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Domenica Dreyer-Plum | Wolfram Hilz [Eds.]

Integration Through Law and the European Union

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Introduction: Integration Through Law and the European Legal Community

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Integration Through Law and the European Union

Domenica Dreyer-Plum, Wolfram Hilz[*†]

The European Union (EU) represents an international legal order which, with the participation of its Member States, influences and shapes national legal systems to a considerable extent and sets limits to national scope for action. This has recently led to serious questions of democracy, legitimacy and sovereignty in political discourse, which have not least encouraged right-wing and left-wing populist parties and a Eurosceptic attitude. This affects the normative foundations of the individual states as well as the overarching legal system of the EU. There is no doubt that the European integration project is a legal achievement. However, the current political dispute over the further shaping of the European legal community is being fought out in many individual processes, institutional arrangements and in each specific policy area.

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† We would like to thank the excellent speakers who accepted our invitation and enriched our panels at the Conference on "Integration Through Law and the European Union: Political and Legal Developments vs. Polycrisis" on 24/25 October 2024. Our special thanks go to our teams at the University of Bonn and RWTH Aachen University: Jakob Bartolomey, Fabian Funke and Marit Geißinger for their research assistance during the conference and in preparation of this edited volume, and Heike Frank for organisational and administrative support. The Conference and this volume would not have been possible without the generous funding by the Arbeitskreis Europäische Integration e.V./European Community Studies Association Germany and the Foundation for International Dialogue of the Savings Bank in Bonn. Last but not least, we would like to express our gratitude to the Institut Français in Bonn for hosting the conference at the Robert-Schuman-Saal.

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1. European Union: The Legal Community

The EU is a well-established legal community. In addition to 70 years of treaty history, the body of law includes a wide range of secondary legislation and extensive case law. European law constitutes a strong core. In view of the manifold crises of recent years,[1] both the power of integration and the authority of law are astonishing. Turning to the early years of integration and remembering that the EU started out as an international organisation similar to the Council of Europe or the Organisation for Economic Co-operation and Development, the transformation of the past decades into a political system is all the more remarkable.

Since the financial crisis starting in 2008, both politicisation and crises experiences have become an increasing challenge to the EU. This exposure has led to the realisation (1) that global governance processes require cooperation between Member States, especially since (2) a number of political challenges can no longer be addressed by individual Member States. But those can only be addressed sensibly and effectively by a community of states (migration policy, digitalisation, dealing with large corporations, taxation). In addition (3), it is precisely in crisis situations that the community's potential for solidarity is demonstrated.

The EU's polycrisis has recently been addressed by a number of renowned European law scholars in order to investigate the question: What is the state of the EU?[2] What characterises the EU's crisis management and how is it institutionally and policy-wise positioned? All contributions fall into one of three categories: *Breaking down*, *muddling through* or *heading up* – which applies to the area under investigation? Unsurprisingly, the answers are just as complex as the EU itself. Very often, the authors arrive at fuzzy results, according to which at least two out of three categories apply.[3]

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1 M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises*, Palgrave Studies in European Union Politics (Palgrave Macmillan, 2021).

2 M. Riddervold, J. Trondal and A. Newsome, see n. 1.

3 A. E. Stie, 'Crises and the EU's Response: Increasing the Democratic Deficit?', in M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 725, 727–729; C. Holst and A. Molander, 'Responding to Crises—Worries About Expertization', in M. Riddervold, J. Trondal, and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 647; S. L. Greer, A. de Ruijter, and E. Brooks, 'The Covid-19 Pandemic: Failing Forward in Public Health', in M. Riddervold, J. Trondal, and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 747.

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This leaves us with the realisation that "the path to political unification remains contested and uncertain to this day."[4] The legal history and success of the EU is not certain: "Above all, history teaches us how improbable the EU's current status is."[5]

What does this imply for examining political and legal developments in the EU against the backdrop of the polycrisis experience? Developments within the EU – in terms of the balance of institutions, separation of powers, democratic demands, but also within policy areas – are diverse and sometimes contradictory. This is where this book seeks to make a significant contribution in four areas of research related to *integration through law*.

This edited book combines conceptual and empirical contributions in relation not only to *integration through law* but also further *integration through…-formats* such as *integration through funding*, *integration through crisis-response* and most basically *integration of law*.

Thus, it stimulates a debate about the significance of *law and legal instruments* in the European integration process in general and in particular within the polycrisis setting. The complex situating of "Integration through Law and the European Union" is approached with an emphasis on the dimensions of *law*, *legitimacy*, *rule of law* and *(self-)perceptions* and address highly relevant concepts such as sovereignty, jurisdiction, policy agenda development and not least the financial architecture of the EU.

2. Conceptual Questions and Focus of the Book

The EU is powerful with its exclusive competence for the functioning of internal market competition rules combined with the effective design of the internal market by way of secondary law. The power of the EU is reinforced by directly applicable law that cannot be discarded by Member States, while the institutional position of the Court of Justice of the EU is continuously reinforced.[6]

4 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023), 4.
5 K. K. Patel, *Europäische Integration: Geschichte und Gegenwart* (C.H. Beck, 2022), 119.
6 T. Eijsbouts, 'Constitutional Sedimentation' (1996) *Legal Issues of Economic Integration*, 51.

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Both disruptive and reinforcing to that continuous process of "constitutional sedimentation"[7] are exogenous crises which hit the EU hard since 2008. Given the magnitude of the crises, it is surprising to see the resilient integration power of EU law. Simultaneous expectations are paradoxical: The EU should do more – especially in crisis situations, when national resources are exhausted – at the same time, Member States want to decide more independently.

The complex situation of the EU therefore includes several dimensions that need our attention, when we address the political and legal developments of the EU against the polycrisis experiences. This edited book strives to combine theoretical, conceptual and empirical contributions in relation to *integration through law* which is not limited to the classic understanding of integration through jurisprudence, but considers various formats such as *integration through legislation*, *integration through funding* and *integration induced by crisis*. What unites these approaches is their focus on the law not only as tool and necessary medium, but powerful variable to strengthen integration in the sense of *constitutionalisation* of the European integration process.

In this volume, we address the significance of law for the European integration process by asking: What can we take from the link between law and European integration in times of multi-layered forms of *integration through law*? We do not stop there, but give an outlook for an integrated research agenda to consider the strategic significance of law in developing and legitimising crisis-intensive policy fields.

The anthology starts with a brief summary of major arguments that were exchanged at the conference "Integration through Law and the European Union: Political and Legal Developments vs. Polycrisis", held at the University of Bonn in October 2024 (Pages 17 to 29). All contributing authors of this edited volume participated in the conference and debated on different panels the four main issues elaborated in more detail in this book.

2.1 Understanding the Link between Law and European Integration

The first section of this book focuses on the significance of *law* in both the integration and policy process at EU level. It reconnects to the theory

7 T. Eijsbouts, see n. 6, 51.

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approach of *integration through law* while extending the scope significantly toward legal culture and the narrative dimension of law.

Domenica Dreyer-Plum returns in her contribution (Pages 33 to 53) to fundamentals of *integration through law* and connects the general assumption about the significance of (case) law with an operationalisation of legal culture to investigate the characteristics of European law and provide access strategies to the multifaceted *integration through…-formats* against the background of a permanent state of crisis in the EU.

In the following Chapter (Pages 55 to 75), *Domenica Dreyer-Plum*, *Anna Wenz-Temming* and *Jared Sonnicksen* turn to law as medium in European integration and policy processes and design a framework to theoretically and methodologically access the strategic potential of law as persuasive idea and powerful fundamental in European policy-making. Their thoughts are guided by broader normative concepts such as legitimacy and democratic repair and at the same time connected to policy design for challenging issues such as climate change.

