU law to respect EU law, including the principles of the rule of law and (EU) fundamental rights.[41] This includes the obligation to interpret national law in conformity with EU law[42] and to set aside national law which is contrary to EU law. In declaring

40 András Sajó, 'Constitutional Adjudication in Light of Discourse Theory', Cardozo LR 17 (1995), 1193, at 1208 ('*constitutional tribunals have more of a chance to provide lasting and unsupervised determinations of the law by interpreting the law rather than voiding it.*'). Although Sajó is describing constitutional tribunals, this argument is even stronger with respect to ordinary judiciary.

41 As perfectly explained already by Francis Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', ELRev 26 (2001), 331, at 333.

42 Judgment of the Court (Third Chamber) of 13 July 1989, case 5/88, *Wachauf* ('*Since* [the requirements of the protection of fundamental rights in then Community law] *are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.*'). The Court followed the advice of its Advocate General Sir Francis Jacobs who reasoned that '[a]*lthough the Court's case-law has hitherto been concerned with respect for property rights by the Community legislator itself, the same principles must in my view apply to the implementation of Community law by the Member States, since it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator.*' AG opinion, para. 22.

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these principles, the Court of Justice has associated itself with ordinary national courts, rather than constitutional courts, in the task of making European law supreme.[43]

The rule of interpretation consistent with EU law, including EU fundamental rights and principles, is one of the key factors of European constitutionalism. It can be seen as a prerequisite for any rational system of judicial review. However, this rule also involves a shift of power within national judicial systems. It strengthens the power of the Court of Justice, which could uniformly impose its version of fundamental rights and the principles of separation of powers on national ordinary courts. By interpreting European rules against the background of their national implementation, the Court of Justice considerably extends the impact of its case law throughout the national legal systems.

Illiberal regimes are very sceptical about the nature of law; they see law as pure politics hidden behind the veil of legalistic jargon. But could the opposite be true? Is the law really autonomous; does the constitution really constrain the government? Or is it a mere sham, devoid of meaning in itself and entirely dependent on its interpreter? I suspect that the early, overtly activist nature of the jurisprudence of constitutional courts in Central Eastern Europe actually justified and legitimized the fears of illiberal thinkers that constitutional law could be abused for political purposes. It also showed illiberal leaders a possible way to strengthen and legalize their cause simply by taking over the personnel of the tribunal that says what the constitution is.

However, if we should give up any hope that the law is capable of limiting the government, this will open the floodgates for unlimited government. Illiberal democracy can easily turn into just another model of an authoritarian regime. That would bring Central Eastern Europe back to the political landscape the region abandoned three decades ago.

In illiberal regimes, ordinary courts could operate in a subversive manner. The answer to the new authoritarians is to promote the value of general rules and their ability to control the ruling power, but to do so — as far as possible — in an impartial and non-political manner (which does not exclude far-reaching political consequences of judicial decisions based on

43 Case 106/77 *Simmenthal*, para. 26 ('[N]*ational courts must protect rights conferred by provisions of the Community legal order and that it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of community rules*').

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legalistic reasoning). Judicial decision-making should follow formal rules and principles and not be driven by free value judgments, emphasizing judicial self-restraint (when legitimate political options to be decided by politicians are at stake) and keeping the judiciary out of pure politics. Courts should let politicians rule; courts should intervene only when the formal rules have been violated or when established case law or constitutional dogmatics require it.

I am well aware that this may sound naive. My task is not to eliminate judicial discretion altogether, but rather to reduce the level of judicial activism. A certain amount of judicial discretion is inevitable. The point is that it should not eliminate politics and the ability of politicians to govern.

The ordinary judiciary, with its formalities and seemingly non-political nature, can provide an important impetus for strengthening the rule of law. Moreover, it is not a few judges of constitutional courts, but thousands of judges of ordinary courts who cannot be easily controlled by the ruling power; the complete control of the entire judiciary is practically possible only in the most extreme versions of authoritarian regimes or in a totalitarian society.[44]

Therefore, a system of centralized constitutional review with some decentralized features seems preferable because it makes the rule of law and constitutionalism much more robust and viable at the same time. All judges — and not just those in the constitutional courts — are there to protect constitutional rules and principles, if necessary disregarding the fact that the decision will upset important political actors. If ordinary judges were involved in this task, the rule of law and constitutionalism would be much stronger than if the Constitutional Court tried to perform the same task as the 'only fighter on the battlefield'.

Authoritarians try to fill the general and abstract language of the constitution with their values. Liberal constitutionalism must reject this. But the goal of liberals should not be to do the same thing in reverse, to fill the constitution with neoliberal economic principles or identity politics. Trying to replace the political with the legal should be a liberal counter-revolution.

44 Peter H. Solomon, 'Courts and Judges in Authoritarian Regimes', World Politics 60 (2007), 122–145, especially 125 ff.

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V. Conclusions

In sum, dangerous trends of democratic backsliding in the Eastern European region have also been facilitated by the drive toward overly powerful constitutional courts. Empowering constitutional courts and centralizing judicial review of legislation often means disempowering or weakening the power of ordinary (general) courts. In the first decade of post-communist transformation, powerful constitutional courts could have accelerated the transition to a new conception of law and constitutionalism. What made sense in the first decade of transformation is now becoming risky. Just as the constitutional courts were used by the architects of the great transformation of the 1990s, they could be used by the architects of the transition to authoritarianism.

Constitutional courts in the region claimed exclusive authority to review the constitutionality of legislation. In the 1990s, many Western observers applauded this trend because it also meant fighting untrustworthy post-communist judges and problematic legal scholars. Constitutional courts became the champions of liberalism and new constitutionalism. Because they were vested with very broad powers, they also had the potential to transform the entire legal system and push ordinary judges toward the ideals of the rule of law.

But the authoritarians and illiberal politicians noticed the opportunities which centralized judicial review provided for the illiberal 'counterrevolution'. Ordinary courts devoid of any political power, as known in the countries of Eastern Bloc by the 1980s, could thus be revived through this kind of 'over-centralization' of constitutional courts. Since it is difficult to control the entire judiciary (unless we are in a pure totalitarian state), the new illiberal politicians find it tempting to take over the personnel of the constitutional court — and to give the captured court even more power.

That is why the empowerment of the ordinary judiciary in Central Europe is becoming an essential task of our time. We need to take seriously the power of ordinary judges to set aside the legislation in conflict with EU law (without any advice or assistance from the domestic constitutional court). Moreover, the ordinary courts must play an important role in promoting international treaties, which take precedence over domestic law (the power of ordinary courts includes both harmonizing interpretations, such as interpretation of domestic law friendly to international law, and setting aside domestic law in conflict with international law). Last but not least, the

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power of interpretation to harmonize the law with the Constitution is also an important tool in the work of ordinary judges.

It is not just to keep constitutionalism and the rule of law strong. There is another reason why decentralizing judicial review is necessary to make the rule of law viable. If the opposition were to win elections in Hungary or Poland, the posts held by the former regime in institutions such as constitutional courts could become the last strongholds of the old regime and effectively block the new ruling elites and their reforms. In this way, we will see the mirror image of what happened after the fall of communism, when these were ordinary judges who were some of the last strongholds of the old legal thought and culture.

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III.
Reestablishing the Judiciary

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Poland After Elections in 2023: Transition 2.0 in the Judiciary

Adam Bodnar

I. Introduction 300
II. Constitutional and Political Constraints of Potential Judicial Reforms 301
III. Necessary Judicial Reforms 303
1. Constitutional Court 303
2. National Council of Judiciary 304
3. System of disciplinary actions towards judges 305
4. Status of neo-judges 307
5. Re-opening of judicial proceedings 309
6. Administration of judiciary 309
7. Prosecution Service 310
8. Other changes 312
IV. Role of the EU and International Organizations in Securing Judicial Reforms 313
V. Transitional Justice Schemes 316
VI. Legitimacy of the Judiciary – Search for Effectiveness 319
VII. Conclusions 322

Abstract:
Since 2015, Poland has been in the midst of a rule of law crisis. Changes affected operation of different 'checks and balances' institutions. But there is a chance that after parliamentary elections, to be held in October 2023, Poland may try to repair its justice system. The purpose of the paper is to analyze the possible reforms, including the methods to implement them. The question is whether and how the transition of the Polish legal system back to compliance with rule of law standards is possible, and what could be potential obstacles and chances. It is unlikely that an amendment to the Polish Constitution will be possible. Therefore, most of the changes will have to be carried out through legislative amendments. The role of the European Union as a possible "agent of change" is analyzed, as well as potential use of transitional justice and accountability instruments.

Keywords: Rule of law, democracy, illiberalism, democratic backsliding, authoritarianism, judicial independence, courts, European Union, transitional justice, constitutional amendments, prosecution service, ECtHR, CJEU, Polish Constitutional Court, elections, Venice Commission, European Commission

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I. Introduction

Since 2015, Poland has been in the midst of a rule of law crisis. After winning parliamentary elections, the 'Law and Justice' (*Prawo i Sprawiedliwość*) party has made numerous legislative changes affecting the operation of constitutional organs and bodies, including the Constitutional Court and the judiciary.[1] Those reforms have been made without amending the Polish Constitution, since the ruling party never had a constitutional majority. As a result of new laws and practical political actions, including actions which violate the Constitution (nomination of so-called 'double judges', refusal to publish verdicts of the Constitutional Court),[2] the Constitutional Court stopped being an independent judicial review organ. In consequence, the role of the Parliament has been marginalized as regards its relationship with the executive power. Laws were adopted without any real constraints and without any threat that, one day, they could be declared unconstitutional. The ruling majority secured total control over the Prosecution Service, civil service, public media and secret services. Judicial independence has been curtailed. The road towards illiberal democracy led to numerous protests and reactions domestically[3] and internationally, most importantly by the European Union institutions.[4] Some of the changes have been frozen. Nevertheless, the turning point could be parliamentary elections, planned to be held in October 2023. The current parliamentary opposition declares that reforms aimed at securing rule of law would be the major task for the new government, in case it won the elections.[5] The purpose of this paper is to analyze the possible reforms, including the methods to implement them. The paper considers whether and how the transition of the Polish legal system back to compliance with rule of law standards is possible, and what could be potential obstacles and chances.

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1 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

2 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

3 Adam Bodnar, 'Polish Road toward an Illiberal State: Methods and Resistance', Indiana Law Journal 96 (2021), 1059–1087.

4 Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Berlin: Springer Verlag 2021).

5 Civil society organizations have prepared 'Porozumienie dla praworządności' (Covenant for Rule of Law) that was signed in November 2021 by major opposition parties, https://wolnesady.org/files/2021.11.05-Porozumienie-dla-praworzadnosci-_logos_final.pdf.

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II. Constitutional and Political Constraints of Potential Judicial Reforms

According to different polls made between 2022 and 2023, the democratic opposition has a chance to win parliamentary elections in Poland, planned for October 2023. However, the Polish Constitution provides for a two-thirds majority threshold in order to change the Constitution. There is a very limited chance that the opposition may achieve such significant success. Rather, the possible winning majority could be just above the threshold of an absolute majority in the Parliament. Such victory may allow for the creation of the government and for a parliamentary majority, but it does not allow for any constitutional changes. Therefore, the scope of potential reforms would be limited.

The process of transitional justice could be complicated due to different obstacles and hurdles. They should not be ignored by policymakers and leaders of the current opposition. Quite to the contrary, they have to be taken into account as a scenario in which political and legal actions are achievable, and which of them are merely theoretical and illusory. They are like traps installed in the system that may prevent a natural return to the rule of law system.

First, judicial reforms may face strong opposition from constitutional organs that may sympathize or be loyal to the previous government. The Constitutional Court has been packed throughout 2015 – 2023 with loyal judges.[6] The Constitutional Court has the power to declare any legislative act unconstitutional. Moreover, in case of a motion by the President, submitted before signing the law, the Constitutional Court may 'freeze' the entry into force of the legislative act for a certain period of time. Therefore, the new government would have to take this factor into account in its political scenarios. Moreover, the possible reform of the Constitutional Court is an issue in itself (see below).

Second, judicial reforms implemented between 2017 and 2023 required a number of individual appointments to positions in the judiciary. Therefore, one of the most important obstacles could be the implementation of any vetting procedure for judges. The President of Poland Andrzej Duda declared on different occasions that any judicial nominations made by him cannot be challenged, as they were made within his constitutional prerogative. This is a controversial view. Nevertheless, it signals that any

6 Venice Commission: Opinion CDL-AD(2016)001 of 11 March 2016, Opinion CDL-AD(2016)026 of 14 October 2016.

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vetting procedures for judges could be subject to fierce opposition from the President of Poland.

Third, in some constitutional organs, its presidents or members are appointed for specific terms, which are constitutionally regulated. For example, the First President of the Supreme Court has a 6-year term, and the National Council of Judiciary members are appointed for 4-year terms. Without a constitutional majority, it might be difficult to shorten those terms, notwithstanding the fact that the original appointments were constitutionally dubious.

Fourth, there might be a strong opposition towards changes due to different personal stakes involved. Over the last 8 years, 'Law and Justice' created a clientelist system, with a number of beneficiaries and financial incentives (including support to special state funds, media, and private organizations). People and institutions defending the *ancien regime* might be an important hurdle in the implementation of different changes.

Fifth, despite the current economic crisis, it seems that as compared to the Communist government in 1989, the government of 'Law and Justice' would not face an overwhelming stigma. This government has provided for important social transfers and secured a low level of unemployment. Even if 'Law and Justice' fails at the elections due to a lack of further trust and current economic problems, it would not face strong moral condemnation. It is not a situation that could be compared to 1989 when Polish citizens observed the financial, political, and moral catastrophe of 45 years of communism. Such a social environment will have an impact on the success of different rule of law reforms and transitional measures.[7]

Those factors will influence the process of Transition 2.0. They may limit the ability of the new government and parliamentary majority to quickly repair the system of the judiciary and reestablish rule of law guarantees. Certainly, there will be pressure to exact revenge, review judicial nominations, and repair the justice system. The question is, however, whether the society at large expects this ('let's finish the war in the judiciary', 'judiciary should be for citizens, not judges', 'judges should not be politicians'); whether legislative changes would get a clearance from the President and

7 1989 was a turning year also for judges, including different transitional schemes – see Adam Strzembosz and Maria Stanowska, *Sędziowie warszawscy w czasie próby 1981 – 1988* [Warsaw judges upon pressure 1981 – 1989] (Warsaw: Instytut Pamięci Narodowej 2005).

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the Constitutional Court; and whether any radical action will fuel the chances of 'Law and Justice' regaining power.

III. Necessary Judicial Reforms

1. Constitutional Court

The situation in the Constitutional Court is commonly regarded as a major obstacle to the potential transitional reforms. The Constitutional Court has been packed by 'Law and Justice', with the majority of judges being appointed by it. Moreover, it includes three 'double judges', i.e. judges nominated for positions that were already filled by the Parliament in 2015.[8] The Constitutional Court is also suffering due to internal crises and conflicts between judges. In the public debate in Poland, two proposals have been submitted on how to resolve the situation in the Constitutional Court. According to Wojciech Sadurski, so-called 'option zero' should be adopted. Politicians should aim toward creation of a new composition of the Constitutional Court, and existing judges should resign.[9] However, it is not clear how to achieve such an outcome without changing the Constitution. According to the Batory Foundation draft law,[10] the change in the composition of the Constitutional Court should be made over time, as a result of the following actions: 1) resignations of some existing members (that could be induced by retirement benefits); 2) appointment of new judges, upon expiry of the actual terms of current judges (some judges end their terms in 2024–2025); and 3) dismissal of 'double judges'. The draft law also provides for a change in disciplinary proceedings against the Constitutional Court judges. Such cases would be heard by panels composed of existing and former Constitutional Court judges. It would provide an opportunity to review the actions of some judges who openly involvement themselves in politiking, despite their judicial function. These actions are certainly long-term options, but they might create the conditions for an evolutionary

8 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 2).

9 Wojciech Sadurski, 'Trybunał do wyzerowania [Constitutional Court is to have option zero]', Gazeta Wyborcza daily, 8 July 2022, https://wyborcza.pl/magazyn/7,124059,28665135,trybunal-do-wyzerowania.html.

10 Draft law on the Polish Constitutional Court prepared by the Batory Foundation has been presented on 18 July 2022, https://www.batory.org.pl/informacje_prasowe/obywatelski-i-apolityczny-projekt-ustawy-o-trybunale-konstytucyjnym.

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recovery of the Constitutional Court, without the necessity of changing the Constitution.

2. National Council of Judiciary

The major constitutional problem with the National Council of Judiciary ('NCJ') is that 15 of its judicial members (out of a total of 25 members) are appointed by the lower chamber of the Parliament. Before 2018, this appointment was made by other judges (peers). Such a method of appointment was in accordance with the Polish constitutional design, as it guaranteed proper separation of powers. The new composition of the NCJ led to numerous consequences. The NCJ has been expelled from the European Network of Councils of Judiciary.[11] According to the jurisprudence of the EU Court of Justice ('CJEU'), any court should have a right to verify whether appointments made by the NCJ are in accordance with the principle of effective legal protection and judicial independence.[12] The ECtHR declared that judicial panels composed of judges appointed by the NCJ in its new composition ('neo-NCJ') may not fulfill criteria of 'court' under Article 6 ECHR.[13] The neo-NCJ is regarded as a fundamental problem in the current legal system. Deficiencies in judicial nominations have an impact on the daily operation of courts and allow for the undermining of court verdicts. Therefore, it is a fundamental task to resolve the problem of the NCJ.

The only solution is the appointment of judges to the NCJ in accordance with constitutional and legislative practices that existed before 2018. 15 judicial members should be appointed by other judges, in order to guarantee judicial independence standards. For this purpose, a relevant legislative act should be implemented. The question is whether the existing terms of current members could be shortened. One should note here that original nominations for the period 2018–2022 (first term) and 2022–2026 (second period) were made in grave violation of the Constitution. Their nominations have been challenged in the public discourse and in the ju-

11 European Network of Councils of Judiciary: Statement of 28 October 2021 on expulsion of the Polish National Council of Judiciary, https://www.encj.eu/node/605.

12 CJEU, *A. K. and Others,* Joined Cases C-585/18, C-624/18 AND C-625/18, judgment of 19 November 2019, ECLI:EU:C:2019:982.

13 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 3 February 2022, no. 1469/20.

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risprudence of the CJEU and the ECtHR. These developments potentially provide an argument that the existing terms of some members could be shortened. Nevertheless, such a decision would result in a vivid discussion and protests by persons (including judges) defending the *ancien regime*. There is also a risk that any legislative act introducing such change could be challenged by the President of Poland, acting in cooperation with the Constitutional Court.[14]

3. System of disciplinary actions towards judges

Judicial reforms introduced by 'Law and Justice' included the new system of disciplinary proceedings, composed of two major elements: 1) disciplinary judges appointed directly by the Minister of Justice, and 2) a new Disciplinary Chamber in the Supreme Court.[15] Thanks to this system it was possible for the executive power – using the hands of loyal judges acting as disciplinary judges – to target those who resisted judicial reforms or were critical towards the transformation of the Polish judiciary into the authoritarian direction. Moreover, proceedings aimed at lifting judicial immunity, instigated by prosecutors, were also used to achieve a 'chilling effect'. As a result of both disciplinary and immunity proceedings, several judges were subject to harsh disciplinary proceedings, and a few of them were suspended as judges (with most notable examples of Igor Tuleya[16] and Paweł Juszczyszyn[17]).

Certainly, any judicial reform should involve the elimination of the special position of disciplinary judges, which are acting together with the executive power. Any person holding such a position should be selected by organs affiliated with the judicial branch of government. Therefore, it is a

14 See the paper by Miroslaw Wyrzykowski on 'constitutional trap' in this book.

15 Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', Hague Journal of the Rule of Law 12 (2020), 451–483.

16 *Tuleya v. Poland*, applications nos. 21181/19 and 51751/20, judgment of 6 July 2023. See also: 'The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland', American Bar Association, 20 November 2020, https://www.americanbar.org/groups/human_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/.

17 Paweł Juszczyszyn case is of special character. For the first time in the history of Polish cases, the ECtHR declared violation of Article 18 ECHR, ECtHR, *Juszczyszyn v. Poland*, judgment of 6 October 2022, no. 35599/20.

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fundamental step towards eliminating the current method of appointment – appointment must made directly by the Minister of Justice in the future.

When it comes to the Disciplinary Chamber in the Supreme Court, as a result of the CJEU judgment of 15 July 2021,[18] and the pressure from the European Commission (suspension of the EU Recovery Plan)[19], the first steps have been made. The Disciplinary Chamber has been replaced with the Chamber of Professional Responsibility in the Supreme Court.[20] Later on, due to ongoing pressure from the European Commission, the new law provided for further changes. The parliamentary majority decided to adopt new laws that implemented two guidelines: independence of the disciplinary mechanism against judges and the possibility for judges to verify the status of other judges (so-called 'judicial independence test').[21] Most notably, the new law included a controversial change – the transfer of all disciplinary cases against judges to the Supreme Administrative Court. The President of Poland decided to submit this law to the Constitutional Court for judicial review before signing it. The case has not been yet decided.[22] Irrespective of the final decision of the Constitutional Court, neither the Chamber of Professional Responsibility nor the Supreme Administrative Court meet the criteria of judicial independence, albeit due to different reasons. Therefore, the reform should provide for transferring such powers to the existing chamber of the Supreme Court, composed of judges who are fully independent. Those criteria are met by the Criminal Chamber of the Supreme Court.

18 CJEU, C-791/19, *Commission v Poland*, judgment of 15 July 2021, ECLI:EU:C:2021:596.

19 'EU withholding billions in cohesion funds from Poland over rule-of-law concerns', Notes from Poland, 17 October 2022, https://notesfrompoland.com/2022/10/17/eu-withholding-billions-in-cohesion-funds-from-poland-over-rule-of-law-concerns.

20 Paweł Marcisz, 'A Chamber of Certain Liability', Verfassungsblog, 31 October 2022, https://verfassungsblog.de/a-chamber-of-certain-liability.

21 Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw [Act of 13 January 2023 on amending the Supreme Court Act and other legal acts].

22 The case is registered with the number Kp 1/23. Due to the dispute and political tensions between the judges of the Constitutional Court, the case is not yet resolved. Specifically, there is a dispute among judges whether Julia Przyłębska is still the President of the Constitutional Term. See on this: Daniel Tilles, 'Polish constitutional court judges rebel against chief justice, demanding she step down', Notes from Poland, 5 January 2023, https://notesfrompoland.com/2023/01/05/polish-constitutional-court-judges-rebel-against-chief-justice-demanding-she-step-down.

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4. Status of neo-judges

Since 2018, the President of Poland acting upon the recommendation of the neo-NCJ has made numerous judicial nominations. He has appointed judges to the new chambers of the Supreme Court (Disciplinary Chamber and the Chamber of Extraordinary Appeals and Public Affairs), existing chambers of the Supreme Court, the Supreme Administrative Court, and to common courts and administrative courts. However, due to the extensive case-law of the CJEU and the ECtHR, judicial nominations made by the neo-NCJ may be subject to legal challenge. In *Advance Pharma v. Poland* and other subsequent cases concerning the situation in the Polish judiciary, the ECtHR confirmed that there is an 'inherently deficient procedure for judicial appointments of new judges' made by the neo-NCJ.[23] In consequence, any court adjudicating cases with the participation of such judges cannot be regarded as a 'tribunal established by law' in accordance with Article 6 ECHR. Despite the ECtHR jurisprudence, neo-judges continue to serve in the judiciary. It happens that their status is challenged by certain 'old' judges who refuse to adjudicate in panels with them or quash judgments issued by them, referring to existing case law of the CJEU and ECtHR. This tension grows with every passing day and will have to be resolved in the case of Transition 2.0.

Therefore, any judicial reform should involve the procedure of vetting such neo-judges. Otherwise, their mandate to adjudicate could be continuously put in question, by both 'old' judges, the ECtHR, and the parties to different proceedings. Any judge should have a clear and undisputed legitimacy to perform his/her duties, and therefore there is a need for a vetting procedure. Such vetting should be made by the NCJ, composed of judges nominated in accordance with the constitutionally compliant procedure.

Among neo-judges, one may distinguish the following categories of judges: 1) 'rookie' judges – graduates of the National School of Judiciary and Prosecution Service; 2) judges promoted to higher instances (e.g. from district courts to regional courts); 3) new judges appointed to the Supreme Court or lowers courts out of academia members, or representatives of other legal professions (prosecutors, attorneys, legal advisors, notaries). One should note that graduates of the National School of Judiciary and Prosecution Service did not have any other option other than to get a judicial nomination via applying to the neo-NCJ and asking for its recommendation.

23 ECtHR, *Advance Pharma sp. z o.o v. Poland* (n. 13), para. 349.

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This factor should have an impact on any possible vetting procedures in the future. Maybe in this case vetting should be relatively automatic – their status as judges should be confirmed by the NCJ acting in constitutionally compliant procedure and composition. Judges in the remaining groups (2 and 3, above) had a personal choice whether to apply for judicial nomination by the neo-NCJ. Therefore, the vetting procedure with respect to them should be more comprehensive. As regards judges appointed to higher instance courts (e.g. district court judges appointed to regional or appeal courts), one should consider their 'return' to their original courts. This way, one may avoid criticism that such judges are deprived of their judicial status. The full process of vetting should concern new judges appointed after 2018 (3. category). They have made a conscious decision to participate in the system which was constitutionally questionable at the outset. They should have been aware when accepting the nomination by the neo-NCJ that they were acting against the Constitution of Poland, in order to benefit personally and professionally.

One should note that due to the scale of judicial nominations made since 2018 (more than 2.000 judges) and the diversified status of judges appointed by neo-NCJ, such vetting procedures may require a longer time to be effectively performed. Moreover, vetting procedures should not lead to the paralysis of the judicial system. Therefore, one could imagine simplified procedures for vetting. The legislation could provide that if no objections are made to the status of a particular judge by a given date, that person's status is confirmed by the new NCJ. For example, the NCJ could confirm the judicial nomination of certain judges as long as, within a certain deadline, nobody presents arguments against such nomination, with the expectation that such arguments would indicate serious facts which bring into question such person's independence or integrity. Only in the case of neo-judges whose status was questionable, the comprehensive vetting procedure would be performed. Such an approach could contribute to a greater sense of stability in the system.

In the case of the vetting process of judges, significant protests can be expected from political circles associated with the current government, from the President of Poland, but also from current neo-judges. Nevertheless, such vetting is necessary to bring the functioning of the judiciary in line with constitutional requirements. Therefore, this political cost must be borne. The vetting process will affect a large group of people and therefore has to be undertaken over a longer period of time. At the same time, it should not jeopardize the efficiency of the proceedings. It is not possible to

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remove from office judges who constitute 1/5 of all judges in Poland. This factor should be taken into consideration when planning relevant vetting mechanisms.

5. Re-opening of judicial proceedings

Neo-judges have been actively involved in the administration of justice since their appointment. Their participation varied, depending on their procedural role: they could adjudicate cases individually, they could be part of court formations (or formations were composed entirely of neo-judges), and they could also perform certain managerial tasks in courts, such as court presidents or chamber presidents. There are dozens of cases pending before the European Court of Human Rights that deal with inadequate staffing of courts and the consequences for citizens. Therefore, reforms have to contemplate the possibility of re-opening proceedings in cases completed or pending with neo-judges.

Here too it is questionable how to carry out these changes so as not to paralyze the judiciary. After all, neo-judges issue hundreds of judgments and orders every day nationwide, and as of 2018, there have been at least several hundred thousand of these rulings. It is inconceivable that all these proceedings should be re-opened years later. One should carefully think about how to reconcile two interests. On the one hand, citizens should have a broad possibility to reopen any proceedings that involved the participation of neo-judges. On the other hand, reopening should not be too frequent, as it may lead to a serious burden on the judiciary. In the case of wider access, the mere allegation of the improper composition should trigger the relevant procedure. It can be assumed that only a proportion of litigants will want to use this procedure and return to cases that have already been concluded. In the case of narrower access, a party would have to make a *prima facie* case that the involvement of a neo-judge in the proceedings had a real impact on the proceedings or on the outcome. Such an additional condition would limit the number of potential re-opening proceedings.

6. Administration of judiciary

Transition 2.0 also requires implementation of changes concerning organization and management of judiciary. In 2017 the Minister of Justice gained

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powers to directly influence the staffing of management positions in the courts (presidents of courts, heads of departments, spokespersons, etc.). In this respect, it would be proper to restore this power to judges and their representative bodies at the level of courts themselves (e.g. colleges of courts). In addition, the problem is the large number of judges who do not perform judicial work but are seconded to the structures of the Ministry of Justice. The long-standing demands of NGOs[24] should be answered and the institution of secondment of judges should be abolished. This will put an end to the unclear relationship between the judiciary and the executive. In addition, the Ministry of Justice will be able to gradually create a civil service corps responsible for the administrative oversight of the judiciary. Significant changes should also be made to institutions that support the Ministry of Justice in carrying out various tasks, such as the National School of the Judiciary and Public Prosecution (*Krajowa Szkoła Sądownictwa i Prokuratury*), the Justice Institute (*Instytut Wymiaru Sprawiedliwości*) and the Justice Fund (*Fundusz Sprawiedliwości*). The management of these institutions should respect the highest standards of public interest, cooperation with civil society and transparency. These institutions should become an example of public trust and thus should be a forerunner in building an ethos of trust in the relationship between the judiciary and the executive. In a further stage, once the necessary institutional changes concerning the courts have been made and the situation in the judiciary has healed, the creation of an independent administrative oversight body for the courts, separate from the Ministry of Justice, should be pursued.

7. Prosecution Service

In 2016, the office of the Minister of Justice and the Prosecutor General was merged. This marked a return to the legal situation that existed before 2010. However, the above institutional change was more taxing on the standards of the rule of law. The Prosecutor General was given a number of additional powers to directly influence the course of proceedings conducted by prosecutors across the country.[25] In addition, the reform led to a kind

24 Dawid Sześciło, *Delegowanie sędziów do Ministerstwa Sprawiedliwości. Problemy ustrojowe i praktyczne* [Delegation of judges to the Ministry of Justice. Institutional and practical problems] (Warsaw: Helsinki Foundation for Human Rights 2012).

25 Venice Commission: Opinion of 11 December 2017 on the Act on the Public Prosecutor's Office, as amended, CDL-AD(2017)028.

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of 'purge' in the prosecution service. Many deserving prosecutors have been demoted to the lowest organizational units. Direct control over the activities of the prosecutor's office provided an absolute sense of impunity for representatives of 'Law and Justice' and its allies.

One of the consequences of the changes in the prosecutor's office was the establishment of the prosecutors' association Lex Super Omnia, which conducts advanced monitoring and research on the functioning of the prosecutor's office.[26] Changes concerning the prosecutor's office became the subject of a 2017 opinion by the Venice Commission.[27] However, this opinion was ignored by the Polish authorities. It does, however, provide evidence that the institutional design of the Office of the Prosecutor General has been questioned for many years.

Therefore, changes in the broader justice system should also include the prosecution service. It is necessary to restore the ethos in the profession of the prosecutor and to depoliticize it completely. The key to achieving these outcomes must be the separation of the office of the Minister of Justice and the Prosecutor General, and limiting the possibility of day-to-day political influence on the activities of prosecutors. Poland should also join the European Public Prosecution Office, as this will enable independent prosecutions (i) with a cross-border dimension or (ii) relating to the use of EU funds.[28]

One of the most important challenges for transitional justice may be the activities of the prosecution in the context of abuses committed by politicians and others associated with the *ancien regime*. The first challenge is whether it is possible to truly decouple the activities of the prosecution service from the new set-up of power in such a way that prosecutions focus only on the merits and not on political aspects, so that a sense of seeking the truth and establishing accountability prevails, and not a desire for political retaliation. The second challenge focuses on whether prosecutors have the ethos and integrity to conduct such investigations in a fair manner, or have too many of them succumbed over the past years to the temptation

26 See e.g. Michał Mistygacz, Grzegorz Kuca and Piotr Mikuli (eds), *Minister Sprawiedliwości a Prokuratura. W poszukiwaniu optymalnego modelu relacji* [Minister of Justice and the Prosecution Service. In search of optimum model of relations] (Kraków: Wydawnictwo Księgarnia Akademicka 2021).

27 Venice Commission, Opinion of 11 December 2017 (n. 25).

28 Adam Bodnar and Maciej Taborowski, 'Uczciwi nie muszą się bać' [Honest people should not be afraid], Rzeczpospolita daily, 10 April 2021, https://www.rp.pl/opinie-prawne/art186701-adam-bodnar-maciej-taborowski-uczciwi-nie-musza-sie-bac.

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to serve the government and fulfill political expectations? If so, they may not be motivated enough to follow up on abuses, or they may create specific obstacles to the fair conduct of investigations.

8. Other changes

The destruction of the rule of law in Poland concerned not only the Constitutional Court, judiciary, and prosecution service. It had a tremendous impact on other sectors of government, including civil service, the educational sector, the operation of state-owned companies, and misuse of public funds, public media, and secret services. It is beyond the scope of this paper to make a detailed analysis of the required reforms with respect to those sectors. Nevertheless, judicial reform should be holistic and go hand in hand with changes concerning those areas of governance that are important for the return of the rule of law. For example, there is a need for comprehensive reform of secret services and creation of the democratic oversight. The work of the special committee in the Senate[29] and the investigative committee in the European Parliament[30] concerning abuse of Pegasus spyware should end up with recommendations concerning the role of the judiciary vis-à-vis secret services, accountability and use of covert techniques.[31] Another example is civic education. Any changes concerning the judiciary should be accompanied by intensive educational programs concerning the role of courts and the importance of the rule of law. Such change is not possible without cooperation with the Minister of Education. An important role could be also played by public media. They were used as an instrument of propaganda and attack against judges, but their role could

29 'Komisja Nadzwyczajna do spraw wyjaśnienia przypadków nielegalnej inwigilacji, ich wpływu na proces wyborczy w Rzeczypospolitej Polskiej oraz reformy służb specjalnych' [Senate Extraordinary Committee to explain cases of illegal surveillance, its impact on electoral process in Poland and on reform of secret services], https://www.senat.gov.pl/prace/komisje-senackie/komisja,215,komisja-nadzwyczajna-do-spraw-wyjasnienia-przypadkow-nielegalnej-inwigilacji-ich-wplywu-na-proces-wyborczy-w-rzeczypospolitej-polskiej-oraz-reformy-sluzb-specjalnych.html.

30 European Parliament's Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, https://www.europarl.europa.eu/committees/en/pega/home/highlights.

31 See also communicated cases, ECtHR, *Pietrzak v. Poland and Bychawska-Siniarska and Others v. Poland*, applications nos. 72038/17 and 25237/18, concerning the Polish law on surveillance and standards not complying with the ECtHR jurisprudence. Hearing before the ECtHR in those cases took place on 27 September 2022.

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be different. They may contribute to raising awareness of the rule of law and the importance of courts for citizens.

IV. Role of the EU and International Organizations in Securing Judicial Reforms

A review of the Polish public debate, especially among opposition parties, judicial and prosecutorial associations and civil society may indicate a high level of preparedness for necessary judicial reforms and other institutional changes required in Poland. There are certain draft laws being prepared. Two of them are adopted as official draft laws of the Polish Senate.[32] Please note, however, that those drafts are presently only of symbolic value, as the lower chamber (Sejm) is blocking any further work on them. But they may be used by the new government after the elections. There are also intensive discussions among lawyers, especially judicial and prosecutorial associations, including on the work necessary for drafting future legislation.

Polish resistance against the decay of the rule of law had a constructive effect in engaging different stakeholders in a discussion. Nevertheless, one should not underestimate the importance of international cooperation, when the window of opportunity for Transition 2.0 opens up. Specifically, this role may be played by the European Union, but also by other international organizations and some states in their bilateral projects (e.g. Norway).

The role of the European Union is crucial due to the need to enforce CJEU judgments concerning judicial independence. As of the end of April 2023, Poland has not implemented the 'milestones' agreed upon in order to benefit from the EU Recovery Plan. Moreover, the CJEU has imposed financial penalties on Poland due to its failure to enforce judgments on rule of law.[33] The European Commission has instigated new proceedings

32 Those draft laws prepared by the Senate and submitted to Sejm include: *Senacki projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw* [Senate draft law on changing the Act on the National Councill of Judiciary, the Supreme Court Act and some other acts], No. EW-020–72/20, submitted on 10 June 2022; *Senacki projekt ustawy o uchyleniu ustawy o Radzie Mediów Narodowych* [Senate draft law on cancelling the Law on the National Media Council], No. EW-020–198/20, submitted on 3 December 2020.

33 On 21 April 2023, the ECJ reduced the penalties for non-compliance with judgments on judiciary from 1 mln EUR per day to 500.000 EUR per day.

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concerning the operation of the Polish Constitutional Court.[34] Therefore, it is up to the new government to close this negative chapter and return to rule of law–compliant countries.

Another aspect is the implementation of numerous judgments issued by the ECtHR concerning judicial independence. The wording of some of them may resemble so-called 'quasi-pilot judgments'. The ECtHR indicated a systemic failure in judicial nominations made by the neo-NCJ and consequently found a violation of Article 6 ECHR in respect of any case adjudicated with the participation of neo-judges. As of now, Poland is refusing to comply with those judgments (but also interim measures concerning disciplinary actions towards judges[35]). The Polish Constitutional Court in two judgments openly undermined the compliance of the ECHR with the Polish Constitution.[36] Nevertheless, enforcement of the ECtHR judgments, as regards their general measures, will be subject of the supervision of the Committee of Ministers. The new government will have to respond to this challenge. One of the ideas to close this chapter could be the issuance by the ECtHR of the pilot judgment, which would include a scheme for how to deal with repetitive cases concerning the violation of Article 6 ECHR.[37] However, such a pilot judgment could only be made possible in case of legislative changes concerning the status of the NCJ, vetting of judges, and creation of a possibility of re-opening of proceedings.

The Venice Commission might be crucial in giving additional legitimacy to reforms planned by the government. Any draft law should be subject to review by the Venice Commission. Such action could increase the legitimacy of actions. It could also allow for the elimination of possible unjust criticism that reforms aim towards revenge, are non-democratic, violates individual rights of judges being subject to vetting, etc. The Venice Commission due to its mandate, experience, but also a representation of

34 Decision to start infringement case against Poland concerning the operation of the Constitutional Court was made on 15 March 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

35 See press release of ECtHR: *Non-compliance with interim measure in Polish judiciary cases*, 16 February 2023, ECHR 053 (2023).

36 See judgments of the Polish Constitutional Court: 24 October 2021, No. K 6/2, 10 March 2022, No. K 7/21.

37 On pilot judgments' concept development and practice of negotiations with the Council of Europe member states see *Pilot Judgement Procedure in the European Court of Human Rights. 3rd Informal Seminar for Government Agents and other Institutions* (Warsaw: Ministry of Foreign Affairs 2009).

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non-European states (especially the United States) might be a credible supporter of governmental reforms. Moreover, positive opinions of the Venice Commission on draft laws may decrease the risk of the President of Poland using his power to veto laws. Another factor is the international pressure that Poland faces to resolve its rule of law problems. Please note that in this regard an important role could be played by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe ('OSCE ODIHR'). Warsaw office of OSCE ODIHR has strong expertise in standards of judicial independence.[38] Between 2015 and 2023 it was heavily involved in a debate on rule of law in Poland. It commented on draft legislative acts or organized round table discussions. One should expect a continuation of the OSCE ODIHR engagement in this topic.

The rule of law crisis has a direct consequence on the economy of Poland and the stability of investments. Over years Poland dropped significantly in the World Justice Project Rule of Law Index.[39] Therefore, the new government should underline that judicial reforms are aimed at regaining the trust of investors and financial markets. For this purpose, cooperation with such organizations as the World Bank, OECD, and the International Monetary Fund may be needed. Those organizations, using their experience, may support the Polish government in changes concerning the efficiency of the justice system (see below for an overview of the necessary reforms). This support may be combined with long-term financing of some reforms. Such an approach would have additional advantages. It could secure that certain ideas are not subject to daily political turmoil, unstable visions, and constant discussions, but could be based on a 5–10 year road map, to be followed by subsequent governments. The crisis of the justice system is deep enough to justify that kind of international support.

Without any doubt, cooperation with the EU or the ECtHR is necessary, due to the need for compliance with the EU law and international human rights treaties. But one should look beyond the pure legal logic of such

38 See e.g. OSCE ODIHR Kiev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2 November 2010, https://www.osce.org/odihr/KyivRec. See also Adam Bodnar and Eva Katinka-Schmidt, 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia', OSCE Yearbook 17(2011), 289–302.

39 According to the recent Rule of Law Index, Poland is at 34. position in the world, one of the lowest in the European Union, with major drop in the category 'constraints on governmental powers', https://worldjusticeproject.org/rule-of-law-index.

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cooperation. International organizations and bodies should be regarded as external agents pushing for changes, giving them more legitimacy and thus diminishing the level of criticism and protests coming from domestic stakeholders (including followers of the *ancien regime*). The compliance-pull of international bodies, whether this view is popular or not, may be similar to the same process as it existed before Poland's accession to the EU. In 2023 Poland is not fulfilling the criteria established in Article 49 TEU, as interpreted in the light of Article 2 TEU. Therefore, the future change in the legal system must be fundamental. The EU as well as other international organizations have an interest in bringing Poland back to the level allowing for fulfilling EU membership criteria.

V. Transitional Justice Schemes

The judicial reforms have caused serious institutional problems, but they have also led to personal involvement in the destruction of basic tenets of the constitutional state. The question is, whether individuals who contributed to unconstitutional reforms should be accountable for their actions, and what role could transitional justice schemes play in settling accounts with the past.

Under the Polish Constitution, violation of the Constitution by major constitutional organs should be adjudicated upon by the Tribunal of State (*Trybunał Stanu*). In practice, this method of accountability may be difficult to achieve due to the complicated procedure and insufficient practice of the operation of the Tribunal of State (there were a few cases in the history of Poland). Moreover, this mechanism may be only applied to the highest state officials. Nevertheless, the initiation of proceedings before the Sejm Committee on Constitutional Responsibility (*Komitet Odpowiedzialności Konstytucyjnej*) should be considered. Proceedings before this body must proceed any motion to the Tribunal of State. Investigatory powers of this Committee (especially the power to hear witnesses) may help in the clarification of different abuses of power.

When it comes to judges involved in building the new system of authoritarian power, one should consider proceedings under Article 231 of the Polish Criminal Code. This provision allows for responsibility for the abuse of the state power. Such proceedings would require lifting judicial immunity. Certainly, this type of transitional justice measure should not concern

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all the judges, but only those who actively participated in the destruction of the legal system. There were several examples of such actions: participation of judges in smear campaigns against other judges[40]; use of disciplinary proceedings in order to 'chill' judicial dissent; participation in the adjudication of cases that resulted in the politically motivated suspension of judges (e.g. in the Disciplinary Chamber of the Supreme Court); refusal to comply with judgments of courts ordering the return of judges to adjudication; or disregard of interim measures issued by the European Court of Human Rights[41]. Please note that some of those actions by judges have been already adjudicated upon by the ECtHR. For example, in *Juszczyszyn v. Poland*, ECtHR identified a number of measures taken by Polish authorities to attack Judge Juszczyszyn for his decision to verify the status of judicial nominations made by the NCJ.[42] Thus, the ECtHR concluded that the suspension of *Juszczyszyn* by the Disciplinary Chamber of the Supreme Court was made to achieve an effect outside of legal aims (violation of Article 18 ECHR).

Certainly, there is a thin line between the ordinary adjudication of different cases, when judges act in accordance with legislative provisions, and the abuse of power. Therefore, in order to initiate proceedings in such cases, the abuse of power should be clear and unequivocal. On the basis of facts, as confirmed by documents, speeches, judicial pronouncements, and other sources, it must be beyond any doubt that certain judges acted on the basis of their personal (or political) motivation, and not on account of legal reasons.[43]

With respect to cases not involving abuse of power, one should consider the use of disciplinary proceedings with respect to judges. It should be not-

40 M. Gałczyńska, 'Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli '"za czynienie dobra nie wsadzamy"' [Trolls' farm in the Ministry of Justice, it means 'for making good we do not put in prison'], press article for Onet.pl, 19 August 2019, https://tiny.pl/7lwbd.

41 European Stability Initiative, *Under Siege – Why Polish courts matter for Europe,* report of 22 March 2019, https://esiweb.org/publications/under-siege-why-polish-courts-matter-europe.

42 ECtHR, *Juszczyszyn v. Poland* (n. 17).

43 There were interesting cases when Polish judges (including Igor Tuleya and Paweł Juszczyszyn) fought for their re-instatement to judicial positions using litigation before civil courts. Civil courts, referring to the CJEU case-law ordered that they should be re-instated. However, those judgments were not respected by respective court presidents, being politically dependent on the Minister of Justice. Open refusal to comply with judgments on reinstatement could be considered as an abuse of power and possibly start criminal proceedings under Article 231 of the Criminal Code.

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ed that the draft law on the Constitutional Court, prepared by the Batory Foundation, provides for the extension of judicial panels able to conduct disciplinary cases against the Constitutional Court judges, also including former judges of this Court. Through this solution, it would be possible to have a more objective approach.

In addition to criminal and disciplinary cases, as well as vetting procedures (see comments in Section 3 of this Chapter), one should consider the implementation of transitional justice measures based on the search for truth and aimed towards reconciliation. It may appear that some judges may want to explain their role in the destruction of the legal system. They would be able to face moral condemnation, but still would like to retain their professional role. A procedure should be created allowing for such testimonies. One could think about the body created within the structure of the Ministry of Justice, with the participation of retired judges, members of academia, respected representatives of bar associations, judicial associations and civil society, that would provide room for such actions. Such a body may work as a truth commission – in case of providing testimony by the judge, there should be a public agreement that no disciplinary case is instigated. However, participation in the work of such a body should not relieve a judge of any criminal responsibility for the abuse of power. Only cases concerning violation of judicial ethics could possibly be dropped.

In addition to this, there is a need for the investigation of specific cases concerning individual judges or actions orchestrated by the Ministry of Justice. There are some individual cases that need a deep evaluation from the point of view of the involvement of different state agencies and bodies (disciplinary judges, presidents of courts, prosecution service, the Central Anti-Corruption Office) in targeting individual judges or the state not providing them sufficient protection against the massive hate. The case of Waldemar Żurek is a good example of long-term orchestrated action by the state.[44] He has been the subject of more than 20 disciplinary cases for his statement. His financial declarations were intrusively reviewed by the Central Anti-Corruption Office. A hate campaign against him was orchestrated by government-related officials. Finally, the Minister of Justice used his personal power to submit an extraordinary appeal against judgments concerning the division of property with Żurek's former wife. To conclude, he is regarded as one of the most repressed judges in Poland. Therefore, the establishment of a commission of inquiry investigating this case (but

44 ECtHR, *Waldemar Żurek v. Poland*, judgment of 16 June 2022, no. 39650/18.

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possibly other fundamental individual cases) could be regarded as a proper enforcement of the ECtHR judgment as regards individual measures. The outcome of such inquiry would be the presentation of the anatomy of the destruction of the judicial systems: methods and instruments used, involvement of state propaganda, cooperation of different state services, lack of accountability for abuses, silent acknowledgment of verbal abuses, and hate of fellow citizens.

To sum up, there should be no single mechanism of transitional justice. Rather it should be a mix of different instruments, being inspired by comparative examples (especially concerning truth commissions), but also taking what is best from the existing legal instruments. Any such measures should be strongly rooted in rule of law standards. Even the highest need for transitional justice should not trump the necessity to comply with procedural standards and guarantees of a fair trial.

VI. Legitimacy of the Judiciary – Search for Effectiveness

Institutional reforms concerning the judiciary are not enough to secure a successful transition. It is equally important to look much broader into origins of the crisis of the rule of law and judiciary. Jan Winczorek, in an interview with Oko.Press, formulated a view as to why Poles—despite appearances to the contrary—have not participated long-term and consistently in protests to defend the judiciary. He stated that in Poland we have a huge gap in access to the law: 'If our law and legal institutions are non-functional, if a legal problem cannot be solved in a certain time or at a certain cost, then why get excited about the law in the first place?'.[45] This statement should be an important memento for anyone who is going to deal with judicial reforms after the parliamentary elections in Poland.

Basically, it means that any reform of the judiciary should take into account the perspective of regular citizens. They may not be so much interested in sophisticated and difficult-to-understand changes concerning judicial independence. They would look at whether, as a result of changes, proceedings are more efficient and courts more reliable. Therefore, further

45 Dominika Sitnicka, 'Dlaczego nie umieramy za praworządność? A kto by chciał umierać za państwo z kartonu?' [Why don't we die for rule of law? But why anyone would like to die for the state made out of cardboard?] – interview with Jan Winczorek, Oko.Press, 19 June 2022, https://oko.press/dostep-do-prawa-jan-winczorek/.

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legislative changes are needed to improve the performance of the court and its public perception. For example, despite numerous postulates by experts, a law on expert witnesses has not been enacted in Poland for years.[46] The lack of expert witnesses (and sometimes their unreliability) is one of the biggest barriers to speeding up court proceedings. Class actions need to be reformed so that those injured by corporations can effectively and quickly claim their rights, even if the amounts are small. In family cases, consideration needs to be given to how to simplify certain proceedings and how to strengthen those most affected, namely children. Consideration needs to be given to court costs as well as to the availability and quality of legal aid (especially in civil cases and criminal cases at the pre-court stage). Finally, it is worth reviewing all the major codes that have been corrected (or rather spoiled and patched up) over the years by the Ministry of Justice staff, rather than the best lawyers in the country.

But even the best legislative changes are not enough. The foundation must be the strengthening of the judiciary's staff. There is a shortage of hundreds of judges in the courts. The vetting process of neo-judges may create additional problems. Moreover, some courts are more overburdened with cases than others. It concerns especially those dealing with abusive CHF or EUR-denominated loans, and those reviewing cuts in retirement benefits for persons who collaborated with secret services before 1989. Courts are flooded with cases, and there is a desperate need to employ additional judges to deal with such cases.

It is also important to strengthen the administrative and support apparatus for judges. Every judge should be fully supported by a professional staff consisting of court clerks, assistants, protocol officers, and registrars, so that he or she can focus on adjudicatory activities. There are currently approx. 4 000 assistants and there should be at least twice as many. Moreover, they are in constant rotation, as in order to improve their financial situation, they either leave the judiciary or apply for judicial positions.

A responsible approach to lay-person judges is also necessary. Judging in court should be the greatest honor. Meanwhile, in Poland, there is an

46 Barbara Grabowska, Artur Pietryka and Marcin Wolny, *Biegli sądowi w Polsce* [Expert witnesses in Polish courts] (Warsaw: Helsinki Foundation for Human Rights 2014), https://prawo.uni.wroc.pl/sites/default/files/students-resources/Biegli%20s%C4%85dowi%20w%20Polsce%20-%20raport%20HFPC.pdf.

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idea to introduce 'justices of the peace' (*sędziowie pokoju*),[47] rather than to reform the institution of 'lay persons' (*ławnicy*).[48] The fact that the function of a layperson can be associated with civic dignity is evidenced by the action of the Committee for the Defense of Democracy (*Komitet Obrony Demokracji*, KOD).[49] The Senate of the Republic of Poland elected 30 lay persons to the Supreme Court, most of whom were candidates put forward by the KOD. In order to bring the judiciary closer to citizens, strengthening 'lay persons' may be crucial.

It is also important to 'take care' of those serving in the broader justice system, especially those who are undervalued: probation officers, prison staff (including prison psychologists), staff in correctional institutions, youth prison centers, and juvenile shelters. Courts will not function properly if they are left without reliable, professional, trust-based support from other institutions responsible for the execution of punishment or the educational and probation system.

There is no simple answer as to how all these changes can be implemented quickly and effectively. Moreover, the veil of information of the current Ministry of Justice may hide even more secrets, systemic problems, and proverbial 'skeletons in the closet'. But surely any changes must take place in a spirit of continuous dialogue, drawing on the knowledge of experts and scholars and the cooperation of all legal communities. That is why support from international organizations may be needed in order to bring the best standards to the Polish judiciary, reform the administration of courts, provide for further IT development, and support the staff.

47 Draft law on justices of peace submitted by President of Poland to Parliament on 4 November 2021, https://www.prezydent.pl/prawo/wniesione-do-sejmu/prezydencki-projekt-skierowal-do-sejmu-projekt-ustawy-o-sadach-pokoju-,41632.

48 Adriana Sylwia Bartnik, *Sędzia czy kibic – rola ławnika w wymiarze sprawiedliwości III RP* [Judge or fan – role of lay judge in the justice system of Polish Third Republic] (Warsaw: Wydawnictwo Trio, 2009).

49 Marcin Jabłoński, Wiktoria Nicałek and Mateusz Mikowski, 'Senat wybrał 30 ławników do Sądu Najwyższego. Kandydatury większości z nich zgłosił KOD' [Senate has selected 30 lay persons to adjudicate in the Supreme Court. Most of the candidates were put forward by the Committee to Protect Democracy], Gazeta Prawna daily, 6 October 2022, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8563365,lawnicy-sad-najwyzszy-wybor-senat-kod.html.

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VII. Conclusions

If the parliamentary opposition wins the 2023 elections, fundamental changes to the judiciary and restoring the rule of law are required. It is unlikely that an amendment to the Constitution will be possible. Therefore, most of the changes will have to be carried out through legislative amendments. At the same time, they may face a number of problems, including resistance from the President or a politically subservient Constitutional Court. However, it is important that the locomotive of the rule of law gets back on track and moves towards increasing the accountability of the authorities to the law, correcting systemic problems, and cooperating loyally with the European Union. The changes must concern the key organs of the judiciary, especially the National Council of the Judiciary and the system of common courts. They must also include the vetting process of judges. This is necessary due to the requirements of EU law and the case law of the European Court of Human Rights. But transitional justice mechanisms will also be important. Without them, confidence in the judiciary will not be restored and acts committed against the constitutional system will not be held to account. In the context of judicial reforms, improving the efficiency of the judiciary should not be forgotten. Without this, it will be difficult to gain the long-term support of citizens and their legitimacy for the changes being made. The support of international organizations for the transformation process should be taken into account to ensure the long-term effectiveness of the reforms.

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Court-Unpacking: A Preliminary Inquiry

David Kosař and Katarína Šipulová[1]

I. Introduction 324
II. What is Court-Packing? 327
1. Conceptualisation(s) of court-packing 328
2. Good vs. bad court-packing 331
3. Specifics of cyclical court-packing 334
III. Après Court-Packing: What Comes Next? 336
1. "Packers" stay in power: What can they do? 336
2. "Packers" lose power: What can the new rulers do? 338
3. A brief summary 340
IV. Court-Unpacking: A Preliminary Theoretical Inquiry 341
1. "Just cause" 341
2. Techniques 344
3. Proportionality: How to differentiate unpacking from new court-packing? 349
4. Other issues to consider when resorting to court-unpacking 352
5. Alternative reform options 357
V. Conclusion: The Ultimate Goal of Unpacking 359

The proliferation of court-packing wars across different political regimes has recently stirred up a lot of controversy. As one of the techniques allowing executive actors swiftly to capture the courts, align them with their own political preferences or even weaponise them against their opponents, court-packing is particularly tempting for both democratic and autocratic leaders. The legitimacy of court-packing and potential safeguards against this method have therefore triggered vibrant academic debate. Yet, much less attention has been paid to a vexing question: what to do with packed courts once the political actors who staffed them with loyal or ideologically aligned judges lose power. Can courts be unpacked? If so, how? Is unpacking always legitimate or does it depend on the legitimacy of previous court-packing? Should the content of decision-making, judicial behaviour or the personal independence and integrity of packed judges be considered in a normative assessment of unpacking? And what role does eventual redress for removed judges play in these considerations? Addressing these questions, this chapter analyses the normative underpinnings of unpacking in the broader context of democratic decay and abusive constitutionalism.

1 The research leading to this project has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (INFINITY, grant no. 101002660).

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I. Introduction

Comparative discussions of court-packing have never been more vibrant. It is no surprise. Court-packing wars are back, in both the Global South and the Global North. This time, court-packing affects not only nascent, transitioning and fragile democracies in Latin America, Central America, Africa and Asia, but also the Member States of the Council of Europe and European Union as well as other consolidated democracies.

Recep Erdoğan expanded the membership of the Turkish Constitutional Court.[2] Viktor Orbán used a similar strategy to achieve a majority in the Hungarian Constitutional Court.[3] Jaroslaw Kaczyński captured the Polish Constitutional Tribunal through a series of sinister actions and significantly increased the number of judges in the Polish Supreme Court.[4] More recently, court-packing debates have returned to the United States with a fervour unheard of since FDR's era.[5] Benjamin Netanyahu's recent coalition announced a wide-scale reform of the Israeli judiciary[6] and Prime Minister Narendra Modi's Government stepped up its pressure on the Indian Supreme Court.[7]

2 Ergun Özbudun, 'Turkey's Judiciary and the Drift Toward Competitive Authoritarianism', Int'l Spectator (Rome) 50 (2015), 42–55; Berk Esen and Sebnem Gumuscu, 'Rising Competitive Authoritarianism in Turkey', Third World Quarterly 37 (2016), 1581–1606; Ozan O. Varol, Lucia D. Pellegrina and Nuno Garoupa, 'An Empirical Analysis of Judicial Transformation in Turkey', Am. J. Comp. L. 65 (2017), 186–216.

3 Gábor Halmai, 'From the 'Rule of Law Revolution' to the Constitutional Counter-Revolution in Hungary' in: Wolfgang Benedek and Florence Benoît-Rohmer (eds), European Yearbook of Human Rights (2012), 367–384; Renata Uitz, 'Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', ICON 13 (2015), 279–300.

4 Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', GLJ 19 (2018), 1839–1870.

5 E.g., Ryan Doerfler and Samuel Moyn, 'Democratizing the Supreme Court', Calif. L. Rev. 109 (2020), 1703–1772; Richard Mailey, 'Court-Packing in 2021: Pathways to Democratic Legitimacy', Seattle Univ. L. Rev. 44 (2020), 35–68; Thomas M. Keck, 'Court-Packing and Democratic Erosion' in: Suzanne Mettler, Robert Lieberman and Ken Roberts (eds), *Democratic Resilience: Can the United States Withstand Rising Polarization?* (Cambridge: Cambridge University Press 2022), 141–168.

6 Joseph H. H. Weiler, 'Cry, the Beloved Country', Verfassungsblog, 1 February 2023, <https://verfassungsblog.de/cry-beloved-country/>.

7 Rohit Sarma, 'On the Road to Censorship', Verfassungsblog, 3 March 2023, <https://verfassungsblog.de/on-the-road-to-censorship/>.

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While examples of "good" or legitimate court-packing exist,[8] most court-packing plans erode judicial independence, the separation of powers and the rule of law, because they either lack "just cause" for such sweeping interference with the judiciary or suffer from grave procedural flaws or disproportionality. Even court-packing plans that initially had a credible just cause and which many commentators considered legitimate often go astray over time.[9]

This raises an important question: What to do with the packed courts once those who packed them lose power? The question is not only to unpack or not to unpack, but also how to unpack and what factors should the "unpackers" take into consideration. In the European context, Poland has attracted the most attention due to the impending November 2023 parliamentary elections. With the gap between the electoral preferences of the PiS and Civic Coalition slowly closing,[10] the 2023 elections have renewed discussion on how to restore the judicial independence of the Polish judiciary if the ruling coalition led by PiS loses power. What should the liberal opposition do with the packed judiciary, if it regains power?[11] On the one hand, the statistical evidence we have on Polish packed courts deciding in favour of PiS[12] increases the pressure to act that the Civic Coalition will face in order to restore the robust separation of powers. On the other hand, the form of unpacking will be complicated due to the "original sin"[13] – the pre-emptive unconstitutional election of judges by the

8 Tom G. Daly, '"Good" Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay', GLJ 23 (2022), 1071–1101; David Kosař and Katarína Šipulová, 'Comparative Court-Packing', I.CON 21 (2023), 80-126.

9 Daly (n. 8); Kosař and Šipulová (n. 8).

10 Opinion polling for the 2023 Polish parliamentary election. <https://en.wikipedia.org/wiki/Opinion_polling_for_the_2023_Polish_parliamentary_election>.

11 Armin von Bogdandy and Luke D. Spieker, 'Restoring the Rule of Law Through Criminal Responsibility', Verfassungsblog, 10 December 2021, <https://verfassungsblog.de/restoring-the-rule-of-law-through-criminal-responsibility/>; Armin von Bogdandy and Luke D. Spieker in this volume; Andrew Arato and András Sajó, 'Restoring Constitutionalism. An open letter', Verfassungsblog, 17 November 2021, <https://verfassungsblog.de/restoring-constitutionalism/>; Andrew Arato and Gábor Halmai, 'So that the Name Hungarian Regain its Dignity', Verfassungsbblog, 2 July 2021,<https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/>.

12 Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', Hague Journal on the Rule Law 11 (2019), 63–84.

13 Lech Garlicki, 'Disabling the Constitutional Court in Poland' in: Andrzej Szmyt and Bogusław Banaszak (eds), *Transformation of Law Systems Central, Eastern and*

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lame duck government – committed by the Civic Platform's Government even before PiS came to power. If the Civic Coalition wins, it will also need to take into account that court-unpacking does not only react to the past, but also shapes the future. However, the implications of this chapter are much broader and go beyond Europe. In fact, unpacking has been a vexing issue, primarily in Latin America, Turkey and Asia,[14] until recently.

We need to add an important caveat though. The scope of this chapter is relatively narrow. First, our understanding of court-unpacking is narrow both procedurally and substantively, as it responds to a limited scope of political interferences in judicial independence. As to the procedural aspect, there must be a causal nexus between court-packing and court-unpacking. The sequence matters. You simply cannot have unpacking unless you have previous court-packing. We thus do not deal with reactions to other court-curbing techniques here. As to the substantive aspect, in our understanding not every irregularity in the selection of judges amounts to court-packing[15] and thus we leave redressing such "below the threshold of court-packing" situations aside. Second, we sketch the issues concerning unpacking in general terms and thus our theoretical framework is divorced from the particulars of Poland and other European States. We do so intentionally to emphasize the generality of our theoretical arguments and to make it easier to "transport" them to other contexts. That said, our theoretical inquiry is informed by the Polish debate and reflects on it, but it is not guided by the Polish specifics. Third, for similar reasons, we leave aside the separate questions what limits supranational courts set for unpacking[16]

Southeastern Europe in 1989–2015 (Gdansk: Gdansk University Press 2016), 63–78 (65–66). See also Aleksandra Gliszczyńska-Grabias and Wojciech Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)', Eu Const. L. Rev. 17 (2021), 130–153.

14 See the examples discussed in Daly (n. 8); Kosař and Šipulová (n. 8); Benjamin G. Holgado and Raul Sanchez-Urribarri, 'Court-Packing and Democratic Decay: A Necessary Relationship?', Global Constitutionalism 12 (2023), 350–377.

15 This in the European context means that *Ástráðsson*-like irregularities do not necessarily amount to court-packing. See ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, application no. 26374/18.

16 On the limits set by the European Court of Human Rights, see the chapter of Adam Bodnar in this volume; and Marcin Szwed, 'Fixing the Problem of Unlawfully Appointed Judges in Poland in the Light of the ECHR', Hague Journal of the Rule of Law (2023 forthcoming, available at https://link.springer.com/article/10.1007/s40803-023-00191-3). On the limits set by the European Court of Justice, see the chapter of Pawel Filipek in this volume.

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and what they require from States in response to court-packing.[17] This is again a peculiar European debate, because both European supranational courts have been far more active in engaging with these questions than the rest of the world.[18] Finally, we leave aside the rights of "packed judges" after undoing the court-packing, such as the right to individualized judicial review and their right to compensation, and what to do with these judges after unpacking.

This chapter proceeds as follows. Section II explains what court-packing is and identifies the key cleavages in the scholarly literature. Section III shows that unpacking is only one of the many options for dealing with a packed court the new rulers have, once the "packers" lose power. Section IV is the core of the chapter and provides the first comprehensive inquiry into the mechanisms of unpacking and the factors that influence them. Section V concludes.

II. What is Court-Packing?

Until recently, most of the scholarship on court-packing has centred on the US experience and focused, quite understandably, on FDR's iconic court-packing plan.[19] Only very recently has court-packing been studied

17 This is particularly relevant in Poland, as the ECtHR held in *Advance Pharma* that the Polish authorities are obliged under Article 46 of the Convention to 'draw the necessary conclusions from the present judgment and to take any individual or general measures as appropriate in order to resolve the problems at the root of the violation found by the Court and to prevent similar violations from taking place in the future' (ECtHR, *Advance Pharma sp. Z o.o v. Poland*, judgment of 3 February 2022, App. No. 1469/20, para. 366). The CJEU has stipulated additional requirements.

18 We are aware of the fact that the Inter-American Court of Human Rights (see e.g. David Kosař and Lucas Lixinski, 'Domestic Judicial Design by International Human Rights Courts', American Journal of International Law 109 (2015), 713–760) and the African Court of Human Rights (ACtHR, *XYZ v Republic of Benin*, judgment of 27 November 2020, Application No. 010/2020, paras 60–72; ACtHR, *Houngue Éric Noudehouenou v. Republic of Benin*, judgment of 1 December 2022, Application No. 028/2020, paras. 68–83; and ACtHR, *Sébastien Germain Marie Aïkoue Ajavon v. Republic of Benin*, judgment of 4 December 2020, Application No. 062/2019, paras 309–325.) have been active in this area. We merely say that the case law of the European Court of Human Rights and the Court of Justice of the European Union is more developed.

19 See Gregory A. Caldeira, 'Public Opinion and the US Supreme Court: FDR's Court-Packing Plan', Am. Polit. Sei. Rev. 81 (1987), 1139–1153; William Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (Ox-

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comparatively.[20] This new scholarship, which has provided detailed case studies on jurisdictions such as Argentina, Turkey and Venezuela,[21] or reconceptualised court-packing based on the experience of various countries across the world and in history,[22] has freed court-packing from its peculiar American straightjacket and shed light on the ways in which politicians can change the composition of the existing courts to pursue their interests.

This section does justice to these developments. It briefly discusses the competing conceptualisations of court-packing and their major differences, summarises the burgeoning debate on whether there can be both "good" and "bad" court-packing, and addresses the specifics of cyclical court-packing. By doing so, it sets the stage for the analysis of unpacking that follows.

1. Conceptualisation(s) of court-packing

Until recently court-packing has been under-theorised, and a clear conceptualisation of the term was missing. In the US context, court-packing has been traditionally understood as a practice that concerned adding justices to the existing court.[23] This reflected the specific features of the abovementioned FDR court-packing plan, which has been the cornerstone of the

ford: Oxford University Press 1995); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford: Oxford University Press 1998); Jeff Shesol, *Supreme Power: Franklin Roosevelt vs. the Supreme Court* (New York: W. W. Norton & Company 2010); Barry Cushman, 'The Court-Packing Plan as Symptom Casualty, and Cause of Gridlock', Notre Dame L. Rev. 85 (2013), 2089–2106; and Alex Badas, 'Policy Disagreement and Judicial Legitimacy: evidence from the 1937 Court-Packing Plan', JLS 48 (2020), 377–408.

20 David Kosař and Katarína Šipulová, 'How to Fight Court-Packing?', Constitutional Studies 6 (2020), 133–163; Daly (n. 8); Kosař and Šipulová 2023 (n. 8); Holgado and Sanchez-Urribarri (n. 14).

21 Daly (n. 8); and Holgado and Sanchez-Urribarri (n. 14).

22 Kosař and Šipulová (n. 20); Katarína Šipulová, 'Under Pressure: Building Judicial Resistance to Political Inference' in: Denis J. Galligan (ed.), *The Courts and the People: Friend or Foe? The Putney Debates 2019* (Oxford: Hart Publishing, 2021), 153–170; Kosař and Šipulová 2023 (n. 8),

23 See e.g., Daniel Epps and Ganesh Sitaraman, 'How to Save the Supreme Court', Yale L.J. 129 (2019), 148–209; David E. Pozen, 'Hardball and/as Anti-Hardball', N.Y.U. Journal of Legislation & Public Policy 21 (2019), 949–955; Rivka Weill, 'Court-Packing as an Antidote', Cardozo L. Rev. 42 (2021), 2705–2761; Adam Chilton, Daniel Epps and Kyle Rozemaand Maya Sen, 'The Endgame of Court-Packing', SSRN Electronic Journal <https://ssrn.com/abstract=3835502>; and Keck (n. 5).

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court-packing debates in the US[24] Recently, Joshua Braver analysed all the successful changes in the size of the Supreme Court of the United States as well as the failed attempts to change, and came out with a broader conceptualisation of court-packing. He defines court-packing as "the manipulation of the Supreme Court's size primarily in order to change the ideological composition of the Court"[25] that includes both expansion of the size of the Supreme Court and reduction of the number of Supreme Court Justices.[26] He joins the growing chorus of scholars who argue that people often use "court-packing" to describe changes to the size of the Supreme Court, but it is better understood as any effort to manipulate the Court's membership for partisan ends.[27]

Similar debates have recently emerged in comparative scholarship. Compared to more traditional US-centred works, we introduced a broader definition of court-packing that covers expanding (adding judges), emptying (reducing the number of judges) and swapping (replacing judges) strategies.[28] More specifically, we defined court-packing as "any change of the composition of the existing court, which is irregular, actively-driven (non-random) and creates a new majority at the court or restricts the old one"[29] and elaborated on each element of this definition.[30] Tom Daly and Mark Tushnet and Bojan Bugaric[31] to a large extent concur with our definition, even though they disagree with our view on the legitimacy of court-pack-

24 Perhaps, for that reason, few American scholars pay attention to the conceptualisation of court-packing and immediately jump into discussions about its legitimacy. See ibid; and also (n. 21).

25 Joshua Braver, 'Court-Packing: An American Tradition?', Boston College Law Review 61 (2020), 2748–2809 (2749). Note that Braver provides a slightly different definition in the abstract of his paper ('manipulating the number of Supreme Court seats primarily in order to alter the ideological balance of the Supreme Court'), but we ignore these nuances here.

26 To justify this broader understanding which departs from the traditional view on court-packing in the US, see in particular Braver (n. 25), 2778–2789, n. 136.

27 Elizabeth A. Moore, 'What is Court Packing', Rutgers, 27 October 2020, <https://www.rutgers.edu/news/what-court-packing.>; see also James Macgregor Burns, *Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court* (London: Penguin Press 2009).