2.2 Sovereignty Claims vs. Legitimacy Deficits

Different contributions in this book point to the legitimacy issues related to sovereignty claims of both Member States and EU institutions. Having in mind the concept of *integration through law*, contributions take different angles to address how Member States demands and legitimacy are reconciled. This is discussed particularly with reference to the European Commission and the Court of Justice. The main theme in the second section is therefore *legitimacy*.

Susanne K. Schmidt investigates legitimacy deficits and risks that are connected to the jurisprudence of the European Court of Justice (Pages 79 to 104). *Schmidt* argues that the imperative of free movement and market liberalisation mediated by case law intrudes deeply in Member States' social and organisational systems. This emphasises the pathway of *integration through law* in the classic sense of *integration through jurisprudence*. While it clearly serves a purpose of efficiency within the legal community, it challenges legitimacy claims of the EU and its institutions in disagreeing Member States. *Schmidt* cites various examples of politicisation generated by the jurisprudence across Member States and reasons, why judicialisation can be a cause for the rise of anti-democratic populism.

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In contrast, *Clemens Ladenburger* focuses on the demands made by Member States to the European Commission and argues that the Commission only acts when there is a claim (Pages 105 to 122). This shifts the focus from *integration through jurisprudence* to *integration through legislation* by tracing the initiatives for law-making. *Ladenburger* argues against the assumption that the European Commission is too activist by providing a closer look at the input channels for legislative development on European level. He considers the effective inclusion of different actors and their policy goals in the development of the strategy agenda, as well as the multi-annual and annual programmes of the European Commission. The emergence of policy demands is illustrated at the example of the process towards adopting a reform of the Common European Asylum System between 2020 and 2024 and the common travel restrictions policies during the Covid pandemic crisis 2020–2021.

2.3 Rule of Law and the Legal Community: Resilience in Times of Crisis

Integration through law is closely linked to the concept of rule of law: since *integration through law* relies on the authority of law and particularly the recognition of the judiciary.

In the EU's multi-level system, characterised by parallel federal power centers, the Member States play a crucial role in upholding respect for EU law through its application and recognition for the judiciary. Questions addressed in this section include: How do we make institutions and electorates resilient for rule of law battles? How can we strengthen bottom-up a legal culture of democracy and rule of law? How could authoritarian political systems be less appealing?

Marcin Gorski reminds us of the developments in Poland that led to the democratic backsliding in the years 2015–2023 and embeds this trend in a wider political and social context (Pages 125 to 147). An emphasis is placed on the political and legal elites and their responsibility for renegotiating democratic principles using legal tools with damaging effects for the Polish political system. *Gorski* argues that the European Court of Justice and the European Court of Human Rights replaced the non-performing highest national constitutional court to uphold democratic norms and to remind Polish elites about their responsibility to align their political actions with fundamental values and freedoms. In this sense, integration through (case) law again reconnects with challenges that relate to the core not only of

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the democratic state, but also the backbone of the EU: the principle of rule of law. *Gorski* also reminds us that illiberal democratic episodes may reoccur in Poland or other countries which makes it all the more important to prepare for challenges to the rule of law by investing in education, supporting civil society organisations to enhance a substantial rather than a formalistic legal culture.

The following Chapter (Pages 149 to 172) then delves deeper into the rule of law crisis and the responses of the Court of Justice more generally. *Darinka Piqani* situates the rule of law challenges in the complexities of the EU multilevel system which strives for unity and collective action but is increasingly characterised by diversity and particularism. *Piqani* demonstrates how the case law related to rule of law questions leads to further constitutionalisation between the Member States and the EU. In the classic sense of *integration through law* by way of jurisprudence, this contribution is substantiated by an analysis of individual cases and their significance to secure not only in particular the independence of courts in the Member States, but also judicial protection in the sense of the Charter of Fundamental Rights. *Piqani* shows how these cases gain importance in relation to the organisation of the judiciary.

2.4 EU Perceptions in Light of Financial Instruments and Crisis Management

The self-conception of the EU viewed from its financial capabilities determines the fourth section. This is where the EU significantly diverges from other international organisations: in its capacity to shape European policies by legislation and funding. Given that the financial constitution is a key component of a democratic political entity, this is a very good reason to look into the finances of the EU: how they developed generally and recently and what this tells us about the current state and the future of the EU. Questions addressed include: What is the role for the financial constitution of the EU? How does the financial constitution of the EU shape the perceptions of the EU as political system?

This is why *Ruth Weber* traces the development of the financial architecture from a classically contribution-financed European Economic Community towards a EU with ever more capabilities to introduce own resources – and with the funding programme of NextGenerationEU as a major step in diversifying the financial activities of the EU (Pages 175 to 196).

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The following chapter then provides us with a connection between crisis response policies during the financial and state debt crisis (2010–2012) and the Covid pandemic (2020–2021) in comparison. *Domenica Dreyer-Plum* and *Anna Wenz-Temming* compare ideational concepts and coalition-building in the different crisis contexts and their effect on European integration through legally-based instruments (Pages 197 to 219). They argue that new forms of EU budget financial instruments have been developed with an unprecedented level of risk-sharing and liabilities, but that former institutional and financial ideas stay in place.

2.5 Results and Outlook

Finally, *Domenica Dreyer-Plum* concludes on the reasoning of this edited volume with view to *integration through law* and its different and extending current formats related to the conceptions of law, legitimacy, rule of law and self-conception (Pages 223 to 243). The integration of legal systems in the EU has progressed far through regulation, which is why an integration of the law can be clearly stated. This development is subject to criticism, as the continued comprehensive regulation at European level has a significant impact on the lives of citizens. In this context, the legitimisation by Member States will remain a critical factor in all integration formats. The "governance of governments"[8] at the EU level continues to rely fundamentally on this legitimisation, despite the existence of supranational structures and institutions.

8 See in this volume: Susanne K. Schmidt (Pages 79 to 104).

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Conference Proceedings: "Integration Through Law and the European Union: Political and Legal Developments vs. Polycrisis", University of Bonn in October 2024†

*Domenica Dreyer-Plum**

Thinking about European integration processes, there is one key variable that is both technical and normative and of utmost importance for both the foundation and the functioning of the Community of Member States: *the law*. Normatively, it is inherently linked to the principle of rule of law. This implies that the development of law follows specified legal procedures as laid down in the legal framework of the treaties and secondary European law. However, it is important to remember that this legal order and the law stemming from it is neither natural nor resistant to change. Quite the opposite: the legal framework of our governmental organisation, but even more so the laws that shape our society, are subject to change, particularly through practice and interpretation.

The European Union (EU) represents an international legal order which, with the cooperation of its Member States, has influenced and shaped national legal systems to a considerable extent and created limits for national scope of action. The internal market and fundamental freedoms are regarded as the nucleus of European integration progress, as these freedoms are interwoven with other sensitive policy areas that have been Europeanised in the course of treaty developments, including, for example, the realisation of the free movement of persons in the Schengen area and the establishment of the currency area. In addition, the case law of the Court of Justice of the European Union (CJEU) in relation to the internal market is increasingly used to negotiate political and social issues with legal consequences for all EU Member States, such as the right to strike,

† This is a translated and extended conference report of the proceedings published by the author as 'Integration durch Recht und die Europäische Union' (2025) 48 *integration* 1, 90–98.