28 Kosař and Šipulová (n. 8).

29 Kosař and Šipulová (n. 8), 5.

30 Kosař and Šipulová (n. 8), 5–9.

31 Mark Tushnet and Bojan Bugarič, *Power to the People* (Oxford: Oxford University Press 2021), 99–100, 156–177.

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ing.[32] Others disagree though. For instance, Holgado and Sanchez-Urribarri prefer a "more minimalist definition" that covers only "adding judges to a court in order to create a new majority with" a clear political purpose.[33] Reducing and potentially[34] also swapping judges are different court curbing techniques for them. Moreover, increasing the size of the court for technical reasons, such as the expansion in the number of seats that is linked to the admission of new States, is likewise outside the definition of court-packing, even though they do not provide guidance on how we can distinguish "technical" from "political" expansion of the size of the court.[35]

This brings us to another conceptual element of court-packing that seems to divide scholars: the element that distinguishes court-packing from other judicial reforms. This debate can be roughly framed as effect versus intent versus irregularity. Some scholars argue that we can know for sure that the change in the composition of the court amounted to court-packing only once we know the effects of this change on actual judicial decision-making – that is whether the newly composed court altered its decision-making and sides more often on hot-button political issues with the government that adopted a given judicial reform.[36] Others claim that the intent of those who adopted a judicial reform is crucial.[37] Finally, some scholars acknowledge the importance of the purpose behind the judicial reform, but either treats it as one of several factors[38] or are sceptical of objective assessment of the intent of the proponents of judicial reform.[39] Some of them even argue that imputation of intent to political leaders is inevitably

32 See below.

33 Holgado and Sanchez-Urribarri (n. 14), 4.

34 Holgado and Sanchez-Urribarri might include a swapping strategy within the ambit of court-packing too if certain conditions were met, because they acknowledge that 'In many cases, court-packing may combine removing sitting judges and the appointment of new judges to the newly free slots.'

35 Holgado and Sanchez-Urribarri (n. 14), 4–5. Their definition differs also in other aspects, which we cannot discuss in detail here.

36 See e.g., Varol, Pellegrina and Garoupa (n. 2); and Sadurski (n. 12); Holgado and Sanchez-Urribarri (n. 14); Neil Siegel, 'The Trouble with Court-Packing', Duke Law Journal 72 (2022), 71–159.

37 For proponents of such an approach see Tushnet and Bugarič (n. 31), 177; Holgado and Sanchez-Urribarri (n. 14).

38 Daly (n. 8).

39 Kosař and Šipulová (n. 8).

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subjective and instead argue that the central feature of court-packing is irregularity of the change in the court's composition.[40]

We do not intend to resolve these conceptual debates here. We mention them in order to identify the main disagreements and to set out the scope of our chapter transparently. Unpacking the courts inevitably requires determining what is meant by "packing" them. Throughout this chapter, we stick to our broader definition of court-packing that includes not only adding judges but also reducing the size of the court and swapping judges. Readers who prefer a narrower or broader definition of court-packing should bear our conceptual choice in mind when reading the text that follows.

2. Good vs. bad court-packing

Court-packing traditionally has had negative connotations. Nevertheless, virtually all scholars writing on this topic agree that it can be legitimate under specific circumstances. Thus, "good" court-packing is possible. Of course, court-packing is never "good" in the sense that it is never an ideal or an easy choice.[41] But sometimes it is necessary to break the norm against court-packing to repair the democratic system. The borderline between "good" and "bad" court-packing is thin though, and scholars disagree on what exactly the dividing criteria are.

Tom Daly proposed a five-pronged analytical framework for evaluating court-packing: its democratic context, articulated reform purpose, reform options (i.e., alternative policies at hand), reform process (deliberation on the policy) and risk of repetition.[42] Mark Tushnet and Bojan Bugaric distinguish between court fine-tuning that increases judicial accountability and court smashing, which occurs when the government takes an otherwise constitutionally permissible action for the very purpose of making the court politically accountable to it rather than to anyone else.[43] They argue that the only reasonably objective way of distinguishing between fine-tuning and smashing is by adding another condition – it is fine-tuning when there is a plausible "good government" justification for the change.[44] Benjamin

40 Kosař and Šipulová (n. 8).
41 Daly (n. 8).
42 Daly (n. 8).
43 Tushnet and Bugarič (n. 31), 161–162.
44 Tushnet and Bugarič (n. 31), 162.

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García Holgado and Raul Sanchez-Urribarri also propose to focus on the goals of the political leaders who implement court-packing as a key criterion. In particular, they distinguish between policy-driven court-packing, in which the alteration of the composition of a court aims to promote public policies, and regime-driven court-packing, in which the alteration of the composition of a court aims to assist the executive in replacing the existing regime with a new one.[45]

Our view sets probably the strictest threshold regarding the criteria for "good" court-packing. We have argued elsewhere that there are two different dimensions of evaluating the legitimacy of court-packing which must be addressed independently. The first dimension addresses the *ius ad bellum* of court-packing – "the just cause". Existing discourse traditionally relates the just cause of court-packing to meta-principles such as democracy (US discourse), the rule of law and judicial independence (Europe) or public trust. Yet, these terms are fuzzy and prevent us from finding a common denominator. Democracy itself does not bring much clarity to the debate; the US example demonstrates this fact quite well. Lack of agreement on the content of democracy makes the use of "democratic decay" or "restoration" language an easy target for abuse.[46] If we want to know how skilful populist leaders are in using democratic rhetoric, it is enough to remember that Orbán instigated his constitutional reform by stressing that Hungary had the only communist Constitution that remained unreformed after democratic transition; or that Kaczyński's entrée into court-packing was a media crusade against an already not particularly popular judiciary, painting judges as a corrupt, undemocratic, privileged "caste".[47]

These experiences bring us to the conclusion that perhaps the *ius ad bellum* dimension of court-packing legitimacy might follow more straightforward and pragmatic goals, and simply outline acceptable justifications which are typically associated with examples of "good" court-packing. These are typically democratic transition, addressing large-scale institutionalised judicial corruption, a reaction to previous court-packing (which will

45 Holgado and Sanchez-Urribarri (n. 14).

46 See Rosalind Dixon, 'Court-Packing in Comparative Perspective', 22 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/22/court-packing-in-comparative-perspective-rzjbl>.

47 Anne Applebaum, 'The Disturbing Campaign Against Poland's Judges', The Atlantic, 28 January 2020, <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>.

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be particularly relevant for this chapter) and the resolution of other more pragmatic issues such as the low efficiency of the courts.

The second dimension is the *ius in bello* of court-packing, which informs us *how* actually to execute court-packing legitimately. Even if it is justified in the aims it pursues, in order to be legitimate it still needs to meet a set of procedural safeguards and an assessment of the techniques it uses against the backdrop of domestic constitutional and international norms. The fact that the survival of democracy is in danger does not mean that you can do whatever you want and pack the court with no limits. This means that court-packing must meet certain requirements, such as proportionality if "unpackers" react to illegitimate court-packing. Importantly, justifications based on court-packing framed in bureaucratic language such as increasing the efficiency of the court administration require particularly strict scrutiny, because strategic political leaders seeking to pack the judiciary, anticipating a public backlash, may disguise their efforts in neutral, apolitical or seemingly positive terms.[48] This means that Erdogan's court-packing, during which he first expanded the jurisdiction of the Constitutional Court just to argue subsequently that the number of justices in the Court needed to be increased to tackle the rising caseload, would still qualify as illegitimate court-packing. Furthermore, the *ius in bello* assessment needs to engage with even more problematic aspects and carefully analyse the compatibility of any reform with court-packing effects within the existing supranational and constitutional norms in a given country.

Why is there such a high threshold? We believe that each court-packing justification carries with it some dangers of backlash. While some of these dangers are inherent in any court-packing (danger of cyclical repetition), others are context-dependent and may vary from one jurisdiction to another. We therefore argue that the conceptualisation of court-packing legitimacy requires one to look both at *when* the court-packing is legitimate and at *how* to execute its techniques legitimately, eliminating as many risks as possible. This second dimension of legitimacy thus interacts with constitutional norms and internationally entrenched rules and practices, which

48 In fact, experimental research shows that would-be packers benefit from such bureaucratic framing, because those political leaders who advance court-packing reforms purported to be bureaucratic in nature are evaluated more positively by voters than those who aim to politicise the judiciary openly; see Michael J. Nelson and Amanda Driscoll, 'Accountability for Court Packing', Journal of Law and Courts (2023), 1–22.

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narrow down the applicability of individual court-packing techniques in a funnel-like structure.

In sum, we need to know whether court-packing was "good" or "bad", because that affects the legitimacy of court-unpacking. In this chapter we focus on how to unpack a court that has previously been a target of "bad" court-packing. This is a value-oriented choice, as we are not interested in, for instance, unpacking the post-communist courts that were subjected to "good" court-packing after the fall of the Berlin Wall and after the dismantling of the communist regimes in Central and Eastern Europe.

Identifying examples of good court-packing is not easy due to the lack of agreement on what distinguishes good from bad court-packing.[49] Moreover, the assessment of whether court-packing is good or bad may change over time. In other words, we cannot be sure that legitimate court-packing will not go awry. For instance, Daly claims that the overhaul of the Turkish Constitutional Court in 2012 and purges at the Argentinian Supreme Court in the 1980s are contexts in which court-packing was initially justifiable but has become inextricably captured by deep-seated or developing pathologies of the political system.[50] However, these grey zones do not affect the fact that it is important to analyse how to unpack a court that was subject to "bad" court-packing.

3. Specifics of cyclical court-packing

Before we situate court-unpacking in the broader set of policy options responding to court-packing (Section III) and zero in on the factors to

49 For cases of possible good court-packing see papers in the International Association of Constitutional Law symposium: Oren Tamir, '"Good" Court-Packing in the Real World', International Association of Constitutional Law Blog, 2 April 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/4/5/good-court-packing-in-the-real-world-z38xc>; Mark Tushnet, 'Court-Packing: Four Observations on a General Theory of Constitutional Change', International Association of Constitutional Law Blog, 17 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/17/court-packing-four-observations-on-a-general-theory-of-constitutional-change-6wskd>; Rosalind Dixon, 'Court-Packing in Comparative Perspective', International Association of Constitutional Law Blog, 22 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/22/court-packing-in-comparative-perspective-rzjbl>; David Kosař and Katarína Šipulová, 'The Ius ad Bellum and Ius in Bello of Court-Packing', International Association of Constitutional Law Blog, 24 March 2022, <https://blog-iacl-aidc.org/new-blog-3/2022/3/24/the-ius-ad-bellum-and-ius-in-bello-of-court-packing-wghpw>.

50 Daly (n. 8).

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be taken into account when considering court-unpacking (Section IV), we want to add one more caveat concerning cyclical court-packing.

Virtually all comparative scholarship views cyclical court-packing as a major risk of resorting to court-packing.[51] Fear of the normalisation of court-packing and a tit-for-tat tactic resonates also in the US debate on the expansion of the Supreme Court. Some US scholars pointed out that court-packing implemented in the current polarised atmosphere would raise unprecedented dangers, spiralling and essentially ballooning the Court's size to such an extent that its legitimacy would "pop",[52] and potentially take down the entire constitutional system.[53] If court-packing becomes cyclical then it will never lead to a new stable equilibrium. Instead, it will lead to a convention of tinkering with the size and the composition of the court whenever the opposition party wins elections.[54] For instance, Chilton, Epps, Rozema and Sen have created a hypothetical model of partisan behaviour after the eventual expansion of the US Supreme Court and argue that repeated partisan court-packing will probably occur, increasing the size of the Court to 23 judges within the next 50 years.[55] Others seem to be more willing to take the risk.[56]

Again, we will not resolve this debate here. In short, cyclical court-packing is special and raises specific concerns. By this we mean, tentatively, the situation where a given court was packed at least three times after each major change at the helm of the country. A typical example was Argentina, as attested to by a famous quotation from President Menem —"Why should I be the only President who won't appoint his own Supreme Court?"[57] For the purposes of this chapter, it suffices to say that if a court (typically a Supreme Court or a Constitutional Tribunal) was already packed cyclically, it will be particularly difficult to "unpack" it, for many reasons. Cyclical court-packing may have changed judges' self-perception of their indepen-

51 Daly (n. 8), 1075 and 1100–1102; and Kosař and Šipulová (n. 8), 38–39.

52 Braver (n. 25), 2748.

53 Neil Siegel, 'Some Notes on Court-Packing, Then and Now', Balkinization, 26 November 2017, <https://balkin.blogspot.com/2017/11/some-notes-on-court-packing-then-and-now.html>.

54 Epps and Sitaraman (n. 23).

55 Chilton, Epps, Rozema and Sen (n. 23).

56 Tushnet and Bugarič (n. 31), 99–100 and 173–177.

57 See Rebecca B. Chavez, 'The Evolution of Judicial Autonomy in Argentina: Establishing the Rule of Law in an Ultrapresidential System', Journal of Latin American Studies 36 (2004), 451–478; and Daly (n. 8).

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dence.[58] It may also have weakened the sensitivities of the people.[59] It may even become institutionalised and turned into a sort of convention.[60] In other words, cyclical court-packing raises specific issues and so, not surprisingly, unpacking a cyclically packed court likewise poses specific challenges.

III. Après Court-Packing: What Comes Next?

In order to understand court-unpacking it is necessary to consider its alternatives. However, that requires taking a step back and looking at the possible scenarios after "bad" court-packing, however defined, because there are several potential developments. As, to our knowledge, no one has addressed these scenarios comprehensively, we need to lay them out here.

1. "Packers" stay in power: What can they do?

After court-packing, the "packers" may stay in power. They sometimes stay for a long time, sometimes for a short one. It does not matter to us here, as we are more interested in what they can do *after* they have packed the court.

They have at least six options. The first scenario is that they are by and large happy with the packed court and do nothing. The second is that the packed court is still not delivering the goods (i.e., not ruling frequently enough in the government's favour in general or not rubber stamping an important specific government legislative plan) and thus those in power decide to engage in another round of court reform. This may include packing the courts again, which we would call multiple court-packing. Or, in the third scenario, they may also think that other court-curbing might be more efficient than another round of court-packing and decide

58 Chilton, Epps, Rozema and Sen (n. 23).

59 See e.g., Amanda Driscoll and Michael Nelson, 'The Costs of Court Curbing: Experimental Evidence from the United States', J. Pol. 85 (2023), 609–624.

60 Some scholars fear that the normalisation of court-packing in democratic regimes would further weaponise its use by authoritarian leaders. See Letter from Rosalind Dixon to Bob Bauer and Cristina Rodriguez, Co-Chairs, Presidential Commission on the Supreme Court of the United States 10–11, 25 June 2021, <www.whitehouse.gov/wp-content/uploads/2021/06/Dixon-Letter-SC-commission-June-25-final.pdf>; and Presidential Comm'n on the Sup. Ct. United States, Draft Final Report (Dec. 2021), <www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

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to use another technique of court-curbing. This may include, for example, merging several courts, replacing the chief justice (without removing them as a judge altogether), adopting procedural reforms such as increasing the quorum and introducing supermajority rule, or channelling packing and curbing only to some panels or judges.

If they believe that they might lose the next election,[61] they may resort to the fourth strategy, which is artificially to prolong the life of the packed court. This practice might be deemed court-hoarding.[62] Possible illustrations of this include, but are not limited to, prolonging judicial terms of office for constitutional justices, increasing the mandatory judicial retirement age, increasing the threshold for judicial impeachment or temporal incentivisation to stay on the bench. If they are really happy with the packed court, they can even adopt a judicial reform which gives that court more power, weaponise the packed court and make it more dangerous vis-à-vis the opposition. In the fifth and most unlikely strategy, "packers" start undoing their original court-packing. This means that they start ceding court seats to the opposition. They may have varying motivations. They can be forced to democratize by internal political competition or they may respond to supranational pressure to undo their previous court-packing. This is voluntary unpacking.

Finally, packers can attempt to wash off the appearance of their court-packing by loosening the legislative rules that allowed them to control the selection of new judges. This scenario played out in Hungary in 2023, after Orbán's government passed a new legislation increasing the participation and oversight of National Council of Justice over judicial appointments.[63] This technique does not in fact remove any of the packed judges and merely appeases the criticism of the centralisation of judicial governance powers. Moreover, its future effects are questionable. In a very long-time horizon, it can potentially lead to a future unpacking, but only if the packers do not possess other, indirect or informal means of control over new bodies in

61 Note that this is one possible condition for engaging in court-hoarding, but certainly not the only one.

62 We discuss this practice in a separate article (David Kosař and Patrick Casey Leisure, Court-Hoarding, forthcoming).

63 Cseke Balázs, Márton Balázs and Andrea Horváth Kávai, 'Hungarian judicial reform worth €13 billion voted through, hidden in amendment', Telex, 3 May 2023, <https://telex.hu/english/2023/05/03/hungarian-judicial-reform-worth-eur13-billion-voted-through-hidden-in-amendment>; on criticism of the reform see also Erika Farkas and András Kádár, 'Restoring the Rule of Law By Breaching It', Verfassungsblog, 10 July 2023, <https://verfassungsblog.de/restoring-the-rule-of-law-by-breaching-it/>.

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which they vested judicial appointments. In the case of Hungary, the effect of the new legislation would hence depend on the speed of judicial turnover and on the level of independence of the National Council of Justice on the political actors.

2. "Packers" lose power: What can the new rulers do?

"Packers" may also lose power and another political party or a coalition with different governance ambitions may come into power. Importantly, new rulers could be not only democratic opposition, but also autocrats, would-be stealth authoritarians or, worse, would-be totalitarians.

The new rulers have a range of options at their disposal. The first scenario is again to do nothing. This is not necessarily because they are happy with the packed court. However, they might know that the packed judges' terms end soon and thus decide that it is better to wait for the natural renewal of the bench. The "packed judges" might also strategically defect[64] to the new rulers and these new rulers can decide that judges with a "guilty conscience" are good enough for them or maybe even more convenient for them than brand new properly selected judges who would replace them. Or there may be a combination of the two.

It is thus not a simple decision, but a difficult cost-benefit and capacity analysis. Moreover, it also depends on the branch or branches of government that engaged in the original packing. There is an inter-branch dynamic in court-packing that plays a role in court-unpacking. If the legislature packed the court and the original executive went along with it, then the newly elected legislature may want to unpack the court but be stymied by the executive branch, i.e. the incumbent president from the "packers' camp" who holds signatory power over new bills. For instance, even if a Civic Coalition wins Polish parliamentary elections in 2023, it will still face for more than two years President Andrzej Duda, who appoints Polish Judges and who in the past has cooperated with PiS on packing the Constitutional Tribunal. A Civic Coalition may try to overcome this hurdle by strategic litigation before supranational courts aimed at reducing the presidential prerogative. Hence, even the judicial branch can instigate or at least smoothen the court-unpacking. Nevertheless, the need for coopera-

64 This term was coined by Gretchen Helmke. See Gretchen Helmke, 'The logic of strategic defection: court–executive relations in Argentina under dictatorship and democracy', American Political Science Review 96 (2002), 291–303.

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tion with other branches, which the new rulers do not necessarily control, may heavily influence what the new rulers will actually do. In other words, their decision may be not only a cost-benefit, but also a capacity analysis.

The second scenario is to unpack the packed court. This is the solution we focus on most in this chapter and discuss in greater detail in Section IV. Thirdly, the new rulers might resort to alternative judicial reform and adopt measures other than court-unpacking. The range of such mechanisms that can be employed to reduce the impact of the packed judges is broad and may include jurisdiction stripping, selecting a new chief justice or a court president, merging the packed court with another court, abolishing the packed court altogether or various procedural mechanisms such as reducing the quorum, abolishing or introducing a supermajority required to reach the verdict, or channelling certain cases to only specifics panels or judges of the packed court. Some of these measures serve only to "buy time", while others are adopted to resolve the situation immediately. We discuss these alternative solutions briefly in Section IV.5 below.

Yet another strategy that does not interfere with the size or composition of the packed court and seeks to remedy the negative impact of court-packing on public trust is an attempt to legitimise the court via the work of a reconciliatory commission. Such a commission could be tasked with different goals. It might open public debate and create a platform for actors to share their worries and positions as regards the past court-packing (like the role Biden's Commission played, even though it did not arrive at a clear-cut finding). It can also allow deeper insight into court(s)' decision-making activity and spur on public debate on safeguards of judicial independence. This may in turn dispel the worries and questions regarding the legitimacy of a packed court. Alternatively, the new rulers might also decide to legitimise the packed court by additionally confirming the appointment of judges packed by the previous government through a vote of supermajority in the Parliament or, at least, in the upper chamber. The symbolic confirmation will at least formally re-establish the legitimacy of judges' irregular appointment (and hence will be relevant particularly where court-packing occurred via an increase in the number or swapping of judges on the bench). Finally, for the sake of completeness, court-hoarding is highly unlikely where the original packers lose power, as there the new rulers

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often have nothing "to hoard" (i.e. no majority to preserve) on the packed court.[65]

3. A brief summary

In sum, court-unpacking is one of the many policy options new rulers have once the "packers" lose power. As such, it must be judged against the other available judicial reforms. Sometimes, especially if the packed judges' terms end soon, the best option might be, perhaps counterintuitively, to do nothing because that might protect judicial independence in the long run. Yet another option is to resort to "healing" and create the truth and reconciliation commission that would be applicable (also) to judges. While this transitional justice mechanism has not been tested on judges properly so far,[66] it cannot be disregarded.

Of course, not all the options will always be on the table. They may not be realistic, either politically or legally. The range of options available to new rulers will always be distorted based on endo- and exogenous factors such as the form of court-packing, disputes and cleavages it has triggered, the type and competences of a targeted court (the opposition will respond differently to the packing of Apex or Constitutional Courts compared to court-packing done at first instance), the behaviour of judges (were they actually aligned with packers?) as well as the public, political and expert pressure to unpack the courts. Needless to say, after court=packing, court-unpacking, which we next examine in more detail, is only one of a number of possible outcomes. In other words, unpacking is not the only game in town.

65 Of course, where the new party or ruler in power has the same, or even more anti-democratic, goals as the party losing power, court-hoarding might be an option. For instance, if Fidesz is replaced by Jobbik in Hungary or if Ziobro's United Poland replaces Kaczyński's Law and Justice.

66 It is telling that the South African Judges refused to appear before the Truth and Reconciliation Commission after the fall of the apartheid régime, invoking judicial independence as their defence. For a criticism of this approach see David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing 2003).

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IV. Court-Unpacking: A Preliminary Theoretical Inquiry

As previously mentioned, refraining from unpacking is actually a difficult and non-intuitive decision for the democratic opposition once it wins the election, for pragmatic, political and legitimacy reasons. The majority of political actors are attracted to either pushing the existing majorities closer to their preferences or, at least, preserving a balanced court which does not openly lean towards any ideology. We thus expect that new rulers will decide not to unpack the courts if it lacks a sufficiently strong mandate, where there is no agreement that the previous court-packing was illegitimate (or that it even qualifies as court-packing, as is the case with the 2021 US discourse), or where new rulers decide that the overall short-term costs of unpacking is greater than the potential long-term gains.

Given the frequency of court-packing in transitions as well as the importance of the perceived independence and legitimacy of courts for young democracies, we argue that in the majority of scenarios new rulers will actively seek to restore the balance at packed courts or even use the unpacking to its own advantage. In what follows we first briefly address the logic behind justifications for unpacking. Next, we look more closely at individual unpacking techniques, depending on whether new rulers seek to reverse the packing to restore the previous status quo, or whether they opt for an alternative reform which either interferes in court's composition or forces the packed judges to align with governmental preferences or reduces its influence. We discuss the role of the proportionality principle in theoretical considerations on unpacking and discuss the thin line between unpacking and cyclical court-packing. Finally, we conclude with a bird's eye view of more complex issues that require an in-depth future discussion regarding the role of time, the behaviour of packed judges and the form of previous court-packing in the assessment of costs and benefits of court-unpacking.

1. "Just cause"

The legitimacy of court-packing has troubled legal and political scholars for quite some time.[67] We have addressed the key issues concerning the conceptualisation of court-packing above. For the purposes of this article

67 Helgado and Sanchez-Urribarri (n. 14); Daly (n. 8); Weill (n. 23); Keck (n. 5); Mailey (n. 5).

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we refrain from strong normative claims which would require more extensive debate and consideration. Instead, we refer to our previous work[68] and raise four points outlining our conceptualisation of court-unpacking.

First, unpacking reacts to illegitimate court-packing. New rulers thus must be able to demonstrate that the court-packing was illegitimate, i.e. that it either lacked the proper justification set out in the four scenarios we outlined above or was implemented in a way that was incompatible with domestic constitutional or supranational norms. The Polish and Hungarian examples offer several of these court-packing instances, be it tinkering with the composition of apex courts, the addition of new judges or lowering the retirement age of judges across the board. All these measures allowed Orbán and Kaczyński to pack the courts with loyal judges, shifting the judicial majorities at the constitutional as well as the top general courts in their favour. The existence of CJEU and ECtHR case law labelling several of these techniques illegitimate relieves the new rulers of the need to demonstrate and prove that Orbán and Kaczyński's court-packing acts were in fact illegitimate. On the other hand, it also increases the pressure that the new rulers will face to undo these court-packings. In the end, it will be a "balancing exercise, in which domestic political actors balance domestic political costs of compliance, on the one hand, with the international reputational costs of non-compliance, on the other".[69]

Second, unpacking can easily be used by politicians with both good and bad intentions. Historically, retaliation for past tinkering with the composition of courts has commonly been used as a moral and political justification behind what were, in fact, new court-packing plans.[70] Take again the example of Poland. Brutal as it turned out to be, Kaczyński's court-packing was first triggered by actual court-packing executed by the outgoing Civic Platform Government who, in the face of looming electoral loss, pre-emptively selected two constitutional justices. In other words,

68 Kosař and Šipulová (n. 8).

69 David Kosař and Jan Petrov, 'Determinants of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Rulings in the Czech Republic', EJIL 29 (2018), 397–425 (422–425).

70 Matthew M. Taylor, 'The Limits of Judicial Independence: A Model with Illustration from Venezuela under Chavez', Journal of Latin American Studies 46 (2014), 229–259; Chavez (n. 57).

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Civic Platform's appointment gave PiS an initial just cause to kick off its own reform.[71]

Third, the dividing line between unpacking and court-packing is very thin, if not non-existent. Some unpacking techniques easily meet the definition of court-packing, and even if they are legitimate, they may ignite a dangerous cycle, similar to the examples of cyclical court-packing[72] we often see in Latin American countries.[73]

Fourth, even if justified, unpacking does interfere with courts' composition, and as such potentially further distorts the principle of judicial independence (or, even more problematically, the perception of judicial independence). Scholars so far have disagreed as to the effect court-packing has on public confidence and the perceived legitimacy of courts.[74] While some scholars argue that the public legitimacy of courts depends on their visible independence from the political branches of power,[75] others argue that the public is not overly sensitive and in fact cares and knows very little about courts.[76]

To what extent do considerations of whether to implement unpacking change if packed courts still enjoy a reasonably high level of public trust? And new rulers still have just cause if packed judges did not demonstrate any behaviour indicating their alignment with past government and, instead, retained their personal independence? The installation of a new majority does not need to translate automatically into the actual decision-making practice of judges. Sometimes, conservative judges may form coalitions with liberal colleagues. In some judiciaries with deeply rooted career

71 This is now even more complicated, as two out of three "quasi judges" illegitimately elected in December 2015 have died and been replaced by new judges under the "standard process", see Gliszczyńska-Grabias and Sadurski (n. 13), and Sadurski (n. 12). The fact that all three seats were illegitimately stolen by Kaczyński from Civic Platform's Government remains though.

72 See above Part I.C.

73 Taylor (n. 70); Chavez (n. 57).

74 Caldeira, (n. 19); Cushman (n. 19); Badas (n. 19); Keck (n. 5).

75 Siegel (n. 36).

76 James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, 'On the Legitimacy of National High Courts', Am. Pol. Sei. Rev. 92 (1998), 343–358; Noah Feldman, 'The Contemporary Debate over Supreme Court Reform: Origins and Perspectives', White House 2, 30 January 2021, <www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf>; Brandon L. Bartels, Jeremy Horowitz and Eric Kramon, 'Can democratic principles protect high courts from partisan backlash? Public reactions to the Kenyan Supreme Court's role in the 2017 election crisis', AJPS (2021); and Nelson and Driscoll (n. 48).

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models, court-packing may not translate into partisan decision-making at all. Should these considerations matter for the *justness* of unpacking?

As previously noted, we refrain from taking a resolute position, and for the purposes of this chapter simply present the first mapping of various factors which need to be taken into consideration when thinking about unpacking.

2. Techniques

So what techniques can new rulers consider for actually unpacking the court? We argue that any unpacking decision will move on a two-pronged scale depending on whether new rulers (1) opt to remove the packed judges or to keep those who meet certain standards, and (2) strive to restore the "old" majority or to install a new balance at the court.

An obvious unpacking technique is removing the packed judges. Such a move is always controversial, since it has to deal with the question of the legitimate expectations of packed judges, their de facto behaviour, as well as the destiny of decisions they managed to issue between their appointment and removal.[77] Moreover, new rulers pursuing the removal of packed judges will also need to decide what to do with the vacant seats: whether to fill them with original judges removed during court-packing, leave them empty (or downsize the court) or fill them with new judges.

The removal of packed judges can be achieved via several different techniques. The most straightforward one is the *repeal of court-packing laws and the annulment of the appointment of packed judges as void*. Yet, this seemingly easy solution still raises all of the questions outlined above. If there is no general agreement on whether the reversal of court-packing is constitutional, the repeal risks throwing the country into legal chaos. Can a decision delivered by a judge whose appointment was annulled still be considered valid? Should it also be annulled? To what extent does such a judge make the whole panel (s)he sits on illegitimate?[78]

A slightly different scenario opens if new rulers decide to *downsize* the court and, instead of annulling the previous legislation, adopt a new amendment reducing the number of seats at the court. While not very probable, new rulers may rely on this technique when the appointment is at least partly in the hands of a different actor, loyal to the outgoing

77 Discussion on Verfassungsblog (n. 11).
78 Ibid.

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government which executed the packing. By reducing the size of a court in a strategic moment, new rulers might prevent such actor from court-hoarding. Reducing the number of seats will freeze the appointments process, shift the existing majority at the court (as some of the packed judges may leave the bench without being exchanged for a new batch loyal to the previous government) and buy the new rulers time. For example, if the Polish liberal opposition wins the next election, for a brief period it will have to cohabitate with President Andrzej Duda, who appoints Polish judges and who in the past has cooperated with PiS on packing the Constitutional Tribunal.

Downsizing is typical retaliation for the expansion of courts, frequently implemented in Latin America. Interesting examples can, however, also be found in the history of the US Supreme Court, where waves of increasing and reducing the number of judges permeated the whole of the 19th century. While the majority of court-packing plans were justified by the changing territory of the USA and the increasing number of circuits, several politicians have recently used similar reasoning to adjust the balance on the bench slightly.[79] Even more complex questions would be triggered if new rulers simply opted for downsizing as a reaction to a different type of court-packing which did not change the size, but only the composition, of the court. It is, however, worth noting that in some countries the ability of new rulers to pass downsizing reforms will also rest on whether the resizing of a court requires a parliamentary supermajority.

Another potential technique would be to shorten the time packed judges serve on the bench. New rulers can achieve this by three different mechanisms, depending on the strategic timing, whether life tenure exists, the length of the terms involved and the ages of packed judges. It can either *remove life tenure*, introduce fixed terms and open the door for a new selection, *shorten the existing terms* (the least controversial option would be to shorten the terms en bloc) or introduce/lower a *mandatory retirement age*. All of these techniques would, most probably, target the whole composition of the court, opening up a completely new opportunity for new rulers to repack the court. It is also important to stress that all these techniques simultaneously qualify as court-packing and as such carry with them all dangers and risks of court-packing. Even if their implementation is

79 MSAB: according to the Washington Post, 11 democratic candidates in the 2020 primaries were open to the idea, <https://www.washingtonpost.com/politics/2020/09/22/packing-supreme-court/>.

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legitimate, they need to be carefully balanced against the form and effect of previous court-packing, as well as domestic constitutional and supranational norms.

Alternatively, new rulers might therefore resort to a longer but less intrusive approach and try to sift out "the bad apples". In this scenario, they will typically rely on *impeachment, disciplining, criminal prosecutions* or even instruments of transitional justice, such as *retention elections, vetting and the lustration* of packed judges.[80] In general, these techniques are seen as legitimate and condoned even by supranational organisations[81] if tied to transitions or systemic problems of judiciaries, such as large-scale corruption.[82] However, the results we have seen so far (mostly in Central and Eastern Europe) seem to suggest that the application of transitional justice mechanisms to hierarchical models of judiciaries riddled with informal networks is, at best, underwhelming. The majority of those judges who had to reapply for their jobs after the reunification of Germany remained in office.[83] Similarly, the Czech Lustration Law as well as subsequent disciplinary proceedings in fact allowed the majority of judges to remain in office due to a combination of lack of evidence and the specific nature of judicial dependence on the communist party, which was difficult to subsume under lustration.[84] The Ukrainian large-scale judicial vetting of 2014, reacting to

80 Yuliya Zabyelina, 'Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine', State Crime Journal 6 (2017), 55–78; Erhard Blankenburg, 'The Purge of Lawyers after the Breakdown of the East German Communist Regime', Law & Social Inquiry 20 (1995), 223–243; David Kosař and Katarína Šipulová, 'Judging the Judges, Judging Ourselves: Never-Ending Dealing with the Past within the Czech Judiciary' in: Christina Murray and Jan Van Zyl (eds), *Judges Facing Transitional Justice: Vetting and Other Mechanisms and How They Affect the Rule of Law* (London: Routledge, forthcoming 2023).

81 See European Commission for Democracy Through Law (Venice Commission), 'Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine', 19 June 2015, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e>;ECtHR, *Polyakh and others v. Ukraine*, judgement of 17 October 2020, no. 58812/15; Konstantsin Dzehtsiarou, 'Lustration in Ukraine: Political Cleansing or a Tool of Revenge?', Verfassungsblog, 26 June 2015, <https://verfassungsblog.de/lustration-in-ukraine-political-cleansing-or-a-tool-of-revenge/>.

82 See European Commission for Democracy Through Law (Venice Commission), Final Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, 19 June 2015, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2015)012-e>; ECtHR, *Polyakh and others v. Ukraine*, judgement of 17 October 2020 no. 58812/15; and Dzehtsiarou (n. 81).

83 Blankenburg (n. 80).

84 Kosař and Šipulová (n. 8).

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widespread corruption, proved largely toothless,[85] with judges voluntarily re-electing the majority of court presidents removed through the lustration process.[86]

The Ukrainian example in particular raises an urgent question: what to do once the packed judges leave office. How should new rulers fill the empty seats? Generally, they will have to choose one of three options: they can attempt to reinstall previous illegitimately removed judges, leave the emptied seats vacant or select their own new candidates. The decision is tricky and is often beyond the direct control of new rulers.

First, depending on the time that has passed since the original court-packing, the removed judges may have already retired, may occupy different positions, be in exile or simply be unwilling (or unable) to return to the judiciary. Think of Hungarian and Polish court-packing by lowering the retirement age. A similar, large-scale court-packing technique will allow only a very short window of opportunity to get judges back before they actually really retire.

Second, depending on the scale of court-packing, small countries may also struggle to generate a sufficient number of new candidates to fill the emptied seats.[87] Third, depending on the passing of time, undoing the effects of court-packing will be more difficult in hierarchical judiciaries that have managed to inbreed and socialise a new generation of judges who are already loyal to the judicial oligarchy that is about to be removed but is nonetheless able to retain its influence via informal channels.[88]

Another way how to undo court-packing is a decision to keep the packed judges on the bench but balance them out by *increasing the size of the*

85 Maria Popova, 'Can a leopard change its spots? Strategic behaviour versus professional role conception during Ukraine's 2014 court chair elections', L. & Pol'y 42 (2020), 365–381.

86 Ibid.

87 Kosař and Šipulová (n. 8).

88 Popova (n. 85); Nino Tsereteli, 'Backsliding into Judicial Oligarchy? The Cautionary Tale of Georgia's Failed Judicial Reforms, Informal Judicial Networks and Limited Access to Leadership Positions', Rev. Cent. & E. Eur. L. 47 (2022), 167–201; Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia', Problems of Post-Communism 69 (2020), 528–538; Maria Popova and Daniel Beers, 'No Revolution of Dignity for Ukraine's Judges: Judicial Reform after the Euromaidan', Democratizatsiya 28 (2020), 113–142; David Kosař and Samuel Spáč, 'Post-communist Chief Justices in Slovakia: From Transmission Belts to Semi-autonomous Actors?', Hague Journal on the Rule of Law 13 (2021), 107–142.

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court.[89] This mechanism is not court-unpacking in the narrow sense, because, in contrast to removal, downsizing and other sifting mechanisms, the "packed judges" remain on the bench. Nevertheless, it is one of the most frequent strategies how to undo court-packing through the change of court composition and thus we mention this technique already in this Section.

This increase in the size of the court can be immediate or staggered. The addition of new seats was the solution proposed by Biden's administration. Interestingly, the US debate justified the expansion plan using two different narratives: the first group advocated for the expansion as a reaction to the latest republican appointments of Barrett and Gorsuch; the second camp simply argued that the Court should be rebalanced and made socially responsive, because it had become too polarised and had lost public trust and legitimacy.[90]

Increasing the number of judges could allow for either the restoration of the old majority or the creation of a new balance. New rulers could add new seats to replicate the diversity from before the court-packing or it might aim for a new proportional composition.

Undoing court-packing by expansion brings several benefits as well as issues. On the one hand, it allows for a rather smooth transition between the two courts, avoiding questions of the legitimacy of previous appointments, the legitimate expectations of judges packed by the previous government, and the treatment of decisions delivered by those judges. On the other hand, if the new rulers go too far, what it does can easily be qualified as a new court-packing.[91] It exposes the danger of normalising court-packing[92] —making the technique less costly and more attractive to future political leaders, and risking the start of a court-packing cycle.[93] The decades-long repetitions of expanding and downsizing the Supreme Court in retaliation

89 See Joshua Braver 'Court-Packing: An American Tradition?', Boston College Law Review 61 (2020), 2748–2809; Daly (n. 8); Tushnet and Bugarič (n. 31) 99–100, 156–177; Kosař and Šipulová (n. 8); Holgado and Sanchez-Urribarri (n. 14).

90 Presidential Commission on the Supreme Court of the United States, Draft Final Report, December 2021, <www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>.

91 Anibal Pérez-Liñán and Andrea Castagnola, 'Judicial Instability and Endogenous Constitutional Change: Lessons from Latin America', B. J. Pol. S. 46 (2016), 395–416.

92 Taylor (n. 70).

93 Taylor (n. 70).

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for previous court-packing is typical for the 1950s-1960s era and the early 2000s in Argentina and Brazil.[94]

In sum, undoing court-packing can be executed via various methods, one of them being unpacking. New rulers need to think along two axes: (1) Are they aiming to restore the previous status quo or to create a new balance at the court; and (2) Do they wish only to remove packed judges or also to add new ones to the court? Each of the combinations opens different risks, pragmatic constraints and political considerations. New rulers thus need at the same time to take into account the trade-off between the political legitimacy and constitutionality of its choice, the lapse of time since the original "bad" court-packing, pragmatic considerations such as a shortage of suitable judicial candidates, the effect on public confidence in the judicial system, and sometimes also issues of legal certainty, as no government wants its country to descend into chaos or a dual state.

3. Proportionality: How to differentiate unpacking from new court-packing?

Any reader who has closely followed the constitutional crises in Poland or Hungary might point out the striking resemblance between many of the techniques we outlined in the previous section as a potential unpacking, and the interferences with domestic judges carried out by Orbán or Kaczynski. As one of his first steps after reaching a parliamentary supermajority, Orbán adopted a constitutional amendment increasing the number of Constitutional Court justices from 11 to 15, securing for the government four new seats to fill and thus eventually to obtain an effective veto at the Court.[95]Jaroslaw Kaczyński borrowed the expanding strategy from Orbán's playbook and expanded the number of judges of the Polish Supreme Court from 81 to 120.[96]

94 Keith S. Rosenn, 'The Protection of Judicial Independence in Latin America', U. Miami Inter-Am. L. Rev. 19 (1987), 1–35 (28).

95 David Landau, 'Abusive Constitutionalism', U.C.D.L. Rev. 47 (2013), 189–260 (209). But note that it took several years for Orbán to achieve full control of the Hungarian Constitutional Court.

96 Śledzińska-Simon (n. 4); Fryderyk Zoll and Leah Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland', Fordham Int'l L.J. 42 (2019), 875–947.

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Between 2015 and 2017, PiS annulled the pre-emptive election of two Constitutional Tribunal justices, replaced three justices properly elected by the previous government, and managed to get rid of other recalcitrant justices via a combination of forced sabbaticals (Vice-President of the Constitutional Tribunal, Stanisław Biernat) and benching (strategically removing three justices from their panel arguing that they were biased towards the Minister of Justice, Ziobro, who might theoretically turn to the Tribunal with a request for a constitutional review).[97]

Both governments emptied a significant number of senior positions in the judiciary through the lowering of the mandatory retirement age. Hungary first introduced this technique in 2012, reducing the retirement age for judges from 70 to 62.[98] Poland followed suit in 2017, reducing the retirement age for Polish judges from 70 to 65.[99] Poland, in particular, became renowned for the abusive use of the disciplining of recalcitrant judges for the smallest trespasses or misdemeanours (see the well-known case of Dorota Lutotsanska, who faced disciplinary proceedings after she appeared at the celebration of 100 years of Polish independence with "Constitution" inscribed on her T-shirt) or for asking the CJEU preliminary ruling questions.[100]

What distinguishes these instances of court-packing techniques from subsequent unpacking? The line between court-packing and unpacking is indeed very thin, if not non-existent in some cases. Its presence will largely depend on the ultimate goal the new rulers wish to achieve. Do they wish to restore the previous status quo or does it aim for a new balance of voices on the unpacked court(s)?

97 For a more detailed discussion of these acts of court-packing see Kosař and Šipulová (n. 8).

98 Tomás Gyulavári and Nikolett Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', ILJ 42 (2013), 289–297; Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary', CML Rev. 50 (2013), 1145–1160.

99 For more details see ECJ, *European Commission v. Hungary*, judgment of 6 October 2012, case no. C-286/12,ECLI:EU:C:2012:687.

100 Laurent Pech and Patryk Wachowiec, '1460 Days Later: Rule of Law in Poland R.I.P. (Part I)', Verfassungsblog, 13 January 2020, <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-i/>, and '1460 Days Later: Rule of Law in Poland R.I.P. (Part II)', Verfassungsblog, 15 January 2020, <https://verfassungsblog.de/1460-days-later-rule-of-law-in-poland-r-i-p-part-ii/>. For more details see also ECJ, *Miasto Łowicz*, judgement of 26 March 2020, case no. C-558/18, ECLI:EU:C:2020:234, and ECJ, *Prokurator Generalny*, case no. C/563/18.

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What is the pool of judges it targets? Any illegitimately appointed judges or judges biased towards the government? Consider the following scenarios that might unfold. First, assume that the new Polish and Hungarian oppositions will take on board the widely discussed proposal[101] to remove the central perpetrators from the judiciary and to criminally punish those Polish and Hungarian Judges who "seriously and intentionally" violate EU values. At first sight, the proposal works with an objective justification relying on the supranational law. Yet, both oppositions will have to tackle the question of how to identify these judge-perpetrators and whether it is legitimate to search for them outside the pool of packed judges. In other words, whether this extraordinary measure should address also judges appointed long before PiS arrived in power. In the most extreme case, the opposition might simply decide to use unpacking to get rid of not only packed judges but any "problematic" judges present at the court. Unless individually targeted, any lustration, screening or disciplining of judges will potentially sift through a much larger pool of judges, including those legitimately selected in the previous era. Both Polish and Hungarian cases raise a plethora of new questions. Are judges who violated EU values because they felt bound by the jurisprudence of their own Constitutional Tribunal to be held criminally accountable? And can the use of a wide-open criminal prosecution still pass the test of legitimacy, or does it already interfere in de facto judicial independence and impartiality?

Alternatively, the liberal opposition might be incentivised by the presented window of opportunity and use it actively to create a completely new majority, aligned with its own preferences. This is, in fact, the very same scenario that played out in Poland after the 2015 parliamentary elections, when Civic Platform's outgoing government selected two Constitutional Tribunal justices to replace the "lame duck judges" whose mandates were to end only after the 2015 parliamentary election, which Civic Platform eventually lost. This pre-emptive (and later confirmed as unconstitutional[102]) election of judges by the lame duck government was clearly motivated by the fear of losing the elections and responded to growing public support for the populist Law and Justice party. However, this strategy backfired badly. Instead of skewing the composition of the Constitutional Tribunal, this "original sin"[103] instigated (and also partly legitimised) Kaczyński's vendetta

101 von Bogdandy and Spieker (n. 11).
102 Polish Constitutional Tribunal, judgment of 3 December 2015, case no. 34/14.
103 Garlicki (n. 13). See also Gliszczyńska-Grabias and Sadurski (n. 13).

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after the elections. Instead of removing two pre-emptively selected justices, PiS, with the help of President Duda, annulled the whole selection and replaced all five justices (two lame duck judges and three properly selected judges) with its own appointees.[104] Disproportional unpacking essentially equates to illegitimate court-packing, which carries the very obvious risk of spiralling into an endless cycle of court-packing practices, as seen in Argentina[105] and Venezuela.[106]

In our previous work on the legitimacy of court-packing we argued that any reactive court-packing, i.e. court-packing as a response to previous illegitimate court-packing, must be balanced and proportional. For example, had President Biden decided to proceed with an expansion of the Supreme Court, he would have been able to expand the bench by a single[107] or two judges, depending on the agreement of the constitutionality and legitimacy of the Senate's refusal to vote on Merrick Garland's appointment, and of the appointment of Amy Coney Barrett. The proportionality requirement, therefore, serves as a bulwark dividing unpacking from cyclical court-packing.

Similarly, in Poland, if PiS wanted to rectify the Civic Platform's 2015 original sin, it could have simply annulled the pre-emptive selection of two justices and selected two new candidates. Instead, PiS opted for a fully fledged illegitimate court-packing. We thus argue that any unpacking that goes beyond the restoration of the status quo and reshuffles the majority at the court needs to adhere to the principle of proportionality and to meet the previous court-packing with what we call "a paired effect".

4. Other issues to consider when resorting to court-unpacking

Broadly speaking, we suggest that any decision on whether or not to unpack the packed court(s) should consider at least four factors: (1) the form of the previous court-packing, (2) the lapse of time from the original illegit-

104 See Zoll and Wortham (n. 96); and ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of May 7, 2021, application no. 4907/18.

105 Chavez (n. 57).

106 Taylor (n. 70).

107 We are of course aware that in cases similar to the US example it might be difficult to come to an agreement about what the constitutional principle is and whether the executive's step was or was not constitutional. For that reason, we rely on our definition of court-packing, not on constitutionality, which rests on more objective criteria evaluating the effect of a given practice created on the bench.

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imate court-packing, (3) the behaviour of packed judges during the reign of "packers", and (4) position of the packed court within the hierarchy of the judicial system. A combination of these four issues will significantly impact the effectiveness as well as the public reception of unpacking.

First, regarding the form of the previous court-packing, it is important to acknowledge that any illegitimate court-packing has a potentially detrimental effect on the quality of democracy, the rule of law or judicial independence, but individual court-packing techniques differ in the scope and intensity of their clash with the constitutional norms and conventions of a given country.

The form of court-packing will also impact the scale of options available to new rulers. Expansion of the court can be quite swiftly resolved by proportional downsizing. Vice versa, judges removed due to downsizing might be reinstalled by the responsive expansion of the bench. This option would be relatively easy for both the Hungarian Constitutional Court (returning to 11 justices) and the Polish Supreme Court (trimming it down to 81). Downsizing of a court does not necessarily have to put into question the legitimacy of decisions delivered by packed judges[108] but simply be presented as a structural reform. Similarly, benched judges (Venezuela 2004, Pakistan 2007) or judges sent on forced sabbaticals (Poland 2017) can, in most cases, be reinstated in their original seats with no further requirements.

Some swapping court-packing strategies (i.e. court-packing executed by changing the quality, not the size, of the court's composition) require more complex reactions, typically because they also raise problematic questions of what to do with the judges who filled the seats emptied by court-packing. Are all these new appointments automatically illegitimate? The restoration of the Polish Constitutional Tribunal is one of the examples where we expect the unpacking to be particularly difficult. Two out of three "quasi judges" illegitimately elected by Kaczyński's coalition in December 2015 had died in the meantime and were replaced by new judges under the "standard process".[109] The fact that two judges ("post-packed" judges) who replaced the original "quasi judges" through a standard process in the Sejm does not in itself rectify the original court-packing in 2015. In other words, the fact that all three seats were illegitimately stolen by Kaczyński from Civic Platform's Government remains. Here, we hypothesise that the

108 See, mutatis mutandis, ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* (Grand Chamber), judgment of 1 December 2020, case no. 26374/18, para. 314.

109 Gliszczyńska-Grabias and Sadurski (n. 13).

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decision-making matrix of the liberal opposition will most likely rest on how brutally the previous court-packing violated domestic constitutional and supranational norms (i.e. is "vendetta" necessary) and what techniques the same norms permit as constitutional.

Regarding the constitutionality of court-packing and unpacking, the harsher or more brutal forms of court-packing (abusive prosecution of judges, such as in examples from 2016 Turkey, abusive impeachments in Chile 2004, Sri Lanka 2013 and El Salvador 2021) probably increase both the public demand and the benefits the new rulers gain from unpacking, making the decision politically less costly, even if not necessarily technically and legally easy to execute. Additionally, the form of unpacking will also depend on the particular political and constitutional setting and context: techniques generally accepted in one country as constitutional might be detrimental and untransferable to a different state. The Polish and Hungarian situation is strongly impacted by the existence of the CJEU and ECtHR case law suggesting that acts of court-packing in both countries, in fact, violated their supranational commitments. From this perspective, both European Courts raised the pressure the new rulers would face in unpacking the domestic courts. The most recent Hungarian legislative reform aimed to restore the rule of law by removing the political control over judicial selection executed via unchecked National Office for the Judiciary, does not in any way solve the issue of what to do with packed judges and we hypothesize that it will not relieve potential new rules of the unpacking dilemma.

A second factor to consider is the lapse of time from the original illegitimate court-packing. The more time has passed since the court-packing, the more costly the unpacking usually will be. Judges removed by original court-packing may no longer be able to return to their seats. Or, even worse, several rounds of appointments may have occurred between the illegitimate court-packing and the new rulers' chance to undo it. Take again the example of the Polish conundrum around the 2015 appointment of constitutional justices. Any future consideration of how to unpack the Constitutional Tribunal, should PiS really lose the November 2023 elections, will inevitably be complicated by the fact that two out of three quasi-judges illegitimately selected by PiS in the disproportionate retaliation against Civic Platform's pre-emptive appointment, have already died and have been

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replaced by new judges selected in a standard process.[110] Is unpacking able to address court-packing the effects of which span across "generations" of appointments?

Apart from the pragmatic level, the lapse of time also has a normative element. Courts cannot remain prisoners to political changes. Similarly, legal certainty and the protection of individual rights cannot depend on an uncertain future and whether the next incoming government decides to reverse policies of long ago. The threshold related to the passing of time is reduced in cases of illiberal regimes and vast abuses of human rights, committed through the direct or indirect engagement of courts. Nevertheless, the lapse of time from the transition itself increases the pressure to abandon transitional justice policies which might potentially undermine the general protection of human rights.[111] The European Court of Human Rights, for example, has already clarified that the lapse of time affects the compatibility of transitional measures such as lustration with the European Convention of Human Rights.[112] Similar considerations apply to the restoration of tinkering with courts' composition.

The stakes are high also for pragmatic reasons. The annulment and proclamation of the appointment of packed judges as unconstitutional invoke questions of what will happen with judgments and decisions delivered by such a packed illegitimate judge. Are they to be considered valid? Are they compatible with the requirements of the right to a fair trial and to a lawful judge (gesetzlicher Richter)? Should they somehow be undone, at least in vertical relationships of individuals vs the state? Obviously, the longer the time that has passed between packing and unpacking, the broader the scope of cases decided by packed judges will be, and thus unpacking will install more instability in the legal system and individual relations. That said, intertemporal aspects of court-unpacking are not necessarily linear. If more time passes, it does not automatically offer a reason for a more restrained approach.

The third issue complicating contemplation of the unpacking of courts is the behaviour of packed judges, as well as the cognitive capacity of the

110 Gliszczyńska-Grabias and Sadurski (n. 13).

111 Katarína Šipulová and Hubert Smekal, 'Between Human Rights and Transitional Justice', Europe-Asia Studies 73 (2021), 101–130.

112 See David Kosař, 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic', Eu Const. L. Rev. 4 (2008), 460–487; and Cynthia M. Horne, 'International Legal Rulings on Lustration Policies in Central and Eastern Europe: Rule of Law in Historical Context', Law & Social Inquiry 34 (2009), 713–744.

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new rulers to decipher it in a timely manner. The question to what extent the behaviour of packed judges impacts the legitimacy of court-packing has already triggered a vibrant debate among international scholars.[113] While we lean towards a negative answer and evaluate court-packing without relying on imputation of intent or the de facto behaviour of judges, we also argue that such behaviour actually does matter and crucially shapes the decision whether to unpack the courts. The ability of judges to retain their de facto independence cannot legitimise previous court-packing, but it increases the costs and significantly reduces the benefits of subsequent unpacking. This is all the more relevant, given the mixed signals issued by the scholarship exploring the development of public confidence in courts which face court-packing or other forms of reform. A completely new perspective is needed when considering the unpacking of such illegitimate court-packing.

To what extent should new rulers care whether packed judges decided independently during[114] the reign of court packers?[115] Does the public still consider the packed court legitimate? How was the court-packing reflected in public trust and the perceived independence of judges? To what extent should political actors drive their important judicial reforms similar to court-packing and unpacking on the public sentiment? To what extent is our understanding of the just cause of unpacking formed by de facto behaviour we can observe? Do new rulers have just cause if the previous government packed the court illegitimately but judges, due to other safeguards of judicial independence or their own resilience, actually remained independent?

These questions relate also to the cognitive problem of the extent to which we are able recognise biased behaviour in packed judges. In some cases, such as the decision-making of the Polish Supreme Court or the Polish Constitutional Tribunal, the statistical evidence is quite straightforward and simple. Multiple studies have demonstrated that Polish judges in

113 Holgado and Sanchez-Urribarri (n. 14).

114 In a way, a change of power provides quite a good natural laboratory to "test" judicial independence, as one could see a change or a path-dependence in how packed judges decide cases pre- and post-change in executive/legislative power. However, a democratic opposition often cannot afford the luxury of waiting to see whether packed judges defect to the new democratic majority as it may lose momentum, often a short window of opportunity, in attempting to undo court-packing.

115 Sadurski (n. 12).

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fact decide increasingly pro-governmentally.[116] A similar observation would probably hold also for the US Supreme Court. But what about strategically packed courts, or small important panels within the courts, that can be activated only once an important case against the previous government or its members is raised?

Finally, the tier of the court we talk about also matters. While packing the Constitutional Tribunals, Supreme Courts and other pinnacle court understandably attracts more attention, packing the lower courts is also consequential, because these courts decide the majority of disputes.[117] However, undoing court-packing at the lower echelons of the judiciary can be easier, because these courts are more numerous and vacancies open more often naturally, the number of judges of the lower courts are usually not fixed by law, and the "packers" usually exercise lesser pressure on the lower court judges which allows them to decide cases more independently than "packed judges" at the apex courts, whose behaviour is policed by the "packers" more closely. Moreover, judgments of lower courts can be reviewed by higher courts. In other words, in most cases, new rulers have more flexibility in undoing court-packing at lower tiers of the judiciary. On the other hand, new rulers can return career judges who were promoted to higher courts by "packers" to their original posts at lower courts (i.e. to demote them), but this measure cannot be used against judges of the lowest tier of the judiciary, which is usually most numerous.

5. Alternative reform options

The difficulties related to the implementation of unpacking techniques might prompt new rulers to search for an alternative reform that would leave the composition of court(s) intact but could indirectly mitigate the effect of court-packing.

First, new rulers might seek to gain the upper hand over the packed judiciary by *seizing control over judicial governance* (and its personal dimension in particular). Generally, this would take place in two steps: transferring the selection, promotion and removal of judges to a new body (either

116 See Sadurski (n. 12); M. Pyziak-Szafnicka, 'Trybunał Konstytucyjny á rebours', Państwo i Prawo 5 (2020), 25.

117 See Martin K. Levy, 'Packing and Unpacking State Courts', Wm. & Mary L. Rev. 61 (2020); 1121-1158; Andrea Castagnola, *Manipulating Courts in New Democracies: Forcing Judges off the Bench in Argentina* (New York: Routledge, 2017).

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completely independent or under the control of the executive power), or via the installation of new court presidents.

Alternatively, new rulers might simply decide to weaken the court and reduce its impact on mega-politics (including elections, budgets and individual rights).[118] This can be achieved in several steps (or their combination). The most common one is *jurisdiction stripping*, typically related to judicial review competence.[119] Particularly in countries where Constitutional Courts significantly constrain the legislator, their increased polarisation will also increase the pressure to limit their influence on the formation of public policies. In the end, the supporters of court-packing, who see it as a suitable response to a too polarised and politicised US Supreme Court, largely overlap with the camp of judicial review critics.

A different technique would be a *reduction of the quorum for judicial review* or, alternatively, an *increase in the supermajority* required for a judicial review decision. While the reduction in quorum seeks to allow more variance in the formation of different alliances within the court, the increase in supermajority (higher than the majority the previous government achieved by packing the court) will make it difficult for packed judges to attract new colleagues who would be willing to create a coalition necessary to take a vote. The drawback of this clever technique is that if the supermajority is set too high, it may bring the court to a deadlock where it would be unable to take any decision.

Lastly, new rulers might also consider a large-scale reform of the judiciary to dissolve completely the court besmirched by the results of court-packing. One option, an alternative to jurisdiction stripping, would be to delegate the salient competence to a *newly created specialised panel* (with the selection of its members controlled) or to introduce an internal *rotation system*, forcing packed judges to alternate in different panels. This will allow new rulers to have a friendly group of judges while not losing the benefit of having a strong independent court. New rulers might also decide to *merge* the packed court with a different court, *split* it or *to dissolve and create a new court* – a pro forma institutional reshuffling which serves only one purpose: to get rid of packed judges and gain an opportunity to select

118 Ran Hirschl, 'The judicialization of mega-politics and the rise of political courts', Annual Review of Political Science 11 (2008), 93–118.

119 We have seen a manifestation of this weakening technique executed in Hungary and Poland. However, it is also worth noting that in the US context, the proponents of weaker judicial review eventually joined the pro-court-packing camp, accepting court-packing as an alternative reform to mellow down the effect of the court.

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a completely new bench. Lastly, extensive court-packing that significantly delegitimised the judiciary and dramatically lowered public trust might actually spur the new rulers to restart the constitutional momentum and adopt a completely new constitution.

V. Conclusion: The Ultimate Goal of Unpacking

We have argued in this chapter that any new rulers that topple the court packers and come to power will face a tricky decision on whether and how to restore the independence and legitimacy of the packed judiciary. We also proposed to build the understanding of unpacking, its justness and its effects on three considerations: the (il)legitimacy and form of past court-packing, the lapse of time and the behaviour of packed judges.

However, the goal pursued by unpacking triggers even more vexing dilemmas. What aims should unpacking follow? What version of court composition is it restoring? Is it aiming simply to replicate the court from before the packing (return to the status quo) or should it strive to achieve a new balance? Perhaps aim for a more socially responsive court? And how would our answer evolve if the courts lacked independence or legitimacy, or enjoyed particularly low confidence and effectiveness before the court-packing? What if the courts we are trying to save were filled with mediocre, bad, slow or even corrupt judges? And how likely is unpacking to lead to cyclical court-packing?

Similarly, is unpacking equally legitimate if original "packed judges" died or left the judicial office and "packers" filled these vacant seats with new judges in a flawless process? Can unpacking travel across generations? Can it be healed by the independent de facto behaviour of packed judges or, on the other hand, will it be replicated as an original sin to future generations of judges filling the packed seats, irrespective of the quality and independence of their behaviour? Court-unpacking simply has both retrospective and forward-looking aspects that are often in tension. Every unpacking is a potential slippery slope that may end up in cyclical court-packing.

The answers to these dilemmas will not be easy to find. Yet, a proper understanding of unpacking, its goals and available techniques fit for different jurisdictions is necessary. As we have shown in the last section, the alternative reforms open to the opposition wishing to undo court-packing might have even more detrimental effects, indefinitely weakening the position of the judiciary in the country's political system. In cases like those

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of Poland and Hungary, where supranational verdicts on the illegitimacy of the current judiciaries basically took away the option of "doing nothing", unpacking might still be one of the best as well as the most probable options.

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What Role for Courts in Transforming a Society? A Central European Cautionary Tale

Michal Bobek

I. Introduction 361
II. The Enchantment and the Promise 362
III. The Central European Experience: A Couple of Revolutions Too Many? 366
IV. The Euro-Wave: From Euro-Timidity to the Judicial Self-Defence 371
V. The Revolutionary Tribunals (in Whatever Direction the Next Revolution Goes) 374
VI. The Way Forward for Courts: Moderate Nudging Within the Bounds of the Constitutional Settlement? 377

Abstract:
This chapter analyses the role of courts in social transitions in the specific Central European judicial context. It explains why, for the reasons embedded in the historical experience of Central European judiciaries throughout the 20th century, the idea of courts-driven transformations is not likely to find that many enthusiastic supporters in ordinary courts within that region. There is nonetheless a notable exception in the form of the much more active, not to say potentially activist, constitutional courts and their contributions to societal transformation. The chapter concludes with a few moderate suggestions what then might be expected of ordinary courts in terms of transitions in the Central European settings.
Keywords: courts enforcing values; value discontinuity; formalism; textualism; teleological reasoning; transformative constitutionalism; Constitutional Courts; separation of powers; Central Europe; national application of EU law; European Convention

I. Introduction

In the moment of rule of law back-sliding and crises, who do we turn to for help? The courts. When musing over re-establishing rule of law constitutional democracy one day, who do we turn to again? The courts. The argument of this contribution is simple: because of their prevailing judicial culture, shaped by historical experience, the (ordinary)[1] courts in

1 Unless expressly stated otherwise, the term 'courts' used in this contribution refers essentially to all 'ordinary' courts, i.e. excluding constitutional courts. The special role

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Central Europe[2] might for at least some time, certainly before their judges themselves are replaced, carry out that first function with dignity. The courts can indeed help in defending the rule of law and liberal status quo for some time. However, to expect and exhort them to a pro-active (not to say 'activist') contribution to a societal change, once 'the regime' changes, yet again, is, in the historical context and the ensuing collective memory and self-perception of the Central European judiciaries, an endeavour unlikely to succeed.

This contribution is structured as follows: it starts by setting the scenes as regards the calls for a more active judicial role in societal transformations (section II). It then explains why the idea of courts-driven transformations is likely to fall on deaf ears in Central Europe, be it in the past (section III), but equally later on within the domestic application of EU law that remains at the level of abstract values or principles, but has been nowhere clearly articulated in the posited law (section IV). There is nonetheless a notable exception in the form of the much more active, not to say potentially activist, constitutional courts and their contributions to societal transformation (section V). Section VI concludes with a few moderate suggestions what then might be expected of ordinary courts in terms of transitions in the Central European settings.

II. The Enchantment and the Promise

(Il) Liberal scholars tend to be in love with courts and judicial power. But that affection is of a different kind than the umbilical cord that connects legal scholars and judges in the more positivist, mostly continental legal systems in Europe.[3] In the latter tradition, it is the predominantly practice-

played by constitutional courts is acknowledged and discussed below, in section V of this contribution.

2 For the purpose of this contribution, I use 'Central Europe' as shorthand for Poland, the Czech Republic, Slovakia, and Hungary. However, a number of statements made, certainly with regard to the perception of the judicial function and a number of historical connotations, might equally apply to Austria, Slovenia, as well as Germany.

3 For a traditional account in English, see Raoul Van Caenegem, *Judges, Legislators and Professors* (Cambridge: Cambridge University Press 1987), 53–65; or Stefan Vogenauer, 'An Empire of Light? Learning and Lawmaking in the History of German Law', Cambridge Law Journal 64 (2005), 481 and Stefan Vogenauer, 'An Empire of Light? II: Learning and Lawmaking in Germany Today', Oxford Journal of Legal Studies 26 (2006), 627.

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oriented and equally practice-driven scholarship that builds upon and systemizes the practice, offering tools and conceptualisation in return. Those approaches and tools are then used by courts, only to be then commented upon by the scholarship again. There is an ongoing intellectual exchange in both directions.

There is, however, a different type of scholarly enchantment with judicial power. It is when courts are not called upon only to adjudicate, in the old, good, often perhaps ridiculed, but by the positivist scholarship construed and expected, 'methodologically sound way'. The scholars want the courts to do more: not just to police the rules of the game, fairness and primarily procedural justice, but to bring about certain outcomes, to implement a given substantive vision of justice. The judicial reasoning style is supposed to change. So should the language of judicial prose. Such legal scholarship is no longer interested primarily in systemizing, explaining, or understanding. It is interested in mobilizing, transforming, in reaching certain outcomes. The keywords and self-description of the academic contribution to law change accordingly: from setting limits or making a prediction about judicial behaviour to mobilizing for change or societal transformation.

Such different perceptions are certainly not new. They keep surfacing in national and international legal discourse under various names in different periods. Their common denominator is that the new visions and their proponents label the established ones as 'old', 'outdated', 'formalist', or, in the more ideologically aggressive varieties as outright 'oppressive', just petrifying the previous societal structures under the guise of 'impartial judging'. The language employed is one of overcoming the traditional 'formalism' in legal reasoning and embracing a more purpose-driven reasoning style, implementing values and objectives in the process of adjudication.

A more recent strand of similar types of calls would come under the fashionable label of transformative constitutionalism,[4] a notion emanating from the South African post-apartheid experience, further elaborated upon with regard to the experience of a number of Latin American countries. A notable article to which a number of contributions invoking transformative constitutionalism as a recipe refer is Karl Klare´s 'Legal Culture and Trans-

4 It ought to be underlined that there is in fact little agreement on the exact content of the notion of 'transformative constitutionalism'. For an overview with further references to the various literature, see e.g. Michaela Hailbronner, 'Transformative Constitutionalism: Not Only in the Global South', The American Journal of Comparative Law 65 (2017), 527.

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formative Constitutionalism'.[5] There, transformative constitutionalism was defined as '*a long-term project of constitutional enactment, interpretation and enforcement committed […] to transforming a country´s political and social institutions and power relationship in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes enterprise of inducing large-scale social change through non-violent political process grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word.*'[6]

But what does all that mean in concrete terms for judicial work? What are courts supposed to do? Klare´s contribution gives some indications in that regard. It starts with a robust deconstruction of virtually all traditionally perceived limits to the judicial function, in the best tradition of critical legal studies.[7] Any and all constraints to the judicial function are briskly set aside: textual constraints in interpreting a legal text are just 'culturally construed'; there is no real boundary between law and politics in adjudication; judges and other participants in adjudication constantly make conscious or unconscious choices of values, perceptions and institutions external to the legal materials interpreted; there are value-laden choices even in routine cases of legal interpretation. All that leads to the classical 'denial' on the part of the judges of what they actually do: they believe themselves constrained by legal materials where they are actually not.[8]

Having deconstructed all the tenets of the previous legal culture as 'formalistic',[9] the real aim of which is, by '*the fiction of politically and morally neutral adjudication*',[10] to just preserve the status quo, what is created is a legal void to be filled by the values of the new constitution.[11] Those values are then to be pro-actively implemented in judicial decisions. They are no longer to be hidden in legalistic, formal reasoning, but are to be openly and

5 Karl E. Klare, 'Legal Culture and Transformative Constitutionalism', South African Journal on Human Rights 14 (1998), 146.
6 Klare (n. 5), 150.
7 It is no accident that the works of Duncan Kennedy and thinking of Critical Legal Studies feature prominently in the entire contribution.
8 Klare (n. 5), 156–166.
9 Klare (n. 5), 188.
10 Klare (n. 5), 166.
11 Klare (n. 5), 153–156, including social rights and substantive conception of equality; affirmative state duties; participatory governance; multi-culturalism; historical self-consciousness.

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pro-actively embraced: *rights discourse and legal reasoning need to be more candid and self-conscious about the politics of adjudication*.[12]

In all that enterprise, a key role is assigned to courts in progressing towards democratic transition. The examples of how courts ought to go about their new role are given with closing illustrations from the case law of the South African Constitutional Court in the 1990s, citing, in particular *Makwanyane,*[13] *Ferreira,*[14] and *Du Plessis*.[15] Klare disagrees, on merits, perhaps not surprisingly, with *Du Plessis*, but embraces *Makwanyane* and mostly also *Ferreira*. The bottom line is, however, that in all those cases, the South African Constitutional Court was less legally constrained and had more room for maneuver than it understood or acknowledged.[16] The results of the process of adjudication were just the outcome of 'good' (*Makwanyane* and *Ferreira*) and 'bad' (*Du Plessis*) value choices by the judges.

To a lawyer from Central Europe, all this sounds oddly familiar. The judges are asked to set aside their 'formalist' heritage, that is supposed to manifest itself by the textual adherence to the 'old rule' and the 'old system' of law. The judges shall embrace a more open, purposive reasoning style instead, which should take into account and incorporate, perhaps be even based on, the new values, goals and objectives projected into and guiding the process of adjudication.

Abstracting for the moment *from the content of the values promoted* and focusing *exclusively on the approach advocated*, there are indeed some uncanny parallels that come to mind from rather recent Central European history. Essentially, similar calls and exhortations for changed approaches in judicial method and the imperative for embracing the 'new values' had been made within the same geographical space around 2004, in the 1990s, but also in 1950 and in the late 1930s. Equally, there is a rather vivid historical memory that those judges who did not follow the Syren's call for 'changing their ideological tune' in the respective period, were removed.

12 Klare (n. 5), 187.

13 *State v Makwanyane,* 1995 (6) BCLR 665 (CC). The case concerned the issue of the constitutionality of the death penalty.

14 *Ferreira v Levin*, 1996 (4) BCLR 441 (CC). The case concerned the issue whether companies, that are unable to pay their debts, should be compulsorily wound up.

15 *Du Plessis v De Klerk*, 1996 (5) BCLR 658 (CC). The constitutional issue raised in this case was the question of horizontal applicability of the rights and freedoms proclaimed in the freshly adopted Bill of Rights (i.e. essentially horizontal direct applicability of fundamental rights).

16 Klare (n. 5), 172.

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Those who followed those calls were removed soon afterwards, when new Syrens came to town.

All that contributed to a rather conservative judicial outlook within the ordinary courts, that is not too enthusiastic about stepping out of the confines of valid laws. That tendency might be called by various names. The classic insult is one of 'formalism', but that is incorrect.[17] Perhaps the more apt description is one of 'textualism'. Where did the tendency, assuming there is one, of Central European judges to 'sail closer to the text of the law', i.e. towards indeed a more textual approach to legal interpretation, come from?[18]

III. The Central European Experience: A Couple of Revolutions Too Many?

There might be a dual explanation: *cultural* and *functional*. On the side of legal culture, to some extent, textualism has always formed a part of the Central European judicial self-portrait. Germanic, or in this legal space rather post-Austrian, judiciaries start from the assumption that judging is a clear-cut analytical exercise of mechanical matching of facts with the applicable law. It is almost 'legal arithmetic'. Judges do not pass any ethical or moral judgments. That is for legislators to do. Judges just find (never create) the applicable (i.e. already extant) law strictly within the laws passed by the legislature. The judicial authority is derived from such technical legal knowledge, acquired and tested in a mandarin-like entrance examination and further fostered in a similar style of promotion and advancement.[19]

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17 The only agreement there apparently is on what it means to be a 'formalist' is that it serves as an universal insult. For the rest, the notion is remarkably vague – see e.g. critically Martin Stone, 'Formalism' in: Jules Coleman and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press 2002).

18 The argument in section II of this contribution is based on Michal Bobek, 'Conclusions: Of Form and Substance in Central European Judicial Transitions' in Michal Bobek (ed.), *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Oxford: Hart 2015), 400–404.

19 Which is certainly, in the broader cultural parallel, the self-perception of large parts of traditional Continental (civil) career judiciaries – see e.g. John Bell, *Judiciaries Within Europe* (Cambridge: Cambridge University Press 2009) or Sophie Turenne (ed.), *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Berlin: Springer 2015).

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Certainly, such a self-perception is, certainly partially, not an adequate description of the situation. But such expertise-derived authority restrains and *protects judges* at the same time. Judges are not called to judge others because they would be better in moral or ethical terms. Judges are called to judge others because *they know the law*, meaning that they have the technical knowledge of the codes, the acts of the Parliament, the case-law of the higher courts and the respective procedures to be followed. The text of the binding law is what decides. Judges are (often equally self-) presented as invisible, grey mice, devoid of any personal values, choices and personality.

Apart from this cultural judicial self-portrait, in itself again not too dissimilar to other civilian continental countries,[20] there is arguably another, *functional* reason for a greater inclination towards textualism in Central Europe. In a nutshell, textualism serves as a *tool of judicial self-preservation in unstable political environments*, within which legal values that normally ought to guide the contextual and purposive reasoning of judges change a bit too often.

To understand this functional reason, one has to look into the logic of revolutions, which has been the same in fascist Italy,[21] Nazi Germany[22] as well as Stalinist Central Europe.[23] All of these examples have one thing in common: as a number of other revolutions in modern history, they were based on *value discontinuity* with the previous regime *and continuity in the body of positive law*.[24] A revolution often happens overnight. Very soon thereafter, a new constitution or a sort of basic law is passed, thus refocus-

20 Further e.g. John P. Dawson, *The Oracles of the Law* (Ann Arbour: The University of Michigan Law School 1968), ch 1 or Jacques Krynen, *L'Etat de justice France, XIIIe–XXe siècle. Tome II: L'emprise contemporaine des juges* (Paris: Gallimard 2012), 21–42. For the jurisprudential account of such positivist interpretive ideology, see e.g. B Frydman, *Le sens des lois: histoire de l'interprétation et de la raison juridique* (3rd edn, Brussels: Bruylant 2011).

21 Guido Calabresi, 'Two Functions of Formalism', University of Chicago Law Review 67 (2000), 479.

22 Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Tübingen: Mohr Siebeck 1968) or Bernd Rüthers 'Recht als Waffe des Unrechts – Juristische Instrumente im Dienst des NS Rassenwahns', NJW (1988), 2825 (2833–2835).

23 Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden: Martinus Nijhoff 2011).

24 Together with other examples, such as Vichy France – see the collected essays in 'Juger sous Vichy', Le genre human, No 28, November 1994. With regard to the administrative judiciary, see Pierre Fabre, *Le Conseil d´Etat et Vichy: Le contentieux de l´antisémitisme* (Paris: Publications de la Sorbonne 2001) or Jean Massot, 'Le

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ing the value foundation of the legal regime. However, the entire system of positive law, for some time, lags behind. No new regime is able to replace within weeks or even months the entire system of positive laws including codifications like the criminal, civil, commercial and other codes.[25] That takes years.

It is precisely in this period *after the revolution but before the system adopts its own laws*, i.e. laws that correspond with the new values of the society, that adjudicators (judges as well as administrative authorities, in fact) are asked to 'remedy' the deficient old laws via interpretation. Marxist law required, at least in its early (Stalinist) phase, that judges disregard the remnants of the old bourgeois legal system in the interest of the victory of the working class and the communist revolution. Judges were supposed to apply the law in a teleological way, always directing its purpose towards the victory of the working class and the dialectic approach.[26] Open-ended clauses, typically of constitutional or even political nature, took precedence over a textual interpretation of the existing written law, typically at the statutory and sub-statutory layer. In a way, the 'faulty' old laws were, for some time, replaced by a direct application of principles and slogans, disguised as 'value' of the new regime. Building on that logic, one of the vocal 'theoretical proponents' of the new approaches to the law shortly after the Communist take-over in former Czechoslovakia, argued for instance that: '*the fundamental canon of interpretation is that the interpretation of any legal provision must be in conformity with the nature and aims of the peoples' democratic order*'.[27]

Conseil d'Etat et le régime de Vichy', Vingtième Siècle – Revue d'histoire 58 (1998), 83.

25 The French Revolution 1789 and the Bolshevik Revolution in 1917 came as close as possible to a complete legal discontinuity, discarding most of the earlier laws. On a closer inspection, however, also they were just gradual revolutions with longer or shorter interim periods, in which the previous laws were still in force. Further see Harold J. Berman, *Law and Revolution* (Harvard: Harvard University Press 1983), 28ff.

26 See generally: Otto Ulč, *Malá doznání okresního soudce* [Small Confessions of a District Court Judge] (Toronto: 68 Publishers 1974), 39–58. Otto Ulč was an émigré Czech lawyer who worked as a judge in a District Court (court of first instance) in Western Bohemia in 1950s. See also the excellent 'ground-level' account in Inga Markovits, *Justice in Lüritz: Experiencing Socialist Law in East Germany* (Princeton: Princeton University Press 2010).

27 See, e.g. František Boura, 'K otázce výkladu zákonů' (On the Question of Interpretation of Laws), Právník 88 (1949), 292 (297).

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This accent on anti-textualism (or, in the period lingo, dialectical materialism) disappears once the new political system established itself and replaced the corpus of positive law and the codes with its own codifications. From that moment on the requirements of the system vis-à-vis its officials, including the judges, change. They are no longer required to be activists, anti-textualists and question the correctness and the applicability of the legal norms. Now they are just asked to (textually) follow, as the new legal order is already in line with the new political system. Purposive reasoning in the age of a 'stabilized regime' becomes in fact disruptive and dangerous.

Textualism, therefore, played an intriguing dual role in the developments described above. In the anti-textual (Stalinist) period, recourse to a textual interpretation of the existing (old) law became a line of defence against the anti-formalistic teleological style of judicial reasoning officially required by Party policy. In the *early period,* therefore, *textualism helped to defeat the new system*: if a judge textually followed the still liberal pre-Communist laws, which would have guaranteed basic procedural rights for every accused, it could for instance lead to an acquittal of an enemy of the new regime. This vision changed, however, in the later period of Communist law, when there were already new codifications. Then textualism became the way to stay in line and not expose oneself by making any personal value judgments. Textualism thus turned from the way of challenging the new regime into a philosophy of hiding.

It is with this heritage that Central European judiciaries entered the era of transformation after 1989, in the logic of this volume 'Transition 1.0'. The post-1989 changes were, in a way, nothing less than yet another legal revolution in this region, with respect to the Czech Republic or Slovakia already a *third* or *fourth* one within the 20th century.[28] This time around, there was again formal legal continuity (positive law and legal relationships stand as before), but (certainly politically proclaimed) value discontinuity with the previous regime. The same patterns thus developed again: there is a new constitution, a charter of fundamental rights and a new political

28 Legal continuity with clear value discontinuity were certainly present in late 1930s (during the Nazi *Protektorat Böhmen und Mähren*), and then in later 1940s and early 1950s (Communist take over). The transition from the Austrian Empire to the (First) Czechoslovak Republic in 1918 is a more complex story. Although that one was supposed to go down, at least in the Czechoslovak official history textbooks, as an instance of another discontinuity with the previous regime, there was, in terms of legal values, reasoning, and thinking, almost complete continuity: the overall regime remained (for that period) liberal, constitutional state.

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order which claims to be based on democracy and the rule of law. However, the entire mass of positive law is composed of decades-old Communist codifications, in the case of Czechoslovakia originating mostly from the early 1960s, with the provisions naturally bearing a deep ideological imprint of the era in which they were adopted.

The newly established Central European Constitutional Courts, therefore, command all the institutions (in particular judicial and administrative), to bring the old laws as well as the new ones in line with the new constitution and its values by the fiat of interpretation. The new interpretative command is to indeed transform the understanding and interpretation of the old Communist codes by imbuing them with new democratic values in the process of adjudication.[29]

Within such settings, if textualism is revived once again, it becomes a tool for defying the new system. This is the tension which lies at the heart of judicial conflicts in some of the Central European countries in the 1990s, especially between the newly established and newly staffed Constitutional Courts and the ordinary Supreme Courts. The Constitutional Courts, guardians of the new constitutional settlement in the new democracies, demand for the judges to do (*on the level of judicial method*) essentially the same as what the Communist Party asked them to do before in the Stalinist period: to interpret the old Communist laws and codes in the light of new values, disregarding their text. The more seasoned judges may be reluctant if not outright hostile to do so. Some of them might indeed be using textualism as a tool for rejecting the new system and its values. Others, however, might not be hostile towards the system at all. Their historical experience, accumulated within the behavioural patterns and a sort of a 'collective memory' of the judiciary, nonetheless advises them to be very careful with openly projecting value choices within their decision-making.

It is to be stressed again that all the analogies previously made relate *exclusively to the 'methods'* advanced for the 'correct' approach to the law in the process of adjudication in the new regime. There naturally is an incommensurable difference in the quality of values and the content of

29 Cf. the early decision of the constitutional courts in the Central European region, proclaiming the duty of all other bodies in the State, including the ordinary courts, to (re)interpret old Communist laws in line with the new constitutional values. See the decision of the Czech Ústavní soud of 21 December 1993, Pl. ÚS 19/93 ('on the lawlessness of the Communist regime'), No 14/1994 Coll., or the decision of the Hungarian Alkotmánybíróság of 15 March 1992, 11/1992 ('on retroactive criminal legislation'), AB (ABH 1992, 77).

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what was being advanced and defended. However, unless one goes for the argumentative shortcut that *noble ends justify whatever means*, or that messianic legitimacy[30] is to override whatever concerns one might have about getting to that noble end,[31] at the level of approach and method, there is indeed an analogy.

Seen from this vantage point, it is the learned wisdom of the Central European judiciaries that those who were seduced by the luring of transcendental values of whatever origin and stepped outside of the textual box are likely to be quickly dismissed once the nature of the political transcendental changes again. Textual interpretation thus helps to survive in any regime. It saves judges from making any visible value judgments and passes on the responsibility for any legal change to the legislator. Connected to that is often the problem of legal certainty and clarity of the law: how is one to apply abstract values and principles that are inherently vague, after a regime change, often to the detriment of a group of individuals?

IV. The Euro-Wave: From Euro-Timidity to the Judicial Self-Defence

With such cultural, not to say ideological, heritage, the Central European judiciaries joined the European Union in 2004. There were a number of predictions about that moment and the early performance of Central European courts within the European judicial structures, analysing the national approaches to law and legal interpretation and making advised predictions.[32] The terms used were, perhaps not surprisingly, again most commonly 'formalism', 'limited', 'mechanical' and in general 'problematic'.[33] The predictions made would mostly revolve around the argument that first, either the accession of the Central European judicial systems and

30 Joseph H.H. Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay', ICON 9 (2011), 678 (682).

31 A theme featuring prominently also when discussing the challenges to the (im)proper legal methodology employed by the Court of Justice of the European Union – in detail see Michal Bobek, 'Legal Reasoning of the Court of Justice of the EU', European Law Review 39 (2014), 418.

32 Cf. for instance Zdeněk Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', German Law Journal 3 (2005), 565; or T Ćapeta, 'Courts, Legal Culture and EU Enlargement', Croatian Yearbook of European Law and Policy (2005), 23.

33 See, for example, Kühn (n. 23); Rafał Mańko, 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective', European Law Journal 11 (2005),

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their courts to the European Union will bring about a steep learning curve for those judges, or second, if not, the domestic application of EU laws, requiring a different, more systematic and purposive style of reasoning, will inevitably result into failure because Central European judges will not be able to act as EU judges.[34]

The reality of the first twenty years has perhaps not been that gloomy. It is certainly true that there has been considerable reticence towards teleological reasoning, seeking to pro-actively plug in vague and general interests of the Union in order to reach results that have no support whatsoever in the text of (national or European) law. Most of the Central European judges have kept sailing 'closer to the wind' of the text of the law, unwilling to embark on the high seas of foggy *effet utile*. From this vantage point, the textualist heritage could indeed be seen as resisting the 'proper and full' application of EU law. On the other hand, hidden within that proposition is a much broader, unspoken assumption about the proper role one can reasonably expect from national judges, including lower court judges, to play in applying EU law to the cases before them. Are they indeed expected to know, constantly seek out, and pro-actively apply EU law in all cases brought before them?[35] Apart from the issue of knowledge, the often articulated reservation has again been one of vagueness and clarity of the law, coupled with a reticence to apply directly values and principles that are in dire need of further legislative articulation in order to be effectively justiciable.

Leaving that normative discussion aside, it may be perhaps suggested that some of that reticence on the part of some of the national courts diminished once those systems started sliding towards rule of law crisis. Embracing EU law and the European Convention, or other various 'international standards', institutions, and organisations, became the external life support line for domestic judicial resistance. For the first time in the

527; Siniša Rodin, 'Discourse and Authority in European and Post-Communist Legal Culture', Croatian Yearbook of European Law 1 (2005), 12.

34 See e.g. Zdeněk Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', American Journal of Comparative Law 52 (2004), 531. For first empirical studies after the Enlargement, see e.g. Marcin Matczak, Matyas Bencze and Zdeněk Kühn, 'Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland', Journal of Public Policy 30 (2010), 81.

35 Critically see Michal Bobek, 'On the Application of European Law in (Not Only) the Court of the New Member States: Don´t Do as I Say?', Cambridge Yearbook of European Legal Studies 10 (2007–2008), 1 (20–25).

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outlined historical antagonism between (defensive) textualism and (transformative) purposive reasoning, it is no longer just the story of textualist defence against the new domestic 'masters' and their 'values'. It became the story about the choice of competing values, competing purposes and telos: the national and the European.

From this vantage point, there has been quite some degree of judicial 'restorative constitutionalism' going on in the past couple of years, seeking to defend the status quo by the combination of national textualism (since statutes and written laws remained the same) with European values acting as alternative constitutional foundations (that are supposed to guide the overall interpretation instead of the national ones). A number of preliminary rulings being made in the last years, which could be put under the heading of structural or institutional 'judicial self-defence', demonstrate a greater willingness to refer to European values, aims and purposes than before. Intriguingly, such cases have one in common: there are not only, or sometimes not at all, about vindicating rights of individual litigants, but rather instances of judges defending themselves against the efforts of the new political masters of intimidation or outright subjugation of courts. Cases of similar sort come from Poland,[36] Hungary,[37] but recently also Romania.[38]

The peak of the latter line of cases of judicial 'self-defence' was arguably *Miasto Łowicz*.[39] Castigated and approached by some,[40] the Court of Justice

36 Such as ECJ, judgments of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (C-585/18, C-624/18 and C-625/18, EU:C:2019:982) of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, EU:C:2021:153); of 16 November 2021, *Criminal Proceedings Against WB and Others* (Joined Cases C-748/19 to C-754/19, EU:C:2021:931).

37 Cf. e.g. ECJ, judgments of 29 July 2019, *Torubarov* (C-556/17, EU:C:2019:626) or of 23 November 2021, *IS* (C-564/19, EU:C:2021:949).

38 Starting with ECJ, judgments of 18 May 2021, *Asociația 'Forumul Judecătorilor din România'* (Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393) and of 21 December 2021, *Criminal proceedings against PM and Others* (Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034).

39 ECJ, judgement of 26 March 2020, *Miasto Łowicz and Prokurator Generalny* (C-558/18 and C-563/18, EU:C:2020:234).

40 For instance Sébastien Platon, 'Court of Justice, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz', Common Market Law Review 57 (2020), 1843.

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was forced to set some outer limits to what national courts can reasonably be said to carry out in the name of EU law: one cannot seek to transform or to challenge the entire institutional practice of disciplinary proceedings against judges under Polish law, even if it might in fact be abused, in proceedings that, on their merits, *have nothing to do with judicial discipline*. Such a 'transformation' in the name of EU values is somewhat far-fetched, even for the otherwise liberal and open stance concerning the admissibility of rule of law cases displayed by the Court of Justice,[41] if such cases are coming as requests for preliminary rulings under Article 267 TFEU.[42]

In sum, the initial phase of domestic application of EU law in Central Europe after the 2004 enlargement was rather on the side of textual restraint, with judges reluctant to go out of their way in openly embracing yet another telos, not written down anywhere in posited law. The situation has changed considerably in the backsliding Member States, where the newly dissident judges started using more systemic and purposive reasoning beyond the text of national law, in relying on EU laws and values, as a tool of judicial self-defence against the 'new values' and 'visions' advocated by the new regime.

V. The Revolutionary Tribunals (in Whatever Direction the Next Revolution Goes)

Most, or rather all of what has been stated so far, is the case for judges at ordinary (i.e. civil, administrative, or criminal) courts. By contrast, Central European Constitutional Courts, certainly those in the Czech Republic and Slovakia, but partially also those in Hungary and Poland, would much better fit the bill of 'court-driven transformation'. In a way, that was their assumed or even articulated raison d´être after 1989,[43] but in a similar

41 As further explained in my Opinion of 20 May 2021, *Prokuratura Rejonowa w Mińsku Mazowieckim* (Joined Cases C-748/19 to C-754/19, EU:C:2021:403), points 102 to 121.

42 While of course the same question could certainly be put by the Commission in the Article 258 TFEU infringement proceedings.

43 See e.g. Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (Chicago: The University of Chicago Press 2000), 18–19 or Marc Verdussen, 'La Justice Constitutionnelle en Europe Centrale: Essai de synthèse' in: Marc Verdussen (ed.), *La Justice Constitutionnelle en Europe Centrale* (Brussels: Bruylant 1997), 229 and 230. For a partially opposing view see, however, Wojciech Sadurski, 'Constitutional Review after Communism' in: Wojciech Sadurski (ed.), *Constitutional Justice, East and West* (The Hague: Kluwer Law International 2002), 175.

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vein already before that in the West and South of Europe:[44] to act as the guardians and the enforcers of the new constitutional order, of its new values, and by the fiat of adjudication, make the new constitution a living reality in the transiting countries, where the 'old' judges could neither be trusted nor really replaced overnight.[45]

Certainly, there were institutional differences amongst the individual countries. In the Czech Republic and Slovakia, the constitutional courts were given from their very inception the competence to hear individual constitutional complaints.[46] They thus became not only a 'third chamber of the Parliament' (being able to carry out an abstract review of constitutionality), but also 'de facto Supreme Courts' (carrying out an equally concrete review of constitutionality via individual constitutional complaints). By contrast, the Hungarian Constitutional Court acquired the latter competence only later on, with its Polish counterpart never being called, at least formally, to carry out a direct review of last instance judicial decisions. In political terms, there was also a clear scale, with the first Hungarian Constitutional Court being arguably the most 'activist' one in the region, with its Czech counterpart being slightly more moderate, but still robust in its transformative case law, while the Slovak and Polish ones being perhaps more restraint (in relative terms) in the 1990s.[47]

In any case, the 1990s created the narrative, nourished heavily by liberal-minded international academia, of 'good, progressive' Constitutional Courts, staffed with 'enlightened', often previously dissident, lawyers, who are bringing change and light to the Communist backwaters. In such a world of clearly defined good and evil, having a Constitutional Court became a 'must', one of the blueprints that should bring about a successful societal transition in a post-Communist State. From this vantage point, it is fascinating to see the subsequent evolution of those institutions in the

44 See Christian Starck and Albrecht Weber (eds), *Verfassungsgerichtsbarkeit in Westeuropa. Teilband I: Berichte* (Baden-Baden: Nomos 1986) and the reports on Germany (121–148), Italy (219–242), Spain (243–278).

45 With the notable exception of former East Germany, there was 'no spare judiciary' available in reserve – see Inga Markovits, 'Children of a Lesser God: GDR Lawyers in Post-Socialist Germany', Michigan Law Review 94 (1996), 2270.

46 For further detail see e.g. Otto Luchterhandt and others (eds), *Verfassungsgerichtsbarkeit in Mittel – und Osteuropa: Teilband I* (Baden-Baden: Nomos 2007) and the individual country studies contained therein.

47 For a comparative study, see e.g. Radoslav Procházka, *Mission Accomplished: on Founding Constitutional Adjudication in Central Europe* (Budapest: Central European University Press 2002).

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backsliding Member States, where the Constitutional Courts again became 'tools of transformation', this time around into a wholly different direction. It became very clear that constitutional review is far from a guaranteed institutional ticket to the destination called liberal rule of law based State. What, by contrast, has shown much greater resistance to 'hostile takeover' are the ordinary courts, once heralded as the backward-looking formalists.

In terms of institutional analysis, that is entirely logical: concentrated constitutional review, embodied by one single, but all powerful Constitutional Court, is the worst possible institutional set up for resisting hostile take-overs of a judicial system. All that the new regime needs is to take over the one centre, the all-powerful head. Having captured that one centre, the new regime is in control of the judicial process (via individual constitutional complaints) and of much of the political arena (via the abstract review of constitutionality). By contrast, by its nature hierarchical but still much more diffused system of ordinary courts is much more resilient to sudden changes, of course provided that there was at least some time for personal renewal in the meantime.

In general terms, therefore, relying on Constitutional Courts as being the institutional guardians of the democratic, liberal, and rule of law oriented legal order is misplaced. There is nothing in their institutional design or inner set up that would prevent those institutions from being turned around and abused in the completely opposite value direction than they were originally created. With tongue in cheek, hijacked constitutional courts can still be entrusted with quite some degree of 'transformative constitutionalism', unfortunately of course in the completely wrong direction. But again, it is not the value underpinning, but the method and tools employed that are of interest here.

What might be of some interest potentially in the 'Transition 2.0' is a debate about the future role of Constitutional Courts. But the same issue might be also raised in more established systems, that did not for the moment succumb to any rule of law backsliding, but are concerned, for the future, about the stability and robustness of their institutional structures. Seeing what those institutions can do in the wrong hands, do they represent a good institutional blueprint? Is it wise to keep an all-powerful Trojan Horse within a judicial system? With societal transformation being over within as legal system, why should one keep within the constitutional system a dedicated and all-powerful 'revolutionary tribunal'?

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Perhaps a way forward in this regard, assuming that one wishes to keep a Constitutional Court at all, might be reverting back to the truly Kelsenian model of a concentrated abstract review of constitutionality,[48] where the Constitutional Court would only adjudicate if explicitly asked by a limited pool of political actors, with its competence being restricted to essentially 'Organstreitigkeiten' and competence policing. The Karlsruhe model of a 'limitless court',[49] or rather outright 'constitutionalism on steroids' is simply too much of a structural danger if falling in the wrong hands. As with any excessive concentration of power, it is not a constitutionally resilient model.

VI. The Way Forward for Courts: Moderate Nudging Within the Bounds of the Constitutional Settlement?

What role for courts in societal transitions? Stated in a nutshell, there certainly is one, but it should not be overestimated. This article sought to explain why, in the Central European judicial traditions, the idea of 'court-driven-transformation' may not meet with universal acclaim, certainly not from the side of judges themselves. Judges are poor revolutionaries. That is not because they would be that (intellectually) limited. It is because being conservative in the sense of upholding the rules of the game currently being played is part of their job description that directly translates into their authority and legitimacy.

On the social or societal side, 'court-driven-transformation' that would be carried out in the longer run against the moral perceptions of the majoritarian population is a recipe for tensions, problems, and backlash. Courts, including constitutional courts, might be successful in occasionally nudging the law and perhaps the society by a not universally supported decision in what is believed the right direction. If logically explained and reasoned, that new direction might even become the new social norm. But such cases must remain rare. What cannot be sustained in the longer run are repetitive and too assertive decisions made against the moral percep-

48 H. Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (vol. 5, Berlin und Leipzig: de Gruyter & Co. 1929).

49 To use the turn of the phrase of the critique in Matthias Jestaedt, Oliver Lepsius, Christoph Möllers and Christoph Schönberger, *Das entgrenzte Gericht: Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Berlin: Suhrkamp 2011).

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tions of majority of the population with regard to issues that can reasonably be subject to the normal political process.[50]

Stated in constitutional terms, the issue is nothing else than the well-known separation of powers. Adhering, as much as reasonably possible, to that normative ideal is not only justified by the virtues of an abstract constitutional principle. It is equally imperative in terms of (longer term) judicial self-preservation. The underlying social problem and consequence of an 'excessive degree of judicial creativity' in interpreting the law is the lack of social acceptance and the inherent elitism by governing a society by decrees from an 'enlightened' Supreme or Constitutional Court. Such 'elitist constitutionalism'[51] is not only unable to genuinely penetrate deeper layers of social structures and induce lasting change in the life of daily law on the ground,[52] and prone to hostilities and challenges by the permanently loosing side. It is also likely to be quickly disposed off once the regime changes again. One does not need to go far for an example by recalling the universal praise that the first Hungarian Constitutional Court, presided by László Sólyom, was receiving from a number of Western liberal scholars, in particular in the later 1990s, for its readings of the 'invisible constitution' of Hungary.[53] But it remains indeed just a matter of unsubstantiated historical conjecture how such arguably excessive constitutional judicialization and overreach helped to pave the way for the new regime that did not meet with much resistance when it wished to reign in the judges.

On the constitutional and systemic side, there is something scary about the notion that, at *the level of method*, it is supposed to be the inherently illiberal and undemocratic judicial imposition of values that is apparently to become the chief avenue for bringing about the rule of law and democ-

50 By contrast to 'discreet, insular minorities' of *Caroline Products* finding their later reflection at the systemic level notably in John H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press 1980).

51 See, more broadly, Bruce Ackerman, 'Three Paths to Constitutionalism – and the Crisis of the European Union', British Journal of Political Science 45 (2015), 705.

52 With such limits apparently equally visible in some of the Latin American countries – see e.g. Sandra Botero, Daniel M. Brinks and Ezequiel A. Gonzales-Ocantos (eds), *The Limits of Judicialization: From Progress to Backlash in Latin America* (Cambridge: Cambridge University Press 2022).

53 Further see e.g. Lázsló Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor: The University of Michigan Press 1999), in particular the notions of 'invisible constitution' and the reflection on the proper role of a constitutional judge when interpreting it.

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racy.[54] Again, if the judicial mandate was to maintain the *status quo ante*, the problem is less acute, because in terms of constitution-making, there was at least once the choice expressed in favour of a model. The question then becomes one of the unalterable constitutional core and whether a given society can vote itself out of democracy. However, the more assertive visions of transformative constitutionalism, that would wish to mobilise and advance causes never previously democratically approved, or even outrightly rejected, reveal much more directly the naked truth: 'the liberal democrats' might be as illiberal as their adversaries since both wish to bypass the democratic process by a judicial shortcut.

The relationship between the two extremes is not a line, but a circle. It leads right back to the endless discussions about judicial legitimacy and authority, as well as the division of powers. 'Judicial activism' is not only an empty notion, but above all one with irregular declination: if a court does what I like, it is the 'good/new/transformative constitutionalism'. If it does something you like, but I do not, it becomes impermissible 'judicial activism'. If it is something that neither I or you like, but a third person perhaps does, it might even amount to an 'ultra vires' decision. But that is precisely the problem: what credibility can be put into judging that has no method, but depends exclusively on personal political convictions and the (dis)like of the particular outcome reached? *Roe v Wade*[55] was the 'good constitutionalism', but *Dobbs v Jackson Women's Health Organization*[56] is the 'blatant usurping of political power by unelected judges'? In terms of approaches and methods, both decisions were 'activist' in the sense that at their time, they assumingly departed from the majoritarian perception of what the law ought to be.

Time is perhaps ripe to re-evaluate the more positivistic visions of judicial function, traditionally ridiculed and then discarded by the 'realists' of whatever ideological outlook. But there are quite a number of pragmatic virtues to a reasonably self-restrained judiciary, which at least partially believes in what is being preached in terms of maintaining some division of powers, and accordingly sees its role as settling social conflicts instead

54 Unless of course, the paradox of Brechtian proportion of 'we who fight for democracy cannot ourselves be democratic' is equally not of application here – see Timothy Garton Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin and Prague* (New York: Vintage Books 1993), 89.

55 410 U.S. 113 (1973).

56 597 U.S. _____(2022).

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of further inflaming them. If nothing else, such a judiciary has some independent foundation to stand on and authority to build upon, advisedly not competing with political power for the outcome or outright popular legitimacy.[57]

All in all, is it then that surprising that (certainly most) judges do not wish to be perceived as legitimized essentially by political outcomes, but rather by enforcing the extant rules? The key argument of this article has been that, in addition to the constitutional and structural challenges, there is an additional historical explanation for enhanced Central European reticence towards excessive 'value-oriented', purposive adjudication, under whatever label it might be packaged and sold at the given moment.

That is not to say that courts and judges do not have a role in societal transformations. They certainly do. But it is arguably a more moderate one. It could be better captured by correcting, nudging and helping, but hardly leading the way.

First of all, a political problem created in political polls will only be resolved in polls again. A society will hardly be saved by courts only, or even predominantly.

Second, in backsliding Member States, as long as reasonably possible, courts can help keep *status quo ante* alive. Within that period, external support is crucial. Having such avenues of external support and communication channels open,[58] continuously manifesting and materialising the embeddedness in larger structures, such as the European Union or the Council of Europe, is of paramount importance. In this regard, the current situation is indeed unique, unparalleled to any in the past within the same region before, where the (only temporal) defence against the new regime was formalism, with that one having a natural expiration date by the moment the given judge would be disposed of.

Third, 're-transition' back to constitutional, rule of law governed democracy, or indeed the 'Transition 2.0', can again be aided by courts, but hardly led by them, or even primarily carried out by them. There again, (ordinary) courts are likely to be more of a break than the vanguard. But is that necessarily a negative phenomenon? The judicial power may, in the name of decency and moderation, help assuaging the excesses of sudden rush and

57 See Michal Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford: Oxford University Press 2013), 278–280.

58 See, more broadly, but in similar vein, my Opinion of 8 July 2021, *Getin Noble Bank* (Case C-132/20, EU:C:2021:557).

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desire for retribution. That might indeed, in the eyes of some, fall short of the expectation of swift 'victor´s justice', or rather just revenge, but might in turn help create a more lasting reconciliation within a given society.

To the discontent and disagreement of many, the phrase famously coined by Václav Havel in 1989 and shortly thereafter in reply to widespread social demands for retribution against the proponents of the Communist regime was 'We are not like them'. This has only put the new, democratic regime on a distinct moral high-ground, but also arguably helped a peaceful surrender of power, and allowed for better future reconciliation. Certainly, such an approach is unlikely to be welcome by persons oppressed or prosecuted by the regime. It equally does not mean that anything and everything may be forgiven or forgotten. But a society trapped in an endless wheel of retribution is unlikely to be facing a happy future.

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EU Law and Judicial Decisions of National Judges Appointed in Breach of European Standards

Maciej Taborowski

I. Introduction 383
II. Preliminary Considerations 387
1. The Polish problem with the judicial appointments – an outline 387
2. The axiological context: The identity of the EU legal order 392
3. National judicial decisions in breach of EU Law 393
III. Potential Consequences of Judicial Decisions of Defective Appointees 400
1. Legal ineffectiveness 400
2. Reopening of judicial proceedings 406
3. Damages actions 412
4. Infringement proceedings 415
IV. Conclusions 420

I. Introduction

Since the seminal *Associação Sindical dos Juízes Portugueses (ASJP)*[1] ruling it is clear that, if a national 'court or tribunal' decides on questions concerning the application or interpretation of EU law, the Member State concerned must ensure that such a court meets the requirements essential to effective judicial protection, in accordance with the second subparagraph of Article 19 (1) TEU and Article 47 of the EU Charter of Fundamental Rights ("CFR").[2] The requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU,

1 ECJ, *Associação Sindical dos Juízes Portugueses*, judgment of 1 February 2018, case no. C-64/16, ECLI:EU:C:2018:117. See Laurent Pech and Sebastien Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', CML Rev. 55 (2018), 1827–1854; Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges came to the rescue of the Polish judiciary', European Constitutional Law Review 14 (2018), 622–643; Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values', GLJ 20 (2019), 1182–1213.

2 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 1), para. 40.

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in particular the value of the rule of law, will be safeguarded.[3] In several judgments after *ASJP*, the Court specified the criteria which national courts must meet to be considered independent in the meaning of Article 19 (1) TEU and Article 47 CFR.[4] The Court also pointed out that these requirements, as part of the value of the rule of law of Article 2 TEU, are to be regarded as part of the identity of the EU legal order.[5] In effect, a national judge who is liable to be called upon to interpret and apply EU law, must constitute an independent and impartial tribunal previously established by law.[6] Therefore also, the primary obligation of the Member State is not to allow that cases are being adjudicated by a court that does not meet the standards of Article 19 (1) TEU and Article 47 CFR. All national bodies should refuse to apply a provision that grants jurisdiction to hear a case to a body which does not meet the requirements of independence.[7]

The independence criterion also plays a crucial role in the context of the preliminary reference procedure. In this regard, the independence of a national court is assessed in the light of Article 267 TFEU alone,[8] although the Court takes here into account also its case law issued on the basis of Article 19 (1) TEU and Article 47 CFR.[9] In *Banco de Santander*, the Court stated that the criterion of independence used in Article 267 TFEU

3 ECJ, *Repubblika v Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311, para. 51; *Commission v. Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596, para. 58.

4 For an overview see Laurent Pech and Dimitry Kochenov (eds), *Respect for the Rule of Law in the Case Law of the European Court of Justice. A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Stockholm: SIEPS 2021).

5 ECJ, *Hungary v. Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2021:974, para. 127 and ECJ, *Poland v. Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 145. See Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: OUP, 2023).

6 See ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of October 2021, case no. C-487/19, ECLI:EU:C:2021:798, para. 154.

7 ECJ, *A.K. and Others*, judgment of 2 March 2021, joined cases C-585, 624 and 625/18, ECLI:EU:C:2019:982, paras 165–166. See Michał Krajewski and Michał Ziółkowski, 'EU Judicial Independence Decentralized: AK', CML Rev. 57 (2020), 1107–1138.

8 See ECJ, *VQ v. Land Hessen*, judgment of 9 July 2020, case no. C-272/19, ECLI:EU:C:2020:535, para. 46.

9 The Court has, at least since the *Wilson* judgment (ECJ, judgment of 19 September 2006, *Wilson*, case no. C-506/04, ECLI:EU:C:2006:587), taken into account for the concept of a court or tribunal under Article 267 TFEU, also elements established under Article 6 ECHR or Article 47 CFR. See respectively: ECJ, *TDC A/S*, judgment of 9

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proceedings 'must be *re-examined* in the light of the most recent case-law of the Court' such as i.a. *ASJP*.[10] But later on, in *Getin Noble Bank*,[11] the Court established a specific presumption, according to which, a referring court in principle satisfies the requirement of independence ("GNB presumption") irrespective of its actual composition. This presumption may nevertheless be rebutted 'where a final judicial decision handed down by a national or international court or tribunal leads to the conclusion that the judge constituting the referring court is not an independent and impartial tribunal previously established by law for the purposes of the second subparagraph of Article 19 (1) TEU, read in the light of the second paragraph of Article 47 of the Charter'.[12] Then the composition national court will be regarded as defective for the sake of the preliminary ruling procedure and the national court's decision would not be able to effectively initiate that procedure.

The purpose of this contribution is to consider under EU law the status and legal effects of rulings issued by national courts staffed by judges who cannot be regarded as independent, impartial or established by law in the light of Article 19 (1) TEU, Article 47 CFR and Article 6 (1) ECHR. This primarily refers to judges who were nominated in violation of EU and ECHR standards according to the tests established in *A.K. and Others*,[13] *Simpson,*[14] *Ástráðsson*[15]and *W.Ż.*[16] rulings.[17] Those tests of judicial independence, embedded in EU and ECHR law, have been described in this book

October 2014, case no. C-222/13, EU:C:2014:2265, para. 31 and ECJ, *Berlioz Investment Fund,* judgment of 16 May 2017, case no. C-682/15, ECLI:EU:C:2017:373, para. 60.

10 ECJ, *Banco de Santander*, judgment of 21 January 2020, case no. C-274/14, ECLI:EU:C:2020:17, para. 55.

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

12 ECJ, *Getin Noble Bank* (n. 11), para. 72.

13 ECJ, *A.K. and Others* (n. 7).

14 ECJ, *Review Simpson and HG v. Council and Commission*, judgment of 26 March 2020, C-542/18 RX-II and C-543/18 RX-II, ECLI:EU:C:2020:232.

15 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, case no. 26374/18.

16 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

17 On those tests see also Ben Smulders, 'Increasing convergence between the European Court of Human Rights and the Court of Justice of the European Union in their recent case law on judicial independence: The case of irregular judicial appointments', CML Rev 59 (2022), 105–128. The status of the defective appointees and possible ways to remedy the defectiveness of their status is the subject of analysis of the contribution by Paweł Filipek in Chapter 14 of this volume.

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in detail by P. Filipek in Chapter 14 of this volume, who elaborates also on their practical application and potential consequences for the Polish legal order. Therefore, they will not be discussed here separately but taken as a starting point. The basic assumption for this contribution will thus be that a judicial decision has been issued by a national court with the participation of persons appointed in a procedure that, after performing the respective tests of independence, cannot be reconciled with the requirements of Article 6 (1) ECHR, Article 19 (1) TEU and Article 47 CFR ("defective appointments/appointees").[18] Such a judicial decision handled by defective appointees may be regarded as legally defective under EU law because it was issued in breach of the principle of effective judicial protection ("defective/flawed judicial decisions") under Article 19 (1) and Article 47 CFR. What needs to be defined more closely is how the EU legal order approaches the problem of flawed judicial decisions. It seems particularly important to establish whether EU law imposes certain obligations on the Member States regarding such decisions, whether EU law refers rather to the Member States' regulatory autonomy and whether that autonomy is somehow limited by EU law. Those reflections may be of use in a situation when a Member State will consider the status of such flawed rulings and their potential healing process after the rule of law crisis in that Member State is over. All measures introduced during such a process must be in accordance with EU law, which may also serve as a reference point or toolbox for the proposed national solutions.

In some recent judgments the Court signalled that decisions issued by courts with a composition that does not meet European standards can be considered "null and void".[19] In doing so, the Court did not pursue any considerations regarding the principle of legal certainty or the alleged finality of a judicial decision. However, in previous rulings relating to final judgments of national courts issued in violation of EU law, the Court has, as a rule, referred explicitly to the principle of legal certainty, which also protects court rulings which are in breach of EU law. The Court usually weighed the principle of legal certainty against the established violation of

18 In light of ECtHR rulings, it is sufficient for a violation of Article 6 ECHR that one of the judges sitting in a national court does not meet the requirements of Article 6 ECHR – see ECtHR, *Morice v. France*, judgment of 23 April 2015, Appl. No. 29369/10, para. 89.

19 See especially *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 159 – 160 and further judgments presented in point III.1. *infra*.

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EU law in a particular case. From this perspective, the finding that the principle of legal certainty cannot protect a flawed ruling issued by a defectively nominated national judge can be seen as rather exceptional. Therefore, in order to better understand the CJEU's first statements regarding judicial decisions of defective appointees, this contribution will be built on how the CJEU's jurisprudence concerning judicial rulings issued in violation of EU law fits to flawed judicial decisions of defective appointees.

The article starts with three points of reference for further issues (point II). First, the Polish problem with judicial appointments (with a focus on the Polish Supreme Court) will be illuminated, to get an idea of the normative background of the Court's case law regarding the status of judicial decisions issued by defective appointees (point II.1). We will also indicate what rank in the EU legal order the CJEU has given to the issue of independence of national courts to show that the problem of defective appointees and their judicial decisions might strike at the very heart of the EU legal order (point II.2). Then, as a point of departure for further considerations, the CJEU's existing jurisprudential framework for final judicial decisions that were made in violation of EU law will be presented in a concise manner (point II.3). This will then make it possible to correctly assess and classify the CJEU's statement to date on judicial decisions of defective appointees being null and void (point III.1). It will also be indicated, albeit only in outline, what other consequences may arise under EU law for decisions of defective appointees and what obligations are incumbent on Member States in this regard, inter alia in connection with the reopening of judicial proceedings (point III.2), damages liability (point III.3) and infringement proceedings (point III.4).

II. Preliminary Considerations

1. The Polish problem with the judicial appointments – an outline

The judicial "reform", which has been carried out by the Polish Government for several years, is mainly aimed at changing the staffing of the judiciary.[20] The process of appointing judges has been changed so that the political

20 The Court of Justice even used the statement that the reform of the retirement age of serving judges of the Polish Supreme Court was made [...] with the aim of side-lining a certain group of judges of that court – see ECJ, *Commission v. Republic of Poland*,

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authorities can nominate "their" judges without scrutiny, especially to the Polish Supreme Court ("SC"), in a way comparable to the opening of a "transfer window".[21] To this end, the Constitutional Tribunal ("CT") was first attacked and "packed".[22] Then the composition of the National Council of the Judiciary ("NCJ"), which proposes judges for nomination to the President was changed. From a body that was supposed to safeguard the independence of judges, it was transformed into a body nominated by politicians.[23] Therefore, the NCJ has been excluded from the European Network of Councils for the Judiciary in October 2021.[24] The hitherto existing judicial control over the process of appointing SC judges was also practically removed.[25] Additionally, presidents of courts throughout

judgment of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 82. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: OUP, 2019).

21 As the Polish Supreme Court stated in its preliminary referral to the Court in case C-508/19 (Polish Supreme Court order of 15 July 2020, case no. II PO 16/20, para 50), "It must therefore be clearly emphasised that in 2018–2019 there was a special 'transfer window' in the Polish legal system in which with a flagrant and evident violation of the constitutional standard and with full awareness of this by all concerned, appointments to serve in the Supreme Court were handed out [..] What is more, the circumstances under which these appointments took place give rise to justified doubts on the part of the individuals hoping to ensure the right to a court implementation of this right, since first the President of the Republic of Poland prepared draft laws allowing for the creation of courts that do not meet the requirements of independence and impartiality, and then on the basis of such provisions – in violation of then, on the basis of such legislation – in breach of constitutional procedural guarantees providing for prior judicial review of NCJ resolutions – appointed persons close to him to judicial positions."

22 See the Commission's Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM/2017/0835 final), paras 26–39, 92–113, as well as the launching by the European Commission of an infringement procedure against Poland because of serious concerns with respect to the Polish Constitutional Tribunal – see in that respect press release, 15 February 2023,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**,** https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842**.** See also ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

23 See ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3), para. 108. See also ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 11 November 2021, nos. 49868/19 and 57511/19, paras 290 and 320.

24 See https://www.encj.eu/node/605.

25 ECJ, *A.B. and Others*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153.

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Poland have been changed and completely subordinated to the Minister of Justice.[26]

The Polish CT is now composed exclusively of judges nominated by the governing political party. Therefore, representatives of the government willingly file motions asking the CT to invoke Polish constitutional identity in order to restrict the effects of the principle of primacy of EU law, or to eliminate from application in Poland particular ECtHR and CJEU judgments indicating violations of European standards concerning the independence of the judiciary and the rule of law, especially those concerning the appointment procedures for judges.[27] And the CT gives the authorities exactly what they want.[28] That is also one of the reasons why the European Commission initiated an infringement procedure, claiming that the Polish CT is partially not a court established by law,[29] that it does not guarantee an effective and independent control of constitutionality of law and that its judicial decisions undermine the primacy and effectiveness of the EU legal order.[30]

Currently, more than half of the judges of the SC, including the person holding the position of its First President, and the entirety of judges sitting in two chambers: the Disciplinary Chamber[31] (now abolished and transferred into the Chamber of Professional Liability)[32], and the Extraor-

26 ECtHR, *Broda and Bojara v. Poland*, judgment of 29 June 2021, nos. 26691/18 and 27367/18.

27 See e.g. Wojciech Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', HJRL 11 (2019), 63–84. There is even a proposal by the Minister of Justice to declare that the asking of questions by Polish Courts regarding the principle of effective judicial protection and independence of national courts under Article 267 TFEU is incompatible with the Polish Constitution (see case pending before the Polish CT, case no. K 7/18).

28 Regarding ECJ judgments, see judgment of the Constitutional Tribunal of 14 July 2021 in case P 7/21 and judgment of the Constitutional Tribunal of 7 October 2021 in case K 3/21; regarding the exclusion of ECtHR judgments from the Polish legal order, see judgment of the Constitutional Tribunal of 10 March 2022 in case K 7/21 and judgment of the Constitutional Tribunal of 24 November 2021 in case K 6/21.

29 See in this respect ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 22).

30 See in that respect the press release of 15 February 2023, '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', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

31 ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3).

32 The Supreme Court's Professional Responsibility Chamber (pol. Izba Odpowiedzialności Zawodowej) also includes the "new" Supreme Court judges. Thus, there is a concern that they will not meet the requirement of a court established by law

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dinary Control and Public Affairs Chamber,[33] were appointed to the SC in a procedure that does not meet the requirements of a court established by law under Article 6 (1) ECHR. This was confirmed by the European Court on Human Rights in Strasburg ("ECtHR") in cases such as *Reczkowicz*,[34]*DolińskaFicek*,[35] or *Advance Pharma*.[36] Those judgments, described in detail by P. Filipek in this volume, directly state a breach of Article 6 (1) ECHR because of the way the judges were appointed to the SC. No other circumstances played a role in establishing such a breach. In those rulings, the ECtHR applied its three-stage test for assessing whether the irregularities in the judicial appointment process were serious enough to entail a violation of the right to a court established by law.[37] The test comprises a set of cumulative criteria: (1) there is a breach of domestic law which, in principle, must be manifest – that is, must be objectively and genuinely identified as such; (2) the breach must be serious enough, affect the essence of the right to a court 'established by law' – that is, pertain to a fundamental rule of the procedure for appointing judges, thereby creating a real risk that other state organs could exercise undue discretion in the appointment process; and (3) the breach was not effectively reviewed and remedied by the domestic court. Therefore, although the judgments in *Reczkowicz*, *DolińskaFicek*, or *Advance Pharma* concerned directly only a limited number of concrete appointees to the SC, the statements made in these judgments can be equally extended to all judges who were nominated to the Supreme Court under similar circumstances. The problem of defective appointments to the SC would then concern all judges nominated to the Polish SC after 2018 ("new judges" of the SC). As defective appointees, they should not rule on matters that are covered by the scope of application

under Article 6 (1) ECHR. This may be evidenced in particular by the first interim injunctions of the ECtHR in the cases of Polish judges who were to be tried before the Supreme Court's Chamber of Professional Responsibility – see the press release concerning applications nos. 18632/22, 6904/22, 15928/22, 46453/21, 8687/22, 8076/22, file:///C:/Users/macie/Downloads/Interim%20measures%20amended%20in%20three%20more%20cases%20concerning%20disciplinary%20proceedings%20against%20judges.pdf.

33 See ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 158 – 160.

34 ECtHR, *Reczkowicz v. Poland*, judgment of 22 July 2021, no. 43447/19.

35 ECtHR, *Dolińska-Ficek and Ozimek v. Poland* (n. 23).

36 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 3 February 2022, no. 1469/20.

37 ECtHR, *Ástráðsson* (n. 15), para. 243 et seq.

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of the ECHR. Otherwise, they will deliver a flawed judgment which will again be in breach of Article 6 (1) ECHR.

Because of Article 52 (3) CFR and in the light of the judgment in *W.Ż.*,[38] the above mentioned conclusion should in principle also apply to the scope of application of EU law.[39] Here the Court adopted in the *Simpson* ruling an equivalent formula to verify whether the irregularity in the appointment procedure concerns fundamental rules forming an integral part of the establishment and functioning of the judicial system and is of such a kind and such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge concerned.[40] The Court relies also on a cumulative method for assessing the independence of courts which was developed in *A.K. and Others*.[41] Here, the Court appraises together all relevant factors and circumstances to check their cumulative effect on the independence of the court or a judge and whether they cast doubt on the

38 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

39 In particular, the pending ECJ case no. C-718/21 may ultimately bring about a final appraisal of the status of the "new" judges of the Extraordinary Control and Public Affairs Chamber of the SC and the question of how the GNB presumption can be rebutted. See for a more detailed analysis of the GNB presumption Piotr Bogdanowicz and Maciej Taborowski, 'The Independence Criterion for National Courts in the Preliminary Reference Procedure after *Banco de Santander*: Still the Joker in the Deck?', CML Rev. 60 (2023), 763–796.

40 Cf, ECJ, *Simpson* (n. 14), para. 75; ECJ, *W.Ż.* (n. 6), para. 130. It must be underlined, that at the end in *Simpson* the Court found that the flaws in the appointment procedure were not blatant and therefore they did not constitute an infringement of the fundamental rules of EU law applicable to the appointment of judges to the Civil Service Tribunal that entailed an infringement of the applicants' right to a tribunal established by law, as guaranteed by the first sentence of the second paragraph of Article 47 of the Charter.

41 ECJ, *A.K. and Others* (n. 7). In respect to the Polish SC see also the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 r. (BSA I-4110–1/20); for the English language version see https://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/AllItems/BSA%20I-4110-1_20_English.pdf; That resolution finds unequivocally, that the new judges of the Polish SC do not fulfil the demands of European standards as far as their independence is concerned. All of them are thus defectively appointed and their judgments are flawed in a way that they might be declared invalid.

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judge's independence.[42] In addition, according to the GNB presumption, judges directly covered by Strasbourg judgments stating that they do not meet the requirements of Article 6 (1) ECHR will probably with time lose the possibility to refer preliminary questions to the CJEU based on Article 267 TFEU.[43]

How far-reaching the problem is with the defective judicial appointments in Poland and therefore also with the flawed judgments, we will only find out in the coming months and years. Proceedings concerning the assessment of the status of the ordinary and administrative courts are still pending, both in Strasbourg,[44] and in Luxembourg.[45] For the moment, it seems though that the biggest problem will be with the defective appointments of the new judges to the Polish SC and their judicial decisions.[46]

2. The axiological context: The identity of the EU legal order

The Court of Justice of the EU places the independence requirement for national courts as the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[47] The value of the rule of law, in turn, defines 'the very identity of the European Union as a common legal order',[48] which the EU must be able to defend within the limits of its powers as laid down by the Treaties.[49] It is also an obligation as to the result to be achieved on the part of the Member States[50] and is expressed in principles comprising legally binding obligations for the Member States.[51] The EU legal system, including its

42 Cf. ECJ, *A.K. and others* (n. 7), paras 143 and 153.
43 See ECJ, *Getin Noble Bank* (n. 11), paras 72–73.
44 See e.g. ECtHR, pending cases *Brodowiak v. Poland*, no 27122/2020 and *Dżus v. Poland*, no. 48599/20.
45 See pending cases *G and B.C. D.C.*, joined cases nos. C-181/21 and C-269/21.
46 See the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 (n. 41).
47 ECJ, *VQ v. Land Hessen* (n. 8), para. 45.
48 ECJ, *Poland v. Parliament and Council* (n. 5), para. 145.
49 ECJ, *Poland v. Parliament and Council* (n. 5), para. 145.
50 ECJ, *Poland v. Parliament and Council* (n. 5), para. 201.
51 ECJ, *Poland v. Parliament and Council* (n. 5), para. 264.

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specific characteristics arising from the very nature of EU law[52] and its decentralized enforcement, is built on the assumption that Member States observe all the values contained in Article 2 TEU.[53] That assumption serves as basis for trust in the legal systems of Member States[54] that those values and the law of the EU will be respected.[55] In the *RS* case, the Court found even that the undermining of the independence of national judges would also be incompatible with the principle of equality of the Member States, where the disciplinary liability of a national judge is incurred on the ground that he or she has refused to apply a decision of the Constitutional Court of the Member State by which that court refused to give effect to a preliminary ruling from the Court.[56] Therefore, it seems that infringing upon judicial independence may also in certain situations be regarded as infringement of the principle of equality of Member States.

Thus, judicial independence is placed by the Court axiologically at the highest place in the hierarchy of the EU legal order. The infringement of a European standard of such a rank should therefore be adequately reflected in the legal consequences resulting from such a violation. As we will see in point II.3. and point III.1. and 2. *infra*, the importance of the violated EU rules may also have an impact on the obligations of Member States towards national judicial decisions violating EU law, including flawed judicial decisions issued by courts with the participation of defective nominees in breach of Article 6 (1) ECHR, Article 19 (1) TEU or Article 47 CFR.

3. National judicial decisions in breach of EU Law

The legal and judicial framework of EU Member States should make it possible to consider all obligations (substantive as well as procedural) under EU law, in order to achieve in any national judicial proceedings an outcome that is compatible with EU law. Nevertheless, it cannot be ruled out that the outcome of the proceedings reflected in the national court's decision will violate Union law. National remedies may provide under the principle of

52 ECJ, *Adhésion de l'Union à la CEDH*, *Opinion* of the Court (Full Court) of 18 December 2014, case no. 2/13, ECLI:EU:C:2014:2454, paras 157–177.
53 ECJ, *Adhésion de l'Union à la CEDH* (n. 52), para. 168.
54 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 1), para. 30.
55 ECJ, *Adhésion de l'Union à la CEDH* (n. 52), para. 168 and para. 191.
56 *RS (Effet des arrêts d'une cour constitutionnelle)*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99, para. 88.

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procedural autonomy for the possibility of reviewing a non-final decision due to a misinterpretation or a misapplication of EU law. The same pathway would be available also in case of non-final judgments issued by a national court with a defective composition under Article 6 (1) ECHR, Article 19 (1) TEU or Article 47 CFR. The problem might be solved within the national judicial procedures by an inferior court which fulfills the relevant European criteria and is staffed by properly appointed judges. For that reason also, courts of last instance in the meaning of Article 267 paragraph 3 TFEU, such as the Polish SC, play an important role in the EU legal order and the protection of the rights of individuals.[57] Therefore also, for the sake of this contribution, a distinction should be drawn on the one hand between rulings that infringe upon EU law but may still be subject to appeal and correction in national courts and, on the other hand, final rulings that may no longer be subject to appeal based on national legal remedies (i.e., rulings issued by a court of last instance within the meaning of the third paragraph of Article 267 TFEU).

An important feature of definitive national rulings is that they should unfold full legal effects, arising from the national legal system, associated with their content, including being subject, if possible, to enforcement. This also applies if these rulings turn out to be contrary to EU law. The legal status of such rulings, unlike in the case of non-final rulings, is specifically protected in the legal systems of Member States, primarily due to the principle of legal certainty.[58] Unlike in the case of non-final rulings, national law, except in very extraordinary circumstances, does not provide further legal remedies for reviewing or challenging a definitive national ruling, even if it turns out to be contrary to national or EU law.

57 After all, it is before these courts that individuals have the last chance to obtain protection of their rights derived from EU law, and judges have the last possibility to refer a question to the Court for a preliminary ruling. At the same time, the obligation in Article 267 (3) TFEU safeguards the effectiveness of the preliminary ruling procedure mechanism and, as a result, the uniform interpretation of EU law in all EU Member States. As it is the courts of last instance which usually set the direction for the interpretation of the law for other national courts, the obligation in Article 267 (3) TFEU is primarily intended to prevent the development of national case law in a Member State which is not in conformity with the provisions of EU law. The imposition of such an obligation on the courts of last instance increases the likelihood that final rulings will comply with EU law.

58 See in this regard, the extensive comparative legal research by Claas Friedrich Germelmann, *Die Rechtskraft von Gerichtsentscheidungen in der EU* (Tübingen: Mohr Siebeck 2009).

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The starting point for further considerations concerning final judicial decisions violating EU law must be therefore the principle of legal certainty, which is a general principle of EU law.[59] As an integral part of this principle, the Court considers the principle of *res judicata* of national judicial decisions.[60] In this regard, in accordance with established case law the legal order of the EU attaches importance to the principle of the authority of *res judicata*. To ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after the expiry of the time limits provided for in that connection can no longer be called into question.[61] Therefore, EU law does not require a national court to disapply domestic rules of procedure conferring the authority of *res judicata* on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law.[62] EU law does not, therefore, require a national judicial body, in order to take account of the interpretation of a relevant provision of EU law adopted by the Court, automatically to revisit a decision that has acquired the authority of *res judicata*.[63]

Comparative legal research shows that the legal orders of the EU Member States shape the protection of the principle of *res judicata* in different ways and through different concepts of national law but in general there are two main aspects of judicial rulings which are protected.[64] The first aspect protects the sustainability of the definitive ruling (*formal aspect*). Thus, this refers to the situation in which the decision can no longer be annulled and amended due to its incompatibility with EU law. The second aspect protects the (legal) effects of the content that a final national ruling usually

59 See ECJ, *Willy Kempter KG v. Hauptzollamt Hamburg-Jonas*, judgment of 3 September 2009, case no. C-2/08, ECLI:EU:C:2009:506, para. 37.

60 The Court recognizes that the principle of *res judicata* derives from the principle of legal certainty – see ECJ, *Eco Swiss China Time Ltd v. Benetton International NV*, judgment of 1 June 1999, case no. C-126/97, ECLI:EU:C:1999:269, para. 46.

61 See ECJ, *Târşia*, judgments of 6 October 2015, case no. C-69/14, EU:C:2015:662, para. 28; ECJ, *XC and Others*, judgment of 24 October 2018, case no. C-234/17, EU:C:2018:853, para. 52; ECJ, *Călin*, judgment of 11 September 2019, case no. C-676/17, EU:C:2019:700, para. 26.

62 ECJ, *Târşia* (n. 61), para. 29; ECJ, *XC and Others* (n. 61), para. 53; ECJ, Călin (n. 61), para. 27.

63 ECJ, *Târşia* (n. 61), para. 38; *XC and Others* (n. 61), para. 54; ECJ, *Călin* (n. 61), para. 28.

64 See Germelmann (n. 58).

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has (*substantive aspect*). This aspect may concern, first, the binding of the content of the ruling (the legal assessment expressed in the ruling) and the recognition of this ruling as binding on the parties to the proceedings, the court issuing the final judicial decision, as well as on other national courts and State authorities, such as administrative authorities or those responsible for the enforcement or execution of the decision (*positive material aspect*). This aspect most often involves the inability of a national court or other national judicial or administrative authorities to make a different legal assessment of what was the subject of the final decision. Thus, in principle, the possibility of re-evaluating the issue of EU law contained in the final ruling is also excluded. Secondly, within the framework of the substantive aspect, it would also be necessary to consider to what extent it is possible to conduct new proceedings between the same parties regarding what, in connection with the legal basis, was the subject of the ruling, i.e. to what extent the violation of EU law contained in the final national judgment justifies the possibility of conducting the same proceedings again without the possibility of invoking the effects of the earlier final judicial decision (*negative substantive aspect*).

As a general rule, in the absence of EU legislation in this area, the rules implementing and protecting the principle of *res judicata* are a matter to decide for the national legal order, in accordance with the principle of procedural autonomy of the Member States, but must be consistent with the principles of equivalence and effectiveness.[65] Nevertheless, despite the respect for the principle of legal certainty and *res judicata*, the Court has confirmed that EU law provides for or influences legal mechanisms that, even after the closing of legal proceedings at the national level by a final judgment of a national court that infringes upon EU law, allow or even oblige Member States for the elimination of violations or the effects of violations of EU law contained in such a final judgment.

First, there is the principle of State liability for damages for violations of EU law by a final national court judgment. In *Köbler*,[66] the Court stated that the full effectiveness of EU law would be called into question and the protection of EU derived rights of individuals would be weakened if there would be no possibility to obtain reparation when the rights of individuals are affected by an infringement of EU law attributable to a decision of a

65 ECJ, *Impresa Pizzarotti*, judgment of 10 July 2014, case no. C-213/13, EU:C:2014:2067, para. 54.

66 ECJ, *Köbler*, judgment of 30 September 2003, case no. C-224/01, EU:C:2003:513.

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court of a Member State adjudicating at last instance.[67] The Court also underlined that the principle of *res judicata* does not stand in the way of such a liability. That is because that liability does not in itself have the consequence of calling in question the status of the judicial decision as *res judicata* is concerned or invalidating it.[68]

Second, in certain procedural constellations, EU law may influence the interpretation and application of national provisions concerning the finality and *res judicata* of rulings of national courts in the context of reopening judicial proceedings.[69] This tool is based mainly on the principles of equivalence and effectiveness, restricting national procedural autonomy. It must be nevertheless underlined that, in principle, EU law does not demand from Member States the introduction of a possibility to reopen a proceeding after a final judicial decision has been taken. Therefore, that tool should be taken into account only, if the applicable domestic rules of procedure provide the possibility, under certain conditions, for a national court to reverse a judicial decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law. That possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that the situation is brought back into line with EU legislation.[70] How this can work, is shown inter alia by the *Asturcom* judgment,[71] where the Court stated, that a national court seized of an action for enforcement of a final arbitration award is required, in accordance with domestic rules of procedure, to assess of its own motion whether an arbitration clause is in conflict with domestic rules of public policy, it is also obliged to assess of its own motion whether that clause is unfair in the light of Article 6 of Directive 93/13.[72]

Third, the Court introduced the possibility for national courts to limit the binding force or the legal effects of a final judicial ruling in whole or in part to the extent that that ruling is contrary to EU law. That mechanism

67 ECJ, *Köbler* (n. 66), para. 33.

68 ECJ, *Köbler* (n. 66), paras 38–40. In fact, the state liability principle influences only the positive material aspect of *res judicata*.

69 That tool affects the formal aspect as well as the substantial negative aspect of *res judicata*.

70 ECJ, *Impresa Pizzarotti* (n. 65), para. 62.

71 ECJ, *Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira*, judgment of 6 October 2009, case no. C-40/08, ECLI:EU:C:2009:615, paras 52–53.

72 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, 29–34.

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allows courts to use a kind of non-applicability tool for a final judicial decision (or national provisions protecting such a judicial decision) in a way similar to the working of the principle of primacy of EU law regarding general legislative acts. The Court allowed such an approach in different procedural constellations: e.g. in the context of not being bound by a final judgment of a criminal court in civil proceedings,[73] within the lower court/higher court relationship,[74] within a relationship between an administrative body and a national court[75] or in the relationship between a Constitutional Court and other national courts.[76] In all those cases, the CJEU invokes various principles of EU law, such as the principle of loyalty (Article 4 (2) TEU), the principle of effectiveness or the principle of *effet utile*. M. Dougan rightly points out in that respect, that the Court accepted the limitation of *res judicata* in extraordinary situations when the protection granted by *res judicata* seems to create too great and durable an obstacle to the effective application of EU law. Those rulings show that restrictions to *res judicata* (mainly concerning its substantive positive aspect) can be justified by the clash between a particularly high value being placed on the

73 See ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v. Vueling Airlines SA and Jean-Luc Poignant*, judgment of 2 April 2020, case nos. C-370/17 and C-37/18, ECLI:EU:C:2020:260.

74 See e.g. ECJ, *Cartesio Oktató és Szolgáltató bt.*, judgment of 16 December 2008, case no. C-210/06, ECLI:EU:C:2008:723; ECJ, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, judgment of 16 January 1974, case no. 166/73, ECLI:EU:C:1974:3; ECJ, *Interedil Srl, in liquidation v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, judgment of 20 October 2011, case no. C-396/09, ECLI:EU:C:2011:671; ECJ, *Georgi Ivanov Elchinov v. Natsionalna zdravnoosiguritelna kasa*, judgment of 5 October 2010, case no. C-173/09, ECLI:EU:C:2010:581. See also Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts' in: Catherine van de Heyning and Maartje De Visser (eds), *Constitutional Conversations in Europe* (Mortsel: Intersentia 2012), 287–308.

75 ECJ, *Gervais Larsy v. Institut national d'assurances sociales pour travailleurs indépendants (INASTI)*, judgment of 28 June 2001, case no. C-118/00, ECLI:EU:C:2001:368.

76 ECJ, *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, judgment of 15 January 2015, case no. C-416/10, ECLI:EU:C:2013:8; ECJ, *Mecanarte – Metalúrgica da Lagoa Ld[a] v. Chefe do Serviço da Conferência Final da Alfândega do Porto,* judgment of 27 June 1991, case no. C-348/89, ECLI:EU:C:1991:278; ECJ, *Aziz Melki and Sélim Abdeli*, judgment of 22 June 2010, case nos. C-188–189/10, ECLI:EU:C:2010:363; ECJ, *Krzysztof Filipiak v. Dyrektor Izby Skarbowej w Poznaniu*, judgment of 19 November 2009, case no. C-314/08, ECLI:EU:C:2009:719; ECJ, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim*, judgment of 8 September 2010, case no. C-409/06, ECLI:EU:C:2010:503.

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proper application of EU law and a particularly serious obstacle related to specific procedural rules at the national level.[77]

Fourth, it has also been confirmed by the Court, that, in principle, it is possible to use the infringement proceedings in case of definitive national rulings that violate EU law, although it is a very rarely used tool.[78] The possibility of initiating proceedings under Article 258 TFEU in view of an infringement committed by a national court was confirmed already as a side issue of the *Killinger* case.[79] In that judgment the Court stated that an infringement of EU law by the national authorities, including an infringement of Article 267 (3) TFEU, may be brought before the Court.[80] Examples concerning Italy,[81] Spain,[82] Slovak Republic,[83] or France[84] followed. Recently, the Commission initiated the pre-judicial stage of the infringement proceedings (letter of formal notice) against Germany[85] in connection with

77 See Michael Dougan, 'Primacy and the remedy of disapplication', CML Rev. 56 (2019), 1459–1508.

78 See i.a. Marten Breuer, 'Urteile mitgliedstaatlicher Gerichte als möglicher Gegenstand eines Vertragsverletzungsverfahrens gem. Art. 258 EG', EuZW (2004), 199; Christiaan Timmermans, 'Use of the infringement procedure in cases of judicial errors', in: Jaap W. de Zwaan, Frans A. Nelissen, Jan H. Jans, and Steven Blockmans (eds), *The European Union: An Ongoing Process of Integration--Liber Amoricum Alfred E Kellerman* (The Hague: T.M.C. Asser Press 2004), 155–163.

79 ECJ, *Magnus Killinger v. Federal Republic of Germany, Council of the European Union and Commission of the European Communities*, order of 3 June 2005, case no. C-396/03 P, ECLI:EU:C:2005:355.

80 See ECJ, *Magnus Killinger* (n. 79), para. 28. For more details see Maciej Taborowski, 'Infringement proceedings and non-compliant national courts', CML Rev. 49 (2012),1881–1914.

81 ECJ, *Commission of the European Communities v. Italian Republic*, judgment of 9 December 2003, case no. C-129/00, ECLI:EU:C:2003:656. Here Court held that judicial decisions which are contrary to EU law may be a factor which determines a declaration of an infringement on the part of the legislating bodies of a Member State.

82 ECJ, *Commission v. Kingdom of Spain*, judgment of 12 November 2008, case no. C-154/08, ECLI:EU:C:2009:695. See Escudero, 'Case C-154/08, Commission v. Spain, Judgment of the Court (Third Chamber) of 12 November 2009, not yet reported', CML Rev. 48 (2011), 227-242.

83 ECJ, *Commission v. Slovak Republic*, judgment of 22 December 2010, case no. C-507/08, ECLI:EU:C:2010:802.

84 See ECJ, *European Commission v. French Republic*, judgment of 4 October 2018, case no. C-416/17, ECLI:EU:C:2018:811. Here the national court adjudicating at last instance failed to follow his obligation to make a reference for a preliminary ruling to the Court.

85 See https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743.

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the *Weiss* judgment of 5 May 2020,[86] and went to Court against Poland in connection with the judgments of the Polish CT concerning the primacy of EU law.[87]

III. Potential Consequences of Judicial Decisions of Defective Appointees

1. Legal ineffectiveness

In several rulings, the Court has made statements regarding the status of judgments that were issued by a court that does not meet the requirements of being established by law, independent and impartial. The Court indicated that it is possible that judicial decisions issued by courts that do not meet these requirements may not unfold full legal effects in the national legal orders. Such a consequence may thus also concern judicial decisions of the national court's ruling with the participation of defective appointees.

According to the Court's judgment in *Euro Box Promotion*, if a national court has been tasked with applying EU law, even if it is a Constitutional Court, and it cannot be regarded as a body which is independent, impartial, and previously established by law, EU law precludes other national courts from having to recognize its rulings as binding. That is because a national court that does not meet the requirements of Article 19 (1) TEU or Article 47 CFR is unable to provide effective judicial protection.[88]

The Court also had the opportunity to assess the impact of the rulings of the Disciplinary Chamber of the Polish SC, stuffed exclusively with defective appointees. This is the Chamber that the Court found in *Commission v. Poland (Régimedisciplinaire des juges*) not to meet the requirements of independence and impartiality in the light of Article 19 (1) TEU, i.a. also because of the way judges were appointed to that chamber.[89] The Court stated that the designation by the President of the Disciplinary Chamber of the SC of the relevant lower disciplinary court (for national judges) is legally ineffective in the sense that the principle of primacy of EU law requires

86 See https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html.

87 See point III.4. *infra*.

88 ECJ, *Euro Box Promotion*, judgment of 21 December 2021, joined cases C-357, 379, 547, 811 and 840/19, ECLI:EU:C:2021:1034, para. 230.

89 See ECJ, *Commission v. Poland (Disciplinary regime for judges)* (n. 3), para. 113; see also ECtHR, *Reczkowicz v. Poland* (n. 34).

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a disciplinary court so designated to disapply the national provisions, pursuant to which the designation took place and, consequently, to declare that it had no jurisdiction to hear the dispute before it.[90] With regard to the rulings of the Disciplinary Chamber of the SC, the Court stated, that a decision adopted by the Disciplinary Chamber is legally ineffective, on the ground that it is contrary to the second subparagraph of Article 19 (1) TEU, and that the applicant in the pending case must be allowed to invoke that ineffectiveness both in the judicial disciplinary proceedings still pending against him as well as before any other national authorities that might be called upon to give effect to that decision of the Disciplinary Chamber of the SC.[91]

Even more far-reaching statements as to the legal effects of judicial decisions of defective appointees were made in the *W.Ż.*[92] judgment of the Court, regarding a ruling issued by the Extraordinary Control and Public Affairs Chamber of the SC. This chamber is composed exclusively of new judges of the SC whose appointment process did not meet the standards of Article 6 (1) ECHR in the light of *Dolińska-Ficek*.[93] In this case, the claimant, a Polish Judge (Waldemar Żurek), a well-known opponent of the governmental judicial "reform", was transferred without his consent from one division to another division of a national court. Such an involuntary transfer may be regarded as having effects similar to a disciplinary penalty.[94] His appeal against this decision eventually went to the Chamber of Extraordinary Control and Public Affairs of the SC. The claimant then requested the recusal of all the judges from this chamber from hearing his appeal, on the grounds that it was staffed with defective appointees. The request for recusal was filed with an old chamber of the SC and dealt with by properly appointed judges of the SC. But then, in a surprising move, a new single judge from the Chamber of Extraordinary Control and Public Affairs, who had been at that time just (defectively) appointed to

90 ECJ, *M.F. v. J.M.*, judgment of 22 March 2022, case no. C-508/19, ECLI:EU:C:2022:201, paras 72–74; see also ECJ, *W.Ż., AS, Sąd Najwyższy and Others*, order of 22 December, cases nos. C-491/20-C-496/20, C-506/20, C-509/20 and C-511/20, ECLI:EU:C:2022:1046, para. 80.