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anti-discrimination and equality issues.[1] It is not uncommon for the court to arrive at an interpretation of norms that is characterised by observers as politically formative.[2] It is obvious that the theoretical approach of *integration through law* in its pure form is no longer able to explain the progress of integration, but that the significance of individual judgements of the ECJ continues to have a formative influence on European societies beyond market issues. In the face of disruptive crises that call into question the balance of institutions, the negotiation of European social cohesion and the unification process as a whole, *integration through law* as a model of European integration seems to be at an end.[3]

Against this backdrop, it is a good time to ask: What does the theory of *integration through law* still contribute to our understanding of the (further) development of the European legal community today? Answers were discussed by ten national and international legal and political scientists at the interdisciplinary conference 'Integration Through Law and the European Union: Political and Legal Developments vs. Polycrisis' on 24 and 25 October 2024 at the Institut Français in Bonn. The aim of the research conference was to review the theory of *integration through law*, according to which the EU's integration progress up to the 1980s was essentially explained by case law. Going a few steps further, the discussions extended to the present and broadened the view towards processes of integration that are connected to the general principle of *integration through law* but with different connotations and instruments than jurisprudence: such as *transformation through legislation* but also: *integration through funding* and *integration forged by crises*.

The conference opened with a panel on the theoretical approach of *integration through law* from the 1980s, which particularly emphasised the position of the ECJ within the institutional framework of the EU. This

1 M. Höpner, 'Usurpation statt Delegation. Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf' (2012) *MPIfG Discussion Paper*; D. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (München, 2016); S. K. Schmidt, *The European Court of Justice and the Policy Process. The Shadow of Case Law* (Oxford, 2018); M. Höpner and S. K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) 22 *Cambridge Yearbook of European Legal Studies*, 182; see also the contribution by Susanne K. Schmidt in this volume (Pages 79 to 104).

2 Höpner and Schmidt, see n. 1; M. Höreth, *Die Selbstautorisierung des Agenten. Der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court* (Baden-Baden, 2008).

3 L. Azoulai, '"Integration through law" and us' (2016) 14 *International Journal of Constitutional Law*, 449, 461.

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was followed by a second panel, which extended the view to the European Commission as an important actor in *integration through legislation* and addressed the cross-cutting issues of legitimacy and sovereignty. The third panel focused on the *rule of law* as a central value and principle of the EU. The experiences of the past ten years have painfully taught the EU that democratic development is not a linear process but that setbacks are also possible. Based on these considerations, a concluding fourth panel focused on the EU's *self-conception* in the face of the polycrisis. The aim was to assess how the EU deals with past and present crises. One of the focal points were budgetary issues, since they are highly relevant not only for the EU's autonomy and ability to act but also for the legitimisation of its output.

1. Classic: Integration Through Law by Jurisprudence

In an examination of the theoretical starting point, the first panel reflected on the development of *integration through law* in recent years in the face of the polycrisis. Among other things, the democratic deconstruction in individual Member States was discussed, which is referred to as the 'rule of law crisis' and has led to the Court of Justice's case law on values, in particular on the interpretation of the common value of the rule of law.

Based on empirical analyses, the theory approach of *integration through law* from the 1980s focused heavily on individual ECJ rulings that had made a significant contribution to shaping the legal community.[4] *Martin Höpner* emphasised that *integration through law* should be distinguished from the integration of legal systems, which effectively arises from the intertwining of legal systems. In that sense, the vertical integration of legal systems is not to be mixed up with integration through jurisprudence. He emphasised that the treaty objectives of the European Economic Community (EEC) had initially resulted in a primacy of market freedoms, which, however, lacked a normative dimension. The resulting tension between the market and the state had been resolved through effective economic liberalisation in favour of *negative integration*. This term captures the dismantling of interstate trade relation barriers in regional economic integration that are found at different levels and vary from the establishment of a free trade area to a

4 See generally: J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal*, 2403.

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customs union, common market and economic union until they reach full economic integration.[5] Höpner argued that early European integration was strongly influenced by case law that promoted economic integration within the newly established organisation by way of jurisprudence. Indeed, it could be observed that the legal development of the EEC in the first decades after its foundation in 1957 was strongly shaped by the judiciary and its interpretation of the treaties. This gave rise to questions of legitimisation, especially when legal decisions were of great political importance.

Clemens Ladenburger argued that the focus of the ECJ's case law is now largely on the interpretation of secondary law, which is contrary to the thesis of negative integration and is rather an expression of positive integration, which is essentially based on regulations and directives.[6] Indeed, the development of the European legal community has increasingly experienced positive integration in the sense that the Member States have established policy areas and institutions at European level in the meantime, which included the transfer of competences. Most compelling examples include the Single European Act (1986/1987) and the Maastricht Treaty (1992/1993). The reference to the significance of positive integration in the current judicial setting of the EU paved the way for a discussion of today's challenges of the political dimension of case law. The different views on positive and negative integration then crystallised in the discussion on the values of the European Union and the question, if it is possible to define the scope and meaning of the values of the Union by interpreting the Treaties.[7] This highlights the political dimension of jurisprudence in the European multilevel legal setting: The involvement of the Member States' legal systems and their affectedness by European case law is the reason for concerns regarding the political legitimacy of European case law that might ultimately draw red lines on the understanding of basic democratic principles.

The panellists thus discussed critically the recent approach of the ECJ to judicialise values enshrined in Art. 2 TEU such as the rule of law and

5 See generally: F. Scharpf, *Governing in Europe: Effective or Democratic?* (Oxford University Press, 1999).

6 Arguing similarly: M. van den Brink, M. Dawson and J. Zglinski, 'Revisiting the asymmetry thesis: negative and positive integration in the EU' (2023) 32 *Journal of European Public Policy*, 209.

7 See this current debate in: J. Bast and A. von Bogdandy, *Unionsverfassungsrecht* (Nomos, 2025). See also the contribution of D. Piqani in this volume (Pages 149 to 172).

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democracy. For *Höpner*, a significant reason for a critical consideration of those judicial activities is the question of legitimacy: He questioned, whether individual judges at the ECJ are legitimised to proactively push for a specific interpretation of liberal democracy, not limited to but especially with regard to values. *Höpner* further argued that the empirical variance of rule of law as a premise of democracy should be uphold and prevent a streamlined and rather uniform understanding of rule of law resulting from case law decisions by the ECJ. The idea of rule of law behind the judgements is linked to the idea that the rule of law can guarantee freedom. The law should function as a common language and lead to integration. However, this does not work because the law is not applied in this way, argued *Eva Lautsch*. Law gives politics a form, *Höpner* agreed, and is a crucial instrument for operationalising political decisions. However, referring to the current crises, *Lautsch* emphasised: "No reading of primary law will help us to meet the political challenges of the legal community."

2. Strategic: „Big on big things" versus Everyday European Legislation Lost in Details

The introductory panel on integration theory was followed by a panel that broadened the view of the European Commission as an important player in *integration through law*. In September 2017, Jean-Claude Juncker made the following promise as a priority for the European Commission:

> "Last but not least, I want our Union to have a stronger focus on things that matter [emphasis in original], building on the work this Commission has already undertaken. We should not meddle in the everyday lives of European citizens by regulating every aspect. We should be big on the big things. We should not march in with a stream of new initiatives or seek ever growing competences. We should give back competences to Member States where it makes sense."[8]

This demand has been repeated many times since then with regard to the European Commission. The Commission of *Ursula von der Leyen* has also defined "better regulation" as a "common task" for the legislative period

8 European Commission, 'State of the Union address 2017', Speech/17/3165, 13 September 2017.

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from 2024 to 2029, in which "all institutions will be involved".[9] The past legislative period from 2019 to 2024 in particular, with legislative initiatives to realise the EU climate targets as part of the Green Deal, left the impression that regulation by the Commission had become excessive. A lot of these are small-scale regulation activities, which entail extensive regulation at national level, explained *Susanne Schmidt*. This is problematic from a democratic perspective, as the EU draws its legitimacy essentially from the legitimacy of its Member States, insofar as the governance of the EU is based on "governance by governments"[10]. *Linn Selle* added that EU citizens also have the impression that the EU regulates too much. The perception is that EU-wide regulation is still increasing and burdening companies and state administrations at various levels.