91 ECJ, *W.Ż., AS, Sąd Najwyższy and Others* (n. 90), paras 80–85.

92 *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6).

93 ECtHR, *Dolińska-Ficek and Ozimek v. Poland* (n. 23).

94 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), para. 115.

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the SC found the appeal of Judge Żurek to be inadmissible, without awaiting the outcome of the recusal request. The preliminary referral in *W.Ż.* concerned thus the question of whether this new judge of the SC, because of his flawed nomination process, fulfilled the demands of Article 19 (1) TEU in the light of Article 47 CFR and whether he was allowed to make judicial decisions within the scope of EU law, like the one regarding Judge Żurek. It is well-known, that the Court has no possibility to appraise the national situation at hand or to apply EU law to the concrete case pending before a national court. But from the *W.Ż.* judgment, some clear indications emerged, that the new judge from the Chamber of Extraordinary Control and Public Affairs could not be regarded as a proper established court in the meaning of Article 19 (1) TEU and Article 47 CFR.[95] Then the Court pointed out, how the judicial decision of the defective appointee should be treated. According to the Court, it might be declared 'null and void', without any considerations relating to the principle of legal certainty or the *res judicata* of such a decision.[96]

This statement of the Court has opened a debate on the exact meaning of the declaration, that a judicial decision is 'null and void'. Some authors suggest that we are dealing here with a new autonomous remedy of EU law,[97] whilst others claim that the Court's statement in *W.Ż.* is rather part of the existing case law on the principle of the primacy of EU law.[98] It appears that the latter opinion should be regarded as correct. Firstly, if one traces the reasoning of the national court's preliminary referral in *W.Ż.*, one will see that the Court essentially used the terminology indicated by the Polish SC. That court analysed the potential effects of a judicial decision of a defective appointee in the Polish law context and suggested in the referral, that there was a possibility under national law to declare that the decision is null and void. It seems that the Court expressly indicated in the judgment itself that it followed the reasoning of the national court in this respect.[99] Secondly, in *W.Ż.* the Court makes an explicit reference to

95 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 152–153.

96 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), paras 158–160.

97 Rafał Mańko and Przemysław Tacik, '*Sententia non existens*: A new remedy under EU law?: *Waldemar Żurek* (W.Ż.)', CML Rev. 59 (2022), 1169–1194.

98 See Dougan (n. 77).

99 See *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)* (n. 6), para. 159 pointing at para. 39 of the judgment.

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the principle of primacy of EU law, which might suggest that the aim of the Court is to ensure full effectiveness of Article 19 (1) TEU in accordance with the principle of primacy, which, in line with *Simmenthal*, also includes the inapplicability of any "judicial practice".[100] Thirdly, the CJEU expressly stipulates that the assessment of whether the flawed ruling of the defective appointee should be considered null and void is a matter for the national court to decide and that this must be declared. The Court limits thus the effects of its statement only to the pending proceedings, which affects the positive aspect of *res judicata* and not its formal aspect (the legal existence of the judicial decision). In this respect, the solution adopted in *W.Ż.* seems to be similar to the CJEU's previous line of jurisprudence concerning the refusal to apply or to grant legal effects to final judicial decisions in breach of EU law.[101] Such a legal ineffectiveness might be invoked before national courts and other State authorities in pending proceedings. It is thus a measure of individual redress, strongly dependent on the concrete context.

According to *W.Ż.* the principles of legal certainty or *res judicata* should not be an obstacle for declaring a ruling of a defective appointee to be null and void. That statement sounds similar to the line of jurisprudence on the inapplicability of final national rulings based on the *effet utile* principle,[102] where the Court leaves no room for the application of those principles too. In these cases, the effectiveness of EU law is enforced fully at the expense of national law protecting the status of the final national court's rulings. Here, the *W.Ż.* case shows similarity with, *inter alia*, the Court's judgment in *Lucchini*. In that case, the Court stated, that EU law precludes the application of a provision of national law introducing the principle of *res judicata*, where that principle prevents the recovery of State aid granted in violation of EU law, the incompatibility of which has been established in a final decision of the European Commission. That is a consequence of the application of the principle of primacy of EU law and the *effet utile*

100 ECJ, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, judgment of 9 March 1978, case no 106/77, ECLI:EU:C:1978:49, para. 22. The CJEU, in principle, does not exercise direct jurisdiction over the validity of national acts of any kind. For an exception see ECJ, *Ilmārs Rimšēvičs and European Central Bank v. Republic of Latvia*, order of 10 April 2019, cases nos. C-202/18 and C-238/18, ECLI:EU:C:2019:299.

101 See point II.3. *supra*.

102 See e.g., ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA*, judgment of 18 July 2007, case no. C-119/05, ECLI:EU:C:2007:434.

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principle, without any room left for the principle of legal certainty.[103] The rationale for limiting the binding force of a final judicial decision in *Lucchini* was to shield the obligations that Member State authorities have towards the EU, which are of a fundamental nature. At issue was the division of competences between the EU and the Member States in examining the compatibility of State aid with the EU internal market rules, as well as the effectiveness of final European Commission decisions that had not been challenged in time, which only the EU General Court and the Court, and not the national courts, were competent to assess. Similarly, the lack of any consideration on the principle of legal certainty is visible in those situations in which the Member State's action leads to a restriction on national courts' ability to apply the principle of primacy of EU law,[104] or to make use of the preliminary ruling mechanism.[105]

The lack of the possibility to invoke legal certainty or *res judicata* in *W.Ż.* would fit into this line of reasoning. Where EU law derived rights and obligations of individuals are decided by a judicial authority which is not an independent, impartial tribunal established by law under Article 19 (1) TEU and Article 47 CFR, the infringement of the rule of law and the identity of the EU legal order is at stake. From the perspective of the interference with the functioning of the supranational legal order of the EU, this might be an axiologically comparable situation, to limiting the principle of primacy, disturbing the preliminary reference mechanism, or interfering with the Commission's exclusive competencies in State aid cases.

In the context of legal certainty, in *W.Ż.* the Court does not mention potential consequences for third parties of a final court judgment being null and void or inapplicable. That is probably due to the fact, that in *W.Ż.*, as well as in the other judgments, in which the Court mentioned the ineffectiveness of flawed judicial decisions, no third parties were engaged. In those proceedings, only national judges were trying to protect their rights derived from the principle of effective judicial protection under Article 19 (1) TEU. In those cases, no rights and interests of third parties were at stake. The question then arises whether the decision of the Court could be equally ruthless if limiting the binding force of a final judgment would be

103 ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* (n. 102), para. 61.

104 See e.g., ECJ, *Aziz Melki and Sélim Abdeli* (n. 70) and ECJ, *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* (n. 76).

105 ECJ, *Cartesio Oktató és Szolgáltató bt.* (n. 74).

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detrimental to the rights of other parties to the proceedings. Probably the principle of legal certainty would then play a more prominent role in the Court's reasoning and would be a counterbalance for the *effet utile* principle. The examination of whether the binding effect of a flawed judgment of a defective appointee should be waived could then be approached in a similar way as in *Fallimento Olimpi club*,[106] *CRPNPAC*,[107] or *FMS and Others*.[108] Here the Court took the principle of legal certainty as the starting point.

In each of those cases, the Court assessed the *res judicata* protection for the final national rulings in the context of the principle of effectiveness and checked whether national procedural provisions made the protection of EU derived rights impossible or excessively difficult. That problem has then been analysed by reference to the role of the national provisions in the procedure, their operation, and their particular features, viewed as a whole, before the various national bodies. Account has been taken of the basic principles of the domestic judicial system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure.[109] In all these judgments, the starting point for the assessment of a final judicial decision, protected by *res judicata*, was the principle of legal certainty. The reasoning behind the analysis was not to allow obstacles to the effective application of EU law which cannot be reasonably justified. Such obstacles must be considered to be contrary to the principle of effectiveness.[110]

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106 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl*, judgment of 3 September 2009, case no. C-2/08, ECLI:EU:C:2009:506.

107 ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* (n. 67).

108 ECJ, *FMS and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, judgment of 14 May 2020, cases nos. C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367, paras 192–202.

109 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl* (n. 106), para. 27; ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v Vueling Airlines SA and Jean-Luc Poignant* (n. 73), para. 93.

110 ECJ, *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v. Fallimento OlimpiclubSrl* (n. 106), para. 31; ECJ, *Caisse de retraite du personnel navigant professionnel de l'aéronautique civile (CRPNPAC) v. Vueling Airlines SA v. Vueling Airlines SA and Jean-Luc Poignant* (n. 73), paras 95 and 96; *FMS and Others*

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That technique of weighing values in the search for a reasonable balance may also sometimes be necessary when assessing flawed judicial decisions of courts adjudicating with participation of defective appointees, in particular in respect to proceedings involving parties who are in a horizontal relationship. When a recognition of the binding force of a judicial decision of a defective appointee would then adversely affect the rights or the legal situation of a party to the proceedings, this could be compensated by damages liability of the Member State, but the flawed judicial decision would be protected, remain valid and unfold its legal effects.[111]

Finally, attention should be drawn to the pending case in *AW "T"*,[112] which lies at the borderline of the discussed issues. The case raises questions about the formal aspect (reopening) and the substantive positive aspect (ineffectiveness) of the principle of *res judicata* in the context of a flawed judicial decision. Here, the Extraordinary Control and Public Affairs Chamber of the SC, stuffed exclusively with defective appointees, has set aside a final judgment of the Court of Appeal in Cracow and referred the case back to that court for re-examination. The reversed judgment of the Court of Appeal was already protected by the principle of *res judicata*. In the meantime, however, while the case was pending at the SC, one of the parties to the proceedings, that ended with that (in the meantime repealed) final judgment, has applied for an enforcement clause for the judgment at the Cracow Court of Appeal. Now, the Court of Appeal needs to know, whether it should disapply the flawed judicial decision of the Chamber of Extraordinary Control and Public Affairs of the SC, issued by defective appointees, and declare the repealed judgment to be fully enforceable, or should it regard the annulment made by the defective appointees from the SC as binding and therefore refuse the request to execute the judgment of the Court of Appeal.

2. Reopening of judicial proceedings

Since the poss ibility to consider a ruling of a defective appointee to be "null and void" according to *W.Ż.* concerns most probably only the inapplicability

v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság (n. 108), para. 197.

111 See point III.3. *infra*.

112 ECJ, *AW „T"*, pending case no. C-225/22.

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of such a judgment in certain procedural constellations,[113] this would not touch upon the permanence (existence) of the flawed judicial decision itself.[114] A flawed judgment of defective appointees might be inapplicable in various contexts, but it will exist in a legal sense. Thus, in order to remove it from the legal order, it would be necessary to initiate an available national judicial procedure leading to its review or annulment.

In this respect, according to the established case law of the Court, EU law, in principle, does not require a Member State to refuse to apply the provisions protecting the *res judicata* of a judgment,[115] or to create procedures to overturn the final judicial decisions which are in breach of EU law. At the same time, however, national law may provide for such a solution. If the applicable domestic rules of procedure foresee the possibility, under certain conditions, for a national court to reverse a decision having the authority of *res judicata* in order to render the situation arising from that decision compatible with national law, that possibility must prevail if those conditions are met, in accordance with the principles of equivalence and effectiveness, so that that situation is brought back into line with EU law.[116]

The regulation of these matters lies within the regulatory discretion and autonomy of the Member States. Within that autonomy, national law may, for example, provide that judgments of defective appointees are still null and void, notwithstanding the different possible interpretations of *W.Ż.*[117] It needs to be emphasized that for the Polish legal system, in the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court from January 2023, which is significant for the legal status of rulings of defective appointees,[118] it was envisaged that all rulings of the new judges of the SC, nominated after 2018, are to be regarded invalid in the Polish legal order. At the same time, that invalidity must be declared in the relevant court procedures. A reopening of judicial proceedings is, therefore, in prin-

113 It would, therefore, have an impact on the material positive aspect of *res judicata*.
114 So, it would not affect the formal aspect of the principle of *res judicata*.
115 See CJ, *Târşia* (n. 61), para. 29; *XC and Others* (n. 61), para. 53; ECJ, *Călin* (n. 61), para. 27.
116 ECJ, *Impresa Pizzarotti* (n. 65), para. 62.
117 Indeed, the Polish SC has ruled so in several cases. See e.g., Polish Supreme Court, order of 26 November 2022, case no. II CSKP 556/22.
118 See the resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber of the Polish Supreme Court, 23 January 2020 (n. 41).

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ciple, already possible currently under the rules applicable to all judicial procedures in Poland on the grounds that a national court deliberated in a composition comprising a defective appointee. Such a national solution, stemming from the national regulatory autonomy of a Member State, is also allowed, and supported by EU law.[119]

The problem in this respect in the Polish legal order is that over time it will be difficult to find an appropriate forum to apply for such a reopening, especially at the Polish Supreme Court. This is because with time more and more judges in the SC will belong to the group of defective appointees. Hence there may be a problem with finding at the SC an appropriate composition that meets the standards of Article 19 (1) TEU, Article 47 CFR or Article 6 (1) ECHR. In addition, the current management of SC, stemming from the group of defective appointees, does not allow for cases to be decided in a way that is detrimental to the status of those appointees. A good example of this is provided by the aftermath of the *W.Ż.* case,[120] or the attempt to reopen national proceedings following the ECtHR ruling in *Advance Pharma*. The ECtHR found in favor of this Polish company, that Article 6 (1) ECHR has been infringed because the cassation appeal of the company filed with the SC had been rejected by a panel composed of defective appointees of the Civil Chamber of the SC. After the ECtHR's judgment, the company requested the SC to reopen the proceedings. The case has been referred for evaluation by a panel composed of one defective appointee. That appointee, surprisingly, initiated a preliminary referral based on Article 267 TFEU, currently pending before the ECJ, with some

119 Interestingly, the ECtHR in *Ástráðsson* expressly indicated that its judgment did not impose on Iceland an obligation to reopen all similar cases that have since become *res judicata* (see ECtHR, *Ástráðsson* (n. 15), para. 314), but no similar reservation was not made by the ECtHR in the judgments concerning appointments to the Polish Supreme Court (see ECtHR, *Dolińska Ficek and Ozimek* (n. 23), para. 368; ECtHR, *Advance Pharma* (n. 36), para. 364)

120 After the preliminary ruling in *W.Ż.* was decided in Luxembourg in October 2021, the files of this case returned to the Polish Supreme Court. But as of today (July 2023) no final ruling has been issued in this case. The reason for this is extra-judicial: the person currently acting as the First President of the Supreme Court, who, as a 'new' judge, is herself affected by the problem referred to in the *W.Ż.* ruling, decided not to release the case file to the panel of judges from the SC's Civil Chamber, who raised the preliminary questions with the Court. Then the composition of panel of judges which should decide the case and implement the CJEU judgment has been changed so that in the end, the 'new' judges, defectively appointed, have a majority on the bench.

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questions concerning EU law and the obligation to reopen judicial proceedings.[121]

It is still necessary to consider whether EU law in any way requires Member States to introduce or to obligatory use a tool for reopening final judicial decisions.[122] The judgment of the Court in *XC*[123] seems to suggest that there is no such requirement provided that the effectiveness of EU law is guaranteed by the legal framework and appropriate remedies available to the parties in the respective Member State. If that is not the case, national law would make it impossible in practice or excessively difficult to exercise the rights conferred to individuals by the EU legal order. Then, the absence of the possibility to reopen proceedings might violate the principle of effectiveness.

In *XC* the Court concluded that legal remedies were in place which effectively guaranteed the protection of the EU derived rights of individuals. That is because the applicants in the main proceedings were fully able to plead an infringement of EU law before proper established national courts stuffed with correctly appointed national judges. Since the effectiveness of EU law was ensured by that framework, it was not necessary to add to it an exceptional remedy enabling national judicial decisions which have the force of *res judicata* to be challenged. The question arises, however, whether the legal framework can be considered to meet the requirements of the principle of effectiveness if, for example, a case has been decided at the last instance by a court which does not meet the requirements of Article 19 (1) TEU and Article 47 CFR and whether, in such a situation, the principle of effectiveness would not require the creation of an additional mechanism to guarantee the effective protection of EU law through a retrial. But for the moment, relevant examples from the Court's case law are missing.[124]

121 See the preliminary referral stemming from a defective appointee of the Polish SC in case no. C-711/22 (pending) concerning the reopening of civil proceedings after the ECtHR judgment in *Advance Pharma sp. z o.o v. Poland* (n. 36).

122 The ECtHR ordered for the first time a reopening of national court proceedings after it has found an infringement of Article 6 (1) ECHR because of a failure to examine, without giving reasons, applicant's request to seek a preliminary ruling from the Court of Justice of the European Union under Article 267 (3) TFEU – see ECtHR, *Georgiou v. Greece*, judgment of 14 March 2023, no. 57378/18.

123 See ECJ, *XC and Others* (n. 61), paras 50–57.

124 But see for final administrative decisions violating EU law: ECJ, *Hristo Byankov v. Glaven sekretar na Ministerstvo na vatreshnite raboti*, judgment of 4 October 2012, case no. C-249/11, ECLI:EU:C:2012:608.

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An isolated example emerged, in a slightly different context, not connected with the principle of effectiveness, from the judgment in *Skoma-Lux*.[125] Its main considerations concerned the consequences of the failure to publish an EU regulation in the EU's Official Journal in the official language of the Member State. In this regard, the Court stated that EU law precludes obligations contained in such a regulation which has not been published in the Official Journal of the EU in the language of the Member State concerned from being imposed on individuals, even if these individuals have had the opportunity to acquaint themselves with those regulations by other means. In regard to the temporal effects of the *Skoma-Lux* ruling, the Court stated that, while in principle the Member State concerned is not, under EU law, obliged to call in question final judicial decisions taken on the basis of untranslated legislation where those decisions have become final under the applicable national rules. But it would be otherwise in exceptional circumstances, where there have been administrative measures or judicial decisions, in particular of a coercive nature, which would compromise fundamental rights.[126]Thus, in case of sanctions which harm the fundamental rights of individuals, the obligation to reopen a final judicial decision nevertheless would arise under EU law. However, the Court has not indicated what exactly the legal basis was for such an obligation. Meanwhile, in other judgments, the Court declares that it is in principle not necessary to extend, in the event of an alleged infringement of a fundamental right guaranteed by EU law, in particular by the Charter, a remedy under national law which, in the event of an infringement of the ECHR or one of the protocols thereto, permits the rehearing of criminal proceedings closed by a national decision which has the force of *res judicata*.[127] Therefore the scope and the practical effects of the *Skoma-Lux* ruling are still unclear.

The above observations of the Court's case law may justify the conclusion, that, with regard to final judicial decisions, also those stemming from defective appointees, EU law in principle will not require their reopening. That is the general rule and starting point. But, firstly, EU law allows for Member States to introduce the possibility to reopen flawed judicial decisions within their regulatory autonomy. It seems thus, that when a Member State would like to introduce the possibility to reopen judicial proceedings

125 ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc*, judgment of 11 December 2007, case no. C-161/06, ECLI:EU:C:2007:773.

126 ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc* (n. 125), paras 71–72.

127 ECJ, *XC and Others* (n. 61).

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which ended with a judicial decision of a defective appointee that would be allowed under EU law. Here EU law introduces some restraints resulting from the principles of equivalence and effectiveness. It is also important to keep in mind that due account must be taken of the rights of parties to a proceeding which will be reopened after a final judicial decision, especially in horizontal cases. A party, which would suffer harm from such a reopening should have the possibility to receive damages.

Secondly, from the case law of the Court also certain situations emerge, which for the moment are not entirely foreseeable or clear, that might require, already because of EU law, national authorities to introduce or to apply an obligation to review flawed judicial decisions of defective appointees. It seems that it would be especially so, where it would be apparent from the complex analysis of the national legal framework that it has not given due effectiveness to EU law, in particular where on the basis of a judicial decision sanctions were imposed that harm fundamental rights of individuals guaranteed by EU law. Actually, the example of the *W.Ż.* case would fit into this scheme, although the case itself did not concern the reopening of a flawed judicial decision of defective appointees but only its legal ineffectiveness in a certain procedural context. In that case, a sanction has been imposed on a national judge (involuntary transfer to a different court division) and the judicial proceeding leading to the verification of the legality of that sanction has been ended by a judicial decision of a defective appointee.

In must be underlined though that such situations are rare and certainly extraordinary, but they are striking at the very heart of the EU legal order. But as it is apparent from point II.2, an infringement of Article 19 (1) TEU or Article 47 CFR by a final judicial decision of a defective appointee, may constitute such a rough interference with the EU legal order. It can therefore not be excluded that, in certain extraordinary situations, especially when sanctions have been imposed on individuals, there may be a requirement under Union law for a Member State, not only to declare a judicial decision of a defective appointee to be null and void but also to implement some kind of procedures to overturn judicial decisions which have been released by defective appointees.[128]

128 For example, the European Commission imposed on Poland a requirement on the basis of milestone F.1.2. relating to the 'Justice System' from point F. of the Annex to Council Implementing Decision (EU) No 9728/22 of 14 June 2022 on the approval of the Polish National Recovery and Resilience Plan, that cases already decided by

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3. Damages actions

The principle of *res judicata* does not preclude State liability for the judgments of a court adjudicating at last instance.[129] Given, inter alia, that an infringement, by a flawed judicial decision of a defective appointee, of rights derived from EU law cannot normally be corrected, individuals cannot be deprived of the possibility of holding the State liable in order to obtain adequate protection of their rights.[130]

With regard to the conditions under which a Member State may be rendered liable for the damage caused to individuals as a result of breaches of EU law for which it is responsible, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of EU law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by those individuals.[131] The liability of a Member State for damage caused by a decision of a court adjudicating at a final instance which breaches a rule of EU law is governed by the same conditions,[132] which are necessary and sufficient to create a right for individuals to obtain redress. This does not mean that a Member State cannot incur liability under less strict conditions based on national law.[133]While there is no doubt that, in principle, the emergence of liability for damages in respect of a final judgment of a defective appointee is possible, several specific questions arise in that respect.

First and foremost, a breach of a provision that confers rights on individuals is necessary for the State's liability for damages to arise. With regard to this premise, there is rather little doubt that the principle of effective judicial protection, as enshrined in Article 19 (1) TEU and Article 47 CFR, according to which a court should be independent, impartial and

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the (in the meantime) abolished Supreme Court Disciplinary Chamber should be re-examined by a court meeting the European requirements of Article 19 (1) TEU.

129 See ECJ, *Köbler* (n. 66), para. 40. On that topic especially see Bernhard Hofstötter, *Non-Compliance of National Courts. Remedies in European Community Law and Beyond* (The Hague: Springer, 2005).

130 See ECJ, *Köbler* (n. 66), para. 34; ECJ, *Târşia* (n. 55), para. 40.

131 See ECJ, *Köbler* (n. 66), para. 51; ECJ, *Tomášová*, judgment of 28 July 2016, case no. C-168/15, EU:C:2016:602, para. 22.

132 ECJ, *Köbler* (n. 66), para. 52; ECJ, *Tomášová* (n. 131), para. 23.

133 ECJ, *Köbler* (n. 66), para. 57.

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established by law, explicitly grants rights to the individual for the sake of the damages action.[134]

Further, the liability for damage can be incurred only in the exceptional case where the national court adjudicating at the final instance has manifestly infringed the applicable law.[135] In any event, an infringement of EU law is sufficiently serious if it was made in manifest breach of the relevant case-law of the Court.[136] In this context, it would seem that already well-developed existing jurisprudence of the ECtHR and the CJEU on the independence of national courts and the value of the rule of law could indicate that the judgments currently rendered by defective appointees constitute such a manifest violation. In particular, in a situation where it has already been unequivocally established, in judgments such as *Reczkowicz*, *DolińskaFicek*, *Advance Pharma* or *W.Ż.* that it should be already clear, that the process of appointing the new judges of the Polish SC was so grossly flawed that every judicial decision of the defective appointees, released after those ECtHR judgments, violate at least Article 6 (1) of the ECHR.

It seems though, that the biggest problem will be with the requirement that there must be a direct causal link between the breach of EU law and the loss or damage sustained by individuals. In this regard, there may be a question as to whether the mere fact that a ruling is given by a court, involving a defective appointee, which is then not a court established by law, impartial and independent, causes in itself harm to an individual in a situation where the substantive effect of the flawed judicial decision itself

134 See ECJ, *A.B. and Others* (n. 25), para. 146 and ECJ, *A.K. and Others* (n. 7), para. 166.

135 See ECJ, *Köbler* (n. 66), para. 53 and ECJ, *Traghetti del Mediterraneo*, judgment of 13 June 2006, case no. C-173/03, EU:C:2006:391, paras 32 and 42.In order to determine whether a sufficiently serious infringement of EU law has occurred, the national court before which a claim for compensation has been brought must take account of all the factors which characterise the situation brought before it. The factors which may be taken into consideration in that regard include, in particular, the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law, and non-compliance by the national court in question with its obligation to make a reference for a preliminary ruling under the third paragraph of Article 267 TFEU – see i.a. ECJ, *Köbler* (n. 66), paras 54 and 55.

136 See ECJ, *Köbler* (n. 66), para. 56; ECJ, *Tomášová* (n. 131), para. 26.

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would be correct in terms of EU law. Indeed, the requirements as to the nature of the national court under either Article 19 (1) TEU or Article 47 CFR will always be to some extent subsidiary to the specific rights derived from the EU legal order or the obligations imposed based on EU law on the parties to the proceedings.

In such a situation, a breach of the principle of effective judicial protection by delivering a judicial decision by a defective appointee will most commonly at the same time interfere with the EU derived right that is protected by that principle. At first sight, it will be probably difficult to consider a procedural failure of this kind as a separate breach leading to liability for damages. The object of assessment under the first condition for liability for damages will probably most often be, in this type of case, not whether rights are conferred by rules designed to protect the EU derived rights of individuals (Article 19 (1) TEU, Article 47 CFR), but whether they are conferred by the EU norms protected by those rules (e.g., free movement of persons or services).[137] The same will be true, moreover, of the national court's breach of its obligations under the principle of primacy or the principle of loyalty (Article 4(3) TEU). In these cases, what will be relevant first and foremost will be whether the provision of EU law, which, in breach of these principles, has not been applied correctly, confers rights on individuals. An infringement of rules of a procedural nature, as the rules concerning the proper composition of a court, will not always entail a substantively erroneous decision by that court. If the national court without a defective appointee would have given the same substantive ruling, even if it had taken into account the obligations flowing from the principle of effective judicial protection regarding its composition, the infringement remains, in principle, at least at a first glance, without negative consequences for the parties. The same will be the case in the event of an infringement of the obligation to initiate a preliminary reference under Article 267 (3) TFEU, which, after all, does not preclude the national court of last instance from giving a substantively correct decision. Then, in the institutional aspect (Member State – EU), although the national court will infringe EU law (Article 267(3) TFEU), it will, however, behave correctly with regard to the dimension granting the individual rights arising from the EU legal

137 With the exceptional situation e.g., where a national judge will derive rights directly from Article 19 (1) TEU.

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order.[138] In such a situation, the individual, it seems, will not be able to claim damages.

However, damage to a party may undoubtedly arise from the fact that a judgment rendered by a defective appointee, because of the infringement of Article 19 (1) TEU or Article 47 CFR, may ultimately not unfold its full legal effects (e.g., it might be inapplicable according to the principle of primacy or challenged by a party as described in point III.2). This raises the risk that a party who, on the basis of such a judgment, has acquired a certain right, has relied on a certain legal relationship, or, for example, relied on the other party to perform certain obligations, may ultimately be unable to enforce them. In general, the question also arises as to whether and to what extent, for example, a specific right can be effectively acquired at all on the basis of a judgment of a defective appointee. Much will ultimately depend in this respect on the regulation of the effects of flawed judgments within the framework of the procedural autonomy of the respective Member State. Damage will undoubtedly arise at the point at which it becomes apparent that a party cannot rely on the content of a judicial decision or in a situation where that judicial decision may be subject to review because of a breach of Article 19 (1) TEU or Article 47 CFR and as a result to it, one of the parties suffers harm.

4. Infringement proceedings

The recent announcement that the European Commission ("Commission") is going to the Court on the basis of Article 258 TFEU against Poland in connection with the judgments of the Polish CT concerning the primacy of EU law,[139] reminded us of the fact, that infringement proceedings conceal also the possibility of a finding of an infringement against judgments of national courts. The subject matter of the infringement alleged against Poland are violations of EU law by the Polish CT and its case law. More specifically, it is about the rulings of the CT of 14 July 2021[140] and 7

138 See Hofstötter (n. 129), 133.

139 See in that respect the press release of 15 February 2023, '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', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842

140 See judgment of the Polish Constitutional Tribunal of 14 July 2021, case no. P 7/21.

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October 2021,[141] in which the CT had considered provisions of the EU Treaties incompatible with the Polish Constitution, expressly challenging the primacy of EU law. According to the Commission, the CT breached the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect of rulings of the ECJ. These CT rulings also are in breach of Article 19 (1) TEU, which guarantees the right to effective judicial protection. The Commission also considers that the CT itself no longer meets the requirements of an independent and impartial tribunal previously established by law under Article 19 (1) TEU. This is due to the irregularities in the appointment procedures of three judges and in the selection of its President. Let us add that, in this context, a judgment has already been delivered by the ECtHR in *Xero Flor*,[142] where panels with the participation of the problematic three judges were found to be not a tribunal established by law under Article 6 (1) of the ECHR.

Thus, the Commission has made the rulings of the Polish CT directly subject of the infringement proceedings under Article 258 TFEU. The question then arises as to what obligations are envisaged by EU law in the event that the Court were to find an infringement with regard to specific judicial decisions, originating, inter alia, from defective appointees according to *Xero Flor*.[143] A judgment handed down under Article 258 TFEU with regard to an individual judicial decision of a national court (as the CT), would in all likelihood obligate a Member State to eliminate the infringement in a specific case covered by the proceedings. In order to avoid penalties under Article 260 (2) TFEU, a Member State would, in spite of the final nature of the ruling, have to find a solution which would effectively neutralize its legal consequences which are contrary to EU law. However, taking into account the Member States' autonomy regarding the manner of implementing a judgment delivered in infringement proceedings,[144] it seems that challenging a definitive national court ruling would be neither

141 See judgment of the Constitutional Tribunal of 7 October 2021, case no. K 3/21.

142 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 22).

143 Further considerations in this point are taken from Taborowski (n. 80).

144 The Court has no competence to point to specific measures which should be applied in order to carry out the judgment pursuant to Art. 260 (1) TFEU with the reservation that Member States are obliged to obtain a result in the form of an effective removal of the infringement.

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an automatic mandatory obligation following from Article 260 (1) TFEU, nor the sole remedy measure which could be applied in that situation.[145]

In its decision, a national court states in specific factual circumstances – constitutively or declaratorily – a certain legal state from which, depending on the type of case, specific effects sanctioned by the Member State follow. This is why it seems that removal of an infringement of this type could in certain circumstances be performed by limiting precisely these effects whilst leaving the ruling formally in force.[146] Thus, it would be possible, *inter alia*, to not carry out execution proceedings or refuse to grant such a ruling specific legal effects,[147] and hence, not to execute a judicial decision with the application of measures of compulsion and sanctions provided for by national law. Another way to carry out the Court's judgment would be to return or not to demand benefits which contrary to EU law should be paid by virtue of an erroneous judgment. If only the character of the breach were to furnish such possibility it would also be possible to grant compensation to aggrieved individuals, or even to take an *ad hoc* legislative intervention removing the effects of the infringement.[148]

However, leaving an erroneous – but in practice powerless – court decision in force may give rise to serious doubts from the point of view of the certainty of law. For this reason, if on the basis of national or EU law removal of a flawed ruling was to be possible[149] or even required,[150] this

145 The inability to challenge this type of decisions is one of the main arguments cited to justify the uselessness of the procedure under Art 258 TFEU in cases where the infringement relates to national courts – see i.a. N. Solar, *Vorlagepflichtsverletzung mitgliedstaatlicher Gerichte und ihre Sanierung* (Wien: Berliner Wissenschafts-Verlag, 2004), 108–109; See also the arguments presented by the Spanish Government in ECJ, *Commission v. Kingdom of Spain* (n. 82).

146 The Commission itself encourages Member States to above all take all appropriate steps aimed at eliminating the practical effects of erroneous court decisions – see 6th Annual Report of the Commission on national implementation of Community law for the year 1988 – Appendix on the attitude of national Supreme Courts to Community law, O.J. 1989, C 330/146 (160).

147 As in ECJ, *Ministero dell'Industria, del Commercio e dell'Artigianato v. Lucchini SpA* (n. 102).

148 The Commission encourages Member States to ensure proper application of EU law by courts also by applying legislative or administrative measures – see 3rd Annual Report of the Commission on national implementation of Community law for the year 1985, O.J. 1986, C 220/27.

149 As in ECJ, *Commission v. Slovak Republic* (n. 83).

150 E.g., according to the principle of equivalence or e.g., in the case of a breach of fundamental rights as in ECJ, *Skoma-Lux sro v. Celní ředitelství Olomouc* (n. 125), para. 72.

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would be a desired measure. Following the need for correct implementation of an infringement judgment, a Member State could also introduce – voluntarily or under EU compulsion – into the national law system provisions which would make it possible to challenge definitive court decisions.[151] In this way one could remove the uncertainty as to what effects are created by an erroneous decision in the national law and secure in a reasonable way the interests of those individuals for which a renewal of closed proceedings would be unfavorable in a legal or financial dimension (especially in horizontal judicial proceedings). The introduction of appropriate solutions would thus allow States to create and control a balance between the obligation to remove an infringement, the protection of principles which are sensitive from the point of view of the national system of law, as well as the necessary interests of individuals.

Sometimes, in view of the character of a breach or the requirements of national law, reversing a final judicial decision of a national court which breaches EU law may prove to be actually the only way to implement a judgment of the Court, which may, in turn, provoke a direct conflict between the obligations of the State arising out of Article 260 (1) TFUE and the principle of certainty of law. That conflict occurred already in cases concerning acts of application of law by administrative bodies like i.a. in *Commission v. Germany*, where in the light of Article 260 (1) TFEU, the ECJ deemed that what will be necessary to reverse the effects of an infringement in the carrying out of a public tender is not financial compensation but the termination (annulment) of an agreement concluded with the business partner selected by virtue of a decision in the defectively conducted tender.[152] Also in *Commission v. Great Britain* the Court did not allow the Member State to rely on the protection of the stability of final administrative decisions (planning permissions) in order to prevent an infringement action regarding the failure of administrative authorities to assess the effects of certain projects on the environment.[153] In order to

151 See e.g., Opinion of A.G. Cruz Villalón in ECJ, *Commission v. Slovak Republic* (n. 83), para. 54.

152 ECJ, *Commission of the European Communities v. Federal Republic of Germany*, judgment of 18 July 2007, case no. C-503/04, ECLI:EU:C:2007:432, paras 31–34. See in particular Jan Komárek, 'Infringements in application of community law: some problems and (im)possible solutions', REAL 1 (2007), 87–98.

153 See ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, judgment of 4 May 2006, case no.C-508/03, ECLI:EU:C:2006:287, paras 66–73, in which the Court regarded the fact that the planning

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avoid liability under Article 260 (2) TFEU, having regard to the judgment in *Commission v. Germany*,[154] the Member State, might have been forced to carry out the environment test required by EU law, which would involve the need to challenge the definitive administrative decisions in question.[155]

The above cases seem also to indicate that a Member State could not invoke the principle of certainty of law as a defense neither in proceedings under Article 258 TFUE nor under Article 260 (2) TFEU since a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under EU law[156] or the non-implementation of a judgment establishing a failure to fulfil obligations, including pleas based on the certainty of law, protection of justified expectations or *pacta sunt servanda* also in situations in which these principles could be invoked in proceedings before a national court.[157] In relations between the EU and a Member State, the Court thus essentially does not take account of the effects of the infringement judgment for the basic principles of the national legal system. Such an approach is understandable, since otherwise the effectiveness of judgments under Article 258 TFEU might be seriously put into question.

A judgment declaring an infringement concerning a judicial decision of a defective appointee may also have a significant impact on the legal position of individuals. However, measures which a Member State is obligated to take in order to correctly implement a judgment declaring an infringement should be distinguished from possible benefits which may be derived from such judgment by individuals being parties to proceedings definitively completed by incorrect decisions of national courts. Individuals can avail only of the 'content' of an infringement judgment, which specifies what kind of

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permission at issue was in force on expiry of the period laid down in the reasoned opinion as sufficient to admit the action for failure to fulfil obligations but ultimately did not declare an infringement concerning acts of application of law as the Commission did not present sufficient evidence in this respect.

154 See ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), paras 36 and 38.

155 See Komárek (n. 152), 91.

156 See ECJ, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* (n. 153), para. 69; ECJ, *Commission of the European Communities v. Portuguese Republic*, judgment of 10 January 2008, case no. C-70/06, ECLI:EU:C:2008:3, para. 22 and ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), para. 38;

157 See ECJ, *Commission of the European Communities v. Federal Republic of Germany* (n. 152), para. 36.

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legal situation is, in the light of EU law, inadmissible, in particular as far as the *ex tunc* interpretation of EU law is concerned.[158] All national bodies will thus be obligated to take into account the effects of an infringement judgment as an element of the legal state of examined cases.[159] That might also be the real added value of the Commission's infringement action against Poland regarding the Polish CT. However, all potential rights of individuals follow in the above cases directly from the provisions of EU law which a Member State violated and not from Article 260 (1) TFEU. In order for individuals to be able to avail of legal protection before national courts all the remaining pre-conditions must be met which allow one to commence the pertinent proceedings before national courts[160] and to use the tools described in point III.

IV. Conclusions

After having analysed the potential influence of EU law on the status and legal effects of rulings issued by national courts staffed by judges who cannot be regarded as independent, impartial or established by law in the light of Article 19 (1) TEU, Article 47 CFR and Article 6 (1) ECHR makes it clear that, just like with the Court's case law on final judicial decisions violating EU law, the starting point for any actions should be the principle of legal certainty, the protection of *res judicata* and the rights of parties to the judicial proceedings. In accordance with established case law, EU law attaches importance to the principle of the authority of *res judicata* in order to ensure stability of the law and legal relations and the sound administration of justice. Therefore, EU law will most probably not require automatically revisiting flawed judicial decisions of defective appointees that have acquired the authority of *res judicata*. These statements have sev-

158 See A.G. Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects', YEL 4 (1984), 1–77 (53).

159 See i.a. ECJ, *Federal Republic of Germany v. Commission*, judgment of 12 June 1990, case no. 8/88, ECLI:EU:C:1990:241 para. 13 and with regard to courts see ECJ, *Procureur de la République and Comité national de défense contre l'alcoolisme v. Alex Waterkeyn and others*; *Procureur de la République v. Jean Cayard and others*, judgment of 14 December 1982, case nos. 314/81, 315/81, 316/81 and 83/82, ECLI:EU:C:1982:430, para. 14.

160 See in particular ECJ, *Vincent Blaizot*, judgment of 2 February 1988, case no. 24/86, ECLI:EU:C:1988:43, para. 27 and ECJ, *Bosman*, judgment of 15 December 1995, case no. C-415/93, ECLI:EU:C:1995:463, para. 141.

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eral implications for a Member State that would like to undertake a healing process in connection with judicial decisions of defective appointees.

Firstly, in respect of such flawed judicial decisions, EU law refers to the Member States's regulatory autonomy, without imposing in principle any concrete obligations on that Member State as far as the legal status and the legal existence of such judicial decisions is concerned. That is also the space, which can be filled by a Member State general regulatory measure aiming at healing the status and the legal effects of flawed judicial decisions of defective appointees. To eliminate such rulings from the legal system, it will probably be necessary for the Member State to adopt appropriate legislative solutions or, if that is possible, to adopt solutions which are already in place (such as e.g., introducing procedures aiming at reopening of judicial proceedings, declaring the judicial decision void etc.). Here, the principles of equivalence and effectiveness restricting procedural autonomy will play a primary role in limiting the possibilities of the Member State's actions. Limits should also be imposed for the sake of legal certainty by the need to protect the rights of parties to proceedings and third parties affected by the measures, especially in horizontal relationships. For this reason, it also seems that it would be more advisable to put in place procedures that allow for individual evaluation of specific legal situations created by flawed rulings of defective appointees than statutory measures that would not provide for such individual evaluation. At least it is indispensable, that adequate compensation will be provided for those individuals, who suffered damages because of the measures introduced in order to heal flawed rulings of defective appointees. For the sake of legal certainty, it would also be certainly desirable that the possibility to question a flawed judicial decision of a defective appointee will be limited by a reasonable time-limit and decided by a court that fulfills all requirements of effective judicial protection under Article 19 (1) TEU and Article 47 CFR.

Secondly, EU law might nevertheless impose some obligations on the Member State as far as the legal status and the legal existence of judicial decisions of defective appointees are concerned, albeit only in some extraordinary situations, which now are not entirely clear or foreseeable according to the current case law of the Court. That might be the case, e.g., when the overall legal framework of judicial protection in a Member State would not guarantee a proper level of effectiveness for EU law, especially when on the basis of judicial decisions of defective appointees sanctions are imposed on individuals and their fundamental rights have been violated. Especially, when a damages action would not be able to cure the legal harm suffered by

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the individual and the reversing of a judicial decision (e.g., by reopening of the judicial proceedings) would be indispensable in a concrete procedural constellation. Such an obligation to deal with the legal status or the legal existence of the flawed judicial decision may also potentially arise if the national judicial rulings of defective appointees become the direct subject of an infringement action under Article 258 TFEU.

Thirdly, EU law demands that a damages action is always accessible for individuals who suffered harm resulting from judicial decisions of defective appointees. Here, the Member State has no discretion. The EU damages liability principle is directly effective. When the respective minimal conditions established by the Court are met, the individual has a right to compensation which should be realized via national courts. In that respect, besides typical situations concerning the manifest infringement of EU law, damage will undoubtedly arise at the point at which it becomes apparent that a party of the judicial proceeding cannot rely on the content of a judicial decision or in a situation where that judicial decision may be subject to review because of the court ruling with the participation of defective appointees and as a result to it, one of the parties suffers harm.

And, fourthly, it is possible for individuals to use all available means of individual judicial protection already available in the procedures of the legal system of the Member State, or introduced specifically by the Member State to provide such protection (e.g., reopening of judicial proceedings). Here, besides the damages action demanded by the EU legal order, EU law offers to individuals potentially also a very special tool against judicial decisions of defective appointees: the inapplicability of a flawed judgment issued by a defective appointee as an implication of the principle of primacy of EU law. That possibility, indicated in *W.Ż.*, will, however, be in principle available in court procedures other than the one in which the defective ruling was made. The condition for using this tool, therefore, is that a party can initiate and conduct some other court proceeding in which the defective court decision plays a certain legal role. It is therefore a tool available only in the context of the individual circumstances of legal proceedings pending in the concrete jurisdiction. Besides, that solution requires further clarification in future case law. The need for clarification concerns mainly the role played by the principle of legal certainty and *res judicata* in allowing the non-application of a flawed judicial decision. The case of *W.Ż.* and the other cases concerning rulings of the Disciplinary Chamber of the Polish Supreme Court, where the Court did not consider legal certainty and *res judicata* as important factors, were all vertical cases (between an

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individual and the State bodies) with sanctions or measures having a similar effect to sanctions imposed on individuals (national judges). In other proceedings, especially involving parties who are in a horizontal relationship, a technique of weighing values in the search for a reasonable balance between the infringement of EU law and legal certainty, may be necessary when assessing the possibility of disapplication of flawed judicial decisions of courts adjudicating with the participation of defective appointees.

The analysis has also shown, that flawed rulings issued by defective appointees, whose nomination process was in breach of Article 6 (1) of the ECHR, Article 19 (1) TEU or Article 47 CFR, can be a source of different problems for the legal system of a Member State in the context of i.a. the preliminary ruling procedure (GNB presumption), damages liability, the legal ineffectiveness of flawed judicial decisions (*W.Ż.*), the possible need of their revocation, the possibility of declaring an infringement of the ECHR by the ECtHR or from the perspective of infringement proceedings under Article 258 TFEU. In effect, judgments of defective appointees may create a problem concerning legal certainty. Potentially, judicial decisions of defective appointees may also cause difficulties within the framework of cross-border cooperation in criminal or civil matters since problems may occur with their recognition and enforcement.[161]

The arguments indicated above are also a good reason for the need to cure defective judicial appointments. Therefore, a judicial reform, after the rule of law crisis is over, cannot be limited to excluding from the judiciary only those defective appointees who most blatantly violated EU values as Von Bogdandy and Spieker propose in this volume (see Chapter 5). The problem of defective appointees is much broader: they will generate flawed judicial decisions all time long. The key problem with the status of defective appointees concerns their nomination process. Here, the mistakes once made, will not be cured with time by themselves. No change regarding defective judicial appointments means more and more flawed judgments. That may expose taxpayers to the need e.g., to pay compensation, according to EU law or based on the ECHR, and will also create wide-spread legal uncertainty – for EU citizens and investors – within the Polish jurisdiction.

161 See e.g., the preliminary reference from a German Court in case C-819/21 (refusal to recognise a Polish criminal conviction on the basis of Article 2 TEU in the light of the framework decision 2008/909).

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Defective Judicial Appointments and their Rectification under European Standards

Paweł Filipek

I. Introduction 425
II. European Standards on the Appointment of Judges 428
1. National v. European competence to regulate the process of appointing judges 428
2. Minimum European conditions of the procedure for appointing judges 430
3. Methodology for assessing the procedure for the appointment of judges: Ástráðsson, Simpson and A.K. 434
III. Flaws in the Polish Procedure for Appointing Judges 440
1. General and systemic deficiencies 440
2. Failure to comply with the requirement of statutory regulation 441
3. Absence of a guarantee of a merit-based nomination process 443
4. Compromised fairness of the procedure 444
5. Lack of effective judicial review 446
IV. Why Judicial Appointments Need to be Rectified 449
1. Axiological and systemic objectives 449
2. Ensuring the capacity of judges to adjudicate 450
3. Reinforcement of the rule of law and judicial independence 451
V. Determinants for Rectifying Defective Appointments 452
1. Ensuring an effective right to a court 453
2. Interests of the parties to the closed proceedings 454
3. Legal certainty and *res judicata* 455
4. Irremovability of judges 457
VI. Rectification of Defective Judicial Appointments 461
1. A precondition: re-composition of the NCJ 461
2. Recognition of defective appointments 462
3. Rejection of defective appointments 463
4. Balancing exercise: search for temperate options and a lesson from Ástráðsson 463
5. Verification mechanisms 467
6. Mitigating measures 468
7. Other instruments: disciplinary and criminal responsibility 469
VII. Conclusions 470

I. Introduction

This paper is dedicated to analysing the defectiveness of judicial appointments in Poland since 2018 from the perspective of European standards, as well as the rationale, the determining factors and the methods of rectifying the existing deficiencies, and bringing the situation into line with the re-

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quirements of the rule of law.[1] It is argued that the rectification of irregular appointments is a necessary part of the process of restoring the rule of law and fully guarantee the effective judicial protection.

The loss of the guarantee of objectivity in the procedure for the selection of candidates, made the process of appointing judges in Poland irregular and incompatible with national law and thus also with the requirements of the ECHR and Union law. Indeed, the procedure does not guarantee that competitions for judicial positions are won by persons who best meet the requirements of professional competence and moral integrity, as the outcome of the nomination process may depend on the undue influence of political authorities. This in turn jeopardises the guarantee of the independence of judges (and courts) which is essential for a meaningful access to justice.

Currently, three persons in the Constitutional Tribunal, more than half of those adjudicating at the Supreme Court, more than a quarter at the Supreme Administrative Court and about a quarter in ordinary courts hold positions based on appointments made in breach of law. The numbers are gradually climbing. Except for the appointment to the Constitutional Tribunal, which is made directly by the Sejm,[2] the defectiveness of appointments results, in particular, from the unconstitutional nature of the National Council of the Judiciary (NCJ). The changes in the NCJ in 2018 were part of a planned strategy by the government to take control of the process of appointing judges and, by so doing, influence the content of judicial decisions.

As a result, the NCJ lost independence from the legislature and the executive. Its nomination requests to the President of the Republic[3] are thus compromised, and so are the Presidential appointment acts based on them. In consequence, the status of persons appointed in this way is questionable under national and international law. They may not meet the necessary

1 It does not, however, discuss the legal value of judicial decisions made by defectively appointed persons. In this regard, see the contribution by Maciej Taborowski.

2 Art. 194(1) Constitution of Poland. The Constitutional Tribunal is left out of discussion in this text, since while it is a 'court' in the substantive sense denoting the exercise of a judicial function, yet, the special mode of appointing its members, the scope of its jurisdiction, its constitutional role and the nature of its judgments merit a separate discussion. On issues related to the Constitutional Tribunal see the contribution by Mirosław Wyrzykowski, for a more general review of necessary reforms in the Polish judicial and legal system see the paper of Adam Bodnar.

3 Art. 179 Constitution.

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requirements of the constitutionally guaranteed right to a fair trial, or to rule on Union law,[4] or to offer adequate protection under the European Convention on Human Rights. Since such persons were appointed in violation of the rule of law – their acting as judges reduces the very value, expands legal uncertainty and contributes to further legal chaos.

Now addressing deficiencies in judicial appointments comes as a necessity for fully restoring the rule of law, ensuring the ability of courts to resolve disputes in a democratic society and guaranteeing the right of individuals to a fair trial. Various scenarios of dealing with irregular appointments are possible, from extreme to moderate. The former result in consequences that are difficult to accept. The latter, on the other hand, weigh values and interests, and propose balanced arrangements that ensure the continuity of the judicial system and redress the growing legal uncertainty about the finality of court decisions. On this point, it is argued that the method of handling defective appointments should, in principle, be held to the same minimum standards as the judicial appointment procedure itself.

This paper outlines such minimum standards for the judicial appointment procedure under the ECHR and EU law, as well as the methodology adopted by the ECtHR and the ECJ for assessing infringements of this procedure (Section II). Against this background, an evaluation of the Polish practice of judicial nominations since 2018 is made, pointing out its fundamental flaws (Section III). The next section then examines the reasons why action is needed to heal irregular appointments (Section IV), to be followed by a review of determinants of the rectification process (Section V). The paper concludes with a discussion of possible corrective measures for defective appointments (Section VI).

4 Though, in principle. they may refer questions for a preliminary ruling to the ECJ, unless their unlawful appointment has already been decided in a final decision by a domestic or international court (here, in particular, the ECtHR); cf. ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235, para. 69.

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II. European Standards on the Appointment of Judges

1. National v. European competence to regulate the process of appointing judges

The competence to regulate the procedure for the appointment of judges rests with States, yet in exercising it, they must comply with international obligations they have voluntarily accepted.[5] Judges appointed under the national law of an EU Member State, adjudicate in a multicentric legal system. They rule not only within the scope of the national legal order, they may also rule on Union law and enforce the protection guaranteed by the ECHR. Accordingly, they must meet the requirements of all the decision-making centres of that system, i.e. of national law, of the ECHR and of the EU. In view of the breadth and depth of Union integration, the obligations of Member States in this regard assume special weight. For in each national system, the principle of effective judicial protection must be respected so as to give full effect to Union law (*effet utile*) and the rights of individuals derived from it.[6]

Most importantly, **the process of appointing judges cannot be carried out in an arbitrary manner**. When regulating the procedure, designating the bodies involved, setting the conditions and criteria for selecting candidates for judicial positions, States are bound by the requirements of the ECHR and the EU, which are identical in their basic terms, for they are geared toward guaranteeing effective judicial protection, that is, the right to a fair trial before an 'independent and impartial court established by law'. In addition, when making changes to the judicial system, States should not

5 Cf. ECtHR (Grand Chamber), *Grzęda v. Poland*, judgment of 15 March 2022, case no. 43572/18, para. 340; ECtHR, *Juszczyszn v. Poland*, judgment of 6 October 2022, case no. 35599/20, para. 208.

6 In successive judgments in Polish cases, the ECJ has consistently rejected the government's argument of exclusive State competence in the organisation of the judiciary: see *Commission v. Poland (Indpendence of the Supreme Court)*, judgment of 24 June 2019, case no. C-619/18, ECLI:EU:C:2019:531, para. 52; *Commission v. Poland (Independence of the ordinary courts)*, judgment of 5 November 2019, case no. C-192/18, ECLI:EU:C:2019:924, para. 102; *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, case nos. C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982, para. 75; *A.B. and Others v. Krajowa Rada Sądownictwa (Appointment of judges to the Supreme Court – Actions)*, judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153, para. 68; *Commission v. Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:591; para. 56.

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result in undermining the independence of the judiciary or its governing bodies,[7] and bring about a reduction in the protection of the value of the rule of law (principle of non-regression).[8]

There is nevertheless a nuanced difference in the attribution of competence of the ECtHR and the ECJ to rule on the issues of the organisation of the judiciary and judicial independence, including the guarantee of a sound procedure for the appointment of judges. While the jurisdiction of the ECtHR covers any interference with rights guaranteed by the Convention (Article 32 ECHR),[9] thus also the right to an 'independent and impartial tribunal established by law' (Article 6(1) ECHR), then the EU principle of effective judicial protection extends to 'the fields covered by Union law' (Article 19(1)(2) TEU) and we needed to have waited for its constitutionalisation in the Lisbon Treaty and for the explicit jurisprudential stance of the ECJ in the *Portuguese judges*' case that judicial independence is indivisible and is covered by EU law at all times if only the court *may* (even potentially) rule on questions concerning the application or interpretation of EU law.[10]

Both European Courts, the ECtHR in the *Ástráðsson* case and the ECJ in the *Simpson* ruling, have explicitly confirmed that the right to an independent court established by law also covers the process of appointing judges.[11] Still, there is no single European model for the appointment of judges.[12] Neither the Union law nor the ECHR imposes any concrete procedure.[13] The procedure is determined by States themselves, thus, there may be very different arrangements in place in various countries. However, States cannot design a model that does not guarantee an effective right to a

7 ECtHR, *Grzęda* (n. 5) para. 323.

8 ECJ, *Repubblika v. Il-Prim Ministru*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:231, para. 63.

9 See also Lech Garlicki, 'Polish Judicial Crisis and the European Court of Human Rights (a few Observations in the Ástráðsson case)' in: Jakub Urbanik and Adam Bodnar (eds), *Law in a Time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski* (Warszawa: C.H.Beck 2021), 169–182 (170–171).

10 ECJ, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C: 2018:117, para. 40.

11 ECtHR (Grand Chamber), *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, case no. 26374/18, paras. 227 and 234; ECJ, *Review Simpson and HG v Council and Commission*, judgment of 26 March 2020, C-542/18 RX-II and C-543/18 RX-II, ECLI:EU:C:2020:232, paras 74–75.

12 See e.g., ECtHR, *Ástráðsson* (n. 11), para. 207.

13 See e.g., ECJ, *A.K. and Others* (n. 6), para. 130.

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fair trial before a properly constituted, independent and impartial court.[14] Eventually, the ECHR and the EU law indicate only minimum conditions of appointment models, so that the arrangements adopted do not nullify the essence of effective judicial protection, and those appointed therein are vested with the mandate to, accordingly, offer the protection required under the ECHR and rule on Union law.

2. Minimum European conditions of the procedure for appointing judges

The process of appointing judges is meant to result in the appointment of persons and bodies that provide a guarantee of independence from all actors who are outside the adjudicating bench: the legislature, the executive, the organs of the courts, other judges, the parties to the proceeding, or the public opinion. In line with that, the requirements of the Convention right to a fair trial and the Union principle of effective judicial protection, as interpreted in the consolidated case law of the ECtHR and the ECJ, permit to identify the essential conditions of the procedure for the appointment of judges. These include: (1) the statutory nature of the rules on the appointment of judges; (2) the objective criteria of merit for candidates for judicial positions; (3) a fair procedure for the selection of judges; and, (4) in principle, the judicial review of the appointment procedure.

1. Statutory regulation — National procedure for the selection and appointment of judges should be regulated by a statutory act, that is, in accordance with the will of the legislature. This guarantees the **accessibility** and **foreseeability** of the rules governing the appointment of judges. Thus, the procedure and criteria for the nomination of judges should be known beforehand and formulated in unequivocal terms as much as possible, so as to prevent any arbitrary interference in the appointment process.[15]

14 See also Marek Safjan, 'Prawo do skutecznej ochrony sądowej – refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18', Palestra LXV (2020), 5–29 (8).

15 ECtHR, *Ástráðsson* (n. 11), para. 229–230; ECtHR, *Reczkowicz v. Poland*, judgment of 22 July 2021, case no. 43447/19, para. 219; ECtHR, *Dolińska-Ficek and Ozimek v. Poland*, judgment of 8 November 2021, case nos. 49868/19 and 57511/19, para. 275; ECtHR, *Advance Pharma v. Poland*, judgment of 3 February 2022, case no. 1469/20, para. 297.

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The requirement is intended to provide the court (judge) with the **legitimacy** to resolve legal disputes in a democratic society.[16] Furthermore, it is to guarantee a necessary level of the separation of powers and ensure that the appointment procedure is not left to the discretion of the executive.[17] This is to protect the judiciary from undue external influence, in particular from the very executive.[18]

It is inherent in the requirement of statutory regulation that it can only be considered met if the statutory provisions remain consistent with the State's Constitution and with its international obligations, including the ECHR and Union law. Therefore, to assess compliance of this requirement includes not only checking if the process of appointing judges is carried out in accordance with the statutory law, but also whether this law itself adheres to constitutional, Convention and EU standards.

2. Merit-based selection — The selection of judges should be based on **objective** criteria of merit to verify that candidates meet the requirements of **technical (professional) competence** and **moral integrity** (impeccability).[19] They are intended to exclude political considerations for judicial appointments. Instead, the deciding factors for the nomination of judges should be their qualifications, integrity, ability and efficiency.[20] In addition,

16 ECtHR, *Ástráðsson* (n. 11), para. 211. Whilst the ECJ has not articulated this requirement expressly, it is implied and follows from a number of observations by the ECJ to the form and scope of national rules on the appointment of judges. In addition, the ECHR standard constitutes a minimum Union standard, as in line with Article 52(3) of the Charter of Fundamental Rights, the ECJ ensures that its interpretation of Article 47(2) of the Charter safeguards a level of protection which does not fall below the level of protection established in Article 6 of the ECHR, as interpreted by the ECtHR, see ECJ, *A.K. and Others* (n. 6), para. 118; ECJ, *Disciplinary regime for judges* (n. 6), para. 165.

17 ECtHR, *Ástráðsson* (n. 11), paras 214–215; ECtHR, *Reczkowicz* (n. 15), para. 216; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 272; ECJ, *Simpson* (n. 11), para. 73; ECJ, *W.Ż.*, judgment of 6 October 2021, case no. C-487/19, ECLI: EU:C:2021:798, para. 129.

18 ECtHR, *Ástráðsson* (n. 11) para. 226; ECtHR, *Reczkowicz* (n. 15), para. 218; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 274.

19 ECtHR, *Ástráðsson* (n. 11), para. 220; ECtHR, *Xero Flor v. Poland*, judgment of 7 May 2021, case no. 4907/18, para. 244; ECtHR, *Reczkowicz* (n. 15), para. 217; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 273; ECtHR, *Advance Pharma* (n. 15), para. 295; Cf. ECJ, *A.K. and Others* (n. 6), para. 134; ECJ, *A.B. and Others* (n. 6), para. 123; ECJ, *Disciplinary regime for judges* (n. 6), para. 98; ECJ, *W.Ż.* (n. 17), para. 148.

20 See ECtHR, *Ástráðsson* (n. 11), para. 221, and the Consultative Council of European Judges (CCJE), *On standards concerning the independence of the judiciary and the irremovability of judges*, Opinion no. 1 (2001) of 23 November 2001, paras. 17 and 25.

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the criteria for candidates should increase with the successive, higher levels of the judiciary to which they aspire.[21]

3. Fair procedure — The selection of candidates should be made under fair procedural rules of domestic law in effect at the time,[22] and these rules must indeed be strictly adhered to.[23] European standards do not resolve which State authorities should select and appoint judges.[24] Nevertheless, they indicate that bodies selecting judges should ensure the objectivity of the procedure, no matter if it is a judicial council, an evaluation committee or any other body entrusted with such a task. The fulfilment by the candidates of the merit requirements should be truly verified and the assessment criteria should be the same for all candidates applying for the position. This necessarily involves the obligation to justify the choice made, in particular by referring to these substantive criteria, which then prompts for the reviewability of the nomination process.[25] Eventually, while the mere participation of political bodies (Parliaments, Heads of States, governments or ministers) in the procedure, e.g., the approval or appointment of judges by such bodies – is acceptable,[26] it should nonetheless be confined to a formal, ceremonial dimension.

Indeed, the substantive conditions and procedural rules should be formulated in such a way that the appointments do not give rise to reasonable doubts as to the independence and impartiality of the judges appointed.[27] They are meant to eliminate the risk of undue influence and/or unfettered

21 '[T]he higher a tribunal is placed in the judicial hierarchy, the more demanding the applicable selection criteria should be', see ECtHR, *Ástráðsson*, (n. 11) para. 222; ECtHR, *Xero Flor* (n. 19), para. 244; ECtHR, *Reczkowicz* (n. 15), para. 217; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 273; ECtHR, *Advance Pharma* (n. 15), para. 295.

22 ECtHR, *Ástráðsson* (n. 11), para. 247.

23 ECtHR, *Ilatowskiy v. Russia*, judgment of 9 July 2009, paras 40–41.

24 Cf. ECtHR, *Grzęda* (n. 5), para. 307.

25 Cf. Sacha Prechal, 'Effective Judicial Protection: some recent developments – moving to the essence', Review of European Administrative Law 13 (2020), 175–190 (186).

26 Cf. ECJ, *A.K. and Others* (n. 6), para. 133; ECJ, *A.B. and Others* (n. 6), para. 122; ECJ, *Repubblika* (n. 8), para. 56; ECJ, *Disciplinary regime for judges* (n. 6), para. 97. See also Matteo Mastracci, 'Judiciary Saga in Poland: An Affair Torn between European Standards and ECtHR Criteria', Polish Review of International and European Law 9 (2020), 39–79 (57) and ECtHR's case law reported therein.

27 See ECJ, *A.K. and Others* (n. 6), para. 134; ECJ, *Simpson* (n. 11), para. 71; ECJ, *A.B. and others* (n. 6), para. 123; ECJ, *Disciplinary regime for judges* (n. 6), para. 98; ECJ, *W.Ż.* (n. 17), para. 148.

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discretion of the other State powers in the process[28] and ensure its appropriately high standard, so as to appoint to judicial positions the most qualified candidates (the **'best candidate' standard**). This ensures the technical ability of judicial bodies to serve justice, lays the foundation for public confidence in the judiciary, and further strengthens the personal independence of the appointee.[29]

4. Judicial review — The judicial review of the appointment process secures the above requirements of a lawful, objective and fair procedure for the selection of judges based on criteria of merit. Neither the ECHR nor Union law expressly requires such judicial review, as it may not be provided in some Member States.

Nonetheless, since the Convention guarantees a self-standing right to a court established by law and a right to an independent court, national law should provide an effective remedy at least to the extent covered by the right to a fair trial guaranteed by Article 6(1) ECHR ('civil rights and obligations' or 'criminal charges'). Additionally, national judicial review of the appointment process was incorporated by the ECtHR into the *Ástráðsson* test as its third criterion (see below Section II.3). The absence of such a remedy means that allegations of a breach of law in the judicial appointment process – as far as they interfere with effective judicial protection afforded by Article 6 ECHR – can be directly examined by the ECtHR. If, however, there was a national remedy, the examination of breaches in the appointment process should be carried out in line with the balancing methodology and criteria indicated by the ECtHR.[30]

Similarly, the Union law also does not impose a general requirement of a judicial review of the appointment process, and possible lack of remedy may not be a problem in some cases.[31] Nevertheless, in the cases of appointments to the Polish Supreme Court, the ECJ recognised the necessity of such review. First, since the decisions of the President of the Republic on the appointment of judges cannot, in principle, be subject to judicial review, this requirement should be implemented at the stage of the preparatory act, i.e. the NCJ's recommendation for appointment.[32] Secondly, since

28 ECtHR, *Ástráðsson* (n. 11) para. 234.
29 See ECtHR, *Ástráðsson* (n. 11) para. 222.
30 ECtHR, *Ástráðsson* (n. 11), para. 251; ECtHR, *Reczkowicz* (n. 15), para. 230; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 286; ECtHR, *Advance Pharma* (n. 15), para. 309.
31 ECJ, *A.B. and Others* (n. 6), para. 156.
32 ECJ, *A.K. and Others* (n. 6), para. 145.

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the NCJ no longer offers sufficient guarantees of independence, a remedy against its resolutions refusing a recommendation is necessary to shield the appointment process from undue influence and to prevent doubts as to the independence of judges selected in it.[33] Thirdly, the State should not reduce the legal protection of candidates for judicial posts that had existed before,[34] in particular by making arrangements that reduce the intensity of judicial review or entirely undermine its effectiveness.[35]

In addition, when recognising the need for judicial review of appointments, the ECJ also indicated its minimum scope covering the examination of whether there was (a) no *ultra vires* or (b) improper exercise of authority, (c) error of law or (d) manifest error of assessment.[36]

3. Methodology for assessing the procedure for the appointment of judges: Ástráðsson, Simpson and A.K.

Not every irregularity in the process of appointing judges will lead to the conclusion that they do not meet the requirements of being established by law, independent and impartial.[37] It is the **gravity** of the breach of the appointment procedure that is decisive. Both European Courts have introduced such a threshold.

The ECtHR in its *Ástráðsson* ruling adopted a **three-stage test** for assessing whether the irregularities in the judicial appointment process were

33 ECJ, *A.B. ant Others* (n. 6), para. 136.

34 Judicial review of the nomination process is required by the Polish constitutional standard (Arts 45(1) and 77(2) Constitution) as confirmed by the Constitutional Tribunal, see judgment of 27 May 2008, case no. SK 57/06.

35 See ECJ, *A.B. and Others* (n. 6), paras 156 and 159–163. During the process of selecting dozens of Supreme Court judges in the summer of 2018, the Parliament changed statutory rules and introduced a partial finality of the NCJ's recommendations (it was no longer permitted to challenge NCJ's request for appointment of a person to a judicial position in the Supreme Court) as well as limited the effects of judgments granting the appeal (Act of 20 July 2018, Journal of Laws 2018, item 1443). Then, using the pretext of implementing the Constitutional Tribunal's ruling (made itself in a unlawful composition) deeming the possibility of appealing NCJ's resolutions to the Supreme Administrative Court as unconstitutional (ruling of 25 March 2019, case no. K 12/18), the Parliament entirely excluded the possibility of judicial review of NCJ's resolutions on the appointment of Supreme Court Judges and mandated to discontinue *ex lege* the pending appeal proceedings (Act of 26 April 2019, Journal of Laws 2019, item 609).

36 ECJ, *A.K. and Others* (n. 6), para. 145; ECJ, *A.B. and Others* (n. 6), para. 128.

37 Cf ECtHR, *Ástráðsson* (n. 11), para. 236,

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serious enough to entail a violation of the right to a court established by law.[38] The test comprises a set of cumulative criteria: (1) there is a breach of domestic law which, in principle, must be manifest – that is, must be objectively and genuinely identified as such;[39] (2) the breach must be serious enough, affect the essence of the right to a court 'established by law' – that is, pertain to a fundamental rule of the procedure for appointing judges, thereby creating a real risk that other state organs could exercise undue discretion in the appointment process;[40] and (3) the breach was not effectively reviewed and remedied by the domestic court.[41] Accordingly, the irregularities in the process of appointing judges that reach the threshold of a manifest breach of essential rules governing the judicial appointment procedure shielding it from undue discretion, constitute a violation of Article 6(1) ECHR and disqualify the judge (court) under the European standard, insofar as they could not have been effectively examined in domestic judicial remedies.

For its part, in the *Simpson* ruling, the ECJ adopted, in principle, an equivalent formula to verify whether the irregularity in the appointment procedure concerns fundamental rules forming an integral part of the establishment and functioning of the judicial system and is of such a kind and of such gravity as to create a real risk that other branches of the State, in particular the executive, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.[42]

The key elements of the two formulas are the same: the assessment concerns the nature and gravity of the irregularity (criterion 1 of a '**manifest breach**'); the irregularity itself must relate to fundamental rules of the ap-

38 ECtHR, *Ástráðsson* (n. 11), para. 243 et seq.

39 ECtHR, *Ástráðsson* (n. 11), para. 244, although, the ECtHR has left the door open to considering that the appointment of judges is defective also in the case of irregularities that do not reach the rank of a 'manifest breach'; the ECtHR stated that 'the absence of a manifest breach of the domestic rules on judicial appointments does not as such rule out the possibility of a violation of the right to a tribunal established by law. There may indeed be circumstances where a judicial appointment procedure that is seemingly in compliance with the relevant domestic rules nevertheless produces results that are incompatible with the object and purpose of that Convention right.' (para. 245).

40 ECtHR, *Ástráðsson* (n. 11), paras 246–247.

41 ECtHR, *Ástráðsson* (n. 11), para. 248.

42 Cf, ECJ, *Simpson* (n. 11), para. 75; ECJ, *W.Ż.* (n. 17), para. 130.

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pointment procedure; and it creates a (real) risk of undue influence of other State authorities on the appointment (criterion 2 of '**undue discretion**'). Yet, the *Ástráðsson* test further embraces criterion 3 of **effective judicial review** (that is fully understandable in the light of Articles 6 and 13 ECHR, as well as the subsidiary nature of Convention protection)[43], which is not present in the *Simpson* formula.

Then, the *Simpson* formula points to a further element: the undermining of the **integrity of the outcome** of the appointment process, which gives rise to a reasonable doubt in the minds of individuals as to the independence and impartiality of the judge. It is not clear whether the ECJ has been pointing here to the obvious consequence of a breach that has already fulfilled the criteria of a 'manifest breach' and 'undue discretion', or whether it is yet another criterion of the test that – cumulatively – must also be met in addition to criteria 1 and 2.

In the first case, it would be seen as an automatic corollary of the breach that was found to satisfy the first two criteria; while in the second case, a court making an assessment would have to address the 'integrity' criterion separately and check whether it is met as well. The first interpretation is supported by a joint reading of the *Ástráðsson* and *Simpson* judgments. The ECtHR included the element of 'integrity' in its test, yet, linking it to the criterion of 'undue discretion'.[44] This means that a breach once qualified as an exercise of 'undue discretion', at the same time undermines the integrity of the outcome of the appointment process and forms ground for doubts about the judge's independence. However, the reading of ECJ's ruling in *Żurek's* case, may suggest the separation of the two elements. The ECJ held that its guidance relates to such appointment process 'that (i) that appointment took place in clear breach of fundamental rules (...), and (ii) the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt (...)'.[45] Such a split remains inconsistent with the original drafting of Simpson's formula, actually repeated verbatim in the *W.Ż.* reasoning.[46] Nonetheless, it cannot be ruled out that splitting the criteria may in the future serve the ECJ to loosen the requirements of a 'court established by law' by accepting that, although the national arrangements

43 See ECtHR, *Ástráðsson* (n. 11), para. 250.
44 See ECtHR, *Ástráðsson* (n. 11), para. 247.
45 ECJ, *W.Ż.* (n. 17), para. 161 and the subsequent conclusion.
46 ECJ, *W.Ż.* (n. 17), para. 130.