Ladenburger countered that sometimes detailed regulations are needed, such as energy-saving shower heads, in order to realise big goals through the small details of everyday life. In addition, the Commission had set standards in recent years with groundbreaking legislation not only with regard to climate neutrality, but also in the area of digitalisation with the General Data Protection Regulation, the Artificial Intelligence Regulation, the Digital Services Act and the European Media Freedom Act. This is embedded in a concept of "better legislation"[11], which has provided for both multi-year planning and detailed annual planning for legislative practice since 2016.

Nevertheless, according to *Lautsch's* observations, lines of conflict arise from the fact that the law is no longer perceived as an instrument for strengthening individual freedoms but rather that individual freedoms are strongly restricted by overwhelming bureaucracy. The European legal community has thus abandoned the path of promoting individual rights in favour of strong regulation.

9 U. von der Leyen, 'Europe's Choice. Political Guidelines for the next European Commission 2024–2029' (*Commission*, 18 July 2024) <https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_de?filename=Political%20Guidelines%202024-2029_DE.pdf> accessed 7 May 2025, 9.

10 S. K. Schmidt, 'Legitimacy dynamics in the multilevel EU – implementing integration through law at the MS level', Bonn, 24 October 2024.

11 European Commission: 'Communication from the Commission to the European Parliament, the European Council and the Council: Better Regulation: Delivering better results for a stronger Union' COM(2016) 615 final.

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3. Legitimacy and Sovereignty of the Commission

Another important area of responsibility of the European Commission – as guardian of the treaties – is to monitor compliance with European law by the Member States. In the political science debate, an essay by *Tommaso Pavone* and *R. Daniel Kelemen* has been cited across policy areas since 2023,[12] according to which the Commission has abandoned this role and is deliberately initiating fewer infringement proceedings for strategic reasons. The authors accuse it of pursuing a „supranational policy of forebearance"[13].

Ladenburger – Deputy Director General of the European Commission's Legal Service – countered that this was not the case. It is true that there has been a decline in the number of infringement proceedings. In 2010, the Commission as a college had made a conscious decision to prioritise infringement proceedings and to focus more on systematic issues than on minor matters. However, this strategic decision should be read in a context in which the dialogue with the Member States has been intensified and there is increased political control and accountability. In any case, the College of Commissioners would decide on infringement proceedings. The reasons for the drop in numbers, according to *Ladenburger*, are declining legislation as well as the Commission's limited resources and the simultaneous expansion of its remit.

4. Controversial: Juridification of Values versus 'Regression Through Law'

The panel discussion on rule of law focused on the core values and principles of the EU. With the experience of the restructuring of the judicial and media systems in Hungary and Poland, the European legal community has learnt that democratic development in the Member States can also turn into the opposite – especially with recourse to the law. In this tense relationship, it is crucial for the ECJ that the independence of the courts is preserved in order to guarantee the functionality of the legal community, stated *Darinka Piqani*. In a decision relating to Art. 19 of the Treaty on European Union

12 R. D. Kelemen and T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75 *World Politics*, 779.

13 R. D. Kelemen and T. Pavone, see n. 12, 779.

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(TEU), the ECJ expressly included the values of the EU from Art. 2 TEU for interpretation and operationalised the abstract concept of rule of law for the first time.[14] *Piqani* considers this step in case law to be ground-breaking, as it establishes a Community-wide understanding of the rule of law. At the same time, this decision emphasises the Member States' responsibility to guarantee for the independence of their courts.

The tension surrounding the interpretation of the rule of law is not only relevant for the Union itself but increasingly with a view to the envisaged EU enlargement towards the Balkan states. If the EU accepts further Member States, it will be important to build on a basic political and legal consensus on the status and significance of the rule of law. This emphasises once again the important technical-serving but also normative role that law as such plays in the EU.

Embedding democratic principles and the rule of law in the Member States' systems and societies is therefore of central importance. The introduction of the Council rule of law annual dialogues and the EU rule of law reports are promising formats for peer dialogue to define the scope of rule of law, promote and share best practices and identify potential challenges early.[15] The EU rule of law report also covers law developments in the candidate countries Albania, Montenegro, North Macedonia and Serbia and can accordingly serve as a tool to enhance a Community culture of rule of law developed bottom-up by dialogue between the Member States. This could contribute to a veritable constitutional development of a shared understanding of rule of law.

At the same time, ideas and strategies are needed to recognise regressions in the rule of law at an early stage and prevent them if possible. The important question as to how the EU could decisively and effectively counter the phenomenon of democratic backsliding in various Member States was ultimately left open during the discussion. The idea of incentivising financial integration – freezing or making funds available – to achieve political goals, as suggested by *Marcin Gorski*, is an obvious one. However, if a constitutional culture is to be strengthened, investment in the political culture is needed too, which will have to come from the citizens of the

14 Court of Justice, Judgment of the Court (Grand Chamber) [2018] ECLI:EU:C:2018:117, C-64/16 *Associação Sindical dos Juízes Portugueses*.

15 European Commission, 'Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final.

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Member States. This cannot be replaced by EU funds in the sense of conditionalisation.

5. Creative: Integration Through Funding

Based on these considerations and questions of legitimacy, sovereignty, rule of law and their coming into life by practices of especially the supranational European institutions, the panellists and participants discussed the EU's self-conception in the face of numerous crises in a concluding panel. Since the financial and sovereign debt crisis in several EU countries in the early 2010s, it has often been observed that reactions to crises were immediate, but long-term integration measures were often delayed, if they were realised at all. By focusing on the experience of multiple severe crises in the past 15 years, *Selle* pointed to a considerable expectation gap: While citizens placed high expectations on the EU, especially during crises, the political room for manoeuvre was limited due to the (bounded) competences and (restricted) financial resources of the EU.

The discussion then concentrated on an assessment of how the EU dealt with past and present crises by looking into budget issues related to crises. Financial capacities are highly relevant to the EU's autonomy, ability to act and its output legitimisation. Already during regular times, the negotiations circling around the Multiannual Financial Framework take numerous rounds of bargaining to define the EU budget and the contributions made by Member States. *Selle* assumed that the negotiation game for the Multiannual Financial Framework with its previous focus on net contributors and net recipients could be changed if a significant proportion of the EU budget were covered by own resources or own revenues, such as the plastic tax or other financial income options independent from the Member States. Whereas *Ruth Weber* remembered that taxes cannot be levied indefinitely, she confirmed this potential avenue for partial budgetary independence by linking funds to conditionality in the sense of *integration through funding*. The pandemic-related recovery fund NextGenerationEU (NGEU) can be seen as an example of how *integration through funding* can work. In a similar vein, the Draghi report presented in September 2024 also builds on this. However, the EU still lacks the full authority to take out loans. To date, the EU has relied mainly on contributions financed by the Member States and, to a much lesser extent, on its own resources.

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Yet, the EU's financial options have been significantly changed by NGEU: Although the Commission has been implementing loan programmes for 40 years, it has so far strictly adhered to a link between borrowing and disbursement. This meant that Member States received repayable funds that were linked to fixed repayment periods and fixed costs. With NGEU, the decision was made in favour of a new and „diversified financing strategy",[16] in which the timing, volume and maturity of the bond transactions are independent of the time of disbursement. In December 2022, this diversified financing strategy was adopted by the legislative bodies as the standard method for EU borrowing.[17] In the future, there is thus the potential to underpin other policy areas (energy, defence) on the basis of the diversified financing strategy.

In this sense, *integration through funding* could supplement *integration through law*. This would also be conceivable with regard to the rule of law and values policy but would reinforce the conditionality approach and undermine the principle of mutual trust between Member States. A compromise could – also in the area of the rule of law – be the explicit promotion of rule of law projects instead of a sanction-oriented approach of withholding funds. This would resemble the active promotion of green technology and digitalisation within the NGEU funding line. But what are the limits of borrowing and the creative use of legal instruments to create financial sources? And why do we even allow ourselves to shift credit financing into the future? These legitimising questions remain open for discussion in hypothetical thoughts about *integration through funding*.