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posed a real risk of undue discretion, they did not, in the specific situation, lead to undermining the integrity of judge's appointment.

The *Ástráðsson* test and the *Simpson* formula are designed to assess compliance with the requirement that a court be established by law. It was relied upon by the ECtHR in cases of appointments to the Polish Supreme Court (so called *'Reczkowicz group'*)[47]. Meanwhile, the *Simpson* formula has been used less frequently in ECJ jurisprudence, e.g., in the *W.Ż.* case. The ECJ, while procedurally constrained by the scope and formulation of infringement actions or preliminary references,[48] more frequently relies on a cumulative method for assessing the independence of courts which was developed in the *A.K.* judgment.[49] It differs from the *Ástráðsson* formula as it represents a broader concept of independence.

The 'establishment by law' is the very first, most preliminary stand-alone requirement for a 'court',[50] it logically precedes the independence requirement. The question of a court's independence only makes sense once it has been confirmed that the body indeed has been established as a 'court'. If there is no lawful 'establishment', there is no 'court' and the question of its independence is devoid of purpose. Still, the two requirements are closely related, both are rooted in and aimed at protecting the principle of the rule of law and the separation of powers, and both are necessary for public confidence in the judiciary.[51] They both may involve the same elements, which is precisely the case of guarantees of the judicial appointment process. A breach of the rules of judicial appointment can thus lead to both the violation of the establishment and the violation of the independence requirements. In the cases on the Polish Supreme Court, the ECtHR in fact assumed an automatic coexistent violation of the guarantee of independ-

47 ECtHR, *Reczkowicz* (n. 15); ECtHR, *Dolińska-Ficek and Ozimek* (n. 15); ECtHR, *Advance Pharma* (n. 15).

48 See Ben Smulders, 'Increasing Convergence between the European Court of Human Rights and the Court of Justice of the European Union in their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointments', CMLRev 59 (2022), 105–128 (116–117).

49 ECJ, *A.K. and Others* (n. 6).

50 See ECtHR, *Ástráðsson* (n. 11), para. 231. The connection between the test of establishment and the assessment of independence and impartiality of the court was also pointed to by the ECJ in *Simpson*, see (n. 15), paras 75 and 79.

51 Cf. ECtHR, *Ástráðsson* (n. 11), para. 233.

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ence where the guarantee of establishment is violated due to an irregular procedure for the appointment of a judge.[52]

The **standard of judicial independence** means both maintaining independence – i.e. the judge/court *'is'* independent; and also presenting an appearance of independence – i.e. the judge/court *'is seen as'* independent.[53] Thus, a breach of the standard is not only when there is an actual (accomplished) breach of judicial independence, but already when there are reasonable doubts as to that independence, i.e. the impression that the judge/court lacks independence. In the appointment process, the breach occurs not only when there indeed comes to a discretionary appointment to a judicial position, but already when there is a *real risk* of undue discretion in the procedure,[54] for it may give rise to reasonable doubts as to the independence of the appointee.[55]

Accordingly, the independence test in *A.K.* offers a broader concept in which it is a **cumulative consideration of all relevant conditions and circumstances** that is decisive for assessing judicial independence. It was originally construed for assessing an entire body (the Disciplinary Chamber) and not only its individual members. While the procedure for appointing persons to the body falls within the scope of that assessment, yet it is not confined to it but involves other considerations, e.g., the nature of the body, its place in the judicial system, the circumstances and purposes of its creation, its powers, etc.[56]

52 See ECtHR, *Reczkowicz* (n. 15), para. 284; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 357; ECtHR, *Advance Pharma* (n. 15), para. 353. The ECtHR recognised even a parallel violation of the third requirement, that of impartiality, though it did not elaborate on this issue any further. Robert Spano maintains that once a judge is appointed in violation of the 'establishment by law' standard, it creates an unrebuttable presumption of unfairness of the proceedings in which the judge took part, and there is no need for a separate analysis of the actual *in concreto*, fairness of the trial; Robert Spano, 'The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary', ELJ 27 (2021), 211–227 (217).

53 ECJ, *A.K. and Others* (n. 6), paras. 127–128; ECJ, *Disciplinary regime for judges* (n. 6), para. 60; ECJ, *W.Ż.* (n. 17), para. 153. More on 'power of appearance' see esp. Michał Krajewski, Michał Ziółkowski, 'EU judicial independence decentralized: *A.K.*', CMLRev 57 (2020), 1107–1138 (1109–1110, 1115, 1123–1125).

54 ECJ, *W.Ż.* (n. 17), para. 130.

55 ECJ, *A.K. and Others* (n. 6), paras 123 and 134; ECJ, *Disciplinary regime for judges* (n. 6), paras 59, 86, 110 and 112; ECJ, *W.Ż.* (n. 17), paras 109, 128, 130, 148, 153 and 161.

56 ECJ, *A.K. and Others* (n. 6), paras 143–153.

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Both European Courts name the methods they have adopted as *cumulative*. However, the nature of these cumulations is different. In the *Ástráðsson* test, these are **cumulative criteria**, which mean that they are examined in the sequence indicated and that they must be jointly satisfied. Under this concept, a single breach is sufficient to find a violation of the right to a court established by law, if it was serious and demonstrated a risk of undue influence that could not be remedied at the domestic level.

In contrast, the method developed by the ECJ in the *A.K.* case takes together all relevant factors and circumstances to assess their **cumulative effect** on the independence of the court (judge). Under this concept, the factors and circumstances when looked at one by one, might not amount to a breach of the law, yet when the whole picture is considered, they cumulatively may cast doubt on the court's (judge's) independence.[57]

The method of cumulative assessment nullified the Polish Government's argumentation, claiming that the particular arrangements adopted by them exist in other European systems. However, similar solutions in other countries may not pose a threat to judicial independence, because of different legal traditions, established constitutional practices, differing democratic experience or the context in which they operate.[58] Such assessment may also include a verification of the intentions ('true aims' or bad faith) of national authorities behind introducing certain arrangements. Such verification was pointed to by the ECJ in the case of *Independence of the Supreme Court*,[59] and subsequently confirmed in *A.B. and others*.[60] Still, an examination of the intentions of the national authorities may come under the establishment test as well. This was made clear by the ECtHR in its first *Ástráðsson* ruling, adopted in the chamber formation.[61] Though it was not explicitly mentioned in the Grand Chamber judgment of 1 December 2020, it may be implied that the (bad) intentions of the national authorities may form part of the concept of 'undue influence and/or unfettered discretion'.[62] In its Grand Chamber ruling in *Grzęda*, the ECtHR pointed to the premed-

57 Cf. ECJ, *A.K. and others* (n. 6), paras 143 and 153. A reading of the ECJ's ruling in *W.Ż.* may suggest that the ECJ is inclined to apply the cumulative effect method also to the establishment test; see (n. 17), para. 131.

58 See i.a. Safjan (n. 14), 13; Prechal (n. 25), 187.

59 ECJ, *Indpendence of the Supreme Court* (n. 11), paras 82–87.

60 ECJ, *A.B. and others* (n. 6), para. 138.

61 ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, judgment of 12 March 2019, case no. 26374/18, para. 102.

62 Cf. Garlicki (n. 9), 174.

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itation of the national authorities and noted that the whole sequence of events in Poland 'vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence'.[63]

III. Flaws in the Polish Procedure for Appointing Judges

1. General and systemic deficiencies

The loss of the guarantee of objectivity in the procedure for selecting candidates makes the process of appointing judges in Poland irregular and incompatible with national law and thus also with the requirements of the ECHR and Union law. Indeed, the procedure does not guarantee that competitions for judicial positions are won by persons who best meet the requirements of professional competence and moral integrity, as the outcome of the nomination procedure may depend on the undue influence of political authorities.

In respect of the ECtHR case law on defective judicial appointments, the main difference between the *Ástráðsson* case and the *'Reczkowicz group'*[64] is that while in the Icelandic case, the breaches of national procedure affected four nominations to the Court of Appeal, in the Polish cases the breaches, indeed, affect each and every nomination to all courts,[65] because they result from the overall shaping of the procedure of appointing judges in a manner contrary to the law. Thus, in the Icelandic case, the violations were of an individual nature, and were exceptions to an essentially well-formed procedure, whereas in the Polish cases, they are of a general and systemic nature since the very procedure for the nomination of judges as such remains unlawful.[66]

63 ECtHR, *Grzęda* (n. 5), para. 348.

64 See n. 47.

65 This also embraces the promotion of judges, e.g., from a district court to a regional court, as it requires a procedure for evaluating candidates before the NCJ, granting a recommendation and separate acts of appointment by the President of the Republic. The NCJ also participates in the appointment by the President of court assessors (junior judges) who are graduates of judicial training programme and passed the examination for judge.

66 In the *Dolińska-Ficek and Ozimek* and *Advance Pharma* cases, the ECtHR announced that its conclusions on the involvement of NCJ in the appointment of Supreme Court judges 'will have consequences for its assessment of similar complaints in other pending or future cases', as the deficiencies identified 'have already

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Furthermore, in the Icelandic case, the breaches occurred in the course of the nomination procedure, whereas in the Polish cases, the manifest breach exists already at the very outset of the procedure, when it is initiated before an unconstitutionally composed body, notwithstanding any further irregularities that may also take place in its course. In other words, every nomination process is already defective from the very beginning. Persons taking part in such procedures are thus aware of the deficiencies. This alone may justify more far-reaching consequences when addressing defective judicial appointments, in particular a denial of protection under the guarantee of irremovability (see below Section V.4).

The irregularities in the appointment process pertain to all four European requirements outlined above (Section II.2), though the number and gravity of violations may vary from case to case. In general, the highest intensity of breaches occurred in the appointments to the Supreme Court.

2. Failure to comply with the requirement of statutory regulation

The requirement for statutory regulation of the process of appointing judges might apparently seem to be met, as the procedure is provided for by legislative acts. It takes place before the NCJ, which organises competitions, analyses documents mostly presented by candidates, interviews them and then decides whom to propose for a given judicial post. Furthermore, there is also a statutory right to judicial review of the NCJ's resolutions that refuse recommendation for appointment.

Nevertheless, the key elements of the statutory regulations are unconstitutional as is the case of the composition of the NCJ since 2018 and the arrangements for judicial review which turn it ineffective.

In 2018 the NCJ was re-composed in breach of the constitutional rules. Firstly, the term of office of the previous NCJ members was prematurely terminated by ordinary law,[67] even though its stability was protected by the Constitution.[68] Secondly, the composition of the new NCJ was determined

adversely affected existing appointments and are capable of systematically affecting the future appointments of judges not only to the other chambers of the Supreme Court but also to the ordinary, military and administrative courts', see: ECtHR, *Dolińska-Ficek* (n. 15), para 368; ECtHR, *Advance Pharma* (n. 15), para 364.

67 See Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts, Journal of Laws 2018, item 3.

68 Art. 186(3) Constitution.

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by a political decision, since the political authorities have reserved for themselves a near-monopoly power to designate its members (they are predominantly selected by the Sejm), although constitutional rules pointed to electing the 15 judges-members of the NCJ by the judges themselves,[69] and thus shielded the composition of the judicial council from undue political influence.

The statutory rules that do not comply with the Constitution cannot be considered to satisfy the requirement that the procedure be regulated by an Act of Parliament. Meanwhile, the unconstitutionality of the new arrangements for the NCJ was unequivocally determined by the Supreme Court.[70] Under normal circumstances, such allegations should be examined by the Constitutional Tribunal. However, it abandoned to pursue the core purpose of the Constitutional Courts, that is, to protect the Constitution.[71] It no

69 Art. 187(1) in conjunction with Art. 186(1) Constitution. This was confirmed by the Constitutional Tribunal in its judgment of 18 July 2007, case no. K 25/07, para. III.4. A different view was then presented in the Constitutional Tribunal judgment of 20 June 2017, case no. K 5/17. However, the substantive conclusions of the ruling were arbitrary – cf. ECtHR, *Reczkowicz* (n. 15), paras 237–239; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), paras 293–295. Furthermore, it was made by an irregular panel comprising unauthorized persons, i.e. appointed to the positions previously lawfully taken (so called 'duplicate-judges') – which, in the light of the ECtHR judgment in *Xero Flor*, rendered the Constitutional Tribunal not being 'established by law'; see ECtHR, judgment in *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, case no. 4907/18.

70 It held that '[n]ew members of the National Council for the Judiciary were appointed by the Sejm ..., which stood in conflict with Article 187(1)(2) of the Constitution', and further that the new legislative provisions on NCJ 'are inconsistent with the principle of division and balance of powers (Article 10(1) of the Constitution of the Republic of Poland) and the principle of separation and independence of courts (Article 173 of the Constitution of the Republic of Poland) and independence of judges (Article 178 of the Constitution of the Republic of Poland)', Supreme Court, Resolution of 23 January 2020 of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber, case no. BSA I-4110–1/20, para. 32.

71 See e.g., its rulings rejecting the primacy of Union law (cases nos. P 7/20, K 3/21) and ECHR standards (cases nos. K 6/21, K 7/21). Addressing the current Constitutional Tribunal, the ECtHR noted 'the apparent absence of a comprehensive, balanced and objective analysis of the circumstances before it in Convention terms', and for this reason held that its assessment 'must be regarded as arbitrary and as such cannot carry any weight' for the ECtHR's conclusions (ECtHR, *Reczkowicz* (n. 15), para. 262; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 317; ECtHR, *Advance Pharma* (n. 15, para. 318). See also ECtHR judgment in *Xero Flor* (n. 69) on unlawful composition of the Constitutional Tribunal. Moreover, the European Commission decided to bring yet another infringement action against Poland for violations of EU law by the Polish Constitutional Tribunal and its case law, see Commission, Press Release of 15

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longer offers a genuine constitutionality review of the law, and instead, it is used to legitimise actions of national authorities which are incompatible with the Constitution.[72]

3. Absence of a guarantee of a merit-based nomination process

Formally, again, the process of appointing judges is based on criteria of merit, that is, the legislation on respective domestic courts indicates such criteria. In fact, however, the significance of the substantive selection of judicial candidates has been reduced. Both the ECtHR and the ECJ are reluctant to give their direct assessment of this aspect of the judicial appointment process. Indeed, this is a more difficult aspect to grasp, therefore problematic in terms of providing evidence, and it would come down to European Courts' evaluating particular nomination decisions made by the NCJ.

In essence, the underlying problem undermining the value of the substantive assessment of candidates is the lack of guarantee of objectivity of the National Council of the Judiciary, a body 'subordinated directly to political authorities'.[73] The changes were made to the NCJ precisely so that the merit criteria would not have a decisive say on judicial nominations. The Supreme Court assessed that 'competitions for judicial positions are very likely to be decided not based on substantive criteria but depending on political loyalties or support for the reform of the judiciary pursued by the parliamentary majority in conflict with the Constitution'.[74] For the same

February 2023, no. IP/23/842, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

72 In its rulings in cases nos. K 5/17 (n. 69) and K 12/18 (n. 35), the current Constitutional Tribunal 'legitimised' changes to the NCJ. First, by a ruling of 20 June 2017 in case no. K 5/17, the CT declared unconstitutional the election of judges-members of the NCJ to individual and not joint term of office (e.g., as a result of filling a vacancy that occurred during the term). It also rejected the CT's previous position that the judges-members of the NCJ are to be elected by the judges themselves (expressed in case no. K 25/07, n. 69). This was used as a pretext for interrupting the NCJ's ongoing term of office and appointing it anew (see n. 69). Then, by a ruling of 25 March 2019 in case no. K 12/18 the Constitutional Tribunal confirmed the finding of the case K 5/17. Both rulings were rendered by irregular panels comprising unauthorized persons (see n. 54). These rulings demonstrated a pattern of legitimising one flawed authority by another flawed authority.

73 Supreme Court, Resolution of 23 January 2020 (n. 70) para. 42.

74 Supreme Court, Resolution of 23 January 2020 (n. 70) para. 38.

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reason, the participation of the judicial self-government in the nomination procedure was eliminated in 2020, despite the fact that such participation had previously been guaranteed since the very creation of the National Council of the Judiciary in 1989, and was supported by the constitutional standard articulated in the case law of the Constitutional Tribunal.[75]

In evaluating the degree to which the current selection model for judges relies on substantive criteria, one also needs to take other considerations into account, including the continued boycotting the NCJ's nomination proceedings by a significant part of the legal community.[76] Furthermore, the recommendations for judicial positions were regularly granted by the NCJ to many those judges who previously backed the candidacies for the new NCJ's members by signing the lists in their support.[77] In fact, there seems to exist a pattern whereby NCJ members treat appointments to senior judicial positions as a way of rewarding those who first supported their candidatures.

4. Compromised fairness of the procedure

A procedure in which objectivity cannot be guaranteed obviously does not meet the requirement of fairness. It is compromised by the lack of the necessary independence of the NCJ from the legislative and executive branches. In particular, this conclusion is substantiated by: the premature interruption of the four-year term of office of the members of the previous NCJ;[78] the election of 15 judges-members of the NCJ by the Sejm instead

75 See Constitutional Tribunal, judgment of 18 February 2004, case no. K 12/03; see also Constitutional Tribunal, ruling of 9 November 1993, case no. K 11/93.

76 See. i.a. Paweł Filipek, 'The New National Council of the Judiciary and its Impact on the Supreme Court in the light of the Principle of Judicial Independence', Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 16 (2018), 177–196 (187), https://europeistyka.uj.edu.pl/documents/3458728/141910948/P.+Filipek_PWPM2018_pages-177-196.pdf.

77 See i.a. Laurent Pech and Jakub Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations', DI Working Papers 2 (2023), 61, https://ssrn.com/abstract=4326932; Association of Judges 'Themis', Close to the Point of No Return (newsletter about the situations of the Polish judiciary), updated for 20 February 2020, 4,http://themis-sedziowie.eu/wp-content/uploads/2020/02/Newsletter.pdf.

78 See ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131; ECJ, *Disciplinary regime for judges* (n. 6), para. 105; ECJ, *W.Ż.* (n. 17), para. 146; ECtHR,

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of earlier election by their peers;[79] the irregularities in the process for the appointment of certain members of NCJ;[80] the way in which NCJ exercises its constitutional responsibilities of ensuring the independence of courts and judges;[81] or the existence of special relationships between the members of the NCJ and the executive.[82]

In the cumulative assessment of the independence of the NCJ, what also matters is the context of the changes, including other arrangements implemented alongside the judicial system, such as the attempt to lower the retirement age of Supreme Court judges leading to their premature removal from office in violation of guarantees of irremovability and independence of judges.[83] Taking control over the composition of the NCJ and, at the same time, removing a significant group of judges from the Supreme Court, was designed to pack swiftly and effectively the Supreme Court with persons supported by the government.[84]

Indeed, the largest number of institutional and procedural violations occurred in procedures for appointments to the Supreme Court.[85] They

Grzęda (n. 5), para. 322. See also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 31.

79 See Supreme Court, Resolution of 23 January 2020 (n. 70) para. 31; ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131; ECJ, *Disciplinary regime for judges* (n. 6), para. 104; ECJ, *W.Ż.* (n. 17), para. 146; ECtHR, *Reczkowicz* (n. 15), paras 234–264; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), paras 290–320; *Advance Pharma* (n. 15), paras 313–321; ECtHR, *Grzęda* (n. 5), paras 310–317 and 322.

80 See Supreme Court, Resolution of 23 January 2020 (n. 70), para. 32; ECJ, *A.K. and Others* (n. 6), para. 143; ECJ, *A.B. and Others* (n. 6), para. 131

81 See ECJ, *A.K. and Others* (n. 6), para. 144; ECJ, *A.B. and Others* (n. 6), para. 131.

82 See ECJ, *A.B. and Others* (n. 6), para. 131. In this context, the Supreme Court noted that the membership of the NCJ 'was determined in such a way as to ensure that it was comprised of persons loyal to the parliamentary majority', see Resolution of 23 January 2020 (n. 70), para. 38.

83 See ECJ, *Independence of the Supreme Court* (n. 11); ECJ, *A.B. and Others* (n. 6), paras 132–135. Over the period between 4 July 2018 and 1 January 2019, i.e. during the culmination of selecting new judges to the Supreme Court, the First President of the Supreme Court was not informed of the NCJ meetings, although she was an *ex officio* member of the body. This is a further cause why the NCJ was then acting in an incorrect composition; see Supreme Court, Resolution of 23 January 2020 (n. 70), para. 33.

84 Cf. ECJ, *A.B. and Others* (n. 6), paras 134 and 163; ECJ, *Disciplinary regime for judges* (n. 6), paras 106–107; ECJ, *W.Ż.* (n. 17), paras 150.

85 See. i.a. Filipek (n. 76), 184–189.

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were initiated by an Act of the President of the Republic,[86] issued without the mandatory countersignature of the Prime Minister as required under Article 144(3) of the Constitution,[87] which therefore had never become valid.[88]Furthermore, an unprecedented breach of the law was to disregard binding court decisions (of the Supreme Administrative Court) suspending the execution of the NCJ's resolution recommending candidates.[89] In such cases, judicial appointments to the Supreme Court were made on the basis of appealed (i.e. non-final) and suspended (i.e. non-enforceable) NCJ resolutions. Eventually, the Supreme Administrative Court, while implementing the ECJ's judgment in *A.B. and Others*, in a series of judgments, overturned the NCJ's resolutions on nominations to the Supreme Court in their part containing requests for an appointment.[90] Accordingly, the Presidential acts of appointment are not based on legally effective requests of the NCJ, which are necessary for the judges' appointment in light of Article 179 of the Constitution.

5. Lack of effective judicial review

Judicial review of the nomination process continues failing to meet the requirements of the ECHR and Union law. Currently, appeals against the NCJ resolutions to recommend or to refuse to recommend for a judicial

86 Announcement of the President of the Republic of Poland of 24 May 2018 No. 127.1.2018 on vacant judicial positions in the Supreme Court, Official Journal 'Monitor Polski' 2018, item 633, https://monitorpolski.gov.pl/M2018000063301.pdf.

87 See i.a. Supreme Court, Resolution of 23 January 2020 (n. 70), para. 34. This issue was also noted by the ECtHR, which nonetheless deemed it unnecessary to rule on it additionally in view of the manifest breaches of the law already established, which were sufficient to constitute a violation of the Convention, see ECtHR, *Reczkowicz* (n. 15), para. 265; ECtHR, *Dolińska-Ficek and Ozimek* (n. 15), para. 339; ECtHR, *Advance Pharma* (n. 15), para. 335.

88 See Art. 143(2) Constitution.

89 See e.g., Supreme Administrative Court, order of 27 September 2018, case no. II GW 27/18 (recommended nominations to the Civil Chamber). See also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 35, ECtHR, *Dolińska-Ficek and Ozimek* (n. 15); ECtHR, *Advance Pharma* (n. 15).

90 See judgments of 6 May 2021, cases nos. II GOK 2/18, II GOK 3/18, II GOK 5/18, II GOK 6/18, II GOK 7/18; judgment of 13 May 2021, case no. II GOK 4/18; judgments of 21 September 2021, cases nos. II GOK 8/18, II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 4/18, II GOK 3/18; judgments of 11 October 2021, II GOK 9/18, II GOK 15/18, II GOK 16/18, II GOK 17/18, II GOK 18/18, II GOK 19/18, II GOK 20/18.

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position are heard by panels of the Chamber of Extraordinary Control and Public Affairs in the Supreme Court.[91] The body, entirely appointed under a procedure involving the new NCJ, itself is not an independent and impartial court[92] established by law, as jurisprudentially stated by the ECtHR in the *Dolińska-Ficek and Ozimek*,[93] as well as by the ECJ in the case of Judge Żurek.[94]A remedy handled by an authority that does not meet the requirements of effective judicial protection cannot itself be considered to meet those requirements.

In addition, the so called 'Muzzle Law', adopted by the Parliament as a negative reaction to the ECJ judgment in the *A.K. case* seeking to render it ineffective domestically, introduced a statutory prohibition on challenging the establishment of courts or assessing the lawfulness of judges' appointments or their powers to exercise judicial functions.[95] The Muzzle Law is a subject of an infringement action brought by the Commission before the ECJ in case C-204/21.[96]Although the ECJ issued interim measure suspending the application of the impugned provisions,[97] in practice the law continues to operate.

As already indicated, the particularly intense violations of the requirement for judicial review of the nomination process occurred in the appointment of Supreme Court Judges in 2018. During the process of selecting candidates for more than 40 vacant positions there, the Parliament changed statutory rules and introduced a partial finality of the NCJ's recommendations – in their 'positive' part, i.e. making a request to the President of the Republic to appoint recommended persons to the Supreme Court. This change alone was considered by the Supreme Administrative Court as aiming 'to nullify the possibility of a competent court to carry out a true review of the competition procedure for a vacancy in the Supreme Court' and 'to prevent any judicial review of appointments to the Supreme

91 Art. 26(1) Act of 8 December 2017 on the Supreme Court, Journal of Laws 2021, item 1904.

92 See i.a. Supreme Court, Resolution of 23 January 2020 (n. 70).

93 See ECtHR, *Dolińska-Ficek and Ozimek* (n. 15).

94 See ECJ, *W.Ż.* (n. 17).

95 Act of 20 December 2019 on amending the Act on the organisation of ordinary courts, the Act on the Supreme Court and certain other acts, Journal of Laws 2020, item 190.

96 ECJ, *Commission v. Poland (Independence and privacy of judges)*, case no. C-204/21.

97 ECJ, *Commission v. Poland (Independence and privacy of judges)*, order of the Vice-President of the Court of 14 July 2021, case no. C-204/21 R, ECLI:EU:C:2021:593.

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Court after the re-composition of the NCJ'.[98] In addition, the legislative novelization also limited the effects of judgments granting the appeal, as no opportunity was provided for the appellant to return to the competition proceedings in which the NCJ's resolution was adopted.[99]

Subsequently, by using the pretext of implementing the Constitutional Tribunal's ruling (made itself in an unlawful composition) deeming the possibility of appealing NCJ's resolutions to the Supreme Administrative Court as unconstitutional,[100] the Parliament entirely excluded the possibility of judicial review of NCJ's resolutions on the appointment of Supreme Court judges and mandated to discontinue *ex lege* the pending appeal proceedings.[101] The sequence of actions taken by domestic authorities clearly indicates that they acted with the specific intention of preventing any possibility of judicial review of appointments to the Supreme Court.[102]

Furthermore, as also pointed out above, in the case of certain nominations to the Supreme Court, the acts of appointment were handed out in a situation when the recommendation resolutions of the NCJ were appealed and suspended. This alone hindered effective judicial review of the nomination process.

Ultimately, despite the subsequent annulment by the Supreme Administrative Court of the NCJ's resolutions in their parts containing the recommendation for appointment to the Supreme Court,[103] that did not substantially change the appellants' situation, since the competitions whose results they challenged were not reopened and the posts for which they had applied remain occupied by persons appointed to them in manifest breach of the law. Accordingly, the remedy cannot be considered to be effective since it failed to remedy and redress the appellants' situation.

98 Supreme Administrative Court, judgment of 6 May 2021, case no. II GOK 2/18, para. 7.2.

99 Act of 20 July 2018, Journal of Laws 2018, item 1443; see also ECJ, *A.B. and Others* (n. 6), para. 160.

100 Constitutional Tribunal, case no. K 12/18 (n. 35).

101 Act of 26 April 2019, Journal of Laws 2019, item 609; see also ECJ, *A.B. and Others* (n. 6), para. 137.

102 See also ECJ, *A.B. and Others* (n. 6), para. 138.

103 See above n. 58.

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IV. Why Judicial Appointments Need to be Rectified

1. Axiological and systemic objectives

There are compelling reasons to address and regulate in a clear manner the problem of defective judicial appointments. The failure to take remedial action on appointments obtained in manifest breach of the law would be tantamount to tolerating lawlessness. Itself it would undermine the rule of law and the very foundations of the legal system. Since, *ex iniuria ius non oritur*, then the violation of the law must be condemned and accounted for.

The rectification of defective judicial appointments should be seen as part of repairing the judicial system, bringing it back to its rightful place and systemic role. The courts, as the third branch, have a vital role to play vis-à-vis the executive – in controlling the legality and legitimacy of acts of public authority and providing that the government and administration can be held accountable for their actions, as well as vis-à-vis the legislature – in making duly enacted laws enforced. The latter task also extends to ensuring compliance of national laws with the ECHR and the Union law and the effective implementation of the supranational law.

To ensure that those adjudicating as judges have unquestionable authority to do the above, and meet the substantive and ethical criteria for their position, comes as a necessity to restore the proper separation of powers and detach the courts and judges from the undue influence of other branches. Addressing irregular nominations is thus needed since the process of appointing judges in Poland has become dominated by the political authorities from whom judges should stand independent. The government, first, have designed such mechanisms to fill judicial positions, especially those at the highest level, with people they support and, then protected the appointments made in this way by instituting statutory,[104]

104 For example, restricting and then entirely excluding judicial review of NCJ's resolutions refusing recommendations to the Supreme Court (see Section III.5 above), or adopting a series of statutory arrangements to preclude judicial review of complaints over the independence of judges appointed, esp. the 'Muzzle Law' (n. 83).

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disciplinary,[105] adjudicatory[106] and other measures.[107] The systemic and institutional goals of transiting back to 'a democratic State ruled by law'[108] cannot be fully achieved without redressing unlawfully obtained judicial status and defective acts issued by irregularly appointed persons as well as holding accountable those who organised or participated in unlawful procedures and benefited from the situation created thereby.

2. Ensuring the capacity of judges to adjudicate

To hold the authority of effectively ruling within a given legal order, judges must meet the conditions which that very legal order sets. This necessarily includes appointing judges in a manner consistent with the rules of that legal order. If, however, judges were appointed in violation of such conditions their legitimacy to adjudicate is compromised, their independence impaired, and the legal force of their rulings is questionable.

Meanwhile, in light of the case law of the ECJ, the ECtHR, and domestic courts, including the Supreme Court and the Supreme Administrative Court, a part of the national judges in Poland has been appointed in manifest breach of the fundamental rules of the procedure for the appointment of judges. This undermines the attributes of them being 'established by law, independent and impartial'. The hearing of cases by courts with their participation may not guarantee the necessary requirements of the right to a fair trial. Then, given that judges appointed under national law adjudicate in a multicentric legal system and may rule on questions concerning the application or interpretation of EU law, they must meet

105 Initiating disciplinary proceedings and applying administrative measures of similar effect (dismissal from delegation to a higher court, suspension from adjudicating, transfer to another judicial division) against judges committed to preserving judicial independence and, in particular, undertaking to assess the independence of judges appointed with the participation of the new NCJ.

106 Proceedings before the Constitutional Tribunal to delegitimize the rulings of the ECJ and ECtHR related to changes in the Polish judicial system, e.g. in cases: Kpt 1/20, U 2/20, P 7/20, K 3/21, K 6/21, K 7/21; as well as certain resolutions passed by the Supreme Court in formations involving defectively appointed persons, e.g., in case I NOZP 3/19.

107 For example, by carrying out media campaigns generally against judges as well as 'individualized' campaigns to attack judges who express critical opinions about changes made to the legal and judicial system.

108 Article 2 of the Polish Constitution proclaims Poland as 'a democratic State ruled by law'.

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the requirements essential to effective judicial protection.[109] Thus, for their rulings to have effect under the Union legal order, they must meet the necessary minimum requirements that this legal order indicates. If they fail to meet them, they are not 'European Judges', and their rulings become inapplicable in the sphere of Union law and, accordingly, should be disregarded. Likewise, under the ECHR, persons appointed in a procedure that cannot be reconciled with the requirements of Article 6(1) ECHR, do not warrant the Convention right to a court and a fair trial, thus generally failing to provide adequate protection of individual rights and freedoms. Accordingly, not addressing and regulating defective appointments and their consequences perpetuates the continued violation of Union law, the ECHR and the national Constitution and fails to restore judges' capacity to adjudicate effectively.

Ensuring the ability of judges to adjudicate takes on material and formal aspects that come together. In the material aspect, it is necessary to make sure that the persons irregularly appointed have the technical competence to adjudicate, that is, their knowledge and experience are adequate for the position, while their personal independence cannot be called into question either. In the formal aspect, this means rectifying or corroborating the defective acts of appointment so as their status as judges as such is no longer in dispute and may not be challenged in the course of the proceedings and serve as the basis for appealing their rulings.

3. Reinforcement of the rule of law and judicial independence

The review of unlawful judicial appointments is also motivated by the reinforcement of the rule of law and the guarantee of judicial independence. First of all, it should convey a clear message that judges must not rely in their career on the favour of political actors, nor flatter or associate with them.

Secondly, it should render elementary justice to those judges who behaved decently, boycotted flawed procedures before the NCJ and did not legitimise unconstitutional arrangements. Such judges regularly suffered adverse consequences because of their stance: disciplinary proceedings, suspension from adjudication, forced transfer to another court division which amounted to *de facto* degradation, or defamation campaigns by

109 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 10), para. 40.

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the government-controlled media.[110] Now, the failure to reopen, especially senior judicial positions (e.g., in the Supreme Court, the Supreme Administrative Court, or the courts of appeal as well) which are of a limited number, would unduly preserve the current state of affairs for years to come. Indeed, it would be equal to rewarding those who participated in unlawful procedures and were appointed in a blatant violation of the law, while, indeed, sanctioning those who followed the law and stood up for judicial independence.

Thirdly, transitional constitutionalism, one of the main concepts developed in this book,[111] argues that judges can play an important role in re-establishing standards of the rule of law and democracy. Yet can this role, at the domestic level, be entrusted to those appointed to judicial positions in violation of the rule of law? May those who violated standards now restore them? Do they have the legal and ethical mandate for doing so? This is a legal issue, for not only their status, but the legal force of their rulings has been, is, and may continue to be challenged in the future. Without addressing these questions, one way or another, the transition involving these persons will be tainted at its very roots. This is also an ethical dilemma, for the conduct of flawed appointees was held to the detriment of judges defending the rule of law and judicial independence. By participating in unconstitutionally shaped and conducted competitions for judicial positions, they have legitimized changes made in violation of the law. They benefited from doing so and accepted acts of appointment even though they were aware that they were made following a flawed procedure.

V. Determinants for Rectifying Defective Appointments

While appointing judges in an unlawful manner violates the rule of law, the consequences of the measures taken to rectify the situation may interfere with an effective exercise of the right to a court, the preservation of legal

110 See i.a. Jakub Kościerzyński (ed), *Justice under pressure – repressions as a means of attempting to take control over the judiciary and the prosecution in Poland. Years 2015–2019* (Warsaw: Polish Judges Association 'Iustitia' 2021), https://www.iustitia.pl/en/activity/opinions/3724-report-justice-under-pressure-years-2015-2019; Association of Judges 'Themis', *From bad to worse – the Polish judiciary in the shadow of the 'muzzle act'. Annual report for 2020*, http://themis-sedziowie.eu/materials-in-english/from-bad-to-worse-polish-judiciary-in-the-shadow-of-the-muzzle-act-report-updated-for-20-november-2020/.

111 See the contribution of Armin von Bogdandy and Luke Dimitrios Spieker.

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certainty and the binding force of judicial decisions (*res judicata*), or the guarantee of the irremovability of judges, all of which also form part of the rule of law. To adopt solutions to deal with defective judicial appointments and to determin the consequences of the irregularities that have occurred requires looking at the bigger picture, involving identification and balancing of all relevant factors.

1. Ensuring an effective right to a court

The restoration of the rule of law should re-instate the primacy of the law over the political will, entrust the society's destiny to fully democratic choices, limit the arbitrariness in the actions of public authorities, and bring back the accountability of decision-makers. This necessarily includes reinstating the full guarantee of independence of the courts and judges, which is not an end in itself and is not meant as judges' privilege. It serves to ensure effective legal protection and the right to a fair trial before a court that meets the necessary conditions to be capable of adjudicating without any undue outside influence.

Accordingly, the right to a fair trial, consistent with the requirements of the rule of law and effective judicial protection, should be guaranteed before a body that has the status of a 'court', whose holding is not determined by the mere name given to the body, but by the scope of its tasks and the attributes it enjoys in carrying them out.[112] Among the requirements, the key ones are the establishment of the court by law and the guarantees of its independence and impartiality. They are constitutive in nature, in the sense that when not meeting any of them, the body cannot be properly recognized as a 'court'.

The effective exercise of the right depends on a number of factors: the accessibility of the courts, their adequate staffing in terms of the quality and the number of judges and other personnel, a properly designed judicial procedure, the efficiency and speed of the proceedings, the effective execution of judicial decisions, the access to legal aid, the costs of participating in the proceedings, etc. While remedying flawed judicial appointments is intended to restore the full enjoyment of the right to a court, then the excessive measures could as well lead to an adverse effect, remove part of

112 See Supreme Court, Resolution of 23 January 2020 (n. 70), para. 15.

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the judges from adjudicating, delay the processing of cases, disorganise the judiciary and thus significantly impede the exercise of this very right.[113]

2. Interests of the parties to the closed proceedings

The consideration of the rights and interests of the parties to proceedings closed by a final decision while handled by defective appointees supports preserving the legal effects of such decisions to the extent possible. The parties should not suffer additional, excessive consequences of the wrongful situation caused by the State. In general, the parties had no or little influence on the composition of the court deciding their case. Specifically, the motions for the recusal of judges can be an instrument of little use here, especially when the legislature – protecting defective appointments – explicitly prohibited the examination of the legitimacy of judicial appointments, and entrusted consideration of motions in this regard to the newly established court (Chamber of Extraordinary Control and Public Affairs of the Supreme Court),[114] which has been fully composed of new appointees (thereby *de facto* adjudicating, at least indirectly, *in causa sua*).

The considerations indicated above speak against an automatic cancellation of all rulings made by or with the participation of defectively appointed persons. Therefore, in principle, challenging their legal force should not be based solely on the defectiveness of the judge's appointment, but be more individualised and point to additional grounds related to the conduct of the judge and the circumstance of the cases decided by that judge. Accordingly, the parties may be provided with a time-limited right to challenge rulings made by defectively appointed persons.[115]

113 Similarly, see Constitutional Tribunal, judgment of 24 October 2007 concerning court assessors (junior judges), case no. SK 7/06, para. III.6.2.

114 So called "Muzzle Law", i.e. the Act of 20 December 2019 amending the Act on the organisation of ordinary courts, the Act on the Supreme Court and certain other acts, Journal of Laws of 2020, item 190.

115 In the case of Polish court assessors (junior judges), whose independence was challenged due to the discretionary power of the Minister of Justice to dismiss them, the ECtHR held – after the Polish Constitutional Tribunal – that, in principle, court proceedings in which the assessors had ruled should not be reopened; see ECtHR, *Henryk Urban and Ryszard Urban v. Poland*, judgment of 30 November 2010, case no. 23614/08, paras. 56 and 64–66; cf. Constitutional Tribunal, case no. SK 7/06 (n. 113), paras. III.6.4 – 6.6 and III.7.5.

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By contrast, when considerations of protecting the interests of the parties do not substantiate upholding the legal force of a defective ruling, the denial of its effects may be direct. In the preliminary ruling in the case of Judge Żurek (C-487/19), the Court of Justice held that an order of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court could be declared null and void, when it was issued by a judge appointed in clear breach of fundamental rules of judicial appointment procedure.[116] The case involved a single-person decision of the Supreme Court finding inadmissible Judge Żurek's appeal against an NCJ resolution which discontinued the action he brought before that body. He challenged the order of the President of the Regional Court to transfer him, against his will, to another court division, which he considered a quasi-disciplinary measure of demotion. The single-judge decision was issued regardless of the appellant's motion for the recusal of all persons appointed to that Chamber, as they were nominated in the unlawful procedure.

3. Legal certainty and *res judicata*

The preservation of legal certainty and stability of judicial decisions (*res judicata*) are fundamental to the functioning of the legal order and the protection of the rights and interests of private parties. Yet, both the right to an independent and impartial court established by law and the preservation of legal certainty are elements and manifestations of the principle of the rule of law.[117] Their weighing becomes a question of maintaining a balance within this fundamental principle. Therefore, neither of them may enjoy absolute protection.

A departure from legal certainty and *res judicata* is justified only when there is a pressing need necessitated by circumstances of a substantial and compelling nature, such as the correction of fundamental defects or a miscarriage of justice.[118] Still, the principle of legal certainty must also give way at times, because maintaining it at all costs, at the expense of the

116 ECJ, *W.Ż.* (n. 17), para. 161. It is being argued that with this case the ECJ has proclaimed the *sententia non existens* doctrine as a new remedy and autonomous concept of EU law, see Przemysław Tacik, 'Sententia non existens: A new remedy under EU law?: Waldemar Żurek (W.Ż.)', CMLRev 59 (2022), 1169–1194 (1182 et subseq.).

117 Cf *Ástráðsson* (n. 11), paras 211, 237–238.

118 ECtHR, *Ástráðsson* (n. 11), paras 238 and 240.

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guarantee of an independent and impartial court established by law, can do even more damage to the rule of law and public confidence in the judiciary.

Indeed, it is the criterion of the gravity of a breach of law in the judicial appointment procedure that represents a balanced approach. The more serious the violation in the appointment procedure for judges, the less important will be the consideration of protecting legal certainty, the stability of judicial decisions and the upholding of a judicial position by a defectively appointed person.[119]

In the case initiated by Judge Żurek's appeal against his forced transfer to another judicial division, the Court of Justice pointed out that if a decision was made by a body that does not constitute an independent and impartial tribunal previously established by law, no consideration relating to the principle of legal certainty or the alleged finality of the decision can be successfully relied on in order to prevent a court from declaring such a decision to be null and void.[120] That said, the specific nature of this case, in which there occurred no considerations of protecting the rights and interests other than those of the party initiating the domestic proceedings (Judge Żurek himself), implies that the Court's guidance may not be similarly applicable to other cases, both as far as the lack of legal force of the domestic decision is concerned (declaring it null and void) and the disregard of considerations of legal certainty.

Another specific situation was that of the Disciplinary Chamber of the Supreme Court, established in 2017 and abolished in 2022 (replaced with a new Chamber of Professional Responsibility), which served as the main bogeyman and mechanism of repression of judges in Poland. The Chamber was unanimously denied the attribute of an independent court by the very Supreme Court,[121] the European Court of Human Rights,[122] and the ECJ.[123] Considering the original unconstitutionality of the establishment of the Disciplinary Chamber,[124] it is legitimate to deny the legal force of

119 ECtHR, *Ástráðsson* (n. 11), para. 244 et subseq.
120 ECJ, *W.Ż.* (n. 17), para. 160.
121 Supreme Court, Resolution of 23 January 2020 (n. 70), para. 45.
122 ECtHR, *Reczkowicz* (n. 15).
123 ECJ, *Disciplinary regime for judges* (n. 6), and indeed ECJ, *A.K. and Others* (n. 6).
124 The Supreme Court held that 'the Disciplinary Chamber … structurally fails to fulfil the criteria of an independent court within the meaning of Article 47 of the Charter and Article 45(1) of the Constitution of the Republic of Poland and Article 6(1) ECHR, and that it is an extraordinary court which cannot be established in

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the rulings issued by the Chamber.[125] Nonetheless, even here some caution might be recommended. Indeed, some of the Chamber's rulings concerned the disciplinary liability of persons charged with committing an 'ordinary' offence, such as driving under the influence of alcohol. The risk of statutory prescription and the risk of impunity for such disciplinary offences, support a need to carefully balance whether absolute, automatic invalidity of all its rulings is the most appropriate remedy. The lack of impunity of offenders is also a value that merits protection. Perhaps a solution to consider could be a summary procedure in which a dedicated court would, within a specified period of time, have to confirm the legal force of such rulings. Failure to reaffirm them would be tantamount to removing the rulings.

4. Irremovability of judges

The principle of irremovability of judges is one of the fundamental guarantees of their status to protect them from any external intervention or pressure. It is secured by the Polish Constitution (Article 180(1)) and, as a key element for the maintenance of judicial independence, is also – as affirmed in the case law of both European Courts – covered by the guarantees of Article 6(1) of the ECHR[126] and the EU principle of effective judicial protection.[127]

Since the *Wilson* judgment, the ECJ has placed the principle of irremovability on the list of guarantees of judicial independence,[128] although it did invoke it earlier.[129] The *Wilson* formula has traditionally been cited by the ECJ in subsequent rulings on judicial independence, including the

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the times of peace according to Article 175(2) of the Constitution of the Republic of Poland'; see Resolution of 23 January 2020 (n. 70), para. 45.

125 See Supreme Court, Resolution of 23 January 2020 (n. 70), points 1 and 4 of the operative part.

126 See e.g., ECtHR, *Baka v. Hungary*, judgment of 23 June 2016, case no. 20261/12, para. 172; ECtHR, *Ástráðsson* (n. 11), para. 239; see also Spano (n. 52), 220; Marcin Szwed, 'Problematyka nieusuwalności sędziów w orzecznictwie Europejskiego Trybunału Praw Człowieka', Przegląd Konstytucyjny 3 (2021), 145–177.

127 ECJ, *Indpendence of the Supreme Court* (n. 11), para. 75.

128 ECJ, *Graham J. Wilson v. Ordre des avocats du barreau de Louxembourg*, judgment of 19 September 2006, case no. C-506/04, ECLI: EU:C:2006:587, paras. 51 and 53.

129 See ECJ, *Raija-Liisa Jokela i Laura Pitkäranta*, judgement of 22 October 1998, cases nos. C-9/97 and C-118/97, ECLI:EU:C:1998:497, para. 20; ECJ, *Walter Schmid*, judgment of 30 May 2002, case no. C-516/99, ECLI:EU:C:2002:313, para. 41.

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Portuguese Judges case,[130] or the independence of Polish Courts.[131] In the *Independence of the Supreme Court* case, the ECJ used it to shield a group of Supreme Court Judges from premature removal from office.[132] In the present context, then, could the guarantee of irremovability prevent removing from office those unlawfully appointed as judges?

The guarantee of the irremovability is not absolute,[133] thus, it would be permissible to deprive of judicial positions those appointed therein in breach of the law, yet under strict conditions of formal and substantive legality as well as proportionality. In principle, the removal of a judge would be thus possible under sufficiently precise statutory provisions, following the appropriate procedure, and proportional to legitimate objectives, that is, on account of legitimate and compelling grounds, e.g., in case of a judge deemed unfit to carry out judicial duties due to incapacity or a serious breach of judge's obligations.[134]

Yet, it should be noted that the Union law (or the ECHR) does not enforce such a measure. Accordingly, the principle of primacy of EU law could not be invoked to overcome a national guarantee of irremovability that has a constitutional rank (Article 180(1) Constitution), if it was deemed that those persons are covered by it. For in light of the European requirements, it is sufficient that defective appointees do not rule on cases to which the requirements apply. The potential mechanism for removing from office those appointed in manifest breach of the law must be decided at the

130 ECJ, *Associação Sindical dos Juízes Portugueses* (n. 10), para. 45.

131 ECJ, *Minister of Justice and Equality (Deficiencies in the system of justice)*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586, para. 64; ECJ, *Independence of the Supreme Court* (n. 11), para. 76; ECJ, *Independence of the ordinary courts* (n. 6), para. 113.

132 See i.a. Paweł Filipek, 'Nieusuwalność sędziów i granice kompetencji państwa członkowskiego do regulowania krajowego wymiaru sprawiedliwości – uwagi w świetle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej', Europejski Przegląd Sądowy 2019/12, 4–14 (9–11); Piotr Bogdanowicz, Maciej Taborowski, 'Regulacje dotyczące stanu spoczynku jako narzędzie służące odsunięciu określonej grupy sędziów od pełnienia urzędu na stanowisku sędziego Sądu Najwyższego – uwagi na tle wyroku Trybunału Sprawiedliwości z 24.06.2019 r., C-619/18, Komisja Europejska przeciwko Rzeczypospolitej Polskiej', Europejski Przegląd Sądowy 2019/12, 15–25.

133 ECJ, *Independence of the Supreme Court* (n. 11), para. 76; ECtHR, *Ástráðsson* (n. 11), para. 239.

134 ECJ, *Independence of the Supreme Court* (n. 11), paras 76 and 79; cf. ECJ, *Josef Köllensperger GmbH & Co. KG, Atzwanger AG*, judgment of 4 February 1999, case no. C-109/97; ECLI:EU:C:1999:52, paras 21 and 24.

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national level. The European requirements, on the one hand – may provide additional legitimacy for it, as the adjudicating of judges who do not meet such requirements undermines the legal protection of the Union law and the ECHR, while on the other hand – can contribute to keeping national arrangements in check by defining the conditions for their use so that they are not excessive (disproportionate) and do not allow for abuse of State power.

Still, we may point to several arguments for the permissibility of removal from office of defective appointees, despite the constitutional guarantee of the irremovability of judges.

Firstly, in view of its unconstitutional nature, the NCJ could not effectively select candidates for judicial positions and could not formulate legally valid requests to the President of the Republic for appointment to judicial positions. As a result, the President – not having the constitutionally mandatory requests – could not effectively make acts of appointment of the persons concerned. Thus, the unlawful acquisition of judicial positions should itself be ineffective.

Secondly, since these persons were appointed as judges in an unconstitutional procedure, then, to the extent of their unconstitutionally gained status, they are not eligible to claim constitutional protection (*ex in iuria ius non oritur*). This conclusion can be, indeed, substantiated irrespective of whether or not they are recognised as judges. If it were considered that they had not been established as judges at all (they are non-judges), their protection against removal from office would not be born in the first place. If, on the other hand, they were considered to have been established as judges, though in a defective manner, the unlawfulness of their status would nevertheless preclude protection under the guarantee of irremovability.

Thirdly, as the ultimate yardstick for permissible removal of a judge, the ECJ, in the context of protecting Supreme Court Judges from premature termination of their functions, pointed to the absence of any 'reasonable doubt in the minds of individuals as to the imperviousness of the court to external factors and its neutrality with respect to the interests before it'.[135] The elimination of the existing reasonable doubts, especially when already confirmed by final international or domestic rulings, and the reinstatement of the court's independence would further legitimize the removal from that court of persons whose appointment therein raised those very doubts. The guarantee of irremovability safeguards the independence of

135 ECJ, *Independence of the Supreme Court* (n. 11), para. 79.

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judges; however, if it has already been established that unlawfully appointed persons do not warrant independence due to the nature and gravity of the irregularities in their appointment procedure, then the guarantee of their irremovability becomes devoid of purpose.

Fourthly, an additional argument supporting the denial of constitutional protection to unlawful appointees is their intentionality in participating in a breach of the law by engaging in an unlawful procedure and accepting an act of appointment issued in its wake (bad faith). Since those unlawfully appointed were aware of the flaws of the procedure, yet, they participated in it and accepted the act of nomination – now should not benefit from their own unlawful conduct. Those who applied to the NCJ's selection for judicial positions must have been aware of the underlying constitutional objections to the new procedures for taking up the office of judge, which exposed the undue influence of political authorities on the process of filling judicial positions.[136]

The impact of the proportionality criterion could be demonstrated in differentiating the situation of irregular appointees by the nature and gravity of the irregularities that occurred in the process of their appointment as well as the level of the court to which they were packed. In general, the intensity of breaches in the nomination procedure has been the highest for appointments to the Supreme Court (see Section III.4 and 5 above), so the cumulative effect there, is also the strongest. Likewise, certain 'courts' – in particular the Disciplinary Chamber and the Chamber for Extraordinary Control and Public Affairs of the Supreme Court – have themselves been compromised in their entirety. They were newly created, packed exclusively with new appointees, granted special character and powers so that other State authorities could use them to generally control the content of judicial decisions in Poland. In their case, it is not only the individual intention of the appointees to participate in unlawful procedures and bodies but also the deliberateness of the national authorities to introduce arrangements that cannot be reconciled with the rule of law and judicial independence,[137]

136 The Supreme Court, while referring to those newly appointed to it, stated itself that '[i]n 2018–2019, there was a special "transfer window" in the Polish legal system in which appointments to serve on the Supreme Court were handed out in flagrant and manifest breach of the constitutional standard, and with full awareness of it by all concerned', Supreme Court, decision of 15 July 2020, case no. II PO 16/20, para. 50; see also Supreme Court, Resolution of 23 January 2020 (n. 70), para. 45.

137 See n. 56.

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that justify the dismantling of such bodies while denying their members protection against removal from office.

VI. Rectification of Defective Judicial Appointments

Addressing the irregularities of judicial appointments may range from an extreme – either '*doing nothing*'; or '*throwing everyone out*' – to some moderate arrangements. Extreme solutions, briefly discussed in points 2 and 3 below, may produce consequences that are difficult to accept. In their case, the cure may turn out to be as bad as the disease. In contrast, moderate arrangements (points 4 and 5) are supported by the balancing of all relevant factors (see Section V above).

1. A precondition: re-composition of the NCJ

A prerequisite for remedying defective judicial appointments is to address the root cause of their irregularity, that is, the unconstitutional nature of the current National Council of the Judiciary. Without doing so, any subsequent appointments involving the NCJ will equally be flawed. The composition of the NCJ must ensure that it is able to perform its task of objectively selecting candidates for judicial posts in a manner that does not raise doubts as to the legitimacy and independence of that body and, accordingly, the legitimacy and attributes of the persons nominated by it.

It does not need to be a return to exactly the same model as before, but it must still fit within the minimum constitutional parameters. The Constitution resolves that although the NCJ is composed of representatives of all three branches of state power, the judiciary forms a large majority within it, as 17 of the 25 seats are for judges.[138] In line with the NCJ's crucial task of guaranteeing the independence of courts and judges,[139] its 15 judge-members should be selected by their peers (by other judges) and not by political authorities. This was confirmed by the Constitutional Tribunal back in 2007.[140]

138 See Art. 186(2) Constitution.
139 Art. 186(1) Constitution.
140 See n. 69.

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2. Recognition of defective appointments

The option of full recognition of defective judicial appointments could be looked into. It is an option of not implementing any corrective measures, and indeed, doing nothing about the irregularities in the establishment of a large group of judges. It would amount to adopting a 'thick line' separating the past from the future and accepting the situation as it is.

However, such recognition does not appear to be a valid solution. It does not resolve acute problems but rather evades them. It still leaves the door open to further challenging irregular appointments and rulings made by defectively appointed persons both domestically and in international procedures. It also rewards those who intentionally infringed the law for personal gains, entrenches the holding of unlawfully obtained positions, and severs judges who stood up for the rule of law and judicial independence. As such, it is deeply unjust. For these reasons, it is inevitable to resolve the problem of defective appointments by expressly addressing the flaws in the appointment procedure identified in international and domestic jurisprudence.

In addition, the acknowledging of irregular appointments would at least require an explicit act of the legislature. Eventually, since the appointments followed a procedure contrary to the Constitution, their confirmation would in principle require approval by an act of a constitutional rank, thus redressing and ending the resulting infringements. Failing a constitutional act – which, because of the 2/3 qualified majority threshold,[141] may be difficult to pass – it might probably be acceptable to confirm appointments by ordinary legislation,[142] if enacted to bring the courts into compliance with constitutional and European requirements, taking into account the applicable case law, including the ECtHR and the ECJ. The enactment of such a law could be preceded by seeking an opinion from the Venice Com-

141 See Art. 235(4) Constitution.

142 It should be kept in mind that national authorities have already tried to statutorily legalize irregular judicial appointments, e.g., by introducing a definition of a 'judge' as a person appointed by the President of the Republic, or prohibiting a review of the legality of the appointment, and introducing new disciplinary offenses for this purpose). They have not fully produced the results expected by the authorities. They have actually reduced challenging irregular judicial appointments, but have not eliminated it, as they are disregarded or contested by some courts. See also, among others, infringement proceeding in case C-204/21 *Independence and privacy of judges* (n. 96).

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mission. Still, the ultimate arbiter of the legitimacy of such arrangements would be the jurisprudential stance of national and European Courts.

3. Rejection of defective appointments

The opposite extreme is to reject all appointments made in manifest violation of the law. This 'zero option', relies on cancelling defective appointments and restoring the situation *quo ante*.[143]

Such a solution satisfies the requirement of justice, in the sense of taking away benefits illegitimately and unlawfully obtained. It is, therefore, morally justified. However, it would have serious public implications, especially for the functioning of the judicial system. It would cause a sudden loss of a significant number of judges, delay the handling of cases, increase the inefficiency of the judicial system, and ultimately curtail the right of individuals of access to a court and further erode public confidence in the judiciary. For these reasons, this is not a reasonable solution either. In addition, the annulment of judicial appointments requires consideration of its consistency with the guarantee of the irremovability of judges (see Section V.4 above).

4. Balancing exercise: search for temperate options and a lesson from Ástráðsson

Indeed, the manner of rectifying defective appointments should be balanced and represent a compromise between conflicting interests and values. It should weigh considerations of the full reinstatement of the right to a properly established court offering necessary guarantees, the interests of the parties to court proceedings, the principles of legal certainty and stability

143 For example, the draft act on regulating judicial appointments, drawn up by the Polish Judges Association *'Iustitia'*, provides that resolutions of the defective NCJ recommending judges are null and void *ex lege*, the judicial positions defectively obtained are considered vacant, and the employment relationships of these judges were not established; see Arts 11 and 12 Draft Act amending the Act on the National Council of the Judiciary, the Act on the Supreme Court and certain other acts, https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4348-naprawimy-fundamenty-sadow-oszczedzimy-miliony-euro-przedstawiamy-pakiet-projektow-ustaw-o-przywroceniu-praworzadnosci. See also Free Courts Initiative (*Wolne Sądy*), 10 Commandments for Restoring the Rule of Law in Poland, Gazeta Wyborcza of 4 October 2021, para. 2, https://wyborcza.pl/7,173236,27646392,10-commandments-for-restoring-the-rule-of-law-in-poland-free.html.

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of judicial decisions, while also bearing in mind certain constitutional constraints, e.g., related to the guaranteed irremovability of judges, as well as policy considerations, like the restoration of public confidence in the judiciary, yet also the passage of time.

From the perspective of ECHR standards and Union law, States are left with a considerable margin of appreciation in how they repair the judicial appointment procedure and address defective appointments already made. Neither the EU law nor the ECHR indicates any single method of how this should be done. The limit of the State's discretion here is to comply with the conclusions of the ECtHR's and the ECJ's rulings and restore courts that meet the necessary requirements of the Union law and the ECHR. Ultimately, whether the measures taken by the State meet the minimum European standards may be subject to further assessment by the competent bodies of the European Union and the ECHR, including the ECJ and the ECtHR.

As a result of the *Ástráðsson* ruling, in which the ECtHR found that a judge appointed to the new Icelandic Court of Appeal was not established by law, Iceland suspended the judges concerned and carried out a new procedure to fill vacated positions. First, once the ECtHR's seven-judge chamber had delivered its ruling on 12 March 2019, the Court of Appeal's activity was immediately suspended, and after it was restored, the four defectively appointed judges did not adjudicate in it. They remained in the Court of Appeal as inactive members. Subsequently, new competitions were opened for the vacant positions in that Court. The defectively appointed persons could also apply therein. Indeed, three of the four submitted their candidacies, were accordingly assessed by the Evaluation Committee, then recommended for the positions, and eventually reappointed.[144] Technically, these judges now occupy positions other than those to which they were originally unlawfully appointed and their status is no longer questioned. The fourth of the irregularly appointed judges who did not apply anew, remained inactive in the Court of Appeal not hearing cases and no cases being allocated to him.

144 See Action report of the Government of Iceland of 15 December 2021 to the Committee of Ministers of the Council of Europe, DH-DD (2021) 1360, 5.

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The arrangement adopted by Iceland fully implemented the ECtHR judgment,[145] ensured that cases would not be decided by judges affected by the judgment either directly (the judge ruling on the applicant's criminal case) or indirectly (the three other judges appointed in the same defective manner), while at the same time avoided the controversy as to whether the removal from judicial office of persons appointed therein in manifest breach of the law, *per se*, violates the constitutional guarantee of the irremovability of judges.

Interestingly, the applicant did not apply domestically for a reopening of his case. Such an individual measure was not ordered by the ECtHR either.[146] Moreover, the ECtHR expressly indicated that its judgment did not impose on Iceland an obligation to reopen all similar cases that have since become *res judicata*.[147] However, the similar reservation was not made by the ECtHR in the judgments concerning appointments to the Polish Supreme Court. The Court refrained from deciding on both individual and general measures,[148] leaving their choice to the respondent State.[149]

While in light of the *Ástráðsson* judgment, no automatic reopening of all cases decided by the four defectively appointed judges was required, nonetheless, the parties to such cases were at liberty to request a reopening of their case.[150] Furthermore, Iceland established a new Court on the Reopening of Judicial Proceedings which is – upon parties request not subject to any time limit – to decide whether a case should be reopened i.a. on grounds of the submission of new information which is likely to have had a significant impact on the outcome of the case if it had been available

145 This was confirmed by the decision of the Committee of Ministers of the Council of Europe of 9 March 2022 to close the supervision of the case, CM/Del/Dec(2022)1428/H46–16.

146 Responding to the Court's question as to whether he would seek such a remedy, the applicant initially replied that he would not, then changed his mind but, in the Court's view, did not sufficiently explain this change; see ECtHR, *Ástráðsson* (n. 11), para. 313.

147 ECtHR, *Ástráðsson* (n. 11), para. 314.

148 ECtHR, *Dolińska Ficek and Ozimek* (n. 19), para. 368; ECtHR, *Advance Pharma* (n. 15), para. 364.

149 This choice should be guided by 'the conclusions and spirit of the Court's judgment' and subject to the supervision by the Committee of Ministers of the Council of Europe, see ECtHR, *Dolińska Ficek and Ozimek* (n. 15), para. 367; ECtHR, *Advance Pharma* (n. 15), para. 363; cf. ECtHR, *Ástráðsson* (n. 11), para. 312.

150 Action Report of the Government of Iceland, 6.

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when the case was first tried. Such category of 'new information' covers also judgements of international courts, including the ECtHR.[151]

The measures adopted by Iceland in the implementation of the *Ástráðsson* judgment may offer a model of how to deal with unlawful appointments and the rulings made by flawed court benches. These include (i) the immediate recusal (suspension) of defectively appointed persons from hearing cases; (ii) the carrying out of new nomination procedures for the defectively filled judicial positions; (iii) leaving it open to the parties to the proceedings to request reopening of their cases on grounds of defective court composition; (iv) the setting up of a specialised court to decide on the reopening of proceedings.

Whereas the Icelandic experience provides a source of inspiration for similar situations, however, not all of their arrangements can be easily followed in other cases involving defective appointments. Given the number of such appointments in Poland, which continue to grow, it does not seem feasible to immediately suspend from hearing cases all judges appointed in breach of the law. Likewise, it does not seem practicable to repeat all the nomination procedures carried out by the new NCJ since 2018. Such mechanisms should be reserved for the highest levels of the judiciary, especially the Supreme Court and the Supreme Administrative Court, as well as for the courts of appeal. The staffing of these courts with unlawful appointees is particularly blatant since, first – they exercise a supervisory role over the lower courts, they issue final rulings and are responsible for the uniformity of national jurisprudence and secondly – these courts should be composed of judges of the highest professional and ethical competence.

A reasonable point of departure for a balanced general measure on final rulings made by defective appointees should be no automatic reopening of cases, instead granting the parties to the proceedings an individual right to request the reopening of their cases. However, for the sake of legal certainty, the right to request reopening of proceedings should not be indefinite. On the other hand, where cases have not yet become *res judicata*, the deficiency in the court composition should be taken into account *ex officio*. It goes without saying that an assessment of the defective court composition in no case can be made by persons who were also defectively appointed.

151 Action Report of the Government of Iceland, 6–7.

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5. Verification mechanisms

The extreme options may give rise to legal, ethical and social questions, urging the search for more nuanced procedures weighing up different rationales and values that will ultimately lead to a decision on whether a judge should remain in the irregularly awarded position. Conceivable mechanisms may vary depending on the scope of persons subject to or exempted from verification (all unlawfully appointed individuals, or not all such persons, e.g., exempting junior judges); the way of initiating the procedure (*ex officio*, or at the request of the person concerned, i.e. the irregular judge); the exact scope of the substantive verification (verification criteria); the body undertaking the verification (e.g., the NCJ once its constitutionality is restored, or another body set up for this very purpose); the consequences of a negative verification (the removal from the profession, the return to the previously held position, the reimbursement of unlawfully received salaries, or the eligibility to run in new competitions for judicial positions), etc.[152]

The mechanism for rectifying defective judicial appointments should, in general, meet similar conditions to those of the very procedure for appointing judges, for it may, indeed, lead to a decision on the continuation or termination of the judicial functions of a particular person. Therefore, it should, in the first place, be adopted by an **Act of Parliament** which will: (i) determine who is liable to be verified and who is exempt from verification; (ii) designate the body responsible for carrying out the verification; (iii) specify the verification procedure, including guarantees for the rights of persons subject to verification; and (iv) set out the criteria of the verification decision. Furthermore, the legislature should settle the consequences of a possible change in the status of judges following their negative verification. It should also determine the legal effectiveness of decisions issued by unlawfully appointed judges and possibly provide for a legal remedy to challenge them.

The verification itself should be based on objective substantive **criteria** formulated with as much clarity as possible, to prevent arbitrary decisions.

152 See proposals in i.a. Pech, Jaraczewski (n. 77), 76; Draft Act amending the Act on the National Council of the Judiciary, the Act on the Supreme Court and certain other acts, prepared by the Polish Judges Association *'Iustitia'*, https://www.iustitia.pl/dzialalnosc/opinie-i-raporty/4348-naprawimy-fundamenty-sadow-oszczedzimy-miliony-euro-przedstawiamy-pakiet-projektow-ustaw-o-przywroceniu-praworzadnosci; 10 Commandments for Restoring the Rule of Law in Poland (n. 143).

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Such criteria could include: (i) checking whether the nominee met the statutory requirements for appointment to the position for which he or she applied; (ii) whether he or she was nominated whilst another candidate satisfied the criteria of merit to a higher degree; (iii) whether there were any blatant procedural infringements likely to have an effect on the outcome of the competition; (iv) whether there is evidence of undue political influence in obtaining the nomination, etc.

The body carrying out the verification procedure should guarantee the fairness of the proceedings and be independent of other authorities. It is reasonable to entrust such verification to the National Judicial Council after it has healed itself. In principle, a judicial remedy should be available, especially in the case of an unfavourable decision for a judge defectively appointed.

6. Mitigating measures

The verification may cover a significant number of persons whose status varies: junior judges, judges promoted to higher judicial positions, persons appointed to the Supreme Court, including those appointed as judges for the first time and straight to the top judicial positions etc. Accordingly, the type of competition before the NCJ is linked to the resulting level of a person's liability for involvement in an unlawful procedure. With this in mind, as well as the social impact of the verification mechanism, it is legitimate to consider complementing the verification process with some mitigating measures that would reduce its potentially overreaching consequences.

First, the verification would not necessarily cover all judges. In particular, the category of persons who could be relieved from the verification procedure are assessors (junior judges), i.e. the graduates of the National School of Judiciary and Public Prosecution who, after completing their judicial training, passed the judge's examination and accordingly were appointed for the first time to a judicial position in a non-competitive procedure before the NCJ.

Secondly, negative verification would not necessarily amount to complete removal from the judicial profession of the persons concerned. These persons could be eligible to return to a previously held position.[153] They could also apply for the position they held as a result of the unlawful

153 For example, so Article 13(1) Draft Act of the Polish Judges Association *'Iustitia'* (n. 143).

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appointment. Yet, the participation in an unconstitutional procedure could then matter in assessing both the candidate's substantive and ethical competence.

Thirdly, the ineffectiveness of the act of appointment would not automatically annihilate judicial decisions made by such a person since the interests of the parties to court proceedings should be protected.[154] Such rulings, in principle, would remain in force, albeit flawed. As flawed, they could for example be revived by filing an appeal, or by reopening the proceedings.

7. Other instruments: disciplinary and criminal responsibility

The verification of judicial appointments is a means of redressing deficiencies in the appointment process. It is not a response to such conduct by certain judges, which itself represented separate, stand-alone breaches of the law. In particular, these are judges failing to implement binding judgments and interim measures issued by the ECtHR and the ECJ; judges acting as disciplinary officers and taking repressive actions against those judges who acted in accordance with the law and were ruling in implementation of ECtHR and ECJ judgments; or judges acting as presidents of courts – and for the same reasons as above – suspending judges from adjudication or transferring them to other judicial divisions. Such judges have assumed the role of the armed arm of a regime that impinges on the rule of law, erodes judicial independence and subordinates the courts to political will.

They should bear disciplinary and criminal responsibility for their actions.[155] Yet, the arrangements involving the individual legal responsibility of selected persons cannot substitute for a verification mechanism. They

154 In this vein, see the Resolution of the Supreme Court of 23 January 2023 (n. 70), which differentiated the legal effects of rulings rendered by defectively composed judicial panels. The most far-reaching consequences were provided for the rulings of the Disciplinary Chamber of the Supreme Court – they were deemed to be made by an unduly appointed or unlawful court composition irrespective of the date of their adoption. The rulings made in other chambers of the Supreme Court – were also deemed to be made by an unduly appointed or unlawful court composition, if they involved a person appointed with the participation of the new NCJ – however, this applied to rulings made after the date of the resolution (23 January 2020). The rulings of common courts made after 23 January 2020 with the participation of persons nominated by the new NCJ were defective only if 'if the defective appointment causes, under specific circumstances, a breach of the standards of independence'; and, again, this applied to rulings made after 23 January 2020.

155 See the contribution of Armin von Bogdandy and Luke Dimitrios Spieker.

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are not sufficient, since they do not solve general and systemic problems, and are not capable of achieving some of the remedial goals (see above Section IV). In addition, such proceedings may last for a long time, during which – in view of the presumption of innocence – the defectively appointed persons could continue to adjudicate, generating further irregular and thus challengeable rulings. Indeed, holding people individually responsible should be carried out independently of adopting the necessary systemic solutions. In this way, the former can complement the latter, but not replace them.

VII. Conclusions

The Union law, the ECHR and the jurisprudence of the two European Courts do not answer as to the finality of an act of appointment of a judge made in breach of the law. That answer should be provided by national law and should fit into the limits set by the Constitution. From the perspective of European standards, it is sufficient that the defective appointees do not rule on, respectively, the interpretation and application of Union law and the protection of the rights and freedoms guaranteed by the ECHR. Theoretically, therefore, they can remain 'national judges', yet functionally they are not 'European Judges'.

Addressing unlawful judicial appointments is essential to overhauling the judicial system, reinstating the rule of law, ending the aggravating legal chaos and restoring fully effective legal protection to individuals. Curing defective appointments requires general, systemic arrangements, adequate to the nature and scale of the problem, while based on an Act of the Parliament. Extreme solutions should be avoided, as they can bring too much negative impact. There should bepreferably some arrangements that take account of all axiological, systemic, institutional and social considerations. Indeed, it is a balancing exercise to rectify the legal chaos that has developed, to lay down rules for removing deficiencies in judicial appointments, and to define the legal consequences of rulings made by defective courts. Still, in light of the jurisprudence of the ECJ and the ECtHR, the removal of unlawfully appointed judges would be permissible provided proper enactment, justification and proportionality of the measure.