6. Outlook: Integration Through a Legally Sound Financing Architecture

EU law has proven to be robust in the multiple crises of the past 15 years. Nevertheless, many pressing questions arise with regard to its sustainability.

16 European Court of Auditors, 'Special report 16/2023: NGEU debt management at the Commission – An encouraging start, but further alignment with best practice needed' 2023/C 206/07, 9.

17 Regulation (EU, Euratom) 2022/2434 of the European Parliament and of the Council of 6 December 2022 amending Regulation (EU, Euratom) 2018/1046 as regards the establishment of a diversified funding strategy as a general borrowing method [2022] OJ L 319/1; replaced by Regulation (EU, Euratom) 2024/2509 of the European Parliament and of the Council of 23 September 2024 on the financial rules applicable to the general budget of the Union (recast) [2024] OJ L 2024/2509.

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Integration through law, in the sense of further development of the legal community through jurisprudence, is currently controversial, particularly in the area of common values. It is doubtful whether this can be an effective way of preventing democratic regression through the use of legal instruments, as long as a corresponding judicialisation of values is not supported by broad social consent. This in turn requires a political and legal culture in the EU, as is being developed in the initial stages of the rule of law dialogue.[18]

The integration of legal systems in the EU has progressed far through regulation and jurisprudence. This development is also viewed critically, as the continued comprehensive regulation at European level has a significant impact on the lives of citizens.[19] Thus, integration of the law has become a complex and undeniable reality for the vertical European multilevel legal system. Since it constitutes a political system with both vertical and horizontal dimensions and outreach, it is advisable to scrutinise the legitimating power of law itself. What follows from this assessment is the need to consider the political dimension necessary for the continuous confirmation of the European integration project not just based on law but on political will, as expressed by actions of the Member States in the sense of positive integration and feeding back into the legal and political European institutional setting.

Legitimisation by the Member States will continue to play a decisive role in all *integration through*-formats. Despite supranational structures and institutions, the concept of "governance by governments"[20] will remain essential. This also applies to *integration through funding*, which was introduced with NGEU and is aimed in particular at the economic promotion of sustainable technologies for climate neutrality and digitalisation in the fight against the pandemic and is becoming increasingly important in the European discourse on overcoming political challenges.

Conference Programme

International and interdisciplinary research conference on European integration, organised by the Institute for Political Science and Sociology (IPWS), the Centre Ernst Robert Curtius (CERC) and the Center for Ad-

18 See also in this volume: Darinka Piqani (Pages 149 to 172).

19 S. K. Schmidt, 'Legitimacy dynamics in the multilevel EU – implementing integration through law at the MS level', Bonn, 24 October 2024; see also in this volume: Susanne K. Schmidt (Pages 79 to 104).

20 See in this volume: Susanne K. Schmidt (Pages 79 to 104).

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vanced Security, Strategic and Integration Studies (CASSIS) of University of Bonn, in co-operation with the Institut français Bonn. Supported by the Arbeitskreis Europäische Integration e.V. (ECSA Germany) and the Foundation for International Dialogue of the Savings Bank in Bonn.

Thursday, 24 October 2024

Welcome and Introduction by Convenors

Dr. Domenica Dreyer-Plum, Postdoctoral Researcher at RWTH Aachen University; Senior Fellow, Center for Advanced Security, Strategic and Integration Studies, University of Bonn
Prof. Dr. Wolfram Hilz, Professor of Politics, Co-Director Center for Advanced Security, Strategic and Integration Studies, University of Bonn

Panel 1: Integration through Law – A Grand Theory Then and Now

Still an Asymmetry Between Negative and Positive Integration?
Prof. Dr. Martin Höpner, Research Group Leader Political Economy of European Integration, Max Planck Institute for the Study of Societies, Cologne
Legitimacy by Legal Means is Deficient Without Political Legitimation
Dr. Eva Lautsch, Political Editor DIE ZEIT Online, Berlin
Integration through Law and Legal Culture
Dr. Domenica Dreyer-Plum, Postdoctoral Researcher RWTH Aachen University

Chair: Prof. Dr. Wolfram Hilz, University of Bonn

Panel 2: Sovereignty and Legitimacy vs. Commission and Court of Justice

Legitimacy dynamics in the multilevel EU — implementing integration through law at the Member State level
Prof. Dr. Susanne Schmidt, Professor of Policy Field Analysis, University of Bremen
Regulation for Governance: The Commission's Response to Member States' Demands

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Prof. Dr. Clemens Ladenburger, Deputy Director-General, Legal Service, European Commission, Brussels

Chair: Dr. Domenica Dreyer-Plum, RWTH Aachen University

Friday, 25 October 2024

Panel 3: Polycrisis and its Processing: Rule of Law and Backslider Populism

Legal Methods Against Rule of Law Deterioration
Prof. Dr. Marcin Gorski, Professor of the University, Chair of European Constitutional Law, University of Lodz
Rule of Law by way of Constitutional Jurisprudence of the Court of Justice
Dr. Darinka Piqani, Assistant Professor, European Constitutional Law, University of Leiden

Chair: Prof. Dr. Jared Sonnicksen, RWTH Aachen University

Panel 4: Self-conception of the European Union in crisis and beyond

EU in times of crisis: past and present
Dr. Linn Selle, Head of Division 'Europe', Representation of North Rhine Westphalia, Berlin
Understanding the EU's self-conception through its financial integration
Prof. Dr. Ruth Weber, Professor of Administrative science, University Speyer; Head of Emmy Noether Junior Research Group "Budgetary Powers" Humboldt University, Berlin

Chair: Dr. Anna Wenz-Temming, FernUniversität in Hagen

Wrap up and Final Discussion

Moderation: Dr. Domenica Dreyer-Plum / Prof. Dr. Wolfram Hilz

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Conceptual Frameworks for Exploring the Connection Between Law and European Integration

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Integration Through Law and Legal Culture

Domenica Dreyer-Plum[*†]

Abstract

This chapter explores the concept of *integration through law* within the context of European integration, highlighting its significance as a foundational element of the European Union (EU) as a legal community. It traces the evolution of EU law from its early years, characterised by treaties and case law, to its current role in shaping a complex legal culture that embodies principles such as democracy and the rule of law. The analysis emphasises how early judicial decisions by the Court of Justice of the EU established key doctrines like direct effect and supremacy, which transformed individual citizens into subjects of Community law and reinforced a distinct legal order separate from international law. Additionally, it examines the gradual shift from integration through adjudication to integration through lawmaking, particularly with regard to the internal market and fundamental freedoms.

The chapter furthermore introduces the concept of legal culture as an analytical framework that combines descriptive, analytical, and normative dimensions to better understand the rich landscape of European law. By focusing on aspects such as legal methodology, argumentation theory, and legitimacy, this approach reveals how legal norms are intertwined with social practices and political contexts. Ultimately, it is argued that while *integration through law* has been instrumental in advancing European unity,

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it must be complemented by an understanding of legal culture to address contemporary challenges related to democratic legitimacy amidst increasing polarisation. This comprehensive perspective aims to enrich scholarly discourse on European integration by bridging gaps between legal studies and political science while providing insights into both 'written and living law' within the EU framework.

1. Introduction: The Legal Backbone of European Integration Processes

The European Union (EU) is a well-established legal community. In addition to nearly 75 years of treaty history, the body of law includes a wide range of secondary legislation and extensive case law. Looking back at the early years and remembering that the EU started as an international organisation similar to the Council of Europe or the OECD, the transformation of the past decades into a political system is all the more remarkable.

Many projects that failed during the unification process in the 1950s, 1960s and 1970s (European Defence Community, European Political Community, the failed transition to majority voting which led to the subsequent empty chair crisis in the 1960s, Werner Plan for a common currency in 1970) were turned into integration successes in the 1980s and 1990s (Qualified Majority Voting, European Political Cooperation, Monetary Union).