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The Role of the Court of Justice of the EU in Transition 2.0

Sara Iglesias Sánchez[1]

I. Introduction 471
II. Context 473
III. Rediscovering the Treaties Through the Judicial Independence Case-Law 476
1. Articles 2 and 19 TEU 476
2. National courts as enforcers of judicial independence – Article 267 TFEU 482
IV. Putting the Mix Back Together After the Rule of Law Crisis 485
1. Jurisdiction: overarching supranational judicial oversight 485
2. Admissibility: selective role of national courts as 'vigilantes' 488
3. EU Law and the material redlines of renewed democracies 491
V. Conclusion 493

I. Introduction

Backsliding towards illiberal regimes is hardly an exclusively European phenomenon.[2] If anything, it may have appeared, until recently, the opposite, when looking at the general track record of the first 50 years of EU integration and its success in fulfilling its promise of keeping the Member States in peace — at least amongst themselves.[3] The last decade has however swept away any self-congratulatory temptation in the assessment of the political performance of the European Union. Several Member States are embarked on profound and long-lasting rule of law crises,[4] and EU institutional action to prevent and overturn this process has so far proven to be

1 Profesora Titular, University Complutense, and member of the IDEIR. This research has been undertaken in the framework of the project I+D «El principio de lealtad en el sistema constitucional de la Unión Europea», PID2019–108719GB-I00 2020–2024.

2 I.a. Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (New York: Crown Publishers 2018).

3 Nobel Peace Prize Lecture on behalf of the European Union, Herman Van Rompuy, President of the European Council and José Manuel Durão Barroso, President of the European Commission, Oslo, 10 December 2012, 'From war to peace: a European tale', https://www.consilium.europa.eu/media/26207/134126.pdf.

4 Among the very vast literature, i.a. Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing 2015); Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias

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insufficient and ineffective. However, underneath the critical state of mind towards the role of the EU in this crisis which has often been depicted as 'too little, too late'– there is an undercurrent of tectonic changes which have affected the understanding of the legal structure of the EU itself. The rule of law crisis has not only consolidated the role of the Court of Justice as a constitutional court, but it has also transformed the role of EU law and, in particular, of the foundational Treaties, as supra-constitutional safeguards.

The judicialisation of the rule of law crisis has provoked a breakthrough in the techniques of interpretation of the Treaties. This development has led to the groundbreaking interpretation of particular treaty provisions. The systemic transformations for the EU legal order go nevertheless beyond the isolated interpretative effects of the case-law on specific Treaty provisions: the 'rule of law case-law' has produced and consolidated a fine-tuned machinery involving the systematic interaction of several provisions of the Treaties, turning them into an EU constitutional safety net. The aim of this chapter is to dissect the different elements of this machinery and to put them back together in a context that goes beyond the ongoing rule of law crisis, in the scenario in which this project is based: that of re-transitioning to democratic standards in the Member States affected by the rule of law crisis.

For these purposes, after providing an overview of the context in which the abovementioned case-law developments have unfolded (II), this chapter will sketch some relevant elements of the 'rule of law case-law' of the Court of Justice in the field of judicial independence by looking at the interpretation of the most prominent legal tools contained in the Treaties: Articles 2 and 19 TEU and Article 267 TFEU (III). It will then focus on the resulting rule of law enforcement system operated through the judicial guarantee of the Court of Justice, which will serve as the framework in which future democratic transitions will unfold (IV). In the conclusion, it is posited that the judicial EU rule of law case-law provides for a solid and at the same time very flexible system of supranational judicial oversight for democratic transitions (V).

Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Berlin: Springer 2021).

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II. Context

The rule of law crisis and the need to protect judicial independence as an existential requirement to ensure the survival of the European project has served as an engine for the evolution of the EU legal order itself. In the recent past, it may have seemed that European integration and democratic development were parallel forward-looking processes. The structure of the EU Treaties relied somehow on this optimistic view of human progress. The tragic events that lie at the origin of the process of European integration itself make however the approach of the Treaties quite surprising: the one provision that was ever introduced to tackle the potential risk of democratic/rule of law backsliding, Article 7 TEU, did not only rely on an essentially political approach but it was also built upon the idea that regression would always be an individual process affecting an isolated Member State, therefore trapping the entire process into the unanimity requirement of all but the affected Member State.[5] The obvious way around the unanimity requirement – the joint activation of Article 7 TEU for several Member States simultaneously affected by a situation of Rule of Law backsliding[6] – has never been put in practice.

As a result, in spite of the potential of Article 7 TEU to offer an avenue for constitutional enforcement, the political practice has turned Article 7 TEU into a virtually useless legal provision,[7] being supplanted by a massive

5 On the negotiation of the different elements of that provision, Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', Columbia Journal of European Law, 16(3), (2010), 385–426.

6 Dimitry Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU', *EUI Working Paper* LAW 2017/10.

7 The 'preventive phase' of Article 7(1) TEU has been activated twice, but the Council has failed to follow up. See the Commission's reasoned proposal in accordance with Article 7(1) TEU: 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 and the Resolution of the European Parliament of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, P8TA(2018)0340.

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reliance in soft-law,[8] only recently complemented by the legislature through the so-called 'Rule of Law conditionality' Regulation.[9]

In turn, the failure of political institutions to enforce Article 7 TEU and the subsequent 'softening' of the approach towards rule of law violations has placed a burden on the legal system and more particularly, onto its ultimate judicial guardian — the Court of Justice of the EU. As it is well known, the Court of Justice took up the challenge in *Associação Sindical dos Juízes Portugueses* (*ASJP*), a case unrelated to the rule of law litigation,[10] but in which the Court laid the ground for its own jurisdiction, in order to be able to address in the near future the serious situation affecting the independences of the judiciary in other Member States, namely Poland. Barely a month after *ASJP* was rendered, the Commission started the first infringement case against Poland,[11] and the first preliminary ruling from a national court concerning judicial independence in Poland was sent to the Court.[12] Polish Courts followed shortly thereafter.[13]

The judicialisation of the rule of law crisis is one of the most significant developments in the evolution of the EU legal system in the last decades, and undoubtedly, one of the events that have more clearly contributed to

8 See, i.a., on the institutional approach, Laurent Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', Reconnect Working Pap*er* 7 (2020).

9 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ 2000 L 433I/1.

10 ECJ, *ASJP*, judgment of 27 February 2018, case no. C-64/16, ECLI:EU:C:2018:117.

11 ECJ, *Commission v Poland (Independence of ordinary courts*), judgment of 5 November 2019, case no. C-192/18, ECLI:EU:C:2019:924, followed by ECJ *Commission v Poland (Independence of the Supreme Court*, judgment of 24 June 2019, C-619/18, ECLI:EU:C:2019:531 and ECJ *Commission v Poland (Disciplinary regime for judges*), judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596). See also ECJ, *Commission v Poland,* Opinion of AG Collins of 15 December 2022, case no. C-204/21, ECLI:EU:C:2021991.

12 ECJ, *Minister for Justice and Equality (Deficiencies in the system of justice)*, judgment of 25 July 2018, case no. C-216/18 PPU, ECLI:EU:C:2018:586.

13 i.a., ECJ, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, judgment of 19 November 2019, cases no. C-585/18, C-624/18 and C-625/18, ECLI.EU:C:2019:982. Later followed by ECJ, *A.B. and Others (Appointment of judges to the Supreme Court)* judgment of 2 March 2021, case no. C-824/18, ECLI:EU:C:2021:153; *Commission v Poland (Disciplinary regime for judges),* judgment of 15 July 2021, case no. C-791/19, ECLI:EU:C:2021:596), ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of 6 October 2021, case no. C-487/19, ECLI:EU:C:2021:798.

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the consolidation of the EU Treaties as the *charte constitutionnelle d'une Union de droit*.

The legal tools available to undertake this task have been found in the Treaties, outside the legal/political devices designed to tackle potential democratic backsliding. After all, Article 7 TEU is not the only instrument that the Treaties had envisaged to successfully confront a deviation from democratic and rule of law standards.[14] Other horizontal provisions of general nature included in the first part of the TEU have been put to work as operative parameters of legality in the framework of the control of national legislation and practices. Following a longstanding claim put forward by part of the doctrine,[15] Article 19 TEU, together with Article 2 TEU — up to now provisions that skeptical observers would have taken for general provisions with little operational potential — have served as the main vehicles for the articulation and enforcement of autonomous EU standards for the protection of the rule of law. The joint use of both provisions in the existing case law begs however today still the question as to whether Article 2 TEU has an autonomous enforceable value.[16]

Thanks to the development of a growing precedent on the interpretation of rule of law standards by the Court of Justice, (re)transitioning back to acceptable democratic standards in the Member States affected by the rule of law crisis is therefore not only mediated through EU *integration*, but more particularly, through EU *law*. The judicialisation of the rule of law

14 Barbara Grabowska-Moroz, 'The Systemic Implications of the Supranational Legal Order for the Practice of the Rule of Law', Hague Journal on the Rule of Law 4 (2022), 331–347 (336).

15 On this debate, i.a., Armin von Bogdandy et al., 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States', CML Rev 49 (2012), 489; Armin von Bogdandy et al., 'A European Response to Domestic Constitutional Crisis: Advancing the Reverse Solange Doctrine' in: von Bogdandy and Sonnevend (n. 4); Armin von Bogdandy, Carlino Antpöhler and Michael Ioannidis, 'Protecting EU Values: Reverse Solange and the Rule of Law Framework' in: Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford: Oxford University Press 2017); Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' Yearbook of European Law 39 (2020), 3–121.

16 Luke Dimitrios Spieker, 'Berlaymont is back: The Commission invokes Article 2 TEU as self-standing plea in infringement proceedings over Hungarian LGBTIQ rights violations', EU Law Live, 22nd February 2023. At length, Luke Dimitrios Spieker, *EU Values Before the Court of Justice* (Oxford: Oxford University Press 2023, forthcoming).

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crisis and the ensuing case law from the Court of Justice means, in quite precise terms, that democratic recovery, at the very least, to the extent that it affects the judiciary, falls *within the scope of EU law*, in the classic understanding of the expression: the Court of Justice enjoys jurisdiction, and the Treaties offer a substantive legal yardstick to assess transitional developments.

III. Rediscovering the Treaties Through the Judicial Independence Case-Law

From the day of its delivery, it was obvious that *Associação Sindical dos Juízes Portugueses* was a pronouncement of wide repercussions. The impact of the case has proven nevertheless even broader than it may have appeared at the outset. That ruling already contains the 'DNA sequence' of the judicial approach to current and future threats to judicial independence (and potentially, other rule of law components) in the Member States. First and foremost, it proclaimed Article 19 TEU as a provision with broad material content and confirmed its 'invokability', turning it into the flagship of the judicial enforceability of the values enshrined in Article 2 TEU (1). Second, it enabled national jurisdictions to become the main characters in the protection of their own independence by admitting preliminary rulings as an admissible procedural avenue for bringing institutional national shortcomings before EU Courts (2).

1. Articles 2 and 19 TEU

The second subparagraph of Article 19(1) TEU, newly inserted by the Lisbon Treaty, reads: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.' The provision first made an appearance in the draft Treaty — Establishing a Constitution for Europe. When the European Convention discussed this paragraph, the common understanding was that this was nothing revolutionary, but rather, a codification of the obligation of effective judicial protection already consolidated by decades of case-law.[17] The second subpara-

17 In particular, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the European Communities, to the discussion circle on the Court of Justice on 17 February 2003, CONV 572/03, para 4, stating that 'Lastly, no specific

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graph of Article 19(1) TEU seems to have entered the Treaties without much discussion, as a seemingly toothless provision, deprived of any innovative content. The second subparagraph of Article 19(1) TEU was however much more than just a reinstatement of preexisting case-law. It amounted to the constitutionalisation of the crucial role of national courts as the ordinary courts at the basis of the entire EU legal system.[18] Similarly to Article 20 TFEU[19] — establishing EU citizenship — the second subparagraph of Article 19(1) TEU may have been perceived as a mere symbolic exercise, but it was destined to be much more than just that.[20]

Since 2009, Article 19 TEU was cited several times in the case law, essentially as supporting argument for enhancing judicial protection by EU Courts.[21] Yet, the seminal case *ASJP* took the second subparagraph of Article 19(1) TEU to a higher level, by way of what could be described as a 'rediscovery' of the provision.[22]

The story is so well known that deserves little introduction.[23] It suffices here to recall that, in a case unrelated to the rule of law crisis, the Court

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comment is called for from the Court on the suggestion that the Member States' obligation to ensure that there are effective legal remedies before their own courts – an obligation recognised in the case-law, should be written into the Treaty.'

18 In depth on this discussion, Sacha Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in: Matteo Bonelli, Mariolina Eliantonio and Giulia Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection*, vol. 1 (Oxford: Hard Publishing 2022), 11–25. Forecasting the potential of Article 19 TEU: Anthony Arnull 'The Principle of Effective Judicial Protection in EU Law: an Unruly Horse', European Law Review 36 (2011), 51–70.

19 For an account of the initial literature, who saw the introduction of EU citizenship as symbolic or decorative, Dora Kostakopoulou, 'The Evolution of European Union Citizenship', European Political Sciences 7 (2008), 285–295.

20 Curiously, the fate of Article 19(1) TEU and of Article 20 TFEU was similar, in the sense that both turned out to become provisions closely related to fundamental rights that emancipated from the scope of application of the Charter. On this parallelism: Aida Torres Pérez 'From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence', Maastricht Journal of European and Comparative Law 27 (2020), 105–119.

21 On this discussion, Matteo Bonelli 'Effective Judicial Protection in EU Law: An evolving principle of a constitutional nature', Review of European Administrative Law 12 (2019), 35–62, 47.

22 Manuel Campos Sánchez-Bordona, 'La protección de la independencia judicial en el derecho de la Unión Europea', Revista de Derecho Comunitario Europeo 65 (2020), 11–31.

23 Among the many case notes: Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges came to the Rescue of the Polish Judiciary', European Constitutional Law Review (14) 2018, 622–643; Laurent Pech and Sébastien Platon,

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planted the seed for its own jurisdiction in the situation of Poland, by interpreting the second subparagraph of Article 19(1) TEU as a self-standing parameter of control for national rules connected to the independence of the judiciary, lacking any other connection with EU law. Significantly, the case marked the transition from a hands-off approach to the scope of EU rights in the economic crisis[24] to an all-hands-in approach in the rule of law crisis, using the occasion provided through the last attempt of Portuguese Courts to get an answer on the scope of application of EU law regarding austerity measures to plant the seed for an ambitions rule of law case-law. The interpretation of the second subparagraph of Article 19(1) TEU in the *ASJP* case is, therefore, a collateral effect of the strict interpretation of Article 51(1) of the Charter in the context of the financial crisis. Turning a case about austerity into a case exclusively related to judicial independence, the Court changed the news cycle, considerably expanding the reach and scope of EU law.[25]

The ruling in *ASJP* marked, more particularly, three important developments that are relevant for the purposes of this chapter.

'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP case', Common Market Law Review 55 (2018), 1827–1854; María José García-Valdecasas Dorrego, 'El Tribunal de Justicia, centinela de la independencia judicial desde la sentencia Associação Sindical dos Juízes Portugueses (ASJP)', Revista española de Derecho Europeo (72) 2019, 75–96; Michal Krawesk, 'Associação Sindical dos Juízes Portugueses:The Court of Justice and Athena's Dilemma', European Papers 3 (2018), 395407; Aida Torres Pérez, 'From Portugal to Poland: the Court of Justice of the European Union as watchdog of judicial independence', Maastricht Journal of European and Comparative Law 27 (2020), 105–119.

24 ECJ, *Sindicato dos Bancários do Norte e.a*, order of 7 March 2013, case no. C-128/12, ECLI:EU:C:2013:149; ECJ *Sindicato Nacional dos Profissionais de Seguros e Afins,* order of 26 June 2014, case no. C-264/12, ECLI:EU:C:2014:2036; ECJ *Sindicato Nacional dos Profissionais de Seguros e Afins*, order of 21 October 2014, case no. C-665/13, ECLI:EU:C:2014:2327. On this case law, Gonçalo De Almeida Ribeiro, and Patricia Fragoso Martins, 'Portugal: Lukewarm Engagement with the Charter' in: Michal Bobek and Jeremias Adams-Prassl, *The EU Charter of Fundamental Rights in the Member States* (Oxford: Hart Publishing 2020). See, however, the more recent judgement ECJ, *BPC Lux 2 Sàrl* of 5 May 2022, case no. C-83/20, ECLI:EU:C:2022:347 and the commentary of Martinho Lucas Pires, 'Unforgivable Late Admissions: The Court of Justice Decides on Bank resolution in *BPC Lux 2 Sàrl* (C-83/20)', EU Law Live, 12 May 2022.

25 In this regard, Matteo Bonelli 'Effective Judicial Protection in EU Law: An Evolving Principle of a Constitutional Nature', Review of European Administrative Law 12 (2019), 35–62 (48).

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First, the Court broke free from the scope of the Charter, making of Article 19(1) TEU a provision of general application for the Member States without the need of a secondary triggering element.[26] *ASJP* made clear that the jurisdiction of the Court was *only* tied to the fact that the Court of Auditors, the independence of which was the object of the case, was liable to rule 'as a court or tribunal' on questions that *may* concern the application or interpretation of EU Law.[27] This broad scope of application was confirmed in subsequent case law.[28] In the words of Advocate General Bobek: 'Since it would be rather difficult to find a national court or tribunal which could not, by definition, ever be called upon to rule on matters of EU law, it would appear that the second subparagraph of Article 19(1) TEU is limitless, both *institutionally* (with regard to all courts, or even bodies, which potentially apply EU law), as well as *substantively*.'[29] By breaking free Article 19(1) TEU from any link to EU law, the debate on the problematic relationship between effectiveness/effective judicial protection and the autonomy of the Member States reaches a whole new level. Indeed, the debate[30] on the existence and extent of a *domain reservé* for the Member States and their procedural rules receives closure here: there is none, nowhere, when it comes to judicial independence.

Second, the *ASJP* case thickened the interpretation of the second subparagraph of Article 19(1) TEU with a very developed legal content, provid-

26 On the notion of 'triggers' with regard to the applicability of the Charter: Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', Common Market Law Review 50 (2013), 1267–1304.

27 ECJ, *ASJP* (n. 10), para. 39.

28 ECJ, *Commission* v *Poland (Independence of the Supreme Court)* (n. 11), para. 51; ECJ, *A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)* (n. 13), para. 83; ECJ, *Miasto Łowicz and Prokurator Generalny*, judgment of 26 March 2020, cases no. C-558/18 and C-563/18, ECLI:EU:C:2020:234, para. 34.

29 Opinion of 23 September 2020 *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19 and C-355/19, ECLI:EU:C:2020:746, point 207).

30 I.a., Constantinos N. Kakouris, 'Do the Member States Posses Judicial Procedural "Autonomy"?', Common Market Law Review 34 (1997), 1389–1412; Michal Bobek, 'Why there is no Principle of Procedural Autonomy of the Member States' in: Bruno de Witte and Hans W. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States* (Cambridge: Intersentia 2012), 305–324 or Daniel Halberstam, 'Understanding National Remedies and the Principle of National Procedural Autonomy: A Constitutional Approach', Cambridge Yearbook of European Legal Studies 23 (2021), 128–158.

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ing it with the same legal content of Article 47 of the Charter — by far, and similarly as to its ECHR counterpart, the most litigated provision of the Charter.[31] The idea of 'absorption' of the content of Article 47 of the Charter into Article 19(1) TEU that was latent in *ASJP* was consistently confirmed by the case law issued thereafter.[32] The second subparagraph of Article 19(1) TEU has become the first clear constitutional clause for general 'incorporation' of a Charter right with regard to the Member States.[33]

Third, the *ASPJ* judgment put forward not only an innovative interpretation of the second subparagraph of Article 19(1) TEU, but also had important methodological consequences, as it created an entire new avenue to enforce judicially different elements of the rule of law principle by EU Courts: the 'pairing-method', which consists in using Article 2 TEU together with a 'concretising' provision – the second subparagraph of Article 19(1) TEU in this case. The possibilities to recreate this 'pairing' with other 'concretising' provisions of the Treaty has not only been immediately advanced by scholarship (identifying the clear potential of Article 10(3)TEU and the democratic principle),[34] but by the Court itself in its response to the constitutional challenge mounted by Poland and Hungary against the rule of law conditionality Regulation, by stating that 'that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which, as noted in paragraph 127 above, are an integral part of the very identity of the European Union as a common legal order, values which are given

31 ECJ, *ASJP* (n. 10), paras. 35 and 41. See, generally Herwig Hofmann, 'Article 47' in: Steve Peers et al. (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing 2014), and for its national application, Kathleen Gutman, 'Article 47: The Right to an Effective Remedy and to a Fair Trial' in: Bobek and Addams-Prassl (note 24).

32 See, for the first cases. ECJ, *Commission v Poland (Independence of the Supreme Court)* (n. 11) para. 49; and ECJ, *Commission v Poland (Independence of Ordinary Courts*) (n. 11), para. 100 and the many other preliminary references thereafter.

33 See on the parallel with the doctrine of incorporation of the Federal Bill of Rights through the due process clause of the Fourteenth Amendment of the US Constitution, Aida Torres Pérez, 'Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?', Cambridge Yearbook of European Legal Studies 22 (2020), 279–300.

34 See the chapter by Pál Sonnenfeld in this volume, as well as John Cotter 'To Everything there is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council', European Law Review 46 (2021), 69–84.

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concrete expression in principles containing legally binding obligations for the Member States'.[35]

The next crucial development came later in the *AB* case, where the Court expressly confirmed that the second subparagraph of Article 19(1) TEU was, moreover, endowed with direct effect.[36] In that way, the rule of law crisis has also influenced the approach of the case law towards the direct effect of Treaty provisions and general principles. It has confirmed that principles and primary law provisions can fulfil the conditions of being sufficiently precise and unconditional 'by reference' to connected provisions and their interpretation,[37] in that case, the principle of effective judicial protection as enshrined in Article 47 of the Charter and its interpretation by the Court.[38] The consolidation of the direct effect of a component of the rule of law principle is not a development isolated to Article 19 TEU. In the Romanian Rule of Law litigation, direct effect was expanded to the benchmarks in the annex of the MCV Decision,[39] which also contained very vague references to rule of law elements and could have been easily considered as mere programmatic provisions.[40]

35 ECJ, *Hungary v Parliament and Council*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 232 and ECJ, *Poland v Parliament and Council*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 264.

36 ECJ, *A.B. and Others (Appointment of judges to the Supreme Court)* (n. 13).

37 See, e.g., regarding the direct effect of the principle of proportionality, ECJ, Opinion *NE v Bezirkshauptmannschaft Hartberg-Fürstenfeld*, Opinion of Advocate General Bobek of 23 September 2021, case no. C-205/20, ECLI:EU:2021:759.

38 Article 47 of the Charter had already been declared directly effective in judgments of 17 April 2018, *Egenberger*, C-414/16, EU:C:2018:257, para. 78, and of 29 July 2019, *Torubarov*, C-556/17, EU:C:2019:626, para. 56.

39 Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption (OJ 2006 L 354, 56).

40 ECJ, *Asociația 'Forumul Judecătorilor din România' and Others*, judgment of 18 May 2021, cases no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, ECLI:EU:C:2021:393 and ECJ, *Euro Box Promotion and Others,* judgment of 21 December 2021, cases no. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034. Some of those benchmarks are: to 'ensure a more transparent, and efficient judicial process notably by enhancing the capacity and accountability of the [Supreme Council of the Judiciary] Report and monitor the impact of the new civil and penal procedures codes' or 'building on progress already made, continue to conduct professional, non-partisan investigations into allegations of high-level corruption' and 'take further measures to prevent and fight against corruption, in particular within the local government.'

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The declaration of the second subparagraph of Article 19(1) TEU as a directly effective provision is a development the constitutional relevance of which can hardly be overstated: it is as revolutionary as the declaration of its role as a self-standing parameter of scrutiny for Member States' action. Without direct effect, the transformative potential of the second subparagraph of Article 19(1) TEU would have been very limited. Direct effect, which is essentially a national-court-empowering tool, is the key development in the transformative role of the court's case law, by giving the key to national courts for the disapplication of national provisions that conflict with EU standards related to judicial independence. What is more, one of the outrageous episodes of judicial independence infringements has led the Court for the first time to go beyond the mandate of disapplication to instruct a referring court to consider a national ruling null and void.[41] Even though the scope of this remedy remains to be clarified beyond the circumstances of the particular case,[42] it is apparent that the rule of law litigation has reinvigorated the interpretation of the primacy principle.[43]

2. National courts as enforcers of judicial independence – Article 267 TFEU

The landmark ruling *ASJP* is also at the origin of the structure of the judicial enforcement strategy for the protection of the rule of law. First, by developing the material meaning of Article 19(1) TEU as a legal rule and providing it with the function of a parameter of the legality of national acts, the Court of Justice provided the Commission (and arguably, other Member States),[44] with a tool to launch the EU law enforcement mechanism by excellence: infringement proceedings. By doing so, the Court saved the

41 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, (n. 13), para. 160.

42 See on the ongoing debate the chapter by Maciej Taborowski in this volume as well as Michael Dougan, 'The Primacy of Union Law over Incompatible National Measures: Beyond Disapplication and Towards a Remedy of Nullity?', Common Market Law Review 59 (2022), 1301–1332; and Rafał Mańko and Przemysław Tacik, 'Sententia non Existens: a New Remedy under EU Law? -Case C-487/19, Waldemar Żurek (W. Ż.)', Common Market Law Review 59 (2022), 1169–1194.

43 See, in particular, ECJ, *RS*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99.

44 Pointing at the potential role of Article 259 TFEU, Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool,' Hague Journal on the Rule of Law 7 (2015),

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Commission more than a headache trying to build its infringement cases on solid or more 'traditional' ground.[45] Once the Court had made clear the enforceable nature of the second subparagraph of Article 19(1) TEU, it has ever since remained true to the promise of *ASJP*, declaring the infringement of that provision repeatedly.[46]

Second, *ASJP* also confirmed the crucial relevance in the field of the rule of law of the traditional system of 'double vigilance'[47]: enforcement of the rule of law is not only limited to infringement proceedings. That task also falls onto national courts through their function as ordinary courts of EU law, and in this context, they may raise preliminary questions to the Court of Justice.

Both procedural avenues — preliminary rulings and infringement actions — have limitations and advantages. Infringement proceedings are a privileged avenue to assess generally and in the abstract a violation of EU law through an adversarial procedure.[48] However, procedural legitimation to initiate such proceedings is monopolised by actors that operate not only under legal, but often predominantly, according to political considerations. Preliminary rulings, on the contrary, present the major drawback of being tied to a specific national case, with regard to which admissibility must be assessed.[49] Moreover, preliminary references are an indirect procedure before the Court, where the parties are only parties to national proceedings

153–174 and Guillermo Íñiguez, 'The Enemy Within? Article 259 TFEU and the EU's Rule of Law Crisis', German Law Journal 23 (2022), 1104–1120.

45 See ECJ, *Commission v Hungary*, case no C-286/12, ECLI:EU:C:2012:687, where the Court relied on Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303, 2.12.2000, 16. The first infringement ruling of the Court with regard to the situation of Poland and judicial independence was also partially based on that directive. ECJ *Commission* v *Poland (Independence of the Supreme Court)*, (n. 11).

46 ECJ, *Commission v Poland (Independence of ordinary courts*) (n. 11) (technically on Article 47 of the Charter), followed by judgments *Commission v Poland (Independence of the Supreme Court* (n. 11) and *Commission v Poland (Disciplinary regime for judges)*, (n. 11). See also ECJ, *Commission* v *Poland,* C-204/21 (n. 11).

47 Koen Lenaerts, 'El Tribunal de Justicia de la Unión Europea y la independencia judicial', Revista de Derecho Comunitario Europeo 72 (2022), 351–368.

48 At length, Luca Prete, *Infringement Proceedings in EU Law* (The Hague: Kluwer 2017).

49 Pointing at the technical difficulties of the preliminary ruling procedure: Pablo Martín Rodríguez, *El Estado de Derecho en la Unión Europea* (Madrid: Marcial Pons 2021), 128.

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and where the Court of Justice has limited inquisitorial capacities.[50] Despite these limitations, preliminary rulings present the indubitable advantage of providing for an avenue of decentralised legal enforcement that may circumvent political inactivity, precisely guaranteed by the independent character of the national judges that raise the preliminary questions. They also guarantee, through the division of tasks between national judges and the Court of Justice, more flexibility to the latter when pointing the former towards a declaration of incompatibility.[51] Even though the eminently casuistic approach of preliminary rulings makes them very much dependent on the attitudes of the national judiciary, recent experience also shows that the cumulative effect of many preliminary rulings coming from one Member States in 'waves' may play also an important part in giving the Court sufficient elements to infer a systematic situation, as has been the case not only in Poland but also of Romania.[52]

The different nature of both procedural avenues has led some authors to express some preferences for one procedure or the other.[53] The truth is however that there is neither need nor possibility to choose between them. Once Article 19(1) TEU is interpreted as an enforceable legal provision, it must be interpreted and applied through whatever legal avenue is available.[54]

50 In this sense, Ondřej Kadlec and David Kosař, 'Romanian version of the rule of law crisis comes to the ECJ: The AFJR case is not just about the Cooperation and Verification Mechanism', Common Market Law Review 59 (2022), 1823–1852 (1843), pointing at the fact that moreover, in cases related to judicial independence, where judges are under attack, they may no longer be 'impartial thirds'.

51 On this discussion Sébastien Platon, 'Preliminary References and Rule of Law: Another Case of Mixed Signals from the Court of Justice Regarding the Independence of National Courts: Miasto Lowicz', Common Market Law Review 57(2020), 1863–1865.

52 It is particularly noticeable that how many of the Romanian cases have indeed been joined and, therefore, made possible a consideration of the 'full' picture painted by different courts in the framework of different national proceedings. ECJ, *Asociația 'Forumul Judecătorilor din România' and Others* (n. 41), paras 158 and 178). See also, *Euro Box Promotion and Others,* (n. 40) as well as ECJ, *RS (Effects of the decisions of a constitutional court)* (n. 43). Further cases remain pending, ECJ, *R.I. v Inspecția Judiciară, N.L.*, Opinion of 26 January 2023, AG Collins, C-817/21, ECLI:EU:C:2023:55.

53 Sara Iglesias Sánchez, 'La independencia judicial como principio constitucional en la UE: los límites del control por el Tribunal de Justicia de la UE', Teoría y Realidad Constitucional 50 (2022), 487-516 (499).

54 See also, in the framework of annulment proceedings, General Court, *Sped-Pro v Commission*, judgment of 9 February 2022, case no. C-791/19, ECLI:EU:T:2022:67.

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IV. Putting the Mix Back Together After the Rule of Law Crisis

How will the case law of the Court of Justice play out in a scenario of democratic transition? This is of course a hypothetical question that the Court itself would declare inadmissible. Indeed, the future role of the Court in such a scenario would not so much depend on itself and past case law, as on the future cases that will arrive at it. However, the existing framework laid down by the 'rule of law' case-law issued to date may help us to undertake a tentative assessment of the future performance of the EU legal framework and to elaborate on how the EU law rule of law constraints, as they have emerged in the 'judicial independence case law', will perform in a scenario of overcoming the rule of law crisis, both during the transition and once things are 'officially' back to 'normal'.

Three essential elements can be identified, which are expected to determine the role of the EU law framework that has been uncovered by recent case law. First, the Court has jurisdiction to look at the national developments, at least for what they affect the situation of national courts and their independence (1). Second, national courts have consolidated their role as 'vigilantes' even though their access to the Court is mediated through complex admissibility requirements (2). Third, the case law of the Court offers a deferential material framework towards the Member States and their institutional autonomy, but it has also made clear that EU law draws solid material red lines that both the Court of Justice and national courts will be willing to enforce (3).

1. Jurisdiction: overarching supranational judicial oversight

As noted above, ever since *Associação Sindical dos Juízes Portugueses,* there is no need for a specific connection with any other provision of EU law in order for a case to fall within the scope of application of Article 19 TEU, and therefore, to trigger the jurisdiction of the Court of Justice in a case regarding the interpretation of that provision. The second subparagraph of Article 19(1) TEU makes of the principle of effective judicial protection one self-referential legal principle of general application.

The general rule becomes, therefore, that judicial independence falls within the jurisdiction of the Court. Indeed, through this operation, the Court ensures its ultimate supervisory role: by procuring very broad jurisdiction, it ensures that it will be in a position to oversight all cases that may arrive before it. Whether the cases are admissible, or eventually, whether

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a breach of material standards is found, are relegated to a further step in the examination. But the fact that jurisdiction is confirmed in a very broad manner at the initial stage, is a rather crucial element in the assessment of the future performance of the rule of law case-law. By consolidating a very broad jurisdiction, the Court places itself in a position that enables it to perform a controlling role also in the context of a situation of transitioning towards democratic standards, since jurisdiction is not tied to any kind of '*de minimis*' requirement, nor linked to the alleged systemic character of infringements or the content or type of provisions infringed.

This extremely broad approach towards jurisdiction has important advantages from a systematic point of view. It ensures a coherent approach towards all types of cases and all types of situations in the different Member States, since any test that would tie jurisdiction to a '*de minimis*' or 'systemic violation' situation would *de facto* oblige the Court to have recourse to legal prejudices or pre-conceptions. In fact, the broad jurisdiction of the Court of Justice has already been tested through several cases that have been posed before it through preliminary rulings coming from national courts, where prima facie there was not a situation of systemic rule of law backsliding. This has been the case in the Maltese case *Repubblika*,[55] but also of the German case *Land Hessen*[56] or the Austria case *Maler und Anstreicher*.[57] The latter, even if declared inadmissible by the Court, was clearly declared to fall under the jurisdiction of the Court.[58]

The broad interpretation of the scope of the second subparagraph of Article 19(1) TEU is complemented by the position of the Court with regard to the concept of 'court or tribunal' enshrined in Article 267 TFEU in the context of the rule of law crisis. A first development – *Banco Santander*[59]–

55 ECJ *Repubblika,* judgment of 20 April 2021 case no. C-896/19, ECLI:EU:C:2021:311.

56 ECJ, *Land Hessen,* judgment of 9 July 2020, case no. C-272/19, ECLI:EU:C:2020:535. See, for another pending case questioning about the compliance of the German system with the standards of Article 19 TEU, the request for a preliminary ruling send by the Landgericht Erfurt, Case C-276/20, pending.

57 ECJ, *S.A.D. Maler und Anstreicher OG*, Order of 2 July 2020, case no. C-256/19, ECLI:EU:C:2020:523, para. 40.

58 That was also the case in ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28) and ECJ, *M.F. and J.M.*, judgment of 22 March 2022, case no. C-508/19, ECLI:EU:C:2022:201, where, despite declaring the cases inadmissible, the Court confirmed its jurisdiction.

59 ECJ, *Banco de Santander*, judgment of 21 January 2020, case no. C-274/14, ECLI:EU:C:2020:17. See also ECJ *CityRail a.s.*, judgment of 3 May 2022, case no. C-453/20, ECLI:EU:C:2022:341.

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lead to the impression that the interpretation of the material standards of judicial independence in the framework of its case law related to the rule of law crises would lead to a tightening of the requirements of 'independence' traditionally requested, in order for national jurisdictions to be regarded as 'courts or tribunals' for the purposes of Article 267 TFEU.

However, *Getin Noble Bank* made the Court confront the dilemma face to face: what if one of the judges whose independence raises doubts according to the rule of law case-law of the Court refers a preliminary question to the Court? Unlike the principled solution proposed by Advocate General Bobek – who argued that, for different reasons, the channels of communication through preliminary rulings should stay open[60] – the Court opted for leaving the door open in principle, but reserving itself the possibility to close it eventually by establishing a 'presumption of independence' which can be rebutted, *inter alia,* by final judicial decisions establishing that a court is not independent.[61] The next case – *L.G.* v *Krajowa Rada Sądownictwa* – pushes the Court further, since the question comes from a chamber that the European Court of Human Rights has declared as not constituting a tribunal established by law.[62] Advocate General Rantos has invited the Court to further flexibilise *Getin Noble Bank*, by considering that 'any irregularities in the appointment of the members of a judicial formation can deprive a body of the status of "independent court or tribunal" for the purposes of Article 267 TFEU only if they affect the very ability of that body to judge independently.'[63]

Considering jointly the broad interpretation of the scope of the second subparagraph of Article 19(1) TEU and the flexible interpretation of Article 267 TFEU leads to a reality in which the Court asserts jurisdiction over a very important new area of law, and, at the same time, it is able to control the potentially negative consequences of its own findings on national judicial independence over judicial dialogue. First, the case law ensures that

60 ECJ, *Getting Noble Bank*, Opinion of AG Bobek of 8 July, case no. C-132/20, ECLI:EU:C:2021:557.

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

62 The reference comes from the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Chamber of Extraordinary Control and Public Affairs; 'the Chamber of Extraordinary Control') of the Sąd Najwyższy (Supreme Court, Poland). See ECtHR, 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland,* ECLI:CE:ECHR:2021:1108JUD004986819.

63 See ECJ, *L.G.* v *Krajowa Rada Sądownictwa*, Opinion of AG Rantos of 2 March 2023, case no. C-718/21, ECLI:EU:C:2023:150.

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the Court enjoys jurisdiction over the institutional change in democratic transitions, at the very least for what concerns the standards of judicial independence. Second, not only virtually all matters related to judicial independence fall within its purview, but essentially all courts, even some of those which may not fulfil the material independence requirements, are part of the dialogue. The fact that in *Getin Nobel Bank* the Court adopted a flexible position over the impact of the criterion of independence on the concept of what is a 'court or tribunal' means in practice that, in potential transitional scenarios, the new 'old' judges (today often referred to as 'neo-judges', 'non-judges' or 'fake judges'), as long as they remain in office, will also have access to preliminary rulings to put to test the solutions that transitional or future governments may come up with, to put a remedy to the problems identified by the case-law of the Court. In such a context the upcoming judgment in *L.G. v Krajowa Rada Sądownictwa* will determine whether the possibilities of rebuttal of the presumption established in *Getin Noble Bank* are real and, therefore, likely to progressively exclude 'neo-judges' from the preliminary rulings procedure, or whether their status as partners in judicial dialogue will remain until a national transitional system is put in place in order to substitute them or ratify their status.

The oversight of a transitional process by a supranational court with full jurisdiction is quite some novelty. Whether this jurisdiction may or may not be activated remains within the realm of futuristic conjectures. However, the mere fact that such a transition will happen with a consolidated system of oversight in place with a clearly established jurisdiction, plays certainly a role in determining the leeway with which the future political elite will act, having the certainty that any national judge may raise a controversial point before the Court of Justice. The system of diffuse enforcement through preliminary rulings together with the broad jurisdiction of the Court makes of the supranational court a latent player in transitional processes, with the shadow of EU rule of law which is already performing an influential role.

2. Admissibility: selective role of national courts as 'vigilantes'

The rule of law case-law of the Court has consolidated the role of national courts in policing the admissible legal reforms which affect judicial independence. This consolidation has however come at the cost of national judges risking internal retaliation often in the form of disciplinary procedures. National judges have also not always successfully reached the Court of Justice as desired, since admissibility requirements have proven partic-

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ularly convoluted in the preliminary rulings concerning judicial independence.

When *Miasto Łowicz*,[64] one of the first preliminary questions related to judicial independence presented by Polish Courts, was declared inadmissible, it was easy to jump to the conclusion that the very broad jurisdiction of the Court was going to be compensated through a strict approach towards admissibility. Admissibility could therefore play the role of gatekeeper in this new area of litigation. The fact that *Miasto Łowicz* was declared inadmissible through a Grand Chamber ruling, and after an opinion of the Advocate General, made moreover apparent that the issue of admissibility was of key importance in this new field of EU law.

The judgment in *Miasto Łowicz* was supposed to bring clarity about the applicability of the admissibility criteria in cases related to judicial independence. Cases would be admissible where they have a substantive connection to the second subparagraph of Article 19(1) TEU (e.g. in cases such as *ASJP*); where they refer to the interpretation of EU procedural law provisions; or where the question aims to resolve procedural questions in *limine litis* before being able to rule on the substance.[65] Indeed, after *Miasto Łowicz*,[66] *Maler und Anstreicher*[67] and *Prokuratura Rejonowa w Słubicach*,[68] made clear that the Court was going to police strictly the 'relevance admissibility criterion', according to which 'the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it'.

However, subsequent cases soon showed that things were not as easy as that. Two cases, *AK* and *Prokuratura Rejonowa w Mińsku*, made apparent that admissibility is very much dependent on the way the question is

64 ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28).

65 Ibid, paras 49 to 51.

66 ECJ, *Miasto Łowicz and Prokurator Generalny* (n. 28).

67 A case concerning the national provisions relating to the allocation of cases in Austrian Courts and the powers of court presidents, ECJ, *S.A.D. Maler und Anstreicher OG*, Order of 2 July 2020, case no. C-256/19, ECLI:EU:C:2020:523. It is debatable whether the case would have fit into the situation of a question of EU law being raised 'in *limine litis*'. The Court however considered 'the referring judge will not be able, in the dispute in the main proceedings, to rule on the question whether that case was allocated to him lawfully, since the issue of an alleged infringement of the provisions governing the allocation of cases within the referring court is not the subject of that dispute and the question of the jurisdiction of the referring judge will, in any event, be reviewed by the superior court in the event of an appeal' (para. 49).

68 ECJ Order of 6 October 2020, C-623/18, ECLI:EU:C:2020:800.

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posed. This may be true about any kind of preliminary reference, indeed. But in the context of the judicial independence case law, the complexity of admissibility criteria raises to a whole new level: since the object of the preliminary questions themselves are often judicial remedies, judicial practices, or elements that appertain to the status of judges, admissibility becomes very malleable by nature. Preliminary questions concerning the independence of other courts, of the referring court, or of some of its members, can be admissible or not depending on the way in which or how it is explained to the Court of Justice, what the referring court can do with its answer: a question is admissible not only because of its material content, but because it is presented in a way that is linked to a procedural remedy the creation of which may be disputed, uncertain, or even the very object of the question.

For example, in *AK*, the question was – essentially and *inter alia* – whether in a situation where the court designated by national law is not an independent court, the referring court should disregard the national provisions and assert jurisdiction over itself.[69] Similarly, in *Prokuratura Rejonowa w Mińsku,*[70] the referring judge asked about the secondment of judges that affected her own bench, and the Court admitted the question as one that requires an answer 'in order to enable the referring court to settle a question raised in limine litis'.[71] These two cases would give the impression that any question would be admissible if the national court phrases the question in possibilistic terms, that is to say, by presenting the procedural solution or remedy that it envisages to apply as something possible or as the object of the question itself, therefore, surrendering the key of admissibility to a great extent to national courts.

Even though the Court appears to have marked the limits of this approach in *M.F. and J.M*,[72] all the above shows how the role of national courts in transitional scenarios may have been eased through a first complex and difficult era of rule of law litigation. The existence of a still convoluted but already quite developed case law on admissibility will make it possible for national courts to present their potential new questions after having had the possibility of going through a steep learning curve over the

69 ECJ, *A. K. and Others* (n. 13).

70 ECJ, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others,* judgment of 16 November 2021, cases no. C-748/19 to C-754/19, ECLI:EU:C:2021:931. The issue of admissibility is explored in depth in the Opinion of AG Bobek in the case.

71 Para 49.

72 ECJ, *M.F. and J.M.* (n. 58).

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past few years. Unlike in the first phase of judicialization of the rule of law crisis, national courts now have a vast methodological material to operate with, which will guide them to select and construe the 'right' questions in the 'admissible' way.

In any case, in a hypothetical future, admissibility will still play a major role. The criteria that flow from the case law, far from offering mathematical clarity, show a quite complex case-by-case approach, not always entirely foreseeable for national courts, and in constant evolution. The rather complex approach towards admissibility shows how the Court still struggles to maintain a balance between the openness to cases perceived as 'deserving', and cases where the Court should not step in. And with such a case-depending approach, given the variety and complexity of the procedural constellations through which rule of law related questions come before the Court, it is to be expected that admissibility will continue to play a variable role, helping to keep the gates half open.

Against that backdrop, even if the learning curve on admissibility may mean that admissibility will be less of an absolute gatekeeping tool for the Court, it is to be expected that judicial independence cases will reach a certain 'plateau' at the Court level, as the progressive development of case-law, as well as the multiplication of cases that move away from serious our systematic situations will make possible that rulings are rendered by smaller chambers, or even the adoption of reasoned orders on the basis of Article 99 of the rules of procedure.[73] The existence of an already well-established body of case law to which refer through smaller chamber rulings or even orders will enable the Court in the future to rationalise its intervention and 'pick its battles'.

3. EU Law and the material redlines of renewed democracies

The case law of the Court of Justice has deployed an important role in identifying and systematising European standards of judicial independence as an essential component of the rule of law principle. The cases that so far have arrived at the Court have enabled it to interpret the standards that emanate from the requirements of judicial independence with regard to

73 See, e.g. ECJ, *Corporate Commercial Bank,* order of 15 November 2022, case no. C-260/21, ECLI:EU:C:2022:881 or ECJ, *FX and others (effet des arrêts d'une Cour constitutionnelle III)*, order of 7 November 2022, cases no C-859/19, C-926/19 and C-929/19, ECLI:EU:C:2022:878.

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different components of judicial organization and status, such as retirement of judges; judicial appointments; secondments; the role of judicial councils; disciplinary judicial procedures and actors involved in disciplinary proceedings; criminal and civil liability of judges; or even the composition and roles of constitutional courts.[74] This is of course not the place to analyse the vast standard-consolidation process that flows from the case law.[75] It is however noteworthy that, despite this colossal development of material standards, the Court has only found infringements of the requirements of the second subparagraph of Article 19(1) TEU in extremely serious situations which could well amount to systemic deficiencies situations, even if the Court has never put it in those terms. The Court has often resorted to cumulative approaches that would combine a complex assessment of the law, but also of the practice, and has in general demonstrated its readiness to be deferential towards the particularities of national systems, outside the situations of systemic rule of law backsliding.

Deference towards national autonomy and strict policing of red lines are the two boundaries that mark the material imprint of the rule of law case-law for democratic transitions. On the one hand, it is not to be expected that a given model of the judiciary will be imposed by EU law. On the other hand, the material boundaries that already ensue from the case law must be abided by. In a way, the existence of a well-nurtured case law on material standards, even if providing a considerable degree of flexibility to national authorities, can prove to be a benefit rather than a constraint in a transitional scenario. By providing with a legal framework and some answers about 'what not to do', EU law may help to depoliticize some elements of the transition which become settled by legal mandate at the supranational level. Case law may guide, to a certain extent, political reform and in many aspects, contains already a mandate for transition. Where the Court has already found an infringement of the second subparagraph of Article 19(1) TEU, doing nothing is just not a possibility. New developments

74 The list of all the cases, closed and pending, is available here: https://euruleoflaw.eu/rule-of-law-dashboard-new/.

75 See, e.g. Rafael Bustos Gisbert, Independencia Judicial e Integración Europea (Valencia: Tirant lo Blanch 2022) or by the same author, 'Judicial Independence in European Constitutional Law', European Constitutional Law Review 18 (2022), 591–620; or Paz Andrés Sáenz de Santamaria, 'Rule of Law and Judicial Independence in the light of the CJEU and ECtHR Case Law' in: Cristina Izquierdo Sanz, Carmen Martínez Capdefila and Magdalena Nogueira Guastavino, *Fundamental Rights Challenges: Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Berlin: Springer 2021).

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would need to ensue on several fronts where further litigation is of course not excluded, such as the effects of judgments rendered by flawed courts, the potential mechanisms for revision of rulings, the status of non-independent judgments, or a whole range of new organisational arrangements and appointment systems. That means that just keeping in place tainted judicial reforms, institutions or practices connected to the judiciary that the case-law has identified as infringing Article 19(1) TEU is not an option for a future transitional government. The extremely delicate situation in which a democratic transition will unfold may advice against a strict judicialization of new political solutions, and in fact, if the judicialization of the transition ensues, a wider leeway for political institutions is to be expected on the side of the Court of Justice. The approach taken by the Court in its rule of law case-law, by relying not only on the legal provisions but also on their practical application and on the broader legal and political context has already created a useful framework to factor in the particular and complex scenario of a transition 2.0.

V. Conclusion

The judicialisation of the rule of law crisis has consolidated both the role of the Court of Justice and national courts as protectors and interpreters of essential elements of the European rule of law through judicial dialogue. This role will not be easily put to rest with a change of circumstances, and cases will likely continue to reach the Court of Justice in a hypothetical transitional future, through the decentralised mechanism of preliminary rulings. The rule of law crisis has, therefore, contributed to the development of a new area of EU law where the jurisdiction of the Court clearly covers the entire field of judicial independence, and where some key elements of the democratic national institutional design may also be brought within its purview through future litigation.

The preliminary ruling procedure is potentially the most relevant procedural avenue in a context of democratic transition. This is due to two main reasons. First, because the case law of the Court has opted for a flexible interpretation of the concept of judicial independence with regard to the judges that may be considered a court or tribunal within the meaning of Article 267 TFEU. Second, because the evolution of the approach of the Court of Justice to the issue of admissibility has also been more flexible and in any case, national courts now dispose of very useful guidance to present

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their preliminary questions in a way that is admissible. The progressive clarification of admissibility criteria is likely to play an essential role in making courts more confident in bringing judicial independence/rule of law related cases to the Court of Justice related to future reforms in the justice system, in the context of a hypothetical democratic transition.

Furthermore, the existence of an already vast body of case law on judicial independence provides invaluable guidance (and a mandate) for reform. Some of the red lines of what the EU legal order admits or existentially requires have already been laid down by the case law and may continue to be developed in the future. Despite the deference that it is to be expected from the Court of Justice, future democratic transitions will take place in quite a peculiar scenario, and for the first time in history, the hard law limits of political transition have been and will continue to be judicially established at the supranational level. National and supranational courts dispose of solid procedural and material tools offered by the EU Treaties, newly found in the legally enforceable elements of the EU rule of law principle.

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IV.
Deepening the European Dimension

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Reversing a Member State's Regression and Restoring (its) Union Membership

– EU law as mandatory toolbox of 'Transition 2.0' –

Christophe Hillion[1]

I. Introduction 498
II. Transition 2.0: A Process Embedded in EU Law 499
III. Transition 2.0: A Requirement Based on the Duty of 'Non-Regression' 505
1. Non-regression from the fundamental commitment to respect and promote EU values 509
2. Non-regression from membership commitments 512
IV. Transition 2.0: A Legal Toolkit to Repair Membership 514
1. Under Article 7 TEU 514
2. Outside Article 7 TEU 517
3. State's obligations 521
4. Obligations of EU institutions 525
V. Conclusion 534

Abstract

Since it concerns Member States of the European Union, the process referred to as 'Transition 2.0' is necessarily embedded in EU law. As EU members, transitioning States must restore their constitutional democracies in compliance with the relevant requirements of the Union as common legal order, particularly as they derive from Article 2 TEU. Such a compliance is critical to rebuild trust in the transitioning States' ability to participate in the EU. The paper discusses the significance of the duty of 'non-regression' in structuring the process of transition, and envisages its possible operationalisation in terms of obligations binding the transitioning States, the other Member States and EU institutions, respectively.

Keywords: EU membership conditions – non-regression – transition – sincere cooperation – reparation – mutual trust

1 Centre for European Law, University of Oslo. This article was written in the framework of the ENROL project (ENforcing the Rule Of Law in the EU, funded by the Norwegian Research Council, 325707). I am grateful to the participants of the two Heidelberg workshops where the core ideas of this paper were presented, and in particular to Michal Bobek and Armin von Bogdandy for their helpful comments on the draft paper, and to Samuel Shannon for his editorial assistance. All mistakes are mine only.

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I. Introduction

As is well-established, EU membership requires all Member States' continued compliance with the fundamental norms of the EU legal order,[2] and primarily with its founding values of, among others, democracy, rule of law and fundamental rights. Enshrined in Article 2 TEU, these values have been 'identified and (…) shared by the Member States [and] define the very identity of the (…) Union as a common legal order'.[3]

From this vantage point, the present chapter argues that more than repairing a Member State's damaged constitutional democracy, 'Transition 2.0'[4] aims at restoring that State's full compliance with those shared values, and more generally with the essential canons of the EU constitutional order. Such renewed compliance is necessary for the transitioning State to rebuild trust in its membership,[5] and thus to recover and keep all of the rights associated thereto.

More specifically, the paper conceives of Transition 2.0 as a particular operationalisation of all Member States' duty of 'non-regression' from the commitments conditioning their EU membership, and in particular from their pledge to protect and promote the values of Article 2 TEU.[6] In the specific context of Transition 2.0, the duty of non-regression entails a requirement for the transitioning State to *reverse* its 'regression' and nullify the effects thereof as a condition fully to operate as a Member (again).

Thus understood, the duty of non-regression also generates obligations for EU institutions and other Member States as co-custodians of the EU

2 ECJ, *Repubblika*, judgment of 20 April 2021, case no. C-896/19, ECLI:EU:C:2021:311; ECJ, *Commission v. Poland ('Muzzle Law')*, judgment of 5 June 2023, case no. C-204/21, ECLI:EU:C:2023:442, para. 68. Also in this sense, see e.g., ECJ, *Commission v Italy*, judgment of 7 February 1973, case no. 39/72, ECLI:EU:C:1973:13, para. 24; ECJ, *Commission v UK*, judgment of 7 February 1979, case no. 128/78, ECLI:EU:C:1979:32, para. 12.

3 ECJ, *Hungary v EP and Council (Conditionality ruling (I))*, judgment of 16 February 2022, case no. C-156/21, ECLI:EU:C:2022:97, para. 127; ECJ, *Poland v. Council and EP (Conditionality ruling (II))*, judgment of 16 February 2022, case no. C-157/21, ECLI:EU:C:2022:98, para. 145.

4 On that notion, see e.g. the Editors' Preface, in this volume.

5 See in this sense: ECJ, *EU Accession to the ECHR*, Opinion of 18 December 2014, no. 2/13, EU:C:2014:2454, paras 166 to 168; ECJ, *Associação Sindical dos Juízes Portugueses ('ASJP')*, case no. C-64/16, judgment of 27 February 2018, EU:C:2018:117, para. 30; and ECJ, *Repubblika* (n. 2), para. 62.

6 ECJ, *Repubblika* (n. 2).

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legal order. As the Court of Justice recalled, the EU 'must be able to defend [its values], within the limits of [its] powers as laid down by the Treaties'.[7] From the moment a Member State's regression is established, and as long as that State intends to remain a member of the Union, those custodians must help or, if need be, force the transitioning State fully to comply with its EU obligations again, so as to restore trust in its membership and in turn the functioning of the Union.[8] Not ensuring that a State's regression is *effectively* reversed would make EU institutions (and other Member States) complicit in the erosion of Union's values, jeopardizing the mutual trust underpinning the common legal order and the latter's sustainability.

That said, the form and degree of the EU's engagement, and the deployment of available EU transition tools to reverse a Member State's regression, hinge on the latter's conduct and in particular on whether, and how far it readily engages to repair its membership. Moreover, the modalities of Transition 2.0 also depend on the gravity of the Member State's (past) breaches of its membership obligations (especially of those stemming from Article 2 TEU), and thus on the degree of ensuing damage done to its membership.

The discussion proceeds as follows. Having established Transition 2.0 as a process necessarily embedded in EU law (II), the paper establishes the significance of the duty of non-regression in structuring the transitioning State's reparation of its constitutional democracy as membership prerequisite (III). The discussion then turns to the possible operationalisation of that duty by exploring how 'regression' may be legally established for the purpose of Transition 2.0, and what EU legal mechanisms may then be mobilised to assist the State in accomplishing that transition (IV).

II. Transition 2.0: A Process Embedded in EU Law

For a Member State, the process of repairing its constitutional democracy must cohere with the imperatives of EU membership, particularly respect for democracy, the rule of law and fundamental rights as values common to all Member States (1). This is a condition for the State to operate within the

7 ECJ, *Conditionality ruling (I)* (n. 33), para. 127; ECJ, *Conditionality ruling (II)* (n. 3), para. 145.

8 See in this sense: ECJ, *EU Accession to the ECHR* (n. 5), para. 168; ECJ, *ASJP* (n. 5), para. 30; and ECJ, *Repubblika* (n. 2), para. 62.

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EU legal order based on mutual trust, and to continue to enjoy all its rights as a member of the Union (2).

Restoring a Member State's constitutional democracy as EU law requirement

At one level, Transition 2.0 may be envisaged as a process whereby a State restores its constitutional democracy following a shift in political leadership,[9] or indeed a change of regime.[10] It is the (explicit) undertaking to repair and compensate for the multi-layered damage (individual, systemic, reputational) resulting from the State's previous (in)actions that marks the start of the transition process. The latter may be carried out in consideration of a variety of moral and political imperatives, including the quest for justice and reconciliation,[11] while legally, the transition proceeds by reference to national constitutional norms (unless the constitution has itself been captured by the previous leadership and needs reparation), international standards of democracy and rule of law, contained in documents such as the European Convention of Human Rights (ECHR), other Council of Europe's sources (e.g. European Commission for Democracy through Law – the Venice Commission,[12] reports of the Group of States against Corruption (GRECO)) and, last but not least, in consideration of EU law.

Indeed, and because it concerns EU Member States, Transition 2.0 presupposes that their respective constitutional democracies be restored specifically in line with the requirements of EU membership in this domain, and in particular as they derive from Article 2 TEU.[13] To be sure, a Member State's constitutional democracy is deeply imbricated with the functioning of the EU. As has become clear, a member's democratic and rule of law

9 Further, see the respective chapters of e.g. Matej Avbelj, Jiří Přibáň, Maryhen Jiménez and Dario Castiglione, Diego García-Sayan, András Jakab, Mirosław Wyrzykowski and Adam Bodnar in this volume.

10 Hungary has been characterized as 'a hybrid regime of electoral autocracy'; see 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', < https://www.europarl.europa.eu/doceo/document/TA-9-2022-0324_EN.pdf >.

11 See the various contributions to the *Verfassungsblog* symposium *Restoring Constitutionalism*, https://verfassungsblog.de/category/debates/restoring-constitutionalism/.

12 See the chapter of Angelika Nußberger in this volume.

13 See the respective chapters of Armin von Bogdandy and Luke Dimitrios Spieker, Kim Scheppele, Maciej Taborowski, Paweł Filipek, Sara Iglesias Sánchez and Werner Schroeder in this volume.

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recession legally and factually undermines its effective compliance with EU norms, thereby damaging trust in its membership and in turn the operation of the EU legal order as a whole.[14] Conversely, transitioning (back) to constitutional democracy must be such as to restore the credibility of the State's membership in the EU, and ultimately the latter's functioning. Insofar as the State concerned intends to remain a member of the EU, its transition requires that it (re)aligns its system (constitutional, administrative, judicial, political) and its conduct,[15] with the agreed terms of the social contract inherent in EU membership,[16] to which it has voluntarily subscribed when joining.

Admittedly a State's renewed adherence to international and European (e.g. Council of Europe) standards of rule of law and democracy will help it fulfil (some of) the legal prerequisites for EU membership. The authentication of a State's restored constitutional democracy by international/European bodies (e.g. the Venice Commission, the European Court of Human Rights) will contribute to the EU process of (re)validation of the transitioning State's membership, the way such authentication contributes to the EU institutions' and Member States' assessment of Candidate States' readiness to join the Union,[17] notably in terms of respecting the rule of law, democracy, and fundamental rights. For example, an authoritative retreat from the 'decision' by Poland's contested 'Constitutional Tribunal' that found the provisions of the European Convention on Human Rights (ECHR) incompatible with Poland's Constitution, as well as measures to realign the operation of the Polish judiciary with the rule of law requirements deriving

14 European Commission, *2022 Rule of Law Report – The rule of law situation in the European Union*, COM(2022) 500 final, 1. Further, see e.g., Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in: Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016), 15–35.

15 On this notion, and obligations associated therewith, see ECJ, *Commission v Germany (COTIF II)*, judgment of 9 January 2019, case no. C-620/16, ECLI:EU:C:2019:256. The Preamble of the 2020 Conditionality Regulation (Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1) also underscores that both 'the laws *and practices* of Member States should continue to comply with the common values on which the Union is founded' (emphasis added).

16 Michael Dougan and Christophe Hillion, 'The EU's Duty to Respect Hungarian Sovereignty: An Action Plan', CMLRev 59 (2022), 181–202.

17 In this regard, see European Commission, *2022 Communication on EU Enlargement Policy,* COM(2022) 528; and the references contained therein.

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from the ECHR, decisions of the ECtHR, and/or the Venice Commission, will contribute to establishing the State's compliance with EU membership obligations too. Conversely, repairing Poland's membership would be hampered should its State authorities persistently flout their obligations under, e.g., the ECHR.[18]

That said, a Member State's renewed observance of its own constitutional norms and international commitments (e.g. ECHR) to rebuild its constitutional democracy might not suffice to re-establish compliance with the specific EU prerequisites,[19] and to restore mutual trust.[20] Recall that some of those membership requirements were declared inconsistent with Poland's Constitution by that same 'Constitutional Tribunal' which challenged the constitutionality of the ECHR,[21] eventually prompting a Commission's infringement procedure.[22]

Transition 2.0 entails more than a State's self-correction by reference to national and international standards, and based on modalities of its choosing and applied at its own discretion. While membership results from the individual and sovereign decision of a State (and its citizens),[23] its conception and development as an 'equilibrium between rights and

18 In this regard, see decisions of the Council of Europe's Committee of Ministers on the execution of the European Court's judgments: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680ab81eb. On the significance of the decisions of international courts for establishing compliance with EU requirements, see ECJ, *Getin Noble Bank*, judgment of 29 March 2022, case no. C-132/20, ECLI:EU:C:2022:235, para. 72.

19 See, in this regard, European Commission, *Reasoned proposal in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland – 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, 1.

20 ECJ, *EU Accession to the ECHR* (n. 5), para. 168; ECJ, *Conditionality ruling (I)* (n. 3), para. 125; ECJ, *Conditionality ruling (II)* (n. 3), para. 143.

21 TK, *Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union*, judgment of 7 October 2021, Case no. K3/21, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

22 European Commission, Press Release: "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", https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; on that TK decision, see e.g. Christophe Hillion, 'Last station before Polexit', *EU Law Live*, 28 October 2021: <https://eulawlive.com/op-ed-last-station-before-polexit-by-christophe-hillion/>.

23 ECJ, *Wightman*, judgment of 10 December 2018, case no. C-621/18, ECLI:EU:C:2018:999.

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obligations flowing from [any States] adherence' to the Union,[24] are the outcome of a joint (on-going) exercise of articulation and validation by Member States and institutions.[25] Membership does not entail, nor result from, a right for each Member State unilaterally to determine, let alone modify, its definition at will.[26] The latter is articulated, e.g., in EU Treaty provisions, the EU Charter of Fundamental Rights, and further elaborated through secondary legislation, the case law of the Court of Justice, and indeed enriched through the 'EU member-state-building policy' developed in the context of the Union's enlargement policy. The ensuing requirements of EU membership, and chiefly the values of Article 2 TEU, have thus been identified and endorsed by the community of Member States,[27] and must serve as a baseline for Transition 2.0,[28] understood as restoration of a Member State's constitutional democracy as part and parcel of the EU constitutional order.

The argument is not that the EU imposes a comprehensive definition of constitutional democracy on its Member States, and in particular on transitioning members. As recalled by the President of the Court of Justice in extrajudicial writings: 'it is (…) for each Member State to choose the model that best reflects the choices made by its own people, provided that

24 ECJ, *Commission v Italy* (n. 2).

25 In this sense, see the wording of Article 49 TEU.

26 Cf. the controversial renegotiations of the UK terms of its EU membership: 'A new Settlement for the United Kingdom within the European Union', 23 February 2016, OJ 2016 C 69 I/1. For a critic of the settlement: see Denys Simon and Anne Rigaux, 'Le "paquet britannique" – petits arrangements entre amis, ou du compromis à la compromission', Europe: actualité du droit communautaire 26 (2016), 8–13.

27 Consider the admissibility conditions articulated by the Member States since the conclusions of the 1969 Hague Summit (https://www.cvce.eu/obj/final_communique_of_the_hague_summit_2_december_1969-en-33078789-8030-49c8-b4e0-15d053834507.html, pt. 13), i.e. prior to the first enlargement of the then EEC. Further Christophe Hillion, 'EU enlargement' in: Paul Craig and Gráinne de Búrca (eds), *Evolution of EU Law* (2nd edn, Oxford: OUP 2011), 187–216; Paul Craig, 'EU Membership: Formal and Substantive Dimensions', CYELS 22 (2020), 1–31.

28 The Court has indeed held that 'by reason of their membership of the European Union, [the Member States] accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by EU law, to the exclusion, if EU law so requires, of any other law'; ECJ, *Commission v Council (Hybrid Act)*, judgment of 28 April 2015, case no. C-28/12, ECLI:EU:C:2015:282, para 40. See also ECJ, *EU Accession to the ECHR* (n. 5).

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those choices comply with the EU's founding values'.[29] In this respect, the EU (i.e. common institutions and other Member States) must instead ascertain that the transition which a Member State's authorities undertake, its modalities and the eventual (legal and political) settlement it reaches, ultimately meet the legal requirements of EU membership, and the functional imperatives of the Union as 'common legal order'.

Restoring a Member State's constitutional democracy to re-establish mutual trust in the Union

Indeed, Transition 2.0 has a functional dimension too. It aims at fixing the State's damaged capacity fully to operate as a member of the EU as common legal order, and in which national systems are deeply intertwined. As the Court of Justice often recalls:

> [the] essential characteristics of EU law have given rise to a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.
>
> This legal structure is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected.[30]

As it concerns Member States whose constitutional democracy has been damaged, Transition 2.0 aims at re-establishing that 'fundamental premiss'.

29 See ECJ, *Euro Box Promotion*, judgment of 21 December 2021, Joined cases no. C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, ECLI:EU:C:2021:1034; ECJ, *RS (Effet des arrêts d'une cour constitutionnelle)*, judgment of 22 February 2022, case no. C-430/21, ECLI:EU:C:2022:99. See also: Koen Lenaerts, 'The Rule of Law and the constitutional identity of the European Union'; Sofia, 5 March 2023, https://evropeiskipravenpregled.eu/the-rule-of-law-and-the-constitutional-identity-of-the-european-union/); and from the same author: 'On Checks and Balances: the Rule of Law within the EU', Columbia Journal of European Law 29 (2023), 15–63.

30 ECJ, *EU Accession to the ECHR* (n. 5), paras. 166–168. See also ECJ, *Conditionality ruling (I)* (n. 3), see also Lenaerts, 'On Checks and Balances' (n. 29).

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The process must help regain the confidence of other Member States' authorities in the transitioning States' renewed and effective compliance with the common values underpinning the EU legal order, as a condition for restoring the mutual trust that underpins the integration process.[31] It entails re-instating the full effectiveness of EU law within its own system.[32]

In sum, reparation of a State's constitutional democracy in the context of Transition 2.0 must be carried out, and gauged by reference to 'the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law'.[33] More than the State authorities' autonomous intention to re-democratise their system, the transition at hand involves the obligation to repair its own system as EU member, as much as a State, in line with the shared canons of the EU constitutional order. It requires it to subscribe to the essential and accepted equilibrium between rights and duties inhering in EU membership, which guarantees the equality of all members and Union citizens before EU law.[34] In this way, the end goal of Transition 2.0 is the renewal of the Member State's capacity to be trusted by its peers and by EU citizens.

III. Transition 2.0: A Requirement Based on the Duty of 'Non-Regression'

From an EU (law) perspective, it is the establishment of a Member State's failure to respect the founding values of the EU, as prerequisites for membership, which triggers the mandatory process of transition. This section discusses the significance in that context of the judicial notion of 'non-regression' (1). It will be suggested that more than 'mere' continued respect for the values of Article 2 TEU, that duty also requires the Member States' continued fulfilment of all membership commitments more generally (2).

31 And by extension, by third states and their nationals having rights in (relation to) the EU legal order. See in this sense Christophe Hillion, 'The EU external action as mandate to uphold the rule of law outside *and* inside the Union', Columbia Journal of European Law 29 (2023), 229–280.

32 ECJ, *Conditionality ruling (I) and (II)* (n. 3).

33 ECJ, *Conditionality ruling (I)* (n. 3), para 125.

34 See in that sense the arguments of the European Commission in its pending infringement action against Poland: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; see also: ECJ, *Commission v Italy* (n. 2); ECJ, *Commission v United Kingdom* (n. 2).

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A duty intrinsic to EU membership

A State's EU membership has been envisaged as 'the enjoyment of all of the rights deriving from the application of the Treaties to that Member State'.[35] Such an 'enjoyment' is conditioned on the State's 'compliance (…) with the values enshrined in Article 2 TEU'.[36] While a 'prerequisite' to become member of the EU, the duty to comply with those values continues to apply post-accession. A Member State cannot regress from its pledge to respect the values of Article 2 TEU, nor from the commitment to promote them.[37] Speaking about the rule of law as one of those EU values, the Court of Justice thus found that:

> A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law (…) The Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary [as essential element of the rule of law].[38]

The Court has further articulated the Member States' obligation of continued compliance with *all* the values of Article 2 TEU. Adjudicating in plenum, it thus recalled that:

> under Article 49 TEU, respect for those values is a prerequisite for the accession to the European Union of any European State applying to become a member of the European Union (…) compliance by a Member State with the values contained in Article 2 TEU is a condition for the enjoyment of all the rights deriving from the application of the Treaties to that Member State (…). Compliance with those values *cannot be reduced*

35 ECJ, *Repubblika* (n. 2), para. 63; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 68.

36 Ibid; ECJ, *Asociația 'Forumul Judecătorilor din România'*, judgment of 18 May 2021, case no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, para. 162; ECJ, *Euro Box Promotion* (n. 29), para. 162; ECJ, *Conditionality ruling (I)* (n. 3), para. 126; ECJ, *Conditionality ruling (I)* (n. 3), para. 144.

37 ECJ, *Conditionality ruling (I)* (n. 3), para 124.

38 Ibid.

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> *to an obligation which a candidate State must meet in order to accede to the European Union and which it may disregard after its accession.*[39]

Conceived as an obligation of result which cannot vary from one Member State to the other,[40] the requirement that Member States continue to comply with the values of Article 2 TEU is inherent in Article 49 TEU. According to that provision, the aspirant State must not only 'respect' the values of Article 2 TEU as a prerequisite for accession, but it must also be 'committed to promoting' them, implying a long-term engagement beyond the point of accession. Such a commitment is indeed a condition for the successful negotiations and ratification of the Treaty of Accession by all the Member States.