Further interactions between success and regression have been observed since then, including the successful eastward enlargement in the 2000s, which has since revealed the fragility of democracy and rule of law processes: the reversibility of political achievements is inherent in liberal political orders and can be abused – to the detriment of the member states concerned as well as the EU, which no longer sees itself merely as a market, but as a community of values. Since the Lisbon Treaty (2009) at the latest, all Member States are also legally obliged to respect fundamental values such as respect for human dignity, freedom, democracy, equality, and the rule of law in their political systems (Art. 2 TEU).

Explaining this transformation essentially leads back to the specific institutional arrangement of the European Economic Community (EEC), which, with the High Authority, had an autonomous supranational institution and thus marked a significant difference to other international organisations. In addition, the Court of Justice of the EU proved to be an undisputed key player in the early years, declaring the legal community

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to be a new legal system within the international order and thus creating a new legal space that stood out from classical international law.[1] With the principles of (1) the direct effect of European law, (2) the primacy of European law and (3) the inadmissibility for Member State courts to reject European law, which subsequently emerged through case law, the Court manifested the authority of European law vis-à-vis the member states.[2]

In this context, it is important to look at how and where EU law is essentially created: With the inconspicuous Single European Act (1987), the integration process shifted from *integration through adjudication* in the face of the powerful Court of Justice of the EU in the 1960s and 1970s[3] to *integration through legislation,*[4] with lasting consequences for the democratic legitimacy of European lawmaking.[5] With the insertion of Art. 100a into the EEC Treaty, the Member States intended to facilitate harmonisation measures that were necessary to establish the effective free movement of goods. The need for this harmonisation followed directly from individual landmark decisions of the Court of Justice.[6] The overarching objective continued to be oriented towards economic interests: to achieve the four fundamental freedoms of the internal market. The internal market has always been the "heart chamber"[7] of the European Union. Here, it has full sovereignty in cooperation with the Member States: as soon as the Commission, Parliament and Council act together as European legislators, an irrevocable "change in the holder of sovereignty in central areas of state rule" is brought about.[8]

The law of the legal community continuously manifests itself like a "constitutional sedimentation"[9]: Through the interplay of (1) exclusive com-

1 W. Phelan, 'The revolutionary doctrines of European law and the legal philosophy of Robert Lecourt' (2016) EUI, LAW, Working Paper.
2 K. K. Patel and H. C. Röhl, *Transformation durch Recht: Geschichte und Jurisprudenz europäischer Integration 1985–1992* (Mohr Siebeck, 2020), 66–67.
3 E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law*; A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004); J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal*, 2403.
4 J. H. H. Weiler, see n. 4, 2465; K. K. Patel and H. C. Röhl, see n. 2, 75.
5 K. K. Patel and H. C. Röhl, see n. 2, 75.
6 K. K. Patel and H. C. Röhl, see n. 2, 40–49.
7 K. K. Patel, *Europäische Integration: Geschichte und Gegenwart* (C.H. Beck, 2022), 64.
8 K. K. Patel and H. C. Röhl, see n. 2, 61.
9 T. Eijsbouts, 'Constitutional Sedimentation' (1996) *Legal Issues of Economic Integration*, 51.

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petence for the functioning and competition rules of the internal market (Art. 3 para. 1 lit b), (2) the effective shaping of the internal market through secondary law,[10] and the fact that (3) this law is directly applicable and cannot be rejected by Member State courts,[11] but is reinforced by the (4) Court of Justice of the EU with regard to the interpretation of the Treaties in case law practice.[12]

The internal market and the fundamental freedoms have become the nucleus of European integration progress, as the freedoms are interwoven with other sensitive policy areas that have been 'Europeanised' in the course of treaty developments, including, for example, the implementation of the free movement of persons in the Schengen area and the establishment of the monetary area. In addition, the case law of the Court of Justice in relation to the internal market has come to be increasingly used to address political and social issues – such as the right to strike, anti-discrimination and gender equality issues – with legal consequences for all EU member states.[13] It is not uncommon for the Court of Justice of the EU to arrive at an interpretation of norms that is characterised by observers as politically formative.[14]

This chapter contributes to the understanding of *integration through law* by examining its origins and normative shortcomings while developing the concept of legal culture to highlight the political and legal dimensions, such as legitimacy and democracy. Furthermore, it positions legal culture as a tool to address both 'written and living law', thereby offering a more comprehensive approach to analysing the internal market, case law, and the mechanisms of integration through law. In order to do so, we first

10 F. C. Mayer, 'Die EU als Rechtsgemeinschaft' (2017) *Neue Juristische Wochenschrift,* 3631, 3635.

11 K. K. Patel and H. C. Röhl, see n. 2, 67.

12 M. Höpner and S. K. Schmidt, 'Can We Make the European Fundamental Freedoms Less Constraining? A Literature Review' (2020) 22 *The Cambridge Yearbook of European Legal Studies*, 182, 187.

13 M. Höpner, 'Usurpation statt Delegation. Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf' (2008) *MPIfG Discussion Paper*; D. Grimm, *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie* (C.H. Beck, 2016); S. K. Schmidt *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018); M. Höpner and S. K. Schmidt, see n. 12.

14 M. Höpner and S. K. Schmidt, see n. 12, 190–191; M. Höreth, *Die Selbstautorisierung des Agenten: der Europäische Gerichtshof im Vergleich zum U.S. Supreme Court* (Nomos, 2008).

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look at the formative years of *integration through law* based on the Court's jurisprudence.

2. "Integration Through Law" – a Theory Approach that Captures Judicialisation

Integration through law is a theory approach that focuses on the significance of the European Court of Justice as an actor and creator of the legal community of the European Union as we know it today. Based on a large-scale research project comparing federally organised *integration through law* in the USA and the EU, the theoretical movement of *integration through law* emerged at the European University Institute in Florence.[15] This theory approach provides a particularly informative perspective that is unique among theories of integration in its emphasis on the nature and character of European law.

The theory approach focuses on analysing the role of law and legal institutions in the process of European integration.[16] In this general reasoning, several decisions of the Court of Justice proved to be central not only for the self-understanding of the European legal community, but also for the shape of a legal community that differs from other international organisations rooted in international law. Indeed, particular decisions on tariffs (*van Gend en Loos*)[17] and energy privatisation (*Costa*)[18] resulted in individual rights for citizens and companies within this legal system which national courts must protect.[19]

In the case *van Gend en Loos*, the Court had to evaluate whether customs duty imposed by the Netherlands on goods imported from Germany violated European Community law. The case was brought forward by the Dutch transport company *van Gend en Loos* and addressed the essence of the newly established tariffs union. The Court confirmed the reasoning of

15 M. Cappelletti, M. Seccombe and J. H. H. Weiler, *Integration through law: Europe and the American federal experience* (Walter de Gruyter, 1986).

16 U. Haltern, 'Integration durch Recht' in H. Bieling and M. Lerch (eds), *Theorien der europäischen Integration* (Springer VS, 2012), 339.

17 Case 26/62 *NV Algemene Transport-en Expeditie Onderneming Van Gend & Loos v Nederlandse Administratie der Belastingen* [1963] ECR 12.

18 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.

19 E. Stein, see n. 3, 10; similar: A. Peters, *Elemente einer Verfassung Europas* (Duncker and Humblot, 2001).

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van Gend en Loos by arguing that individuals (and companies) can invoke European law in national courts. In its own words, the Court argued:

> "[T]he states have acknowledged that community law has an authority which can be invoked by their nationals before [national] courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields [...]."[20]

Following this interpretation, the treaties of the European Communities differ from international treaties because they do not regard states but the community – consisting of individuals – as the subjects of the treaty, according to the argumentation in *van Gend en Loos*.[21] On the one hand, this means that European treaties constitute a source of law distinct from international treaties. On the other hand, the judges derived the direct application (*direct effect*) of European law from this, which also results in a predetermination of the principle of the supremacy of European law.[22] Accordingly, Community law applies directly and can establish subjective rights.[23] Direct applicability means that the rules of primary and secondary Community law are binding, provided that they are sufficiently clear and precise and do not require any further implementing acts. They then not only bind the Communities and their Member States but also establish direct subjective rights.[24]

The essential innovation lies in the fact that individual citizens are subjects of Community law, whereas international treaties have so far only recognised states as subjects of treaties.[25] The decision therefore classifies

20 Case 26/62, see n. 17.

21 G. de Baere, *Constitutional principles of EU external relations* (Oxford University Press, 2008), 35.

22 E. Stein, see n. 3, 10; M. Rasmussen, 'Law Meets History: Interpreting the Van Gend en Loos Judgment' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 103, 111–117; L. Azoulai, 'The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies*, 178, 188–194.

23 E. Stein, see n. 3, 10; U. Haltern, *Europarecht und das Politische* (Mohr Siebeck, 2005), 283.

24 A. Vauchez, '"Integration-through-Law": Contribution to a Socio-History of EU Political Commonsense' (2008) EUI Working Papers RSCAS 12.

25 W. Phelan, 'Goodbye to All That: Commission v. Luxembourg & Belgium and European Community Law's Break with the Enforcement Mechanisms of General International Law' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 121, 131.

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as "constitutional foundation" of the European legal community.[26] The law applies not only in a vertical relationship between state and citizen, but also in the horizontal relationship between citizen and citizen and ultimately also in the relationship between citizen and state, because citizens can sue the Member States before their national courts and thus watch over the "integrity of the Community order"[27]. The states are thus deprived of the possibility of determining for themselves which rights and obligations arise for citizens from European Community law.[28]

Thus, from those rather narrow decisions related to tariffs and energy privatisation emerged the general concepts of supremacy and direct effect of European law. These precedents consequently paved the way for a more integrated European legal framework. It is precisely the dynamics and magnitude of these decisions that are emphasised by the *integration through law* approach on integration through *judicialisation*. Accordingly, the latter process winds up shaping a legal community with stricter and more binding rules in comparison to other young European international organisations established at the same time, such as the Organisation for European Economic Co-operation (OEEC) or the Council of Europe (CoE).

At the same time, the theory approach of *integration through law* is not limited to the European Court of Justice but considers the institutional conditions at particular times and the interplay between the Court and other institutions over time.[29] Since the Luxembourg Compromise of 1966, the Member States had had the option of vetoing a Council decision (the main legislative power in the system at the time) if their national interests were affected. Joseph Weiler argues that the Member States were able to accept the decisions of the Court of Justice precisely because of the possibility of preventing legislative decisions through a veto.[30] The intergovernmental and consensual dialogue in the Council as a legislative competence thus contrasted with the Court of Justice, which dogmatically interprets treaty law supranationally. Similar importance is attributed to the case *Costa v ENEL*. In that case, the Italian citizen Flaminio Costa challenged the nationalisation of the electricity sector. Being a shareholder of the electricity supplier ENEL, Costa argued that the nationalisation of ENEL would

26 G. de Baere, see n. 21, 34.
27 U. Haltern, see n. 23, 284.
28 U. Haltern, see n. 23, 284.
29 J. H. H. Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law*, 267, 267.
30 J. H. H. Weiler, see n. 29, 267.

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violate European community law. The European Court of Justice confirmed this reasoning and elaborated that European law takes precedence over (conflicting) national laws, thereby asserting the principle of supremacy of European law.

Accordingly, norms of Community law take precedence over norms from the body of law of the Member States irrespective of the date of enactment of Community law, and irrespective of the position in the hierarchy of norms[31] even secondary law can thus take precedence over national constitutional law.[32] European law is not only on a par with the law of the Member States, it is even higher than national law. This principle of primacy was established as precedent in the *Costa v ENEL* decision.[33] This case therefore likewise counts as a case that gives weight to the authority of European Community law and binds the drafters of the treaties – the Member States – to comply with the obligations resulting from the legal community they have created. The innovative approach – or: "what appears constitutional"[34] – in the Court's jurisprudence is the fact that the Court "requires national judges to treat EC law as if it were a source of law that is superior to, and autonomous from, national statutes, and capable of being applied, directly, within the national legal order, by national judges."[35]

The direct application of *van Gend en Loos* and the primacy principle of *Costa v ENEL* together have a constraining effect on national legislators and restrict the Member States' room to manoeuvre to the extent that they may not take any decisions or regulations that would diverge from European law.[36] This limitation of the Member States' scope for action is further restricted by the fact that the Court of Justice assesses, on the basis of the objectives of the Treaties, whether Member State regulations run counter to the objectives of Community law. If this is compounded by the fact that regional and national courts must ignore national law independently of the legislatures of their home states if a conflict with European law arises, regional and national courts are made the guardians of European law, which in turn observe the principles of direct application and primacy. *Antoine Vauchez* calls this the "emerging constitutional doctrine of EC

31 G. de Baere, see n. 21, 36.
32 U. Haltern, see n. 23, 284.
33 Case 6/64 *Flaminio Costa v ENEL* [1964] ECR 585.
34 A. Stone Sweet, *Governing with Judges* (Oxford University Press, 2000), 161.
35 A. Stone Sweet, see n. 34, 161.
36 U. Haltern, see n. 23, 284.

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Treaties" which enabled the understanding of a "coherent and self-sufficient 'legal order' granted with direct effect and supremacy over national bodies of legislation"[37].

While it is commonly agreed that Community law indeed creates a separate system from the national law of the Member States, the separation from international law is controversial.[38] It has come into effect because "the Court declared it separate"[39]. This is critical,

> "[…] because European integration is about transferring standards from numerous national legal systems to the European level through a central authority by means of original European law. According to this concept, the authority of European law is secured by the primacy of Community/Union law."[40]

Hence, European law received a supreme status in order to prevent norm collisions between European and national law of the participating Member States. To ensure the effect of European law, national courts were additionally required to guarantee for the application of European law through national jurisprudence.[41] This is ultimately the reason, why the scholarly literature from the perspective of *integration through law* view the interdependent jurisprudence on both national and European level as decisive for the European legal community in its evolution toward a multilevel system with European supremacy.

Accordingly, the Treaties of Rome can be conceived as laying a formal and general legal groundwork, while the landmark decisions of the Court of Justice in the early 1960s breathe life into the Treaties (*van Gend en Loos; Costa v ENEL*). Indeed, a handful of fundamental decisions can be used to trace how structural principles of European law have been developed

37 A. Vauchez, 'Methodological Europeanism at the Cradle: Methodological Entrepreneurs, the Acquis and the Making of Europe's Cognitive Equipment' (2014) NYU School of Law, Jean Monnet Working Paper 2014/23, 9.

38 T. C. Hartley, *Constitutional Problems of the European Union* (Hart Publishing, 1999), 138–139.

39 T. C. Hartley, see n. 38, 138–139.

40 F. Schorkopf, 'Rechtsgeschichte der europäischen Integration: Ein Themengebiet für Grundlagenforschung in der Rechtswissenschaft' (2014) 69 *JuristenZeitung*, 421, 424 (translation by the author).

41 W. Phelan, see n. 25, 131.

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through judge-made law which paved the way for the later European Union.[42]

Of course, the Court's action would not have been possible without the Treaties, which both instituted the Court and defined the Community's objectives. However, such an argument aims rather to capture the birth of the legal community as an independent entity and to show at what point the European Economic Community diverges from the continuous development to the European Coal and Steel Community. The decisions of the Court of Justice thus mark the first break in the history of integration: one of the supranational, independent, autonomous institutions defines the legal community and its legal culture.