The twofold duty (viz. to comply and commit) coheres with the EU's own prominent value-promotion mandate enshrined in Article 3(1) TEU,[41] which frames the tasks and operation of its institutional framework, as stipulated in Article 13(1) TEU. That EU mandate in turn generates obligations for all Member States. In particular, they are bound by positive and negative duties stemming from the said principle of sincere cooperation, to secure that the Union effectively fulfils its primary task of promoting its values, as 'identified' and 'shared by the Member States'.[42]

The ensuing duty of non-regression, which the Court of Justice stated in its *Repubblika* ruling, amounts to a specific application of that same principle of sincere cooperation in the EU value-promotion mandate. Borrowing the terminology of the last paragraph of Article 4(3) TEU which establishes that principle, the Court held that Member States must 'refrain from' adopting measures that would reduce the protection of EU values. Such measures would jeopardise the very first task the Union is entrusted with, and which the Court has since conceived as encompassing the capacity for the EU to 'defend' those values.[43]

The Court's notion that a Member State cannot regress from its commitment to protect those values is also intrinsic to the provisions of Article 7

39 ECJ, *Conditionality rulings (I)* and *(II)* (n. 3) (emphasis added), see also ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 68.

40 ECJ, *Conditionality ruling (II)* (n. 3), para 265; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 73.

41 Further Christophe Hillion, 'Overseeing the rule of law in the European Union Legal mandate and means' in: Closa and Kochenov (n. 14), 59–81.

42 ECJ, *Conditionality ruling (I)* (n. 3), para 127; ECJ, *Conditionality ruling (II)* (n. 3), para 145.

43 Ibid.

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TEU. Like Article 49 TEU, it contains an explicit reference to Article 2 TEU, and expressly connects any Member State's continued value-compliance with the enjoyment of its membership rights. Thus, Article 7(3) TEU makes it clear that a Member State's characterised breach of the values of Article 2 TEU may result in the EU's suspension of some of 'the rights deriving from the application of the Treaties to that Member State.'

Repubblika confirmed and mainstreamed that basic quid pro quo inherent in Article 49 TEU, and in the procedure of Article 7 TEU. It is indeed noticeable that the Court of Justice also used the language of the latter provision when establishing that: 'compliance by a Member State with the values enshrined in Article 2 TEU is *a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State*' (emphasis added).[44] The Court thereby made it plain that any Member State's weaker fulfilment of the fundamental conditions to belong to the Union (even before it amounts to a systemic breach of values in the sense of Article 7 TEU), mechanically affects its capacity to enjoy the ensuing membership rights, particularly that of being trusted by other Member States.

A duty to be interpreted and applied broadly

In the same ruling, and subsequent case law,[45] the Court of Justice has envisaged the notion of 'non-regression' as the Member States' duty of continued compliance with the conditions of membership: viz. to respect and commit to promote the values of the EU (i). As mentioned above, the Court has emphasised that Member States must thereupon refrain from adopting measures that lead to 'a *reduction* in the protection of the value of [e.g.] the rule of law' (emphasis added).[46] Arguably, that obligation also relates to the broader commitments that Member States make upon accession (ii).

44 ECJ, *Repubblika* (n. 2), para. 63; see also: ECJ, *Euro Box Promotion* (n. 29), para. 162; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 74.

45 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36); ECJ, *Commission v Poland (Disciplinary regime for judges)*, judgment of 15 July 2021, C-791/19, ECJ, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:596; ECJ, *Euro Box Promotion* (n. 29).

46 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36).

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1. Non-regression from the fundamental commitment to respect and promote EU values

The moment of accession constitutes the point at which a State voluntarily commits itself to respect and to promote the values of the Union. To quote the President of the European Court of Justice, this point amounts to 'a "constitutional moment" for the State concerned since, at that very moment, the legal order of the new Member State *is deemed by the "Masters of the Treaties" to uphold the values on which the EU is founded*'.[47] Then, 'from the moment of accession onwards (…) the Member State in question commits itself to respecting those values for as long as it remains a member of the EU. That *ongoing commitment* means that there is "no turning back the clock" when it comes to respecting the values contained in Article 2 TEU' (emphasis added).[48] As suggested above, that commitment concerns each and every Member State, irrespective of the timing of its membership.

In *Repubblika*, the Court evaluated the compatibility of the revised Maltese rules of appointment of judges with the standards of judicial independence which the EU judicature had articulated, notably in its case law concerning the Member States' obligation to provide effective judicial protection under Article 19(1) TEU, by reference to the value of the rule of law included in Article 2 TEU.[49] Had the national rules under review failed to meet those standards, Malta would have been in breach of its EU obligation under Article 19(1) TEU.[50] Moreover, it would have also breached its duty of non-regression, understood as a structural obligation for Member States

47 See in this sense, Lenaerts (n. 29), 51.

48 Ibid. See also. ECJ, *Commission v Poland (Muzzle Law)* (n. 2), paras 66–68.

49 See in particular: ECJ, *ASJP* (n. 5). For an analysis of the case law articulating those standards, see e.g. Dimitrios Spieker, *EU Values before the Court of Justice. Foundations, Potential, Risks* (Oxford: Oxford University Press, 2023); Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case* (Stockholm: Swedish Institute for European Policy Studies), Report 2021:3.

50 Which was subsequently the case of Poland (in ECJ, *Commission v Poland (Disciplinary regime for judges)* (n. 45)). The Court found that by 'failing to guarantee the independence and impartiality of the Disciplinary Chamber which is called upon to rule (…) in disciplinary cases concerning judges of the Sąd Najwyższy (Supreme Court) and (…) in disciplinary cases concerning judges of the ordinary courts and by thereby undermining the independence of those judges *at, what is more, the cost of a reduction in the protection of the value of the rule of law in that Member State for the purposes of the* [Repubblika] *case-law of the Court* (…), the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU' (para. 113, emphasis added).

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to *continue* respecting and promoting the values of Article 2 TEU. In other words, it would have violated the EU substantive rule of law standards, *and* regressed from its structural commitments on which its EU membership is predicated.

The Member State's obligation not to regress, understood as a duty not to reduce the protection of e.g. the common values enshrined in Article 2 TEU once it has voluntarily joined the Union, does not mean that its legal situation, including its constitutional arrangements, have to remain as they were upon entry, on the ground that they were then deemed to have fulfilled the membership requirements. In line with Article 4(2) TEU, Member States are free to decide on, and develop their own constitutional rules, but on the condition that these do not depart from, and indeed cohere with, the values contained in Article 2 TEU, as jointly articulated within the Union.[51]

Admittedly, the Court did mention Malta's rules relating to judicial appointment as applicable when the country acceded, and which the contested new rules replaced. That reference does not however mean that the Court would systematically go back to the State's entry rules as substantive baseline to establish whether there is a 'reduction' in the protection of the rule of law. As it has been compellingly argued, this would deter constitutional innovation, and would otherwise generate a highly unequal application of the duty of non-regression to Member States depending on the timing of their admission to the Union, and the applicable accession conditionality and related standards if any, at the time of the ratification of the Treaty establishing their membership.[52]

Determining whether there is a 'reduction' in the protection of the values of Article 2 TEU (e.g. of the rule of law) that is contrary to the duty of non-regression, thus supposes a comparison between those new rules and the ones they are deemed to replace, which may have been amended since the State in question joined the Union. To quote the Court's President again: 'the level of value protection provided for by a Member State when it joined the EU is *a starting point* and *the trend of constitutional reforms must always be towards strengthening that protection*' (emphasis added).[53] Constitutional innovation is thus not dissuaded but rather encouraged

51 The Court confirmed that notion in its *Conditionality rulings (I) and (II)* (n. 3), and in ECJ, *Commission v Poland (Muzzle Law)* (n. 2), paras 72ff.

52 Further on this point, see Julian Scholtes, 'Constitutionalising the end of history? Pitfalls of a non-regression principle for Article 2 TEU', EuConst 19 (2023), 59–87.

53 Lenaerts (n. 29), 51.

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for the purpose of enhancing the common protection of the values that Member States subscribe to when joining, and jointly articulate thereafter in the Union. Indeed, a Member State's constitutional status quo might end up being regressive if the level of protection within the Union has increased in the meantime, be that through the case law of the Court, secondary legislation or the elaboration of the EU membership law in the context of the EU enlargement process.

Arguably, the notion of regression is the converse of the structural evolution inherent in the integration process envisaged in Article 1(2) TEU, premised on an *increasing* safeguard of the values at the EU level in accordance with Articles 3(1) and 13(1) TEU,[54] and at national level in line with Article 4(3) TEU, as a basis for deepening the mutual trust among Member States, which is functionally essential to the process of an ever closer union among the peoples of Europe.[55] Regression encapsulates a retreat from this dynamic process of integration, which the duty articulated by the Court in *Repubblika* and subsequent case law aims at preventing and, if need be, reversing.[56]

What the duty of non-regression thus seems to entail is that whenever a Member State modifies its laws, as they existed by the time of accession or as modified since, it must not only comply with the substantive obligations stemming from, e.g., the values of Article 2 TEU, as identified and incrementally enunciated, but it must also conform to the structural obligation not to regress from its membership-based commitment to respect and promote the values of Article 2 TEU.[57] If this interpretation is correct,

54 See the chapter of Werner Schröder in this volume, and from the same author: 'an active EU rule of law policy' in: Allan Rosas, Pekka Pohjankoski and Juha Raitio (eds), *The Rule of Law's Anatomy in the EU: Foundations and Protections* (Oxford: Hart, 2023), 105-122.

55 Without prejudice to the Court of Justice's *Melloni* case law: ECJ, *Melloni*, judgment 26 February 2013, case no. C-399/11, ECLI:EU:C:2013:107.

56 Arguably, the 'New Settlement' for the UK' (n. 26) would have been tantamount to the regression to which the Court refers in its *Repubblika* ruling (n. 2). In effect, by establishing e.g. that the UK 'is not committed to further political integration into the European Union', and that 'the references to ever closer union would not apply to the United Kingdom' (Section C, pt. 1), the arrangement would have amounted to a regression from the UK commitment to the very aims of the Union, stemming from its membership. The Court of Justice has partly confirmed the incompatibility between some aspects of the New Settlement and EU law in ECJ, *Commission v Austria*, judgment of 16 June 2022, case no. 328/20, ECLI:EU:C:2022:468.

57 See in this sense: ECJ, *Inter-Environnement Wallonie*, judgment of 18 December 1997, case no. 129/96, para. 45.

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it may be wondered whether the latter obligation would be breached if the revised rules, e.g. on judicial appointments, though still compatible with the standards of Article 2 TEU, entailed a reduction in the protection thereof compared to what they were before in the Member State concerned.

Both of these obligations are particularly relevant in the context of Transition 2.0. As an application of the duty of non-regression, such a transition involves a Member State's duty to reverse any established reduction in their protection of the common values, and a renewed protection in line with the evolving standards that operationalise these values in the EU legal order. Based on the above understanding of the duty of non-regression, reversing a Member State's reduced protection does not require from the State's authorities that they return to the status quo ante, in the sense of the legal situation applicable upon the moment of the state's accession, nor to the standards in place before the regression started. Such a return could also amount to another form of regression if, in the meantime, the protection of values has been further strengthened at the EU level since. The evolving understanding of the requirements of membership, and specifically of the obligations deriving from the values of Article 2 TEU, therefore have a ratchet effect: in reversing their regression, transitioning Member States must ensure that their laws and practices conform to the developing standards operationalising EU values, and more generally to the evolving and arguably hardening membership obligations.[58]

2. Non-regression from membership commitments

As recalled earlier, membership is contingent on Member States' fulfilment of other requirements. It presupposes compliance with wider, multi-layered obligations based on the founding EU Treaties,[59] as interpreted by the Court of Justice, and articulated by institutions and the existing community of members. Compliance with such requirements is indeed essential for a State to secure the full application of EU law and thus to secure the principled equality of Member States before the Treaties, as envisaged in Article 4(2) TEU. As such, these requirements equally ought to be considered as conditions for any Member State's continued enjoyment of membership

58 Mathieu Leloup et al., 'Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on *Repubblika v Il-Prim Ministru*', European Law Review 46 (2021), 692.

59 Paul Craig, 'EU Membership: Formal and Substantive Dimensions', CYELS 22 (2020), 1–31.

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rights, and in turn for the purpose of a successful Transition 2.0, a process aimed at restoring mutual trust in the EU.

Such obligations can be deduced not only from the very terms of Article 49(1) TEU, which refer to Article 2 TEU, but also from those contained in the accession conditionality, as articulated notably by the European Council.[60] Conditions for a State to become a Member State, as encapsulated in the so-called 'Copenhagen criteria' and as subsequently elaborated in the EU 'Pre-accession Strategy',[61] underscore that membership presupposes, in particular, the State's 'ability to take on and implement effectively the obligations of membership, *including adherence to the aims of political, economic and monetary union*' (emphasis added).[62]

The EU pre-accession strategy includes operational standards which the aspirant State must meet to fulfil those criteria. Such standards have been, and still are, regularly and systematically endorsed by the Member States, as conditions for admission, and indeed as evolving EU membership law.[63] Arguably, 'the enjoyment of all of the rights deriving from the application of the Treaties to that Member State presupposes continued 'compliance' with those prerequisites too: they '*cannot* [either] *be reduced to an obligation which a candidate State must meet in order to accede* to the European Union and which it may disregard after its accession' (emphasis added).[64]

In this way, the decisions of Poland's contested 'Constitutional Tribunal', in which it held various fundamental provisions of the EU Treaties incompatible with the national Constitution, is tantamount to a regression on

60 Since the Treaty of Lisbon, Article 49(1) TEU stipulates that '[t]he conditions of eligibility agreed upon by the European Council shall be taken into account'.

61 Further see Marc Maresceau, 'Pre-Accession' in: Marise Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), 9–42.

62 European Council, Copenhagen, June 1993. On the significance of those accession criteria, see: ECJ, *Getin Noble Bank* (n. 18), para 104; ECJ, *Commission v Poland (Muzzle Law)* (n. 2), para. 65.

63 See further Hillion (n. 27).

64 To be sure, the Court has envisaged States' compliance with the values of Article 2 TEU, as '*a* prerequisite', 'a precondition' for the accession of any applicant, and '*a* condition for the enjoyment of all the rights', not 'the' prerequisite, precondition or condition (see: ECJ, *Repubblika* (n .2), para. 63). Other conditions for that enjoyment are thus conceivable, and in particular the State's 'ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union'.

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the State's membership commitments. Those decisions eventually led the Commission to commence infringement proceedings against Poland.[65]

In sum, it is by reference to the State's duty not to reduce its fulfilment of the prerequisites for EU membership that Transition 2.0 can be legally envisaged and structured. It is the regression therefrom that triggers the transition process, and it is the transitioning State's certified renewed compliance with those fundamental conditions of membership, as endorsed by the Masters of the Treaties, as articulated in EU law and the Court's case law, that constitutes the finish line of Transition 2.0. As held by the Court: 'mutual trust is itself based (…) on the commitment of each Member State to comply with its obligations under EU law *and* to continue to comply (…) with the values contained in Article 2 TEU, which include the value of the rule of law' (emphasis added).[66] The next point is then to unpack the EU law of transition (2.0) by determining how regression may be established, then to map out how it should be reversed.

IV. Transition 2.0: A Legal Toolkit to Repair Membership

Regression may result from a Member State's disregard for EU substantive obligations whose compliance is essential for membership. It may also stem from its failure to remedy such breaches, e.g. by refusing to follow decisions from the ECJ, thus disregarding (some of) the structural obligations of membership. Regression may thus be established (1), and addressed (2), in several manners.

Establishing a Member State's regression

Article 7 TEU sets out a specific procedure to establish that a Member State is retreating from its membership commitments (i). The Court of Justice has acknowledged other legal avenues to that effect (ii).

1. Under Article 7 TEU

The procedure of Article 7 TEU has not proven itself a decisive tool to prevent, let alone sanction, Member States' regression from compliance

65 https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842; although at the time of writing, the case has not yet been registered at the Court of Justice.

66 ECJ, *Conditionality ruling (II)* (n. 3), para 147.

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with the values of Article 2 TEU.[67] Approaching it as an elaborate legal framework for the EU to bring a Member State back to constitutional democracy and operational membership might make it more relevant. The provision in effect sets out a useful template to structure Transition 2.0 as an EU-embedded process, and in particular for the EU (qua institutions and other Member States) both to establish a Member State's unlawful regression, and then to assist it in reversing it, in line with the canons of EU law.[68]

Under the procedure of Article 7(1) TEU, the EU Council has the power to establish that a Member State is taking a regressive course, i.e. that there is 'a clear risk of a serious breach by [that] Member State of the values referred to in Article 2'. The initiation of the procedure by the Commission, the European Parliament or a third of Member States, in itself puts the Member State in question under a specific observation from its peers, even prior to the Council's formal determination of the 'clear risk'. Since the activation of the procedure of Article 7(1) TEU, by the Commission in the case of Poland, and by the European Parliament in the case of Hungary,[69] the two Member States concerned have indeed been subject to (ir)regular hearings within the General Affairs Council.[70] The mere

67 See e.g. Daniel Kelemen, 'Article 7's place in the EU rule of law toolkit' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 12–16. Further on Article 7 TEU, see Wojciech Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement and Jorg Haider', Columbia Journal of European Law 16 (2010), 385; Leonard Besselink, 'The Bite, the Bark and the Howl Article 7 TEU and the Rule of Law Initiatives' in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford: OUP 2016), 128; Clemens Ladenburger and Pierre Rabourdin, 'La constitutionalisation des valeurs de l'Union – commentaires sur la genèse des articles 2 et 7 du Traité sur l'Union européenne', Revue de l'Union européenne 657 (2022), 231.

68 See section IV.2, below.

69 European Commission, 'Reasoned proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland', Brussels, 20.12.2017, COM(2017) 835 final; 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).

70 On the ad hoc organization of the hearings of the two Member States presently subject to this procedure, see: https://data.consilium.europa.eu/doc/document/ST-10641-2019-REV-2/en/pdf. For a critical appraisal on the hearings, see e.g., European Parliament, 'Resolution of 5 May 2022 on ongoing hearings under Article 7(1) TEU regarding Poland and Hungary', 2022/2647(RSP). On the effect of that activation,

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initiation of procedure has thereby triggered a transition phase, albeit of a (very) low intensity, which in principle may last until the reasoned opinion by the institution that submitted it is withdrawn, or by a Council negative decision in relation to that submission.[71] In the views of Jessika Roswall, Minister for EU Affairs of Sweden in charge of holding the hearings during the 2023 Swedish presidency of the EU Council: 'The Article 7 procedures regarding Poland and Hungary are continuing. Hearings are a useful tool in this process. They allow Member States to get a detailed picture of the reforms undertaken by the respective governments, the implementation process and the issues that still need to be addressed'.[72]

By contrast, a decision under Article 7(2) TEU would plainly establish that a Member State has failed to comply with EU values as prerequisites for membership. That decision, to be taken by the European Council on the initiative of the Commission or several Member States, would recognise that the Member State in question has systematically regressed ('persistent and serious breach' of the values of Article 2 TEU), thereby preventing it from operating in the common legal order based on mutual trust, and thus from enjoying all the rights deriving from membership. Such a decision triggers a process of transition of higher intensity – compared to the one envisaged in Article 7(1) TEU – within which the State needs to take appropriate measures to restore compliance with the values of Article 2 TEU as articulated in EU law, and in turn to regain other Member States' confidence, for the State in question to recover its full membership rights (Article 7(4) TEU).[73] Before taking its decision under Article 7(2) TEU, the European Council invites the Member State in question to submit its observations. It may then react and indeed disagree with the allegations, and face the prospect of a formal suspension of some of its membership rights (Article 7(3) TEU). Alternatively, it may acknowledge that its membership has been damaged and indicate which course of action it intends to take to

and on the usefulness of keeping that procedure open as long as the regressive course has not been fully reversed, see Kelemen (n. 67).

71 On the effects of the initiation of the procedure of Article 7(1) TEU, see Protocol (no 24) on asylum for nationals of member states of the European Union, annexed to the TEU (OJ [2016] C 202/304); ECJ, *Hungary v Parliament*, judgment of 3 June 2021, case no. C-650/18, ECLI:EU:C:2021:426, paras 39ff, ECJ, *LM*, judgment of 25 July 2018, case no. C-216/18, EU:C:2018:586, para. 79.

72 https://www.consilium.europa.eu/en/meetings/gac/2023/05/30/.

73 ECJ, *Conditionality Ruling II* (n. 3), para. 209.

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stop and reverse its regressive course. That latter scenario, might then open for a more cooperative Transition 2.0.[74]

2. Outside Article 7 TEU

The Court of Justice has confirmed that a Member State's breach of the values of Article 2 TEU, as regression from its membership commitments, can be established in other ways. This in turn means that the duty to reverse may be triggered outside the context of Article 7 TEU. In its seminal *conditionality* rulings, the Court indeed recalled that:

> In addition to the procedure laid down in Article 7 TEU, numerous provisions of the Treaties, frequently implemented by various acts of secondary legislation, grant the EU institutions the power to examine, determine the existence of and, where appropriate, to impose penalties for breaches of the values contained in Article 2 TEU committed in a Member State.[75]

In particular, the Court has established that EU primary law contains several provisions that 'give concrete expression' to the values of Article 2 TEU, and which stipulate specific requirements to secure compliance therewith. For instance, the second subparagraph of Article 19(1) TEU, which 'gives concrete expression to the value of the rule of law contained in Article 2 TEU, requires Member States (…) to establish a system of legal remedies and procedures ensuring that the right of individuals to effective judicial protection is observed in the fields covered by EU law'.[76] Similarly, 'Article 10(1) TEU provides that the functioning of the Union is to be founded on the principle of representative democracy, which gives concrete form to the value of democracy referred to in Article 2 TEU'.[77] In its *Conditionality* rulings, the Court added that other provisions like:

74 Further on the legal modalities of 'Transition 2.0' based on Article 7 TEU, see section IV.2.ii., below.

75 ECJ, *Conditionality ruling (I) and (II)* (n. 3), at paras 159 and 195, respectively.

76 ECJ, *Conditionality ruling (I) and (II)* (n. 3); see also ECJ, *ASJP* (n. 5); ECJ, *A.B. and Others (Appointment of Judges to the Supreme Court – Actions)*, judgment of 2 March 2021, case no. C-824/18, EU:C:2021:153.

77 ECJ, *Oriol Junqueras Vies*, judgment of 19 December 2019; case no. C-502/19, ECLI:EU:C:2019:1115, para. 63. On the significance of Article 10 TEU in the context of the transition, see the chapter of Pál Sonnevend in this volume.

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> Articles 6, 10 to 13, 15, 16, 20, 21 and 23 of the Charter *define the scope of the values* of human dignity, freedom, equality, respect for human rights, non-discrimination and equality between women and men, contained in Article 2 TEU (…) [while] Articles 8 and 10, Article 19(1), Article 153(1)(i) and Article 157(1) TFEU define the scope of the values of equality, non-discrimination and equality between women and men and allow the EU legislature to adopt secondary legislation intended to implement those values.[78]

On that basis, the Court could then review the Member States' '[c]ompliance with [the] requirement [of e.g. Article 19(1) TEU] *inter alia* in an action for failure to fulfil obligations brought by the Commission under Article 258 TFEU'[79] – a review which it may also perform in an action brought by a Member State under Article 259 TFEU. A Court's decision may therefore establish a Member State's breach of provisions 'giving concrete expression' to the values of Article 2 TEU, or of those defining the scope thereof,[80] and thus acknowledge the existence of a regression in the protection of those values, in turn triggering a mandatory transition.[81]

The existence of a regression may also be established by Council decision, albeit indirectly, following an initiative of the Commission, e.g. in the context of the Regulation 'on a general regime of conditionality for the protection of the Union budget, or in the framework of other conditionality mechanisms attached to EU budgetary instruments.[82] For instance, the

78 ECJ, *Conditionality ruling (I)* (n. 3), paras 157ff (emphasis added).

79 ECJ, *Conditionality ruling (I)* (n. 3), para. 161 and ECJ, *Conditionality ruling (II)* (n. 3), para. 197; ECJ, *Commission v Poland (Independence of the Supreme Court)*, judgment of 24 June 2019, case no. C-619/18, EU:C:2019:531; ECJ, *Commission v Poland (Independence of the ordinary courts)*, judgment of 11 July 2019, case no. C-192/18, EU:C:2019:924.

80 The Court's multiple formulations of the connections between Article 2 TEU and other provisions of primary law beg the question of whether these provisions play different functions in terms of operationalising the values of Article 2 TEU, and as obligations for Member States.

81 See e.g., ECJ, *Commission v Poland (Disciplinary Chamber)* (n. 45).

82 General Conditionality Regulation (n. 15); Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions [2021] OJ L231/159; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L57/17; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Poland [2022], Interinstitutional File: 2022/0181 (NLE), https://data.consilium.europa.eu/doc/document/ST-9728-2022-INIT/en/pdf and ANNEX https://data.consilium.europa.eu/doc/document/ST-9728-2022-ADD

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Council found that Hungary had breached 'the principles of the rule of law [in a way that] affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'. In line with Article 4(1) of the 'Conditionality Regulation', the Council imposed 'appropriate measures', by way of a suspension of some EU budgetary commitments, until Hungary's adoption of adequate remedial measures.[83] The Commission and Council also decided to withhold EU cohesion policy funds allocated to Hungary and Poland until they restored the independence of their judiciary, in line with the requirements of the Charter of Fundamental Rights.[84]

The authorities of Member States too, including their courts, may establish that a Member State is regressing on its membership commitments, notably that commitment of respecting the rule of law. Since its *LM* ruling in particular,[85] the Court of Justice has recognised that a Member State's court can be relieved from its EU obligation of mutual recognition in the specific context of the European Arrest Warrant,[86] 'where the executing judicial authority, called upon to decide whether a person in respect of whom a European arrest warrant has been issued (…) is to be surrendered, has material (…) *indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalised deficiencies so far as*

-1/en/pdf; Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary [2022], Interinstitutional File: 2022/0414 (NLE), https://data.consilium.europa.eu/doc/document/ST-15447-2022-INIT/en/pdf and ANNEX, https://data.consilium.europa.eu/doc/document/ST-15447-2022-ADD-1/en/pdf. Further on EU conditionality and respect for the values, see John Morijn and Kim Scheppele, 'What Price Rule of Law' in: Södersten and Hercock (n. 67), 29–35.

83 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 [2022] L325/94.

84 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7801 (Hungary); https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4223 (Poland).

85 ECJ, *LM* (n. 71), see also ECJ, *Aranyosi et Căldăraru*, judgment of 5 April 2016, case no. C-404/15 et C-659/15 PPU, EU:C:2016:198; ECJ, *RO*, judgment of 19 November 2019, case no. C-327/18 PPU, ECLI:EU:C:2018:733.

86 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190/1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81/24).

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concerns the independence of the issuing Member State's judiciary' (emphasis added).[87]

As a result, a Member State's judge, in casu the 'executing authority', may itself determine the existence of 'systemic or generalised deficiencies [regarding] the independence of the issuing Member State's judiciary', and suspend that State's enjoyment of some of its membership privileges, viz. the right for the judicial authorities as the 'issuing Member State's judiciary', to be trusted, in casu the 'executing authorities', that they comply with the principles of the rule of law. Member States' judicial authorities, as part of the EU judicial system,[88] may however take that decision only where the strict conditions set out by the Court of Justice are fulfilled:[89] the '[executing] authority must determine, specifically and precisely, whether, having regard to [the prosecuted individual's] personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the European arrest warrant, and in the light of the information provided by the issuing Member State (…), there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State'.[90]

While in principle circumscribed to the case at hand, the executing authority's decision not to execute the decision of the issuing authority may have ripple effects across the EU judicial system.[91] Other Member States' (judicial) authorities may follow suit, thus spreading the distrust towards

87 ECJ, *LM* (n. 71), para. 79.

88 ECJ, *Unified Patent Court*, opinion of 8 March 2011, opinion no. 1/09, ECLI:EU:C:2011:123.

89 As well-established, 'a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach (…) of rules of [EU] law'. See ECJ, *Commission v Greece (IMO)*, judgment of 12 February 2009; case no. C-45/07 ECLI:EU:C:2009:81; ECJ, *Commission v France*, judgment of 25 September 1979, case no. 232/78, ECLI:EU:C:1979:215.

90 ECJ, *LM* (n. 71), para. 79.

91 See e.g. the decision of 17/02/2020 of the Oberlandsgericht Karlsruhe (Higher Regional Court in Karlsruhe), DE:OLGKARL:2020:0217.AUSL301AR156.19.00. Further see Anna Wójcik, 'Muzzle Law leads German Court to refuse extradition of a Pole to Poland under the European Arrest Warrant', 6.03.2020, https://ruleoflaw.pl/muzzle-act-leads-german-to-refuse-extradition-of-a-pole-to-poland-under-the-european-arrest-warrant/; Christophe Hillion, 'A(nother) lost opportunity? The European Council and domestic assaults on the EU constitutional order', Verfassungsblog, 3.11.2021, https://verfassungsblog.de/another-lost-opportunity/.

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the Member State of the issuing authorities more generally.[92] To be sure, it signals that the State in question has to re-establish the credibility of its (judicial) authorities, while implicitly calling on EU institutions' to engage with that State so as to repair mutual trust.[93]

In sum, EU institutions and Member State's authorities have the power to make a determination that a Member State is regressing from its membership commitments, and in particular from that of protecting the values of Article 2 TEU. The next section turns to mapping the potential legal tools that can be mobilised to carry out the transition that such a determination triggers, and what the EU as 'common legal order' can contribute to the process at hand.[94]

EU legal tools to reverse regression

Once established, a Member State's regression triggers a mandatory process of transition, viz. Transition 2.0. In particular, such a determination prompts various obligations stemming from EU law that bind the State in question, and which then legally structure its transition (i). A Member State's regression also prompts the duty for EU institutions, and for other Member States, to engage in that process of transition to secure that the State in question effectively reverses its regression, nullifies the negative implications thereof and regains its credibility, so that (its) membership can be repaired (ii).

3. State's obligations

A State's admitting its own regression and commitment to reverse it will undoubtedly *facilitate* the process of transition, and the re-establishment of its trustworthiness. Yet as a process embedded in EU constitutional order,

92 On the widening damage to mutual trust, see the decision of the General Court in *Sped-Pro S.A. v European Commission*, judgment of 9 February 2022, case no. T-791/19, ECLI:EU:T:2022:67.

93 The authorities of an EU partner with which the EU has mutual recognition arrangements may equally decide no longer to execute decision from a regressive Member State, adding the pressure on the EU to engage with the Member State in question to restore the rule of law. In the same vein, the suspension of external funding towards a Member State, e.g. EEA funds, following the latter's breach of the values shared between the parties, could also be an indication of that State's regression, and of the ensuing need for the EU to secure that it reverses that regression. Further Hillion (n. 31), 262.

94 ECJ, *Conditionality ruling (I)* (n. 3), para. 127.

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Transition 2.0 is *activated* irrespective of that recognition and must be carried out in line with the requirements of EU law. A Member State whose actions or omissions fall foul of its EU obligations must always seek to stop and reverse its unlawful conduct, a fortiori if the latter concerns the conditions of (its) membership.

Article 260 (1) TFEU epitomises the mandatory character of the transition, once regression has been established by way of an infringement procedure. Thus, 'if the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the *State shall be required to take the necessary measures to comply with the judgment of the Court*.' The Court has recalled the general character of this remedial obligation in situations of non-compliance with EU law, by reference to Article 4(3) TEU:

> it follows from the principle of sincere cooperation (…) that the Member States are obliged to take all the measures necessary to guarantee the application and effectiveness of EU law and to eliminate the unlawful consequences of a breach of that law, and that such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (…).[95]

A fortiori, such obligations are of particular relevance if and when it has been established that a State has regressed from its membership commitments, and in particular from that pledge to protect EU values. In view of its impact on the EU legal order, such a regression arguably bolsters the normative force of the duty 'to take all the necessary measures' referred to above. The State in question must stop and reverse its regression, and restore full compliance with the agreed conditions of membership. Re-compliance therewith is the necessary endpoint of transition 2.0,[96] at least as long as the State concerned intends to remain part of the Union. Indeed, it is that very intention that activates and justifies the State's obligation of transition based on EU law.

Formulated in *Repubblika* as a negative obligation (obligation not to), viz. to 'refrain from' taking measures that would reduce the protection of EU values, the duty of non-regression, as specific application of the obligation of sincere cooperation to the task stipulated in Article 3(1) TEU,

95 ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36), para. 176.

96 In this regard, see the chapter of Armin von Bogdandy and Dimitri Spieker, in this volume.

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arguably generates positive obligations too, particularly in the context of Transition 2.0. Borrowing the phraseology of Article 4(3) TEU recalled above, non-regression thus requires from Member States that they 'take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union', ultimately 'to facilitate the achievement of the Union's tasks', in particular that of defending its values, and more generally 'the process of integration that is the raison d'être of the EU itself'.[97] More than compliance, the duty of non-regression entails the State's overall cooperation to protect the common values of Article 2 TEU.

More specifically, what the obligation to reverse the regression entails for the State's authorities is that they disapply,[98] and if need be, remove unlawful national provisions (or inactions) generating that regression. This includes illicit judicial decisions.[99] Ultimately, they must eliminate the unlawful consequences of the regression, if need be by replacing the regressive measures with provisions that will cohere with the standards operationalising Article 2 TEU, and with the requirements of membership more generally:

> The Court has consistently held that the incompatibility of national legislation with Community provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty.[100]

97 ECJ, *EU Accession to the ECHR* (n. 5), para. 172.

98 Further Michael Dougan, 'Primacy and the remedy of disapplication', CML Rev. 56 (2019), 1459–1508.

99 ECJ, *W.Ż. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, judgment of October 2021, case no. C-487/19, ECLI:EU:C:2021:798, paras 152ff. See also ECJ, *Asociația 'Forumul Judecătorilor din România'*, Opinion of AG Bobek of 23 September 2020, case no. C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19. See also ECJ, *Commission v Poland (Muzzle Law)* (n.2), para. 79. Further on this point, see the chapter of Maciej Taborowski in this volume.

100 ECJ, *Commission v. France*, judgment of 13 March 1997, case no. C-197/96, ECLI:EU:C:1997:155; see also ECJ, *Commission v. France*, judgment of 7 March 1996, case no. C-334/94, ECLI:EU:C:1996:90.

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Disapplication and replacement of contentious acts might however not suffice to 'eliminate the unlawful consequences' of the State's misconduct.[101] For instance, disapplying and replacing measures that led to a reduction in the protection of the rule of law in Poland will not be appropriate to remedy the implications of these measures for individuals who did not obtain the effective judicial protection they were entitled to under EU law, and in particular Article 19(1) TEU, and Article 47 CFR. Similarly, such disapplication and replacement will not in themselves nullify the consequences of the unlawful disciplinary measures suffered by numerous Polish judges in breach of the requirements of Article 19(1) TEU.

Eliminating the consequences of regression may entail that individuals should be able to obtain reparation in case of damage, based notably on the *Francovich* jurisprudence.[102] Arguably, the latter could play a particularly important role in helping to reverse regression in the protection of EU values, which could be envisaged as 'a sufficiently serious breach' for the purpose of establishing liability of the transitioning State. Admittedly, the chances of success of this course of action, which are limited in normal circumstances,[103] will be highly dependent on whether national courts have in effect recovered, in law and in fact, their ability to adjudicate independently and impartially, on the availability of national rules on liability, and more generally on the extent to which the rule of law has been restored. The feasibility of *Francovich* liability could indeed indicate whether the State is effectively reversing its regression as regards the rule of law, and incidentally whether its judicial authorities can be trusted, in terms of providing legal protection.

101 See in this respect, e.g., ECJ, *Varhoven administrativen sad*, judgment of 24 November 2022, case no. C-289/21, ECLI:EU:C:2022:920.

102 ECJ, *Francovich*, judgment of 19 November 1991, cases no. C-6/90 and C-9/90, ECLI:EU:C:1991:428; see also, e.g. ECJ, *Deutsche Umwelthilfe*, judgment of 19 December 2019, case no. C-752/18, EU:C:2019:1114; ECJ, *JP v. Ministre de la Transition écologique*, judgment of 22 December 2022, case no. C-61/21, ECLI:EU:C:2022:1015. On the application of *Francovich* liability to judicial bodies see ECJ, *Köbler*, judgment of 30 September 2003, ECLI:EU:C:2003:513.

103 See e.g. Michael Dougan, 'Addressing Issues of Protective Scope within the Francovich Right to Reparation', European Constitutional Law Review 13 (2017), 124–165; Norbert Reich, '*Francovich* Enforcement Analysed and Illustrated by German (and English) Law' in: Jakab and Kochenov (n. 67), 112–127; Tobias Lock, 'Is Private Enforcement of EU Law Through State Liability A Myth? An Assessment 20 Years After *Francovich*', CMLRev. 49 (2012), 1675–1702.

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4. Obligations of EU institutions

As recalled earlier, EU institutions are generally bound by Article 13(1) TEU to promote EU values. In this way, they have an obligation to practice sincere cooperation in line with Article 13(2) TEU, so as to help the EU perform its tasks and achieve its value-related objectives. The Court findings that the 'Union *must be able to defend* [its founding] values, within the limits of its powers as laid down by the Treaties' (*conditionality* rulings) confirm that point and add to the notion that EU institutions must actively engage with a transitioning State to reverse its regression – and to ensure that the unlawful consequences thereof are eliminated. The very 'powers' the Court alluded to in its *conditionality* rulings are particularly relevant, if not critical, in Transition 2.0, and they must be exercised accordingly.

This general EU value-mandate determines the way in which all Union's institutions, as well as other Member States, ought to engage to ensure that a transitioning State effectively reverses an established regression, and transitions back into operational membership, based on compliance with the values of Article 2 TEU. In particular, the mandate ought to frame the way EU tools, including Article 258–260 TFEU, Article 7 TEU, and the various conditionality mechanisms referred to earlier, are mobilised, ultimately to repair the transitioning State's membership and restore mutual trust in the EU.

While Transition 2.0 is mandatory from the moment regression is established, its *modalities* may however vary, not only in view of the specific characteristics of the regression at hand, but also in consideration of the attitude of the authorities of the State in question in the face of their obligation to reverse it. The transition will indeed unfold in different ways whether the State concerned accepts or contests the existence of a regression, *viz.* whether it acknowledges (or indeed self-declares) that its membership has been impaired by the authorities' past actions and/or omissions, or not.[104]

That said, Transition 2.0, as reversing a State's regression from its membership commitments, ought to be a time-limited process. Unless EU membership rules are themselves revised legally to accommodate a new type

104 See in this regard: https://www.euractiv.com/section/politics/news/eu-presses-poland-to-pay-fines-in-disciplinary-chamber-standoff/.

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of differentiated membership,[105] an implausible prospect if differentiation concerns observance of the very prerequisites of membership,[106] a Member State cannot remain in a transitory mode on a permanent basis. Either the transition succeeds so that trust is restored, and membership is thus fully repaired, or transition fails and alternatives to the State's member status must be considered so as to preserve the integrity of the EU as common legal order, and membership thereof.[107]

a) In the context of Article 7 TEU

As suggested earlier, Article 7 TEU provides, in principle, a legal framework wherein EU institutions may not only establish a Member State's regression; the provision also envisages mechanisms whereby institutions determine and monitor how the State ought to reverse its regression, ultimately to be able to revalidate its membership and regain its ability to enjoy all the rights it entails. Practice so far shows that this transition framework – and thus a more constructive dimension of Article 7 TEU – has been overlooked. Much more could therefore be made of this mechanism as a

105 As attempted in the renegotiation between the Member States and the United Kingdom in 2016, see (n. 26).

106 Daniel Kelemen, 'Is differentiation possible in rule of law?', Comp Eur Polit 17 (2019), 246–260; Ivan Damjanovski, Christophe Hillion and Denis Preshova, 'Uniformity and Differentiation in the Fundamentals of EU Membership: The EU Rule of Law Acquis in the Pre- and Post-accession Contexts', IDEA Working Papers 4 (2020), https://www.iai.it/en/pubblicazioni/uniformity-and-differentiation-fundamentals-eu-membership.

107 If a disconnect appears between an intransigent Member State's government, refusing to reverse its regression, and its EU-supportive nationals, the EU and other Member States arguably ought to assist the latter, to protect their EU citizenship, and their State's membership. That might entail, e.g. direct assistance to local authorities, CSOs, without going through the captured State's structures (the connection between the EU and Union's citizens, circumventing the State's disruptive actions is evidenced in the Commission's action against Poland for the decision of its constitutional tribunal: 'The Commission's objective is to ensure that the rights of Polish citizens are protected and that they can enjoy the benefits of the EU in the same way as all EU citizens. Primacy of EU law ensures equal application of EU law across the Union', https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842). Conversely, in case of alignment between a Member State and its people in carrying out anti-EU policies, EU institutions and other Member States' should respect that democratic choice while preserving the EU constitutional order, namely by facilitating Member States' withdrawal. See in this sense Dougan and Hillion (n. 16).

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basis for monitoring and steering a State's transition away from an unlawful regression, precisely to avoid the latter becoming ever more damaging for the EU and other Member States, and the process of restoring the State's compliance becoming ever more difficult to carry out.

Once the procedure of Article 7(1) TEU is initiated – and this is particularly significant for Transition 2.0 – the Council may adopt 'recommendations' *before* it decides whether there is a risk of serious breach of the values of Article 2 TEU. Presumably, the very purpose of these recommendations is to set out ways to prevent the Member State from taking a further regressive course, and thus to keep its membership rights intact. Article 7(1) TEU thereby empowers the EU in general, and the Council in particular, to avert (further) regression, not only by putting the State concerned under observation, but also by possibly steering it away from its deteriorating course. These recommendations could indeed be of particular significance in helping the State's renewed compliance with its membership requirements, if considered in the light of the Court of Justice's case law on the Commission recommendations adopted in the context of the Cooperation and Verification Mechanism (CVM). In particular, and given the importance of the Council's Article 7 recommendations for the State's compliance with the values of Article 2 TEU, one may wonder whether they ought to enjoy the same constraining effect as the one the Court attributed to the CVM recommendations. Paraphrasing the Court's ruling in *Asociaţia 'Forumul Judecătorilor din România*, it is arguable that since Article 7 recommendations 'are [equally] intended to ensure that [the Member State concerned] complies with the value[s] (…) set out in Article 2 TEU', they should be equally 'binding on it, in the sense that [the Member State] is required to take the appropriate measures for the purposes of meeting those [recommendations], (…) under the principle of sincere cooperation laid down in Article 4(3) TEU'.[108]

If, and when, the Council establishes that there is a 'risk' under Article 7(1) TEU, it 'shall regularly verify that the grounds on which such a determination was made continue to apply'. This entails that the State con-

108 ECJ, *Asociaţia 'Forumul Judecătorilor din România*' (n. 36), paras 178, 249 and 250, and the Opinion of AG Bobek (n. 99). For some reflections on what these recommendations could look like, see e.g., Laurent Pech and Jakub Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations', CEU DI Working Papers 2023, https://democracyinstitute.ceu.edu/articles/laurent-pech-jakub-jaraczewski-systemic-threat-rule-law-poland-updated-and-new-article-71.

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cerned would be subject to increased scrutiny, until the Council considers otherwise. In making that determination, the Council ought to exercise its discretion in the light of the purpose for which the procedure exists, namely to restore the State's compliance with the values of Article 2 TEU, and ultimately to re-establish mutual trust.

Should the European Council proceed to the decision under Article 7(2) TEU, the latter would set in motion the most explicit and intrusive form of Transition 2.0. For under Article 7(3) TEU, the Member State in question may have some of its membership rights suspended by the Council, until it complies again with the values of Article 2 TEU, and thus the conditions for membership;[109] that is until the Council takes a decision 'to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed' (Article 7(4) TEU). The transitioning State's renewed fulfilment of the prerequisites for membership, including constitutional democracy in line with the requirements of Article 2 TEU, is then a matter for the Union institutions to validate. This is a particular expression, that legally the successful outcome of Transition 2.0 as a re-compliance with the requirements of membership, needs authentication by the EU (as institutions and other Member States), rather than a mere self-proclamation of restored constitutional democracy by the Member State in question.

In the meantime, the decision to suspend a State's membership rights generally relieves the other Member States from (some of) their obligations towards the transitioning State. In particular, Member States' courts are no longer bound to recognise and execute decisions from its courts – a suspension of mutual recognition that may also apply to other national authorities. Instead, they are required to suspend some of the membership-based rights of the transitioning State, in casu the presumed confidence that its authorities comply with EU values including fundamental rights and the rule of law. This is notably the case in the context of the European Arrest Warrant (EAW) mechanism, as discussed above.[110] Thus according to the EAW Framework Decision:

109 As the Court underlined in its *Conditionality ruling (I)* (n. 3), para 170: 'the purpose of the procedure laid down in Article 7 TEU is … to allow the Council to penalise serious and persistent breaches of the values contained in Article 2 TEU, *in particular with a view to compelling the Member State concerned to put an end to those breaches*' (emphasis added).

110 See section IV.1.ii. Incidentally, such a decision could also deprive the transitioning State of some of its membership rights deriving from the external action of the

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> The mechanism of the European arrest warrant is based on a high level of confidence between Member States. Its implementation may be suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in [Article 2 TEU], determined by the [European] Council pursuant to [Article 7(2) TEU,] with the consequences set out in [Article 7(3) TEU].[111]

Mutual recognition can only be resumed, and the State's presumed trustworthiness stemming from its membership in principle restored, once the European Council decision is reversed by a Council decision based on Article 7(4) TEU. Such a decision is required to terminate the transition: it formally certifies that compliance has been restored, that membership has been repaired, so that mutual trust can be re-established. The Member State in question may thus de novo, 'enjoy (…) all (…) the rights deriving from the application of the Treaties to that Member State'. In principle, that would immediately require from other Member States' courts (and other authorities) that they comply again with the principle of mutual recognition towards decisions from that State's authorities. Yet, this in turn presupposes that the assessment made by the Council of the State's renewed compliance is cogent.

A more constructive approach to Article 7 TEU could therefore be contemplated, away from the castrating and lingering discourse on Article 7 as 'nuclear option' – which it is not. This potential change of perspective could indeed come from the State concerned itself. Nothing prevents a transitioning Member State from engaging to reverse its regressive course by actively mobilising the EU, its institutions and law, including by way of a Council decision under Article 7 TEU. As paradoxical as it may sound, the transitioning State may have an interest in a Council determination that its membership is being/has been damaged by past (in)actions, which then formalises the general requirement for the State to take the necessary

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Union. Thus, EU external agreements involving mutual recognition of courts' decisions (e.g. Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, [2006] OJ L 292/2; Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2007] OJ L 339/3) might also prompt the third states (courts) to stop executing decisions of that Member State's authorities. Further on this point, Eirik Holmøyvik, 'No Surrender to Poland', Verfassungblog, 2.11.2021, https://verfassungsblog.de/no-surrender-to-poland/; Hillion (n. 31).

111 Council Framework Decision (n. 86), Preamble.

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measures to keep its membership rights intact. Such a decision would thus provide a firm EU law basis for the State's authorities, following a change of leadership, to carry out potentially far-reaching reforms deemed necessary to repair its membership and trustworthiness, with the support of EU institutions (and other Member States), as well as substantive input through, e.g., Council recommendations. Indeed, it has been compellingly argued in this volume that the process of transition might encounter internal 'obstacles and hurdles'.[112] One example would be the opposition from Poland's President and/or from the captured constitutional tribunal and/or supreme courts to the reforms the new leadership intends to introduce to repair the state's constitutional democracy, and in turn its membership.

In this scenario, an Article 7(2)-decision, establishing that the State has unlawfully and systemically regressed from its membership commitments and might lose some of its membership prerogatives if no reversing measures are taken, might provide a useful EU / and other Member States' legal authority to the government's reparation agenda, as well as additional political leverage for the latter to reverse the unlawful regression. It might incidentally unlock the tailored use of other mechanisms, including financial, for the purpose of securing the transition. It should indeed be recalled that there is no automaticity between the European Council decision of Article 7(2) and that of the Council under Article 7(3) TEU. The latter might agree on measures to be taken so that the transitioning State does not lose its rights. To be sure, Article 7 TEU does not mechanically entail a suspension of the transitioning State's right to vote. The Council appears to have a wide discretion in choosing the measures to address a serious and persistent breach of EU values, in terms of the measures to stop it. Use could be thus made of that tool to help the State repair its membership, without it losing its voting right – except in relation to the decisions relating to the very process of transitioning back, and of authenticating that the transition has been effectively accomplished, in line with the prescriptions of Article 7(5) TEU and 354 TFEU.

112 See the contribution of Adam Bodnar in this volume.

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b) Outside Article 7 TEU

While all institutions (and other Member States) may activate Article 7 TEU and engage in the transition process that provision envisages, the European Commission arguably has the most prominent role to play for a Transition 2.0 unfolding outside Article 7 TEU. The EU constitutional charter foresees that it 'shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall [also] oversee the application of Union law under the control of the Court of Justice of the European Union'.[113]

On this basis, and as indicated above, it may (and should) activate the infringement procedure of Article 258 TFEU, initiate available conditionality mechanisms whenever necessary to protect the Union as a common legal order (and/or indeed trigger the procedure of Article 7 TEU), so that a Member State's regression is formally established, and the mandatory process of transition triggered. Once such regression has been acknowledged, it must a fortiori ascertain that the then-transitioning State does comply with the obligations of conduct and result recalled above, to return to EU legality, including by way of nullifying the unlawful consequences of the regression, also for the EU.[114] In case of infringements more specifically, the Commission has to verify that the transitioning State observes the obligations stipulated in Article 260(1) TFEU and, if not, return to the Court of Justice to formalise that the regression is deepening.[115] It may indeed call on the Court to impose penalty payments and financial sanctions to put additional pressure on the transitioning State, in a further attempt to stop and reverse its regression – as it has been the case in relation to Poland.[116]

While it thus has tools to help or, as the case may be, compel regressive States to carry out their transition, the Commission may also provide substantive guidance and support to the transitioning State, by mobilising various management mechanisms, involving more dialogue and informa-

113 Article 17(1) TEU.

114 ECJ, *Commission v UK*, judgment of 31 October 2019, case no. C-391/17, ECLI:EU:C:2019:919; ECJ, *Commission v The Netherlands*, judgment of 31 October 2019, case no. C-395/17, ECLI:EU:C:2019:918.

115 Further Pål Wennerås, 'Making effective use of Article 260 TFEU' in: Jakab and Kochenov (n. 67), 79–98.

116 E.g. ECJ, *Commission v Poland (Indépendance et vie privée des juges)*, Order of the Vice-President of the Court of 27 October 2021, case no. C-204/21, ECLI:EU:C:2021:878.

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tion.[117] Those may be specifically calibrated with a view to steering the Member State's effective reversal of the regression, and will be of particular relevance if the State concerned is readily engaging in its transition.[118] The Commission may thus use existing monitoring instruments such as its Annual Rule of Law reporting on each Member States, the EU Justice Scoreboard,[119] and/or the framework of the European Semester,[120] to enunciate the steps for the transitioning State to return to EU legality. In this sense, it is noticeable that, for the first time since their initial publication in 2020, the Commission's Annual Rule of Law Reports contain '*recommendations* ... to support Member States in their efforts to take forward ongoing or planned reforms, to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed, also with a view to address systemic challenges in certain cases' (emphasis added).[121] These 'recommendations' could have particular potency as benchmarks for Transition 2.0, specifically if used in synergy with conditionality mechanisms, for instance as basis for the decisions the Council takes in these contexts.[122]

As mentioned above, conditionality mechanisms have already been deployed to steer the transition in Poland and Hungary.[123] The question has however been raised as to whether the Commission, and other institutions, have used those mechanisms appropriately. Beyond the inconsistent use of the infringement procedure in relation to regressive states,[124] its recent

117 Sonja Priebus, 'The Commission's Approach to Rule of Law Backsliding: Managing instead of Enforcing Democratic Values', Journal of Common Market Studies 60 (2022), 1684–1700.

118 On the limits of dialogue with recalcitrant Member States, see Priebus (n. 117).

119 https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

120 See references above (n. 82).

121 European Commission, *2022 Rule of Law Report* (n. 14), 1. The (short) recommendations are contained in an Annex of the Communication.

122 Consider the significance given by the Court to of the Commission's reports in the context of the CVM in ECJ, *Asociația 'Forumul Judecătorilor din România'* (n. 36).

123 See references above (n. 82).

124 Daniel Kelemen and Tomasso Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union', World Politics 74 (2023) (forthcoming); Gráinne de Búrca, 'Poland and Hungary's EU membership: On not confronting authoritarian governments', International Journal of Constitutional Law 20 (2022), 13–34; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', Hague Journal on the Rule Law 13 (2021), 1–43.

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enunciation of 'Milestones' and 'Super Milestones' as conditions for Poland and Hungary to access EU funding in the context of the EU Recovery Fund has also been contested as not requiring appropriate measures to reverse well-established regressions, thus failing its obligations as Guardian of the Treaties to oversee compliance with EU law in general and deriving from the duty of non-regression in particular.[125]

To be sure, the use of monitoring mechanisms in Transition 2.0 must purport to secure that the Member States concerned *fully* reverse the established regression, e.g. by effectively resuming compliance with EU norms, including by obeying judgments of the Court of Justice. While EU institutions involved in monitoring and steering the transition enjoy a degree of discretion in the choice of tools they may deploy to that effect, that discretion always ought to be envisaged, circumscribed, and, if necessary, reviewed by reference to the obligation of result, which in casu is the transitioning State's effective return to EU legality, including compliance with EU values as condition for enjoying the benefits of membership. Institutions will otherwise end up contributing to entrenching regression, while failing to restore mutual trust, thus jeopardizing the EU functioning and credibility more generally.[126]

In sum, restoring a Member State's compliance with EU values and repairing its membership in the context of Transition 2.0 entails persuasive measures by the State authorities themselves to restore trust in their membership within the Union. But it equally requires cogent engagement by EU institutions too. Their involvement, by way of guidance and ultimate validation of the transition (e.g. by a Council decision under Article 7(4) TEU, a withdrawal of the initial reasoned opinion or decision of the Council establishing that there is no risk under Article 7(1), a termination of

125 https://medelnet.eu/rule-of-law-lawsuit-against-the-polish-recovery-and-resilience-plan/. Further Laurent Pech, 'Covering Up and Rewarding the Destruction of the Rule of Law One Milestone at a Time', Verfassungsblog, 21.06.2022, https://verfassungsblog.de/covering-up-and-rewarding-the-destruction-of-the-rule-of-law-one-milestone-at-a-time/.

126 The EU also has a responsibility vis-à-vis the wider world to restore a Member State's compliance with EU law in general and EU values in particular, and chiefly vis-à-vis partners with which the EU has elaborate agreements, e.g. including mutual recognition mechanisms. These agreements require that the domestic systems of the parties are trustworthy in terms of observing e.g. the rule of law; see Hillion (n. 31).

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the penalty payments,[127] the lifting of conditionality measures), is indeed governed by EU law and determined by specific objectives, chiefly to defend EU values. It thus needs to be both lawful and credible. In this context, Member States' courts have a central role to play: both in the transitioning State to restore and preserve constitutional democracy and the rule of law, and in other Member States ultimately to validate the transition.[128] The resumed functioning of the EU legal order depends on their trust in the veracity of the renewed compliance with the common values underpinning the EU legal order.[129]

V. Conclusion

Writing about Poland's march for Democracy of 4th June 2023, the Editor of Gazeta Wyborcza underscored that '[t]his march will be a great success for a democratic Poland. It will be the beginning of a long march back to Europe, to the traditions and values we chose to embrace on June 4th, 1989!'[130]

Insofar as it involves an EU Member State, that 'long march back to Europe', which is what Transition 2.0 is all about, cannot be left to the transitioning State to walk alone. EU institutions and other Member States ought to join to help give direction to that march and bring it to the finish line. In this exercise, they ought to follow the values of Article 2 TEU, and all the agreed conditions of membership as a common constitutional compass, for they encapsulate the 'traditions and values embrace[d] on June 4th, 1989'.

127 Meeting some of the requirements of the Courts' infringement rulings may lead to a Court's decision to reduce penalties. See in this sense ECJ, *Poland v Commission*, order of the vice-President of the Court of 21 April 2023, case no. C-204/21R.RAP, ECLI:EU:C:2023:334.

128 Further on this role, see the chapter by Michal Bobek in this volume.

129 The same partly goes for third states' authorities.

130 Editorial, 'On June 4th, Poland is Marching for Democracy!', Gazeta Wyborcza, 2 June 2023, https://wyborcza.pl/7,173236,29830243,on-june-4th-poland-is-marching-for-democracy-editorial.html.

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

Werner Schroeder

I. Introduction 535
II. A Union Transformative Constitutionalism 537
1. Transitional justice and transformative constitutionalism 537
2. The union framework for transitional justice in the union 538
3. Union values as a basis for transitional justice in Member States 540
4. Tools for transitional justice provided by secondary union law 541
III. Legitimacy Issues of Transformative Constitutionalism in the Union 543
1. Right of the union legislator to define the rule of law 543
2. Constitutional minimum harmonisation in the union 544
IV. The Value-Function of the Rule of Law 547
1. A functional view of the rule of law 547
2. A 'System of Values' doctrine for the rule of law 549
3. Negative and positive obligations emanating from the rule-of-law value 550
4. The promotion of the rule of law as a constitutional mandate 551
V. Mainstreaming the Rule of Law as a Union Task 553
1. Residual union competences for promoting the rule of law 553
2. Making use of the union's sectoral competences 555
3. How to mainstream the rule of law in union law 557
4. Supporting transitional justice by mainstreaming the union rule of law 560
VI. Conclusion 561

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

II. A Union Transformative Constitutionalism

1. Transitional justice and transformative constitutionalism

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

6 Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', YBEL 39 (2020), 3–121 (5).

7 Werner Schroeder, 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in: Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Berlin: Springer 2021), 105–126 (113 f.).

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

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

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

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

2. The union framework for transitional justice in the union

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

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

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

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

13 Hailbronner (n. 4), 527.

14 von Bogdandy and Spieker (n. 5).

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

16 Hailbronner (n. 4), 540.

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Tools for transitional justice provided by secondary union law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Legitimacy Issues of Transformative Constitutionalism in the Union

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

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

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

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

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

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

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

The definition of the rule of law provided in Art. 2 lit. a) of the 'conditionality' Regulation (EU, Euratom) 2020/2092[43] refers to 'the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law'. This broad understanding, which does not exceed the limits of the concept of the rule of law,[44] assumes correctly that the Union rule of law cannot be reduced to the situation of the judiciary but includes formal elements and substantive standards, imposing an obligation for fairness and a prohibition of arbitrariness in the content of legal norms.[45]

2. Constitutional minimum harmonisation in the union

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

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

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

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

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

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

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

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

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

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

46 See Spieker (n. 38), 229–232.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The Value-Function of the Rule of Law

1. A functional view of the rule of law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72 Schroeder (n. 1), 9–10.

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

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

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

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

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

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

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

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

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

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

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

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

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

81 Krygier (n. 67), 134 f.

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

83 Werner Schroeder, 'The European Union and the Rule of Law – State of Affairs and Ways of Strengthening' in: Werner Schroeder (ed.), *Strengthening the Rule of Law in*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

91 Werner Schroeder (n. 1), 10.

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

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V. Mainstreaming the Rule of Law as a Union Task

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

1. Residual union competences for promoting the rule of law

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

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

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

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

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

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

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

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

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

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

2. Making use of the union's sectoral competences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

112 Halberstam and Schroeder (n. 3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125 Halberstam and Schroeder (n. 3).

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

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

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

VI. Conclusion

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

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

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

128 Spieker (n. 38), 134.

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

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

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

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How to Make Article 10 TEU Operational? The Right to Influence the Exercise of State Power and Cardinal Laws in Hungary

Pál Sonnevend

I. Why Democracy? 566
II. The Matter with Cardinal Laws 569
III. What, Specifically, Follows from Article 10 TEU? 573
1. Ensuring democratic legitimacy of the EU or a general requirement of democratic legitimacy at the national level? 574
2. The right to vote as a key 575
3. The doctrinal framework 580
IV. Conclusions 582

In the past decade, the discourse on the enforcement of the values of the EU has been focused primarily on the rule of law. The other important core value in Article 2 TEU, democracy has had a marginal role in academic discourse and basically no weight in the actions of EU institutions. What is more, the main argument defending the deviation from mainstream European standards by Poland and Hungary offered by their governments has been democracy. This allowed the discussion to be about the conflict between the values of the rule of law and of the will of democratic majorities. Only recently the attention has been turned to the concerns relating to democracy and the role of European Union law in maintaining it.[1]

By the unilateral focus on the rule of law it was for a long time missed that the rule of law crises in Member States are equally crises of democracy.[2]

1 John Cotter, 'To Everything There is a Season: Instrumentalising Article 10 TEU to Exclude Undemocratic Member State Representatives from the European Council and the Council', European Law Review 47(1) (2022), 69-84 (77 ff.); Armin von Bogdandy, 'European Democracy: A Reconstruction through Dismantling Misconceptions', ELTE Law Journal 1 (2022), 5-23; Luke Dimitrios Spieker, *EU Values Before the Court of Justice. Foundations, Potential, Risks* (Oxford: Oxford University Press 2023), 199 ff.; Luke Dimitrios Spieker 'Beyond the Rule of Law: How the Court of Justice can Protect Conditions for Democratic Change in the Member States' in: Anna Södersten and Edwin Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions* (Stockholm: SIEPS 2023), 72 ff.

2 Jakab, András: Three misconceptions about the EU rule of law crisis, VerfBlog, 17.10.2022, https://verfassungsblog.de/misconceptions-rol/.

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Several rule of law concerns – including but not limited to – the freedom of the press, party financing and corruption have far-reaching implications for the democratic process necessary for the legitimation of public power.[3]

The question of democracy in relation to the rule of law backsliding was exposed in the context of an eventual transition after the electoral success of the opposition. Prior to the 2022 elections in Hungary, a debate unfolded whether an eventual new government without a constitution-making majority could effectively exercise its democratic mandate.[4] It was argued that a new Parliament on its first day in office could, with a law of nullification passed by a simple majority, eliminate unwanted elements of the Fundamental Law. It was also proposed that a new simple majority could withdraw the appointment of all State officeholders chosen by a two-thirds qualified majority in Parliament, including members of the Constitutional Court.[5]

Needless to say, the idea that a Constitution could be ignored in the name of democracy is explosively dangerous. This idea has created most of the problems an eventual transition would need to handle. Still, it is a central question whether legal barriers could prevent an effective change of government in a democratic system, and how such barriers could be handled in harmony with the rule of law.[6]

This chapter seeks to address a narrow aspect of this set of issues. Its basic premise is a situation where a new government is elected without a majority necessary to change the Constitution. In this narrow context, I shall endeavour to explore the possible legal solutions to handle the issue of

3 Armin von Bogdandy and Luke Dimitrios Spieker, 'Transformative Constitutionalism in Luxemburg: How the Court Can Support Democratic Transitions', Colum J. Eur. L. 29 (2023), 65-91 (82).

4 For the international variant see the debate Restoring Constitutionalism on Verfassungsblog, https://verfassungsblog.de/category/debates/restoring-constitutionalism/. See also Beáta Bakó, 'Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary', HJIL 82 (2022), 223-254 (223, 236 ff.).

5 See the summary of the position of Imre Vörös in: Andrew Arato and Gábor Halmai: 'So that the Name Hungarian Regain its Dignity: Strategy for the Making of a New Constitution', VerfBlog, 2.07.2021, https://verfassungsblog.de/so-that-the-name-hungarian-regain-its-dignity/.

6 As András Sajó puts it: 'This is the problem where the Midas touch of legality has served the usurper. The Midas touch means that most of the acts which have undermined democracy and kept people in intellectual serfdom and material dependence were fully legalized' in András Sajó, 'On the Difficulties of Rule of Law Restoration', Democracy Institute Working Papers 8 (2023), 9.

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laws adopted with a special supermajority – in the Hungarian constitutional system called cardinal laws – with legal means without an actual breach of the law. More specifically, I shall explore whether and how the principle of representative democracy in Article 10 TEU may assist any democratic majority to ensure its requisite room of manoeuvre against cardinal laws. By this, I am picking up a thread started by Kim Scheppele,[7] Armin von Bogdandy and Luke Spieker.[8]

In the following I shall first argue that democracy should take centre stage in the debate about the respect for the values in Article 2 TEU (Section I). As a second step I shall outline the concerns that have been raised in Hungary with a special emphasis on cardinal laws (Section II). This will allow me to expound on what standards follow from Article 2 TEU in combination with Article 10 TEU (Section III).

I shall argue that Article 10 TEU has to be interpreted in light of the general principles of law referred to in Article 6(3) TEU, and through that, the right to vote in Article 3 Protocol No. 1 ECHR and national constitutional traditions. It is submitted that the principle of democracy of EU law is applicable not only to such aspects of the operation of the national democratic system that are directly involved with the legitimation of the exercise of public power by the EU. Rather, the whole operation of the Member States must conform to some basic democratic requirements under EU law.

My choice of topic is deliberate. While I do not deny the moral force behind the calls for a general constitutional reset, I do not believe that they are of legal nature. Legal scholarship can only offer legal solutions. Disguising revolutionary proposals for a rupture in the constitutional system as some elevated, morally justified constitutional law may deliver arguments for a political debate, but it damages the long-term viability of the rule of law.[9] This is not to say that the law as it is would lack any teeth to address many salient issues. The unique setting of multilevel constitutionalism within the EU has the potential to offer solutions that are at the same time

7 Kim Lane Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament', VerfBlog, 21.12.2021, https://verfassungsblog.de/escaping-orbans-constitutional-prison.

8 Armin von Bogdandy and Luke Dimitrios Spieker, 'How to Set Aside Hungarian Cardinal Laws: A Suggestion for a Democratic Transition', VerfBlog, 18.03.2022, https://verfassungsblog.de/how-to-set-aside-hungarian-cardinal-laws; von Bogdandy and Spieker (n. 3).

9 See chapter of András Jakab in this volume.

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value based and legal and can contribute to the self-healing processes of democracy at the national level.

I also deliberately limit my considerations to the scenario where a new government possesses no constitution making majority. This is because completely different questions will arise should a new constitution making majority come to existence. In that situation, the major issue would be what limits are set for the new constitution-making, a situation similar to 2011 when the new Fundamental Law was adopted in Hungary. In other words, the question will not be how European Union law could promote changes in the national legal system but rather how it prevents certain changes to protect the rule of law and democracy.

I. Why Democracy?

Fareed Zakaria hardly thought that the term he coined in his essay in Foreign Affairs in 1997[10] would be used in the context of the European Union both by governments and their critiques. It occurs that illiberal democracy became the popular name commonly used by politicians and the media for the phenomenon otherwise described as rule of law backsliding or hybrid regimes. Yet the concept of illiberal democracy itself is misleading.

The concept of illiberal democracy suggests that democracy can exist without respect for the rule of law including the protection of a set of fundamental rights. In the words of Zakaria 'of course elections must be open and fair, and this requires some protections for freedom of speech and assembly. But to go beyond this minimalist definition and label a country democratic only if it guarantees a comprehensive catalogue of social, political, economic and religious rights turns the word democracy into a badge of honour rather than a descriptive category.'[11] This approach suggests that liberal democracies aim at guaranteeing certain values, whereas illiberal democracies are still democracies, just without these values. This in turn presupposes that if a country holds competitive, multiparty elections, we call it democratic.[12]

10 Fareed Zakaria, 'The Rise of Illiberal Democracy', Foreign Affairs 76 (1997), 22-43 (22).
11 Zakaria (n. 10), 25.
12 Zakaria (n. 10), 25.

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The truth of the matter is that regimes Zakaria described in 1997 as illiberal democracies are better described by the political science term of Guriev and Treisman as spin dictatorships.[13] It occurs that there are methods to monopolise power while maintaining the impression of democracy. As Guriev and Treisman suggest, spin dictators pretend to embrace the idea of democracy yet maintain their power through distorting information and manipulating democratic processes.[14]

This is not to say that Hungary or Poland are dictatorships in the legal sense of the word. As András Jakab argues in this volume,[15] a hybrid regime could be the most fitting classification. Yet the political science term "spin dictatorship" seems to better encapsulate the issue at hand. It is wrong to assume that democracy can be illiberal in the sense Zakaria described it. Democracy as a self-government of the people presupposes democratic legitimacy. And democratic legitimacy does not arise from natural laws but from the application of many legal norms, which are indispensable for the free and informed formation and the free expression of the will of the people through elections. Hence the rule of law and protection for a core of fundamental rights are not only a necessary complement and counterweight to the will of the majority but an elementary prerequisite for its formation and articulation.

Against this background, it has been misguided to characterise the constitutional crises in the European constitutional area as rule of law crises, democracy and rule of law crises would have been a more fitting conceptualization.[16] Accordingly, exploring the meaning and functions of the principle of democracy could contribute to shifting the attention to the most burning issues.

The exploration of the possible roles the principle of democracy can play is also warranted by the very nature of the European Union as reflected in Article 10 TEU. As the Bundesverfassungsgericht[17] and especially German legal scholarship[18] had pointed out, the democratic legitimacy of the Euro-

13 Sergei Guriev and Daniel Treisman, *Spin Dictators, The Changing Face of Tyranny in the 21st Century* (Princeton and Oxford: Princeton University Press 2022).

14 Guriev and Treisman (n. 13), 13.

15 See chapter of András Jakab in this volume.

16 In this sense von Bogdandy and Spieker (n. 3), 82. See also Kim Lane Scheppele 'How Viktor Orbán Wins', Journal of Democracy 33 (2022), 45 ff.

17 BVerfGE 89, 155, 184 (Maastricht); 123, 267, 364 (Lissabon).

18 Winfried Kluth, *Die Demokratische Legitimation der Europäischen Union* (Berlin: Duncker & Humblot 1995), 78 ff.; Jelena von Achenbach, 'Theoretische Apsekte des

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pean Union rests on two pillars, one EU and one national pillar. Article 10 TEU reflects this understanding: one source of democratic legitimacy of the EU consists in the direct election of the European Parliament, the other in the participation of representatives of Member State Governments in the Council, as these cabinet members are legitimised by the people of the respective Member State either directly or through their national Parliament. What is more, it is suggested that the two pillars on which the democratic legitimacy of the EU rests are by no means on an equal footing, rather the national contribution to legitimacy, mediated by the (European) Council predominates.[19]

From this it follows that issues concerning the democratic legitimacy of an EU Member State Government are a matter of concern for the whole of the European Union.[20] Though the purpose of Article 10 TEU is to ensure democracy at the EU level, this cannot function if democratic legitimacy at Member States level is flawed.[21]

It is for this reason that the supposed democratic deficit of the EU cannot question the application of Article 10 to the Member States. Admittedly, constitutional reservations against the supremacy of EU law have been based on this supposed deficit. Both the *ultra vires* and the constitutional identity reservations are premised on the assumption that democracy is only complete at the national level and the concept of democracy is different – and supposedly inferior – in EU law. But exactly this understanding is reflected in Article 10 TEU which derives the democratic legitimacy of the Union from two sources: from the direct representation of the citizens in the European Parliament and from the representation of Member States

dualen Konzepts demokratischer Legitimation für die Europäische Union' in: Silja Vöneky, Cornelia Hagedorn, Miriam Clados and Jelena von Achenbach (eds), *Legitimation ethischer Entscheidungen im Recht* (Berlin: Springer 2009), 191 ff.; Peter M. Huber, 'Art. 10 EUV [Demokratie]' in: Rudolf Streinz et al., *EUV/AEUV: Vertrag über die Europäische Union und Vertrag über die Arbeitsweise der Europäischen Union* (3. edn, Munich: C.H.Beck 2018), para. 34 ff.; Matthias Ruffert, 'Art. 10 EU Vertrag [Demokratische Grundsätze]' in: Christian Calliess and Matthias Ruffert, *EUV/AEUV* (6. edn, Munich: C.H.Beck 2022), para. 7.

19 Huber (n. 18), para. 41.

20 Cotter (n. 1), 77. See also Lando Kirchmair, 'The EU and its hybrid regimes are poisoning each other. When it comes to democracy and the rule of law, we can't see the forest for the trees', https://www.politico.eu/article/eu-hybrid-regime-poison-each-other-democracy-spitzenkandidaten/.

21 von Bogdandy and Spieker (n. 3), 82.

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by their respective executive powers, which are themselves democratically accountable either to their national Parliaments or to their citizens.

The supposed democratic deficit and the ensuing dual legitimation of the EU is thus not an obstacle in the way of identifying standards of democracy in EU law. On the contrary, exactly because the legitimation of the EU is partly based on the democratic legitimation of national governments it is essential that there is a common understanding on the minimum requirements of democratic legitimacy.

II. The Matter with Cardinal Laws

The debate relating to Hungary identified four major areas of concern from the perspective of democratic governance.[22] First, it was suggested that the power of the Budget Council to veto the budget on the basis of Article 44(3) of the Fundamental Law may prevent a budget being adopted, which may, in turn, could lead to the President dissolving the Parliament according to Article 3(3) of the Fundamental Law.[23] Second, concerns were articulated that the Constitutional Court could strike down any laws of a new majority. Third, the possibility of selective, politically biased law enforcement by the prosecution services was raised. The fourth focal point of the discussion was the excessive use of cardinal laws in Hungary. It was suggested that cardinal laws requiring a supermajority in Hungarian Parliament may limit the action of future democratically elected governments and could ultimately make the exercise of power by the new democratic majority impossible.[24] One might add to this list the general refusal of the Fundamental Law as illegitimate.[25]

I submit that out of these five issues, the question of cardinal laws need be and might be addressed from the perspective of European Union law. By that, I do not mean that the other issues are not or cannot become relevant. Still, some of the issues are not of legal but of sociological or political nature, others can be addressed differently.

22 See also chapter of András Jakab in this volume.

23 See already Herbert Küpper, *Einführung in das ungarische Recht* (Munich: C.H.Beck 2011), 300.

24 For a summary of the positions see Viktor Kazai, 'Restoring the Rule of Law in Hungary, Possible Scenarios', Osservatorio sulle fonti 3 (2021).

25 See supra at n. 5. Also Bakó (n. 4), 223, 237 ff.

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First and foremost, the suggestion that the Fundamental Law was adopted in an illegitimate fashion, or its content makes it illegitimate cannot be handled with the toolkit of the law, as long as there is not a sufficient majority to replace it with a new Constitution. If the adoption and the amendments of the existing Fundamental Law were carried out in accordance with relevant legal provisions, its substantive illegitimacy as a whole remains a value judgment beyond the realm of the law. This is not to say that a formally legal Constitution cannot be overthrown. In fact, such constitutional ruptures usually occur after gaining independence, a lost war or a revolution. Some of these *ex nihilo* constitution making processes[26] have even become the most successful ones, like the US Constitution or the German Grundgesetz. Yet in the case of a revolutionary *ex-nihilo* constitution making, the act of de-constituting the old system will always remain a purely political act which is clearly illegal from the perspective of the existing legal system. This is where legal scholarship does not have the means to make the act of de-constituting legal, irrespective of how convincing the moral arguments are for a change.

Zooming in on the more specific issues, the right of approval of the Budget Council does in fact question the discretion of the Parliament in terms of the budget. Yet it is fair to note that according to Article 44(3) of the Fundamental Law, the Budget Council may only use its power to enforce the limit placed on State debt by Article 36(4) and (5) of the Fundamental Law. These articles mean that if the Budget Council abuses its power to deny approval, this would not prevent Parliament from passing the budget. Moreover, even a legitimate refusal to approve a budget would not in itself impede the passing of that budget, nor would it entitle the President to refuse to sign the budget without further grounds. A lack of approval by the Budget Council for the budget is ultimately a constitutional issue, which has to be ruled on by the Constitutional Court, either in the form of a preliminary review, if initiated by the President, or an ex post constitutional review on the basis of a petition from some of those entitled to do so (the relevant possibility is that one-quarter of the MPs may submit such a petition).[27]

26 Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in: Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP 2012), 426.

27 See also chapter of András Jakab in this volume.

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In contrast, the question of whether the Constitutional Court would in the future unnecessarily strike down laws is a matter beyond the realms of the law. Should the Constitutional Court decide clearly beyond the limits of the Fundamental Law, such an interference with the operation of democracy would be unlawful. We cannot, however, anticipate that justices would break the law for political reasons until they do so. Nor shall we contemplate to interfere with the operation of a court merely because its members were elected by a different majority. This is all the more true as the Implementing Decision of the Council on Hungary within the framework of the conditionality mechanism does not raise concerns about the Constitutional Court,[28] and the 27 Super Milestones Hungary has to meet in order to gain access to the RRF funds only refer to the Constitutional Court in relation to reviewing final decisions by judges on request of public authorities, and does not mention concerns relating to its independence in general terms.[29]

As it seems, constitutional democracies must put up with highly controversial constitutional rulings.[30] Even a track record of almost unlimited deference to the government in politically sensitive questions could not justify touching upon the independence of the judiciary, a principle central to the operation of the rule of law.[31] If distrust and track record becomes the yardstick for respecting or not respecting the independence of the judiciary, there is no independence any more.

The issue with the prosecution services is somewhat different in nature. Both the Implementing Decision of the Council triggering the conditionality mechanism against Hungary[32] and the Implementing Decision on the approval of the assessment of the RRF plan for Hungary[33] raise the problem of the lack of effective prosecution of corruption related crimes.

28 Council Implementing Decision 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, 2022/2506.

29 Annex to the proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, 2022/0414(NLE), 86, 98; Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary, paras 21, 60.

30 The obvious example being *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).

31 Court of Justice of the European Union (CJEU), judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses*, case C-64/16, EU:C:2018:117, para. 32.

32 Council Implementing Decision 2022/2506 (n. 28) paras 4, 12, 19, 29, 37, 44-46.

33 Proposal for a Council Implementing Decision 2022/0414(NLE), (n. 29), 20.

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Nevertheless, I shall not elaborate further on this problem since the various EU mechanisms already try to handle the matter. But more important than that, the Hungarian Government can opt to join the European Public Prosecutors Office in accordance with Article 331 TFEU, thereby guaranteeing an effective prosecution at least in the matters where EPPO has a competence.

In contrast, cardinal laws in Hungary may indeed pose a legal obstacle in the way of governing in the name of a new (simple) majority. The 1989 Constitution already required a two-thirds majority for a wide range of legislative subject matters. These laws are now termed as 'cardinal laws' by Article T(4)[34] and require a qualified majority of two-thirds of the Members of Parliament present for their adoption and amendment. While the number of subjects requiring a special majority did not increase significantly with the Fundamental Law and its amendments,[35] the range of the subject matters covered changed considerably.[36] Several of these should be

34 Fundamental Law, Art. T(4): 'Cardinal Act shall mean an Act, the adoption or amendment of which requires the votes of two-thirds of the Members of Parliament present'.

35 See András Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* (Budapest: HVG-Orac 2011), 173. Since then, however, the amendments also concerned the introduction of new topics which could only be regulated by cardinal laws, thus today the number of two-thirds majority topics is approximately the same as before the adoption of the Fundamental Law.

36 The Fundamental Law stipulates that the following issues be regulated by cardinal statutes: citizenship; national symbols and decorations; family relations; publishing of laws; authority for the protection of information rights; churches; political parties; freedom of the press; media; minority rights; elections of Members of Parliament; elections of representatives of local governments; status of Members of Parliament; operation of the Parliament and of its committees; the President; autonomous regulatory bodies; the Constitutional Court; the judiciary; prosecution services; local governments; protection of national wealth; the taxation and pension system; the National Bank of Hungary; supervision of financial institutions; the State Audit Office; the Budget Council; police and intelligence; the national army; and special legal orders. Furthermore, issues concerning the European Union also require qualified majority. According to the Constitution, qualified majority was required in the following fields: EU affairs; national symbols; legislation and publishing of laws; special legal orders; status of Members of Parliament; national referendums; the President; the Constitutional Court; the Commissioner for Human Rights; the State Audit Office; the relationship between the Parliament and the government in EU affairs; the National Army; police and intelligence; local governments; the judiciary; public prosecutors; migration; information rights; religious freedom; freedom of the press; the media; freedom of assembly; freedom of association; political parties; the right to asylum; minority rights; citizenship; right to strike; elections of Members of

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left to ordinary legislation. These include the rules on the protection of families;[37] the requirements for preserving and protecting national assets, and for the responsible management thereof;[38] the scope of the exclusive property and the exclusive economic activities of the State, as well as the limitations and conditions of the alienation of national assets of outstanding importance for the national economy;[39] the basic rules for the sharing of public burdens and for the pension system;[40] and the detailed rules on the operation of the Budget Council.[41]

Since 2010, the governing parties in Hungary mostly possessed the necessary majority to adopt these cardinal acts. However, a future government having a simple majority without support from the opposition will be limited in shaping its economic and financial policies. Given the deep cleavages between the different wings of Hungarian politics, this may quickly lead to a stalemate in the case of any future Cabinet that does not have a two-thirds majority in the Parliament.

III. What, Specifically, Follows from Article 10 TEU?

There seems to be an emerging and very convincing case in legal scholarship for the justiciability and also for the application of Article 10 to the Member States.[42] It is also rightly pointed out that Article 10 TEU should be read in combination with Article 2 TEU, and specifically the principle of democracy enshrined therein, a principle being part of the identity of European Union law.[43] Still we seem to know rather little about the exact requirements flowing from Article 10 TEU. The case-law of the ECJ has thus remained rather scarce, and the principle of democracy in EU law can only be regarded as a frame concept requiring concretisation.[44]

Parliament; elections of representatives of local governments; self-governments of the minorities.

37 Fundamental Law, Art. L(3).

38 Ibid. Art. 38(1).

39 Ibid. Art. 38(2).

40 Ibid. Art. 40.

41 Ibid. Art. 44(5).

42 von Bogdandy and Spieker (n. 3), 82 ff., with further references.

43 Thomas Verellen, 'Hungary's Lesson for Europe: Democracy is Part of Europe's Constitutional Identity. It Should be Justiciable', VerfBlog, 8.04.2022, https://verfassungsblog.de/hungarys-lesson-for-europe/.

44 Huber (n. 18), para. 10.

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It would be misguided to try to give an all-encompassing answer to the question of what is democracy in Europe or to develop a comprehensive theory of the limits of checks and balances in this chapter. Rather, some red lines in relation to the basic value of democracy should be drawn, as the democracy at EU level can only be seen as a set of minimum standards.[45] The purpose is to identify those areas of government action that shall be reserved for the democratically elected government without undue interference by laws that are beyond the control of such government. This entails asking the question of to what extent higher ranking laws of the national legal system may limit the rule of any given democratic majority.

1. Ensuring democratic legitimacy of the EU or a general requirement of democratic legitimacy at the national level?

While attempting to identify what red lines follow from Article 10 in combination with Article 2 TEU first a distinction needs to be made. Should Article 10 in combination with Article 2 TEU be seen as ensuring the democratic legitimacy of EU action, or do these provisions guarantee democracy for Member States as a generally binding value beyond the legitimacy of national governments being the second leg of the legitimacy of the EU? In the first scenario, actions must be taken by a Council consisting of properly legitimised governments. In this case, the focus is whether the member of government acting in the name of their country possesses sufficient legitimation by their people. In the second scenario, the whole operation of the Member States must conform to some basic democratic requirements.

At first sight, the difference between the two scenarios seems to be non-existent. How could a minister of a Member State cabinet be properly legitimised by their people if the operation of the constitutional system of the very same Member State is not in conformity with at least a minimum of democratic requirements?[46] Yet exactly the question of special laws requiring a higher majority highlights the difference: not all such laws bear direct relevance for the EU, not all of them bind the hands of the government when it comes to a decision in the Council, as not all of these laws affect EU competencies. Therefore, exactly the question of how to handle cardinal laws requires a prior choice about the breadth of situations where EU democratic principles are to be applied to the Member States.

45 Huber (n. 18), para. 9.
46 Cotter (n. 1). 78.

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To demonstrate the difference in the context of cardinal laws, if we opt for the narrower interpretation, the cardinal law on elections, Act CCIII of 2011 on the election of the Members of Parliament as amended by Act No. CLXVII of 2020 could be an obvious subject of review on the basis of Article 10 TEU,[47] as the democratic legitimacy of any government is primarily rooted in the electoral laws of that country. In contrast, the broad interpretation could lead to questioning cardinal laws that have no obvious direct bearing on the legitimacy of government, like Act no. CCXI of 2011 on the protection of families or Act CXCIV of 2011 on the economic stability of Hungary.

2. The right to vote as a key

In order to make a choice between the narrower and broader interpretation the scope of obligations deriving from Article 10 in combination with Article 2 TEU needs to be specified. It is submitted that the content of the principle of democracy can be operationalised through more specific Treaty provisions, just like the principle of the rule of law.[48] For example, Article 2 TEU is given concrete expression in Article 19(1)(2) TEU, which in turn must be interpreted in light of Article 47 CFR, which, again, is informed by the practice of Article 6 (1) ECHR through Article 52(3) CFR.

Article 10 TEU clearly specifies the principle of democracy enshrined in Article 2 inasmuch as it requires the democratic legitimation of national governments. It is thus fair to say that the most important aspect of democracy as a basic value of the EU is democratic legitimacy.

This requirement, however, is still quite general. The Charter of Fundamental Rights can provide some further guidance, since it protects essential political fundamental rights, like the freedom of expression, the press and assembly.[49] But the most important fundamental right protecting the operation of national democracies, the right to vote cannot be concretised on the basis of the Charter. This is because Articles 39 and 40 CFR only guarantee the right to vote in relation to the election of the European Parliament and municipal elections.

47 As suggested by von Bogdandy and Spieker (n. 8).
48 CJEU, judgment of 16 February 2022, *Hungary v. Parliament and Council*, case C-156/21, ECLI:EU:C:2022:97, para. 232.
49 von Bogdandy and Spieker (n. 3), 82.

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Nevertheless Article 6(3) TEU offers an opening here, as the right to vote is undoubtedly a general principle of the Union's law as it follows from the ECHR and common constitutional traditions of the Member States. As a result, the interpretation of the right to vote in Article 3 of Protocol No. 1 ECHR by the European Court of Human Rights, as well as the case law of national Constitutional Courts can help identify certain principles. Accordingly, the right to vote as a general principle of law informs the interpretation of Article 10 TEU in combination with Article 2 TEU.

As a start, the Venice Commission made it clear as early as 2011 that the unnecessarily wide scope of cardinal laws raise concerns from the perspective of Article 3 Protocol No. 1 ECHR as it stated the following: 'Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the 'expression of the opinion of the people in the choice of the legislator', would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.'[50]

Further, the case law of the European Court of Human Rights on thresholds at national parliamentary elections and closed party lists should be considered. The Court – following the earlier case law of the European Commission of Human Rights[51] – consistently holds that thresholds applied in electoral systems to filter out representatives of parties enjoying less significant popular support constitute an interference with both the active and passive aspect of the right to vote under Article 3 Protocol No. 1 ECHR.[52] Concerning closed party lists, the Court has found that while this

50 Venice Commission Opinion 621/2011 on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), para. 24; repeated in Venice Commission Opinion 720/2013 on the Fourth Amendment to the Fundamental law Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), para. 133.

51 European Commission of Human Rights, *Magnago and Südtiroler Volkspartei v. Italy*, Decision of 15 April 1996, No. 25035/94, DR 85-A.

52 ECtHR, *Federación Nacionalista Canaria v. Spain*, Decision of 7 June 2001, n. 56618/00; ECtHR, *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia*, Decision of 29 November 2007, n. 10547/07 and 34049/07; ECtHR, *Yumak and Sadak v. Turkey*, Decision of 8 July 2008, n. 10226/03.

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system entailed a restriction on voters as regards the choice of candidates[53] and this can also potentially be a matter for the right to vote.

Obviously, the European Court of Human Rights does not consider the right to vote to be an absolute one and accepts interference with these on the basis of the limitations implicit in Article 3 Protocol No. 1 ECHR.[54] In examining compliance with Article 3 of Protocol No. 1, the Court has focused mainly on two criteria: whether there has been arbitrariness or a lack of proportionality, and whether the restriction has interfered with the free expression of the opinion of the people. In this connection, the wide margin of appreciation enjoyed by the Contracting States has always been underlined.[55]

On the face of it, this case law focuses on the equality of votes. Yet the underlying idea is that every vote of an eligible voter must have a realistic chance to influence the composition of the legislative body and through that the content of the laws to be made by that legislative body. Only through this realist chance can we talk about the representation of the electorate, the core idea of Article 3 Protocol No. 1 ECHR. This is why the European Court of Human Rights has consistently found that high electoral thresholds may deprive part of the electorate of representation.[56]

The same conclusions can be drawn from the case law of the European Constitutional Courts on electoral thresholds at the elections of the European Parliament. Although the outcome of the cases was different, the German Bundesverfassungsgericht, the Czech Constitutional Court and the Italian Constitutional Court all reviewed respective national thresholds on the basis of the right to vote.

The case law of the Bundesverfassungsgericht declaring both a 5% and a 3% threshold unconstitutional[57] is based on the formal requirement of the equality of the vote. Still the Bundesverfassungsgericht emphasises that

53 ECtHR, *Saccomanno and Others v. Italy*, Decision of 13 March 2012, n. 11583/08, para. 63.

54 ECtHR (Grand Chamber), *Ždanoka v. Latvia*, Decision of 16 March 2006, n. 58278/00, para. 115.

55 Ibid.

56 ECtHR, *Bakirdzi and E.C. v. Hungary*, Decision of 10 November 2022, n. 49636/14 and 65678/14, para. 46, with further references.

57 BVerfGE 129, 300 - five-percent hurdle, European elections; BVerfGE 135, 259 - three-percent hurdle, European elections.

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general requirement that all voters should have the same influence on the election result with the vote they cast.[58]

The Czech Constitutional Court followed a similar path, albeit with the opposite result, declaring a 5% threshold not to be unconstitutional.[59] The premises of its reasoning are, however, very similar. The Czech Constitutional Court also considers a threshold to be a limitation of the principle of equal vote deriving from Art. 21 paras. 3 and 4 of the Czech Charter of Fundamental Rights and Freedoms.[60] Part of the principle of the equality of vote is the notion that every vote cast should have the same weight in relation to the number of the gained mandates.[61]

The Italian Constitutional Court also refused to declare a 4% threshold for the elections of the European Parliament to be unconstitutional.[62] Yet its reasoning is also based on the right to vote (Article 48 of the Italian Constitution)[63] and the idea of political representation where the wishes of the people are expressed through votes, as the principal instrument for expressing popular sovereignty.[64]

These judgments are primarily based on equal voting power, referred to as Erfolgswertgleichheit in the German Constitutional Court's case law.[65] Yet they also necessarily imply that the equality of the vote also protects the right of the voters to influence the way public power is exercised by the respective legislative power. This view is articulated in very clear terms in the case law of the Bundesverfassungsgericht on European integration. The centrepiece of the reasoning of the Maastricht Judgment is the idea that

58 BVerfGE 129, 300, 317f.
59 Czech Constitutional Court, 19 May 2015, Pl. ÚS 14/14.
60 Hubert Smekal and Ladislav Vyhnánek, 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014European Parliament Elections, Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14', European Constitutional Law Review 12 (2016), 148, 153.
61 Smekal and Vyhnánek (n. 60), 153.
62 Italian Constitutional Court, judgment of 25 October 2018, n. 239/2018, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_239_2018_EN.pdf.
63 Giacomo Delledonne, '"A Goal That Applies to the European Parliament No Differently From How It Applies to National Parliaments": The Italian Constitutional Court Vindicates the 4% Threshold for European Elections, Italian Constitutional Court, judgment of 25 October 2018 no. 239/2018', European Constitutional Law Review 15 (2019), 376, 382 ff.
64 Italian Constitutional Court, judgment of 4 December 2013, n. 1/2014, 11, https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/1-2014_en.pdf.
65 Smekal and Vyhnánek (n. 60), 153.

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Article 38 of the Grundgesetz guaranteeing the right to vote also encompasses the right to influence the exercise of state power.[66] The Maastricht Judgment also makes clear that the influence of voters over the exercise of state power belongs to the core of the principle of democracy. In the words of the Bundesverfassungsgericht: 'The right guaranteed by Article 38 of the Basic Law to participate in the legitimisation of state power through election and to gain influence on its exercise precludes, within the scope of application of Article 23 of the Basic Law, emptying this right by shifting tasks and powers of the Bundestag in such a way that the democratic principle, insofar as it is declared by Article 79 (3) in conjunction with Article 20 (2) of the Basic Law to be untouchable, is violated.'[67] These insights are especially relevant in the interpretation of Article 10 TEU as this provision was clearly inspired by the German case law and the ensuing debate over the democratic legitimacy of the EU.[68]

From these, it follows that the core of the requirement flowing from Article 10 TEU in combination with Article 2 TEU in relation to national governments is the right of the voters to influence the way state power is exercised. This is not just an individual right following from the right to vote, it is a guarantee for transmitting the popular will to the actions of public authority.

The most important aspect of the right to influence the exercise of state power consists in the capacity of the constituents to elect a new government if they are no longer content with the previous one. Should, however, a new government be unduly prevented from taking decisions, the right to influence the exercise of state power is also interfered with. Naturally, this right is far from being absolute. Not only is the right to vote subject to the limitations of the respective electoral system and laws. The right to influence the exercise of state power and to contribute to the formation of the popular will is embedded in the system of checks and balances and is limited by the respective Constitution. Still, the right to influence the exercise of state power imposes limits on removing issues from democratic decision making and requires proper justification for such legislative measures.

66 BVerfGE 89, 155, 182 ff. – Maastricht.

67 BVerfGE 89, 155, 182.

68 Armin von Bogdandy, *Der Strukturwandel des öffentlichen Rechts, Entstehung und Demokratisierung der Europäischen Gesellschaft* (Berlin: Suhrkamp 2022), 234.

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3. The doctrinal framework

Conceiving Article 10 TEU in combination with Article 2 TEU as primarily guaranteeing the right to influence the exercise of state power allows us to answer the question of a broad or narrow application of the requirement of democratic legitimacy at the national level.[69] Putting the right to influence the exercise of state power in the centre clearly warrants the application of these articles to every aspect of democratic legitimacy of national government. Thus, the principle of democracy of EU law is not limited to ensuring that a member of a national government voting on the Council is properly legitimised. Rather, voters of the Member States must be able to exert influence on every area of the national legislation.

In this sense, the breadth of the scope of obligations following from Article 10 TEU in combination with Article 2 TEU is comparable to the requirement of judicial independence following from Article 19(1) and (2) TEU.[70] The independence of national courts is not only guaranteed by EU law in situations where they actually apply the Union's law. European Union law protects the independence of the judiciary in general terms. The reason for such a general guarantee of independence for the judiciary is different from generally ensuring the right to influence of national voters. The former is based on the possibility that any national court might be called upon to adjudicate matters of EU law,[71] whereas the latter is a consequence of the close relationship between the principle of democracy and the individual right to vote.

The right to influence the exercise of state power, however broad its application is, must leave significant room for manoeuvre for the national legal systems. First, this right can only be conceived in relation to the legislative power and those institutions that are accountable to this branch of government, otherwise, the system of checks and balances of a constitutional State takes precedence. Second, the right to influence the exercise of state power can only be invoked against the respective national Constitution only in the most extreme of cases. This restraint is necessary because the whole of state power emanates from the national Constitution, a law

69 See also András Jakab, 'Democracy in Europe through parliamentarisation' in: Andràs Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press 2016), 171 ff.

70 von Bogdandy and Spieker (n. 3), 82; Spieker (n. 1), 67.

71 *Associação Sindical dos Juízes Portugueses* (n. 31), para. 40.

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representing a higher consensus of the polity and setting the rule of the game for all players of the machinery of the State. To borrow the term of Bruce Ackerman, democracy is dualistic, with one body of laws emanating from the people binding the government (the Constitution) and another body of law created by the government binding the people.[72] Therefore to overrule express constitutional provisions of a Member State *in the name of the principle of democracy* of EU law would be an extreme intrusion with the constitutional order of a Member State, offsetting a broader democratic consensus within that Member State. Albeit legal, this possibility should be reserved for situations where there is not a hint of doubt that the specific provision of the national Constitution is clearly designed to and has the effect of preventing democratic decision making in questions that have nothing to do with the protection of fundamental rights or the operation of independent institutions or other subject matters that are normally reserved for the Constitution. In other words, absent a clear and excessive abuse, the principle of democracy of EU law shall not be used to question national constitutional provisions.

Consequently, Article 10 TEU in combination with Article 2 TEU understood as the right to influence the exercise of state power in the Member States is relevant for the assessment of laws not being part of the Constitution, like cardinal laws in Hungary. Even in this area, Member States must enjoy a wide margin of appreciation, similar to the one applied in the context of electoral thresholds.[73] Also, the assessment must always focus on specific provisions of laws requiring a special majority and not the laws as a whole.

Within this framework, the assessment of whether a specific provision of a cardinal law is in breach of the right to influence the exercise of state power is essentially a balancing exercise aimed at establishing whether the interference with this right is proportionate to the needs of a more consensus based law-making in certain areas of the law. Just like in other areas of human rights adjudication, legal comparison and the existence or lack of a European Consensus can largely assist the decision on the proportionality of the interference with the right to influence the exercise of state power. It is in the proportionality review where questions on the share of the popular

72 Bruce Ackermann, *We the People, Volume I: Foundations* (Cambridge: Harvard University Press 1992).

73 See supra Section III. 2.

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votes behind the specific majority that adopted the cardinal law can be considered.[74]

IV. Conclusions

Interpreting Article 10 TEU in combination with Article 2 TEU taking into account Article 6(3) TEU and through that the right to vote as a general principle of Union's law emanating from Article 3 Protocol No. 1 ECHR and common constitutional traditions of Member State has the distinct advantage that issues of democratic legitimacy become justiciable according to the logic of human rights adjudication. Also, the interpretation of the right to vote by the European Court of Human Rights and by the Bundesverfassungsgericht suggest that the right to vote entails the subjective right to influence the exercise of state power, a right directly encompassing the essence of the principle of representative democracy enshrined in Article 10 TEU.

Nevertheless, one must not forget that applying Article 10 TEU to challenge the legality of provisions of cardinal law is effectively choosing democracy over the formal rule of national laws. As long as this happens on the basis of principles of EU law enjoying supremacy over national law, this choice cannot be deemed illegal. But the very idea of choosing democracy over law entails severe risks for constitutionalism.

The perils of enforcing national democracy with the help of EU law become higher if we consider the situation in which this can happen in practice. Presumably, a new government without the requisite supermajority in Parliament will not have the time to wait for decisions of European institutions. A new majority will probably adopt laws in order to execute its democratic mandate and thereby violate provisions of the inherited cardinal laws. It is in this context that the question of whether the conflicting provisions of the cardinal law in question were ultimately in breach of the right to influence the exercise of state power under Article 10 TEU in combination with Article 2 TEU will be raised. The ensuing debate will be highly politicised, and in a debate like that clear-cut and convincing legal arguments are needed.

From this, two conclusions follow. First, the legal standards need to be elaborated at the possible length and precisions before the change of gov-

74 The Hungarian electoral system can and did translate less than 50% of the popular vote for one party to a two-thirds majority in Parliament.

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ernment occurs. A reference to an existing practice of European institutions and a case law of the ECJ could reduce the risk of an ugly politicised debate which would definitely damage the cause if the rule of law as it were.

Second, the right to influence the exercise of state power must be applied with utmost foresight and surgical precision. Only a nuanced examination of proportionality including legal comparison and a wide margin of appreciation can prevent the abuse of this right and the consequent backlash for the future of constitutionalism.

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The Venice Commission and Constitutional Dilemmas

Angelika Nußberger

I. The Challenge of the 'Transition 2.0' 585
II. Lacunae in the Constitutional Regulation 587
1. Deadlock in presidential elections – the Moldovan example 588
2. Radical effects of vetting procedures – the Albanian example 590
III. Abuse of Power by Constitutional Courts 593
1. The reversal of constitutional amendments – the case of Kyrgyzstan 593
2. The reversal of constitutional amendments – the case of Ukraine 594
3. Self-interested decisions of the Constitutional Court – the case of Ukraine 597
4. Politically motivated constitutional court judgments – the case of Moldova 601
IV. Lessons Learnt for Transition 2.0 603
1. Characteristics of transition 2.0 603
2. Anti-deadlock mechanisms 604
V. An Outsider's Role in Deblocking Constitutional Impasses 605

Abstract
The Venice Commission is experienced in giving advice on best practice in situations of constitutional crises. In the course of its work since the 1990s, it was confronted on several occasions with the deadlock or misuse of constitutional mechanisms and had to give guidance on how to overcome constitutional dilemmas. The article analyses the innovative approaches provided by the Venice Commission under very specific circumstances in Ukraine, Albania, Moldova and Kyrgyzstan and discusses in how far they might be helpful for the transition 2.0.
Keywords: Venice Commission, constitutional reform, transition, abuse of power, constitutional courts

I. The Challenge of the 'Transition 2.0'

Constitutional transitions may be complex or easy, foreseeable or unforeseeable, long-lasting or quick. No transition can be considered the last one; each period of stability can come to an end.

The first transition in Central and Eastern Europe concerned the transformation of socialist States into liberal constitutional States based on a market economy; this transformation was understood to be a *conditio sine qua non* for being fit for the accession to the European Union. It was followed by a 'retrogression' reintroducing elements of power concentration incompatible with the EU understanding of democracy and rule of law. The

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transition 2.0 is a model not yet existing, but hoped for – the return to a model fully in compliance with the foundational ideas of European integration and the values enshrined in Article 2 EU Treaty. Thus, while there are intensely debated models for the second transition (Poland, Hungary, Romania), the turn-around to the past is, for the time being, hypothetical. The last elections in Hungary in 2022 have clearly confirmed the Orban-model of power concentration instead of bringing about regime change. Thus, the focus of the debate is concentrated on Poland and the elections in 2023.

The main problem of the presumed or hoped for transition 2.0 is that the constitutional systems of the respective States have been rebuilt during the anti-democratic backlash in a way that does not allow simply reforms to be rolled back. On the contrary, constitutional hurdles have been built up that are difficult to overcome. This is so because many of the constitutional mechanisms (e.g. lifelong appointment of judges, eternity clauses in constitutions, property protection, legal force of judgments) function – with a view to a re-change of the system – *à contresens* as they provide solid protection for all systemic changes including those incompatible with rule of law standards.

The Venice Commission has been created at the beginning of the 1990s in order to support the first transition from socialist to rule-of-law based, democratic and liberal constitutional models.[1] It has, however, over the decades been permanently confronted with (constitutional) changes that were considered as retrogression[2] and has advised against them.[3]

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1 Thomas Markert, 'Die Venedig-Kommission des Europarats – Vom Beratungsgremium zum Akteur der Verteidigung von Rechtsstaat und Demokratie (1990–2022)', EuGRZ 49 (2022), 602; Christoph Grabenwarter, 'Standard-Setting in the Spirit of the European Constitutional Heritage' in: Simona Granata-Menghini and Ziya Caga Tanyar (eds), *Venice Commission, 30th Anniversary 1990–2020* (Lund: Juristförlaget 2020), 257–327; Angelika Nußberger and Júlia Miklasová, 'The Venice Commission' in: Daniel-Erasmus Khan, Evelyne Lagrange, Stefan Oeter and Christian Walter (eds), *Democracy and Sovereignty: Rethinking the Legitimacy of Public International Law* (Leiden and Boston: Brill 2023), 269–287.

2 To name just a few famous examples: the dismantling of the judicial system in Poland starting from the transformation of the Constitutional Tribunal into a body loyal to the ruling party (Venice Commission CDL-AD(2016)001); the foreign-agents-legislation in Russia that was meant to curtail political freedoms of the society (Venice Commission CDL-AD(2014)025); Venice Commission CDL-AD(2016)020; Venice Commission CDL-AD(2021)027).

3 This was sometimes done in very strong terms; see Venice Commission CDL-AD(2016)001, para. 138: 'Crippling the Tribunal's effectiveness will undermine all three basic principles of the Council of Europe: democracy – because of an absence of a

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At the same time, the Venice Commission was called upon to deal with the deadlock or misuse of constitutional mechanisms and had to solve the question of how to overcome dilemmas. Famous examples are the (mis)use of constitutional courts in order to topple political compromises achieved on the basis of negotiation. In other scenarios, the constitutional rules turned out to be dysfunctional because of unforeseen developments.

In this context, unorthodox solutions were identified. The respective proposals can be seen as part of what might be called pragmatic constitutionalism or emergency constitutionalism. It is worth studying those examples in order to identify innovative approaches that might be helpful for the transition 2.0.

II. Lacunae in the Constitutional Regulation

Constitutional provisions are often characterised by their vagueness and openness. This is, however, only true for human rights provisions and provisions fixing values or State goals. The regulations on State organisations, on the contrary, can be so precise that they do not leave any room for manoeuvre for interpretation. In such a situation, the constitutional process may be at an impasse if the respective rule does not 'work'. Well-known examples for this scenario can be found in the recent constitutional history of Moldova and Albania where the political actors asked the Venice Commission for help.

central part of checks and balances; human rights – because the access of individuals to the Constitutional Tribunal could be slowed down to a level resulting in the denial of justice; and the rule of law – because the Constitutional Tribunal, which is a central part of the Judiciary in Poland, would become ineffective.'; Venice Commission CDL-AD(2021)027, para. 91: 'As a result, [the recent amendments] constitute serious violations of basic human rights, including the freedoms of association and expression, the right to privacy, the right to participate in public affairs, as well as the prohibition of discrimination.'

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1. Deadlock in presidential elections – the Moldovan example

In Moldova, according to the wording of the Constitution[4] a 3/5 majority of the deputies of the Parliament was required for the election of the President. If such a quorum could not be attained in two rounds, the Parliament had to be dissolved and new elections had to be scheduled.[5] This regulation created a serious deadlock in the political process and led to an enduring constitutional crisis from 2009 onwards.[6]

According to the wording of the Constitution, it was impossible to exclude a vicious circle with a theoretically endless repetition of elections and dissolutions of Parliament, potentially always with the same candidates.[7] While in such a situation the best solution would have been a modification of the Constitution, the political majority failed to achieve this aim due to the low participation rate in the respective referendum;[8] it was declared invalid.[9]

In this situation, the Venice Commission did not advise to neglect a clear and unequivocal constitutional provision and to bypass it with an organic law, not even under exceptional circumstances:

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4 The current Constitution of Moldova was adopted on 29 July 1994 and amended eight times. The election of the President by a 3/5 majority of the Parliament was foreseen from 1997 to 2016.

5 Article 78 of the Moldovan Constitution at that time read: (1) The President of the Republic of Moldova shall be elected by the Parliament by secret ballot. … (3) The candidate who receives the votes of three-fifths of the elected deputies shall be elected President. If a candidate has not obtained the required number of votes, a second ballot shall be held between the first two candidates in descending order of the number of votes received in the first round. (4) If in the second ballot no candidate has received the required number of votes, a new election shall be held. (5) If, after the new election, the President of the Republic of Moldova is not elected, the incumbent President shall dissolve the Parliament and set the date for the parliamentary elections. (6) The procedure for the election of the President of the Republic of Moldova shall be regulated by an organic law.

6 In 2009, the candidate of the Communist party, Zinaida Greceanîi, did not attain the 3/5 majority and could thus not replace Vladimir Voronin. The Parliament was dissolved, and new elections were scheduled for July where the communist party lost the majority. However, the opposition was not in a position to elect the President; respective attempts failed in November and December of the same year.

7 Venice Commission CDL-AD(2011)014, para. 25.

8 See 'Moldovan referendum appears to flop on low turnout', Reuters, 5 September 2010, https://www.reuters.com/article/moldova-referendum-invalid-idUSLDE6840FD20100905.

9 See on the political background in Moldova at that time Venice Commission CDL-AD(2011)014, paras 10–12.

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> 'For the Venice Commission, the question of the majority required to elect the President is a substantive issue, a fundamental criterion for the validity of the election, which is expressly stated in the Constitution and the organic law. As such, it appears to be one of the constitutional principles that should be respected even in this unprecedented situation.'[10]

The wording of the Venice Commission's opinion thus suggests a distinction between fundamental and non-fundamental constitutional provisions. Therefore, it holds a literal interpretation 'preferrable'.[11] The 3/5 majority is seen as an expression of the general aim of the Constitution to achieve a compromise between the main political forces of the country. Nevertheless, the Venice Commission finds a contradiction between the aim of guaranteeing a well-functioning constitutional system and the fact of allowing (or even making necessary) endless repetitions of presidential elections and dissolutions of Parliament. Based on comparative constitutional law the Venice Commission highlights the deficiency of the Constitution of Moldova of not having a default mechanism for repeatedly failing elections. Against this background, the Venice Commission calls for a 'functional interpretation' of the Constitution:

> 'As the Parliament is unable to elect a compromise candidate and thus cannot prevent the crisis from continuing, it might be wise to opt for a functional interpretation of the Constitution: in view of the Constitution as a whole and the specific purpose of Article 78, which is to ensure the proper functioning of the constitutional bodies, such repetitive events should be limited, so as to prevent the abuse of successive dissolutions and to provide the necessary guarantee of political stability. The political and institutional impasse in which Moldova finds itself must be resolved as soon as possible.'[12]

In the end, the Venice Commission thus promotes a pragmatic approach in the light of the overarching aim of preserving a well-functioning constitutional system.

The crisis was, however, not easily solved afterwards, and in the end, it was solved on the basis of politics, not law. Presidential elections held on 16 December 2011 failed and were repeated on 15 January 2012. They

10 Venice Commission CDL-AD(2011)014, para. 32.
11 Venice Commission CDL-AD(2011)014, para. 33.
12 Venice Commission CDL-AD(2011)014, para. 39.

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were annulled as they were not secret. On 16 March 2012, Parliament finally succeeded in electing the candidate Nicolae Timofti with 62 votes out of 101 with the Communist party blocking the elections and some rebels of the Communist party supporting Timofti. He stayed President until 23 December 2016 thus ending the constitutional crisis.[13] Yet, a change of the text of the Constitution was necessary as otherwise, a similar crisis might have repeated itself. Thus, the 3/5 majority in Parliament was abolished in 2016 on the basis of a judgment of the Constitutional Court which declared the introduction of the 3/5 majority vote in 2000[14] unconstitutional and thus 'revived'[15] the original version of Article 78 of the Constitution.[16] Interestingly, the relevant part of the opinion of the Venice Commission is quoted at length in the judgment of the Constitutional Court.[17]

The background of the controversy is the swaying back and forth between pro-European and pro-Russian forces in Moldova.

2. Radical effects of vetting procedures – the Albanian example

A similar constitutional deadlock situation could be observed in Albania when the election of Constitutional judges was blocked for such a long time that the Constitutional Court became dysfunctional.

According to Article 125 of the Constitution of Albania, the Constitutional Court consists of nine members. The basic rules of the election reflect a model that is quite common in young democracies, but not only there: Three members are appointed by the President of the Republic, three members are elected by the Assembly and three members are elected by the High Court; thus involving the executive, the legislative and the judicial branch of power on an equal footing. The candidates have to be ranked by a special body, the Justice Appointment Council.

13 See Alexander Tanas, 'Moldova breaks political deadlock, elects president', 16 March 2012, https://www.reuters.com/article/us-moldova-president-idUSBRE82F19M20120316.

14 Law no. 1115-XIV of 5 July 2000 amending the Constitution of 1994.

15 The word is used in the judgment of the Constitutional Court, see para. 8 of the operative part.

16 Judgment nr. 7 from 4 March 2016 on constitutional review of certain provisions of the Law no. 1115-XIV of 5 July 2000 amending the Constitution of the Republic of Moldova (modality of electing the President) (Complaint no. 48b/2015), https://www.constcourt.md/ccdocview.php?l=en&tip=hotariri&docid=558.

17 See e.g. para. 180 of the Judgment of the Constitutional Court which refers to para. 39 of the VC opinion.

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While this system seems to be solid and well thought through, it could not cope with specific developments in Albania.

Due to the high level of corruption in the country, it was agreed to introduce large-scale vetting procedures for judges. This process was, however, not swift and smooth, but long-lasting and complicated. What was worse, it had the effect of paralysing the justice system as a whole. All but one of the judges of the Supreme Court either left voluntarily or were dismissed.[18] As a result, the Supreme Court was no longer able to play its role in the election of the constitutional court judges. Furthermore, it was unclear how to apply the constitutional election rules in the case of early resignments of judges as there was no clear explanation about the order in which the election process would have to proceed. The crisis was aggravated by the fact that – due to the controversy over the interpretation of the constitutional norms – two judges were elected for the same vacancy, one by the President and one by the Parliament. The President of Albania refused to take the oath of the judge elected by Parliament and suspended the election procedure although the Constitution did not provide for such a measure.

The Venice Commission was once again called upon to advice on solutions for a deadlock where the literal interpretation of the Constitution did not show a way out. Interestingly, the Venice Commission took into account the extent to which the difficulties were the result of bad faith or the consequence of a legal vacuum. Concerning the President's refusal to swear the judge in it held:

> 'While such suspension is not explicitly envisaged by the Law on the Constitutional Court, it could be consistent with a default mechanism meant to deblock a situation in case of malicious or wilful inaction on the part of one of the actors involved. If there is neither malicious nor wilful inaction, but rather a legal vacuum to be filled, the ratio legis of a default mechanism would not apply. As a consequence, there must be the possibility to interrupt the – otherwise automatic – functioning of the default mechanism. On the basis of a teleological interpretation of the legal provisions, it could therefore be justified to accept the belated appointment of a second candidate by the President. It, therefore, seems

18 See the comment of the Venice Commission CDL-AD(2020)010, para. 85: 'The unforeseen difficulties and delays in the vetting of the judges sitting on the High Court specifically resulted in its paralysis for over two years. The Commission's delegation learned that there are few candidates for appointments to the High Court and that this would also be due to the rigour of the vetting procedure.'

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> justified that the President refused to accept the oath of the judge allegedly appointed by default.'[19]

On the contrary, the solution provided by the Parliament – the adoption of a new procedure replacing the swearing-in by the President – was deemed not to be in line with the Constitution as it would create 'uncertainty as to the legitimacy of members starting to work at the Constitutional Court'.[20]

Furthermore, the Venice Commission proposed another pragmatic solution concerning the inability of the High Court to appoint judges and stated that 'it should make its outstanding appointments as soon as it is functional again.'[21]

The decisive message of the Venice Commission in such a situation of conflict was, however, the following:

> 'Finally, the Venice Commission reiterates the absolute need for dialogue and loyal cooperation among State institutions. The mandate and powers of State institutions must be respected in order for them to fulfil their legitimate institutional objectives, always seeking the best benefit for the citizens of Albania.'[22]

While the Venice Commission always stresses the prerogative of the national constitutional court, it takes over its role, as in the Albanian case, whenever the constitutional court is non-existent or blocked in its decision-making power. The Commission uses the whole panoply of constitutional interpretation rules but dares to go against literal interpretation if otherwise the constitutional problems cannot be solved.

The direct effect of the opinion of the Venice Commission was that the most controversial appointment by the Parliament not confirmed by the President was considered null and void. Yet, the Venice Commission's recommendation of quickly compromising on new appointments was not implemented. After the difficult phase in the winter of 2019 where the conflict between Parliament and Government broke out and the Venice Commission was asked for its opinion it lasted until December 2020 before the next new judge was appointed; two more appointments followed in

19 Venice Commission CDL-AD(2020)010, para. 98.
20 Venice Commission CDL-AD(2020)010, para. 100.
21 Venice Commission CDL-AD(2020)010, para. 104.
22 Venice Commission CDL-AD(2020)010, para. 108.

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December 2022. By now (March 2023) the court works again in full composition.[23]

III. Abuse of Power by Constitutional Courts

While the constitutional crises in Albania and Moldova were caused by the interplay of internal and external factors, the constitutional stalemate in Kyrgyzstan, Ukraine and Moldova were direct consequences of the (evident) abuse of power by constitutional courts.

1. The reversal of constitutional amendments – the case of Kyrgyzstan

Contrary to other central Asian countries Kyrgyzstan was open to democratic forms of governance not only on paper but also in reality. It was, however, a painful path with ups and downs that ended abruptly in 2021 with the adoption of a model authoritarian constitution.[24]

In the early 2000s, there was, however, still hope for a democratic development. President Akajev who had become more and more authoritarian was forced to resign in the so-called Tulip Revolution. In 2007, the Parliament adopted a new version of the Constitution soon to be followed by yet another one; the second one entered into force in January 2007. In September of the same year, however, the Constitutional Court declared that both new versions of the Constitution had been adopted in a formally incorrect procedure and declared them null and void. This allowed the new President Bakiev, to put a third version of the Constitution to a referendum,[25] this time concentrating much more power in the hands of the President, i.e. in his hands.[26]

The action of the Constitutional Court that resembled a legal coup d'État had to be respected by the Venice Commission, albeit it criticized it with clear words:

23 See https://www.gjk.gov.al/web/Composition_90_2.php.
24 Venice Commission CDL-AD(2021)007.
25 The text of this Constitution is documented by the Venice Commission, see https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2007)127-e.
26 On the background of the opinion of the Venice Commission see Markert (n. 1), 628.

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> 'It is indeed highly unusual, if not unprecedented, that a Constitutional Court declares the full text of an acting Constitution to be unconstitutional. As a general rule, constitutional courts have to take their decisions on the basis of the Constitution valid at the moment of their decision. Former versions of the Constitution are irrelevant. This means that the Court could take this decision only if the text of the Constitution adopted on 30 December 2006, and which was supposed to have entered into force on 15 January 2007, was invalid ab initio. There might be doubts as to whether the 2003 Kyrgyz Constitution envisaged such a possibility. Furthermore, it has to be stressed that such an interpretation would have important consequences. All the actions based first on the Constitution of 9 November 2006 and then on the Constitution of 15 January 2007 would be without a legal basis. That would also apply to any election of constitutional judges taking part in the relevant decision.'[27]

Despite this criticism, the Venice Commission provided a neutral analysis of the provisions of the new Constitution and thus, implicitly, accepted their validity. In line with the task it was given it avoided any further general comments and concentrated on the substance of the new regulation.

In 2010, there was another turn-around, once again after turmoil and bloodshed, this time with an interim President. The newly adopted Constitution was seen by the Venice Commission as an 'effort of the Provisional Government and the Constitutional Assembly of Kyrgyzstan aimed at drafting a new Constitution that is fully in line with democratic standards.'[28] Yet, as already stated, the present Constitution does not confirm the path towards a truly democratic model, but led to an authoritarian backlash.[29]

In following the constitutional development in Kyrgyzstan, the Venice Commission showed a pragmatic approach and was reluctant to comment on the context of the adoption of the new versions of the Constitution.

2. The reversal of constitutional amendments – the case of Ukraine

Constitutional history in Ukraine was even much more complicated. In 2004 after the so-called Orange Revolution presidential power was cur-

27 Venice Commission CDL(2007)128, para. 10.
28 Venice Commission CDL-AD(2010)015, para. 64.
29 See the text of the new Constitution adopted by referendum on 11 April 2021 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2023)009-e.

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tailed. Six years later, in 2010, the Ukrainian Constitutional Court declared those changes unconstitutional because of procedural irregularities. As a consequence, the former Constitution, albeit with certain changes, was revived.

This was an unprecedented act of a Constitutional Court. It was so badly argued that the Venice Commission was forced to mention the major deficiencies, even if it claimed not to criticize judgments of Constitutional Courts. Thus, it observed 'a certain inconsistency' in the case-law of the Constitutional Court as the findings on which the judgment was based were incompatible with what the Constitutional Court had decided just four months earlier. On the one hand, the Constitutional Court had argued that constitutional amendments, once they entered into force, became 'an integral part of the Constitution', even if they were not based on an expert opinion of the Constitutional Court, on the other hand, it had held that the lack of an expert opinion by the Constitutional Court was a reason for the invalidity of reform provisions. This obvious inconsistency was not even addressed in the Court's judgment.

The Venice Commission commented as follows:

> 'The Commission also noted, with some surprise, that the 30 September Judgment does not refer to the Decision of February 2008 and does not explain the difference between the petition of 2007, and the petition of July 2010. It also considers highly unusual that far-reaching constitutional amendments, including the change of the political system of the country – from a parliamentary system to a parliamentary-presidential one – are declared unconstitutional by a decision of the Constitutional Court after a period of 6 years. The Commission notes however, that neither the Constitution of Ukraine nor the Law on the Constitutional Court provides for a time-limit for contesting the constitutionality of a law before the CCU.'[30]

As a consequence, the Venice Commission laments on the legitimacy problems linked to the Constitutional Court's legal coup d'État:

> 'As Constitutional Courts are bound by the Constitution and do not stand above it, such decisions raise important questions of democratic legitimacy and the rule of law. It is clear that a change of the political system of a country based on a ruling of a Constitutional Court does not

30 Venice Commission CDL-AD(2010)044, paras 34–35.

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> enjoy the legitimacy which only the regular constitutional procedure for the constitutional amendment, and preceding open and inclusive public debate can bring.'[31]

The Venice Commission finds therefore problems with the acceptability of the judgment and legal certainty. It argues that the Ukrainian Constitutional Court should have observed the principle of proportionality and at least have included 'unambiguous transitory norms' in its judgment.[32]

What is of interest in the context of the present analysis are the consequences of such a deficient judgment that is not only wrong but seems to be adopted 'for ulterior purposes'.[33] While the Constitutional Court speaks out explicitly in favour of the reinstatement of the pre-existing legal contents of the 1996 Constitution, the Venice Commission identifies a lot of issues where this solution plainly does not work. One major problem is created by the unclarity as to the length of the parliamentary term, as the parliamentarians were elected on the basis of the 2004 Constitution for a five-years-term whereas the Constitution of 1996 provides for a parliamentary term of only four years. As in the case of other constitutional dilemmas where no solution can be found in the text of the Constitution, the Venice Commission pursues a double strategy: admonishing cooperation and pragmatic actions to overcome the crisis and developing potential solutions:

> 'The Commission strongly hopes that the CCU, as the only authority competent to give the official interpretation of the State Constitution, will take its decision on this matter very soon and preferably before the end of the year, thus contributing to ensuring the rule of law and the stability of the country in a difficult moment of its constitutional history.'[34]

The other problem was that it was necessary to bring the existing legislation in line with the former and new Constitution. This was done hastily, neglecting procedural rules, thus repeating the mistakes that led to the nullification of the Constitution in the first place.

In its conclusions the Venice Commission is very outspoken about its negative take on the constitutional developments in Ukraine. It warns

31 Venice Commission CDL-AD(2010)044, paras 36–37.
32 Venice Commission CDL-AD(2010)044, para. 38.
33 See Art. 18 European Convention on Human Rights (ECHR).
34 Venice Commission CDL-AD(2010)044, para. 53.

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against the creation of an 'excessively authoritarian system'[35] and calls for a comprehensive constitutional reform.

All that means that the Venice Commission criticizes, but does not put into question the validity of the fake (or faked) process of replacing one constitution with another one. Rather, it looks into the future and requests fundamental changes.

3. Self-interested decisions of the Constitutional Court – the case of Ukraine

The 2010 scandalous judgment was not the only one. In 2020, the Ukrainian Constitutional Court annulled large parts of an anti-corruption law,[36] the implementation of which was considered by international donors as a *conditio sine qua non* for the granting of loans.[37]

What made the judgment so piquant was that the Ukrainian President had filed a motion in the proceedings to declare four of the fifteen judges, including the chairman, biased. The background to this was a direct conflict of interest, as proceedings were pending against these judges themselves on the basis of the very anti-corruption law whose constitutionality they were to judge. However, these motions of bias were simply not decided upon. In addition, the judgment declared legal regulations null and void, which had not been challenged by the applicants, without giving any reasons for this. In general, the reasoning was erratic, lacked subsumption under the norms and cited international norms only incompletely, even if conclusions were drawn from them. In addition, the annulment of the norms was, unlike usually, ordered with immediate effect and not for a later date.[38]

The Constitutional Court's move was considered to be unacceptable by the Ukrainian public and international donors alike. The Ukrainian President reacted to the storm of indignation with a bill declaring the judges'

35 Venice Commission CDL-AD(2010)044, para. 64.

36 Judgment of the Ukrainian Constitutional Court (27 October 2020), n°13-r/2020, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)078.

37 The background of the case is explained in Venice Commission, CDL-PI(2020)019, para. 7 ff.; see also the analysis of the judgment in Angelika Nußberger, 'Was ist Willkür? Auf der Suche nach europäischen Standards', JZ 76 (2021), 965–973.

38 See the analysis of the Venice Commission, CDL-PI(2020)019, paras 17 ff.

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decision null and void.[39] The reason given was that the ruling 'was issued in the private interest of the judges of the Constitutional Court, is arbitrary and unfounded and contradicts the rule of law, as well as disregards the European and Euro-Atlantic directional decision of the Ukrainian people.'[40] The law also ordered the revalidation of the norms declared unconstitutional, as well as the removal of all judges of the Constitutional Court and a new election of judges.

This measure caused the President of the Venice Commission and the President of the anti-corruption agency GRECO to intervene. They warned Zelensky in a letter that terminating the judges' mandates would be a blatant breach of the Constitution and the principle of separation of powers.[41]

> 'We urge you nonetheless to consider the adverse, profound and long-term implications for your country of a possible rushed decision to dismiss the constitutional justices. We encourage you to explore possible alternative ways of ensuring that the fight against corruption in line with international standards remains a priority for your country.'

Zelensky agreed to request an expert opinion from the Venice Commission, which confirmed the inadequacy of the Constitutional Court's argumentation as it had 'serious shortcomings' and fell 'short of standards of clear reasoning in constitutional court proceedings'.[42] At the same time, the Venice Commission proposed a series of measures for improving the function of the Constitutional Court for the future.[43]

Even in light of its findings that the controversial Constitutional Court judgment did not live up to the standards of argumentation to be requested from a Constitutional Court, the Venice Commission defended the strong position of constitutional courts in the architecture of democratic States. It stressed that constitutional court judgments are final and binding, even

39 Draft Law No. 4288 'On renewal of public confidence in constitutional proceedings', in Ukrainian, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=70282.

40 The first Article of the law is cited in Venice Commission, Urgent Opinion No. 1012/2020 on the reform of the Constitutional Court, CDL-AD(2020)039; see the comment Markus Akeret, 'Selenski versucht einen Befreiungsschlag gegen die Verfassungsrichter', Neue Züricher Zeitung, 3 November 2020, https://www.nzz.ch/international/ukraine-selenski-auf-konfrontationskurs-mit-verfassungsgericht-ld.1585081.

41 See https://www.venice.coe.int/files/2020_10_31_UKR_JointGRECOVeniceCommissionLetterSpeakerVerkhovnaRada.pdf.

42 Venice Comission, CDL-PI(2020)019, para. 21.

43 Venice Commission, CDL/Pl(2020)019.

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if they are wrong. While subsequent changes of the legislation (and the Constitution) are possible they must not repeat the contents of the invalidated laws. The Venice Commission also requested restraint in criticizing constitutional courts. Based on these reflections, it held that a Constitutional Court 'cannot be "punished" for its decisions, but its working can be improved'.[44]

The Venice Commission furthermore defended a conservative line of reasoning with regard to the comprehensive powers of constitutional courts. It spoke out against removing completely their autonomy in adopting their own rules of procedure and did not argue in favour of a stronger influence from outside in dismissing or disciplining constitutional court judges, a power in Ukraine left entirely to the Constitutional Court itself. However, it requested more transparency in this regard.

Furthermore, it insisted on the importance of a selection procedure that would guarantee the high quality of the personal composition of the court and advocated international cooperation in this respect.[45]

Concerning the question of the reopening of procedures the Venice Commission showed a nuanced approach, fully aware of the dilemma constitutional courts would be faced with in such circumstances:

> 'Such a possibility could be provided for in the Law on the Constitutional Court in cases where the Constitutional Court has failed to abide by the laws and procedures applicable to itself – in particular, where judges have participated who should have been excluded because of conflicts of interest. The problem with such a provision would be that due to the final and binding nature of the decision of the Constitutional Court, it would be for the Court itself to come to the conclusion that it failed to abide by the law.'[46]

The final conclusions of the Venice Commission stress the exceptionality of reopening a case and limit its consequences:

> 'The Venice Commission, therefore, does not recommend instituting a possibility for a Constitutional Court to re-open its proceedings, in general. That could easily be abused for exerting pressure on the Court to re-open its proceedings for political reasons. Such a possibility could

44 Venice Commission, CDL-PI(2020)019, para. 38.

45 See as a follow-up to this aspect the Venice Commission's opinion on the improvement of the procedure on the election of judges CDL-AD(2022)054-e.

46 Venice Commission, CDL-PI(2020)019, para. 86.

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> however be opened when the criminal liability of a judge relating to that case (e.g. bribe-taking) has been established. In any case, a re-opening of the decision cannot lead to the reinstatement of a law that has already been annulled. That would change the nature of the Court from a negative to a positive legislator.'[47]

It, therefore, seems that the Venice Commission's approach is much less radical than the one of the European Court of Human Rights. This will be discussed below.

As a follow-up to the opinion the law announced by President Zelensky to annul the Constitutional Court decision and dismiss and re-elect all judges of the Constitutional Court was withdrawn. But the crisis was by no means over. The Ukrainian Parliament passed the anti-corruption law that had been declared unconstitutional, a short time later for a second time.[48] Zelensky suspended the president of the Constitutional Court – who had been appointed by his predecessor Yanukovych – first for two months, then for another month. On 27 March 2021, he annulled the original appointment decree as well as that of another judge, as they posed a threat to the State independence and national security of Ukraine, and he was thus required by the Constitution to intervene.[49] Action beyond the law was thus justified as serving to protect the law. The legal debate became a political one with a friend-foe polarisation in the sense of Carl Schmitt.[50]

The fight between President and Constitutional Court continued until the beginning of the Russian aggression against Ukraine. The Constitutional Court declared the President's decree annulling the appointment of the president of the Constitutional Court by Yanukovych incompatible with the Constitution; it refused to swear in the new judges appointed by Zelensky

47 Venice Commission, CDL-PI(2020)019, para. 89.

48 Euronews, 'Ukraine's parliament defies court ruling and restores anti-corruption legislation', 4 December 2020, https://www.euronews.com/2020/12/04/ukraine-s-parliament-defies-court-ruling-and-restores-anti-corruption-legislation.

49 Presidential Decree No. 124/2021, 27 March 2021 on 'Certain questions concerning Ukraine's national security', in Ukrainian: https://ips.ligazakon.net/document/view/U124_21?utm_source=jurliga.ligazakon.net&utm_medium=news&utm_content=jl03&_ga=2.255099919.628368149.1622024495-727478107.1622024495. After the start of the war the former President of the Ukrainian Constitutional Court Olexandr Tupyzkyj was spotted in Vienna although he would not have been allowed to leave the country, see https://www.derstandard.de/story/2000134472045/chef-des-ukrainischen-verfassungsgerichts-wurde-in-wien-gesichtet.

50 Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien* (9th corrected edn, Berlin: Duncker & Humblot 2015), 25.

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'until vacancies appear'. Sergiy Holovaty acts as interim president. The Venice Commission was once again involved in assessing a new procedure for the election of the judges of the Constitutional Court.[51] More questions remain open than could be regarded as solved. The Venice Commission takes a critical view of how constitutional justice in Ukraine continues to develop.

4. Politically motivated constitutional court judgments – the case of Moldova

In the case of Moldova, the Venice Commission was also asked several times to adopt opinions because of political turmoil caused by Constitutional Court decisions.[52] The decisions considered to be the most scandalous ones were the decisions of 8 June 2019 to dissolve Parliament. This seemed to be motivated by the endeavour to keep the party of the oligarch Plahotniuc in power as the Parliament elected on the very same day a new government composed of the representatives of the opposition.[53]

In this case, national and international pressure was so high that the Constitutional Court revoked its decisions a few days later. As explained in a letter dated 17 June 2019 from the President of the Constitutional Court of Moldova to the Venice Commission Secretariat, the revocation of the contested series of decisions was meant to be 'a source of social peace, rule of law, democracy, as well as a safeguard of a proper framework of human rights protection, by combating a political crisis of great magnitude'.[54] Here again, it can be said that the solution to the crisis was rather political than legal. While the President of the Constitutional Court referred to legal principles enshrined in the Constitution he did not give any legal grounds for the reversal of the judgments of the Constitutional Court; there was neither an argument about the legal basis for this bold step nor an assessment of what was wrong in the former judgments. Rather, it was clear that the Constitutional Court reacted to pressure from outside and inside the country.

In this situation, the Venice Commission was not confronted with the question of assessing the consequences of obviously wrong yet binding

51 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2022)054-e.
52 For an overview see Markert (n. 1), 628.
53 Markert (n. 1), 628.
54 Cited in the opinion of the Venice Commission, CDL-AD(2019)012 (n. 11).

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constitutional court decisions. On the contrary, it was free to analyze those decisions from the ex post perspective.

Therefore, the Venice Commission gave up its usual restraint in assessing Constitutional Court decisions. It harshly criticized the procedure of the adoption of the respective court decisions which were rushed (five judgments within three days, partly on weekends) and violated basic procedural principles. In the Venice Commission's opinion, it was a clear case of collusion between political forces and the Court, a 'coordinated action at lightning speed of the Democratic Party and the Constitutional Court'.[55] The Venice Commission also criticized the 'inconsistent argumentation'. The reason given for not summoning the Parliament to the proceedings was that it had already been dissolved, whereas the parliamentarians who brought the respective cases to the Constitutional Court were considered to still have *locus standi*. Furthermore, the Venice Commission argued that it was not justifiable to treat differently complaints concerning basically the same matter, conferring the status of 'extreme urgency' on some, but not on others.

In substance, the Constitutional Court's decisions could not be based on the Constitution as they were neither compatible with the wording of the relevant constitutional provisions nor with their telos.

By way of conclusion, the Venice Commission took a bold step in defining the limits of the power of constitutional courts:

> 'The Venice Commission reiterates that in a State governed by the rule of law, it is essential that constitutional bodies decide within the parameters of their legal authority and responsibility, lest the robustness of State institutions in the country in line with the Constitution, be seriously undermined and the democratic functioning of State institutions be irreparably compromised. Only in such a situation will the Venice Commission exceptionally accept to assess the judgments of a Constitutional Court.'[56]

While the findings of the Venice Commission are clear the question remains why the same principles were not applied to the judgment of the Ukrainian Constitutional Court which was also full of inconsistencies and obviously not within the parameters of its legal authority. What is lacking

55 Venice Commission, CDL-AD(2019)012, para. 34.
56 Venice Commission, CDL-AD(2019)012, para. 56.

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is a clear standard of arbitrariness where what seems to be "the law" should no longer be considered to be "the law".

It should be accepted as general standards that there is a red line when constitutional court judgments have the function of a legal coup d'État. But the arbitrariness of a judgment must be obvious, leaping into the eyes of every objective observer.

IV. Lessons Learnt for Transition 2.0

The question is what can be learnt from those responses given to constitutional dilemma situations for re-developing legal systems in the transition 2.0.

1. Characteristics of transition 2.0

As explained above, transition 2.0 is hoped to happen. It is, however, not yet a reality. Unlike in the first transition, there is no longer a constitutional 'clean slate' where everything can be made new. In the late 1980s and early 1990s it was clear that the legal system built up during the time of socialism – with centralization instead of separation of powers, with judges fulfilling the party's will instead of being independent, with a sometimes formalist, sometimes instrumental understanding of 'the law' instead of rule of law, with the subordination of people's will to State ideology instead of political human rights – was to be given up and replaced by something completely new.

During the period of constitutional backlash, with or even without a change of the Constitution democratic institutions were captured and transformed into something different from what they were meant to be, but still function under the same or a similar heading. This is most evident with the Constitutional Court of Poland which – on the surface – continues working after 2015 as before. Nevertheless, it has lost its function of being a neutral arbiter in the constitutional process. The most important of its judgments reflects its loyalty – or what is more – its collusion with the Government in fundamentally changing the legal system, distancing it from European influence and enforcing a complete turn-around in controversial societal questions. Thus, the Constitutional Tribunal declared Article 6 ECHR in the interpretation given by the European Court of Human Rights

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inapplicable in Poland,[57] a finding that was fiercely contradicted by all the former judges of the Constitutional Court.[58] It also declared the abortion law null and void thus restricting the possibility of abortion even more.[59]

Constitutional architects in such a situation do not have the possibility to re-design everything but are confronted with the question of what to do with existing institutions considered to be flagships in democratic States and safeguarded by important constitutional guarantees.

Furthermore, the transition 2.0 might suffer from the fact of being 'one too much'. While for the first transition, there might have existed enthusiasm, it might be difficult to convince people that within a relatively short period of time another fundamental transformation is necessary.

Last but not least, the transition 2.0 might be incomplete and unfinished. As it would be the reversal of the work of specific political forces, it is clear that it will be confronted with many obstacles. In so far as such obstacles cannot be fully overcome, reforms will often need to be based on compromises and thus not be as far-reaching as they would be intended to be.

2. Anti-deadlock mechanisms

The main question is what to do with the heritage of the constitutional backlash. In so far as it is based on binding constitutional judgments innovative approaches are needed to open the avenue for reforms.

The Venice Commission was often confronted with the task to find a way out of constitutional deadlock situations when Constitutional Court

57 Judgment of the Polish Constitutional Tribunal, 24 November 2021, Case K 6/21, https://K 6/21trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny; the Polish Constitutional Tribunal challenged Article 6 ECHR a second time in its Judgment, 10 March 2022, Case K 7/21, https://trybunal.gov.pl/en/hearings/judgments/art/11820-dokonywanie-na-podstawie-art-6-ust-1-zd-1-ekpcz-przez-sady-krajowe-lub-miedzynarodowe-oceny-zgodnosci-z-konstytucja-i-ekpcz-ustaw-dotyczacych-ustroju-sadownictwa-wlasciwosci-sadow-oraz-ustawy-dotyczacej-krajowej-rady-sadownictwa.

58 Statement by Retired Judges of the Constitutional Tribunal on the Constitutional Tribunal Judgment in case K 7/21, Verfassungsblog, 14 March 2022, https://verfassungsblog.de/statement-by-retired-judges-of-the-constitutional-tribunal-on-the-the-constitutional-tribunal-judgment-in-case-k-7-21/.

59 Judgment of the Polish Constitutional Tribunal, 22 October 2020, Case K 1/20, https://trybunal.gov.pl/en/hearings/judgments/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy.

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decisions blocked the way forward or constitutional provisions could not be applied because of very specific circumstances.

Generally, the approach of the Venice Commission can be called pragmatic, but not revolutionary. It never advised to openly neglect Constitutional Court judgments, even when they were obviously wrong, but rather showed a way to avoid committing the same errors in the future. Neither did it support the idea to openly neglect specific provisions of the Constitution, but rather tried to show teleological interpretations that might overcome hindrances. The principles the Venice Commission upheld in its opinions are thus mainly legal certainty and respect for institutional competences.

From the perspective of human rights, the European Court of Human Rights adopted a much more radical approach in its judgment Guðmundur Andri Ástráðsson v. Iceland,[60] where it stressed the subjective aspect of State organizational decisions in so far as they had an effect on the composition of tribunals. While the Court emphasized 'that the finding of a violation … may not as such be taken to impose on the respondent State an obligation under the Convention to reopen all similar cases that have since become res judicata' the possibility of requesting a reopening for those concerned by judgments of not correctly composed tribunals is undeniable. Such a possibility would not exist when 'only' the political process and not a subjective right is concerned. The violation of Convention rights can, however, be a very effective mechanism for reversing reforms. This was evidenced in the case Advance Pharma sp. z o.o v. Poland where the Court held that it was an 'inescapable conclusion' that the National Council of the Judiciary responsible for judicial appointments had to be changed.[61]

Nevertheless, with an 'only subjective' approach based on the jurisprudence of the European Court of Human Rights many of the features changed in the constitutional backlash would remain intact.

V. An Outsider's Role in Deblocking Constitutional Impasses

The Venice Commission is not a court that builds up binding case-law comparable to one of the European Court of Human Rights. Nevertheless,

60 ECtHR (Grand Chamber),*Guðmundur Andri Ástráðsson v. Iceland*, judgment of 1 December 2020, no. 26374/18.

61 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 7 May 2021, no. 4907/18, para. 365.

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it is involved in many constitutional crisis situations, especially in the new democracies in Central and Eastern Europe and has responded to many – always different – questions concerning dilemma or deadlock situations where a literal interpretation and application of constitutional provisions did not provide a solution to intricate problems. In these situations, the Venice Commission's role is that of a pragmatic problem-solver.

The question is how far the Venice Commission's solutions can be used for elaborating models for overcoming potential problems in the transition 2.0. Some preliminary conclusions may be drawn:

In so far as the personal (partisan) composition of specific State institutions, above all the Constitutional Court, is concerned the Venice Commission does not provide any ideas on how to bring about change. In all its opinions, even in those where it had to confirm abuse of power on the part of the constitutional courts, it concentrated only on future improvements and guarantees for a selection of constitutional court judges fulfilling high quality standards. At the same time, it excluded any form of 'punishment' for wrong decisions and warned against undue influence on constitutional courts and criticism that would weaken their authority. Yet, it proposed new models for the future and accepted intensive vetting procedures. A change of the personal composition of courts including the Constitutional Court seems, however, possible under the jurisprudence of the European Court of Human Rights under Article 6 ECHR.

On the contrary, the Venice Commission gave advice on how to overcome institutional dilemmas, i.e. the dysfunction of a specific State institution due to unforeseen circumstances. In this context, it argued for a 'functional approach' allowing to deblock institutions on the basis of an 'only teleological' interpretation of the Constitution going beyond its wording. In this context the Venice Commission advices to take into account the idea of the Constitution as a whole – which is meant to make the State system function smoothly and not to create unnecessary difficulties – and finding a solution on that basis.

All in all, the Venice Commission is rather reactive than active. It has managed to build up consistent standards, for instance for elections according to the rule of law, but not in all fields. While it keeps quoting its own opinions it is only in the first phase of building up precedents; too often there are no opinions the Commission could build on. What is lacking is

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a clear definition of arbitrariness[62] which might be very helpful in defining red lines in the transition 2.0.

In general, the Venice Commission emphasises the good cooperation and dialogue between all public authorities in order to overcome difficulties. To rescue the Constitution by violating it remains a dangerous endeavour. Yet, European standards and institutions might help when such steps are necessary to re-establish constitutional democracy.

62 Angelika Nußberger, 'The Notion of Arbitrariness in European Law' in: Christina Deliyanni-Dimitrakou, Hélène Gaudin and Eugénie Prévédourou (eds), *Le droit européen, source de droits, source du droit. Mélanges en l'honneur de Vassilios Skouris* (Le Kremlin-Bicêtre: Mare & Martin 2022), 433–444.

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