Ulrich Haltern sees the decisions of the Court of Justice as a central contribution to *constitutionalisation through law*, which has helped Community law to become a clearly supranational legal order, in which the Court of Justice has played a significant role through the "gradual construction of this legal edifice"[43]. Therefore, the Court of Justice's activities are also at the core of the theory according to which one can legitimately speak of *integration through law*.[44]

What is certain is that the Court of Justice could not be sure of the approval of the Member States.[45] But in fact the case law has been accepted and respected by the Member States, despite formal opposition. *Alec Stone Sweet's* analysis makes extensive reference to examples of dissent: Belgium, Germany, Luxembourg and the Netherlands protested the doctrine of direct effect declared by the Court in the *van Gend en Loos* case; Italy against the doctrine of primacy in the *Costa* and *Simmenthal* cases; the UK's rejection of the principle of direct effect in the *van Duyn* case.[46]

42 A. von Bogdandy and J. Bast, 'Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge' in A. von Bogdandy and J. Bast (eds), *Europäisches Verfassungsrecht* (Springer, 2009), 24; M. Höpner, see n. 13, 7–17; M. Rasmussen, see n. 22, 111–117; W. Phelan, see n. 25, 130–133; A. McNaughton, 'Acts of Creation: The ERTA Decision as Foundation Stone of the EU Legal System' in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 147–152; L. Azoulai, see n. 22, 188–194.

43 U. Haltern, see n. 23, 283.

44 U. Haltern, see n. 23, 283

45 C. Joerges, 'Das Recht im Prozeß der europäischen Integration: ein Plädoyer für die Beachtung des Rechts durch die Politikwissenschaft und ihre Beteiligung an rechtlichen Diskursen' in M. Jachtenfuchs and B. Kohler-Koch (eds), *Europäische Integration* (Leske und Budrich, 1995), 80; E. Stein, see n. 3, 25.

46 A. Stone Sweet, see n. 34, 161.

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Furthermore, France resisted the principle of primacy until the 1980s.[47] The Federal Constitutional Court of the Federal Republic of Germany is until today in a dispute with the ECJ over the question of who has the final say in legal matters.[48]

Despite the authority gained by those early decisions, the "heyday of the ECJ" has come to an end in the 1980s.[49] While the Court's decisions in the 1960s and 1970s were used as a support for the integration process at that time,[50] both jurisprudence and integration processes have become more contested. *Loïc Azoulai* explains the acceptance of the case law by the fact that in the 1960s and 1970s, long-term benefits were still expected for the participating economies and citizens. However, a sceptical attitude increasingly developed as EU law penetrated into sensitive areas such as civil rights and social welfare through cross-connections of the internal market.[51] *Christian Joerges* therefore also makes a critical assessment in this line of thought, according to which law has risen above intergovernmental politics by its own means and enforced its validity against sovereign Member States.[52] There is a lack of an "alternative legal theory inspired by cultural theory"[53], which would also do justice to the "deep structure" of law and "is the condition of its normativity"[54]. This is because questions of identity, origin and future are inherent in law,[55] the answers to which are a

47 A. Stone Sweet, see n. 34, 169.

48 U. Haltern, 'Europarecht und ich' in O. Lepsius and others (eds), *Jahrbuch des Öffentlichen Rechts der Gegenwart* (Mohr Siebeck, 2020), 469; D. Grimm, 'Jetzt war es so weit' *Frankfurter Allgemeine Zeitung* (Frankfurt 18 May 2020), 9; A. Nußberger, 'Die Crux des letzten Wortes' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 May 2020), 6; P. Kirchhof, 'Chance für Europa' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 May 2020), 6.

49 K. K. Patel and H. C. Röhl, see n. 2, 23.

50 L. Azoulai, 'Solitude, désoeuvrement et conscience critique / Solitude, Community, and Critique. Motives for a Reshaping of EU Legal Studies (Translated by Cadenza Academic Translations)' (2015) 50 *Politique européenne* 82, III.

51 L. Azoulai, see n. 50, X.

52 C. Joerges, 'Das Recht im Prozeß der Konstitutionalisierung Europas' (2001) EUI Working Papers LAW.

53 U. Haltern, see n. 16, 353.

54 U. Haltern, see n. 16, 354.

55 P. W. Kahn, *The reign of law: Marbury v. Madison and the construction of America* (Yale University Press, 1997); P. W. Kahn, *The cultural study of law: reconstructing legal scholarship* (University of Chicago, 1999); P. Legendre, *Das politische Begehren Gottes: Studie über die Montagen des Staates und des Rechts* (Turia and Kant, 2012); U. Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9 *European Law Journal*, 14.

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task for the European legal community,[56] but are hardly taken into account in the theoretical approach of *integration through law*.

While the dialogue on the law of the Community was conducted between legal and political science until the 1970s and 1980s, this exchange has largely been lost since the 1990s.[57] During this period, the law-making of the European Communities increased exponentially and gained considerably in complexity, which is why law was simplistically reduced to a "technical-serving role" in the integration process, especially in political science.[58] The case law of the Court of Justice still receives less attention in political science in contrast to the legislating institutions. While the Court of Justice is recognised as an engine of integration by political scientists, it is not reflected in the attention paid to the dynamics of judicialisation within the EU.[59] In the following section, legal approaches and political science approaches are reconnected to examine European law through the lens of *integration through law*, emphasising the connection between legal culture and political culture as a means to reinforce the rule of law and democratic legitimacy which ultimately highlights the critical importance of dialogue between legal studies and political science.

3. Integration Through Law and European Law

European integration relies on law and its application. While the law is often underestimated as a technical instrument, it is actually the backbone of European integration. The grand political science theories of European integration (intergovernmentalism, neofunctionalism, multi-level governance) do not consider the law or legal instruments as a significant variable in theoretic assumptions on integration processes.[60] Although all theory approaches implicitly accept that the law is an integral element of

56 U. Haltern, see n. 16, 354.
57 U. Haltern, see n. 16, 339.
58 U. Haltern, see n. 16, 339; J. H. H. Weiler, 'Community, Member-States and European Integration' (1982) 21 *Journal of Common Market Studies*, 39, 39–40.
59 A. Slaughter, A. Stone Sweet and J. H. H. Weiler, *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in its Social Context* (Bloomsbury, 1998); M. Höreth, see n. 14; A. Stone Sweet, see n. 3; S. K. Schmidt, see n. 13.
60 B. Rosamond, *Theories of European Integration* (Bloomsbury, 2000); A. Wiener, T. Börzel and T. Risse (eds), *European Integration Theory* (Oxford University Press, 2019); A. Grimmel and C. Jakobeit (eds), *Politische Theorien der Europäischen Integration* (Springer, 2009).

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the continuous process of European integration, only *integration through law* emphasises the relevance of law, particularly of jurisprudence.[61] Most of this scholarship has a strong emphasis on case law.[62] This is not surprising given that the theory approach *integration through law* in its focus on the role of law and legal institutions in the process of European integration is mainly informed by ECJ case law.[63] However, *integration through law* cannot capture the complete essence of the legal system since it mostly focuses on detailed facets of law.[64] Therefore, this theory approach has been criticised for having an under-theorised concept of law especially on account of missing a culturally founded and grounded concept of law.[65]

It would be analytically meaningful to capture the multidimensional processes of (dis)integration and the interdependencies between the national and European legal systems.[66] Quite in contrast, *integration* seems like a misleading one-directional concept which focuses on top-down processes from the European to the Member State level.[67] It seems that the reciprocal effects of law, integration boosts as well as trends of disintegration are all part of the legal development of the European community.[68] Hence, the term *integration* is already problematic since it hints to an understanding of an ever closer European legal community. While *integration through law* is still important both for our understanding of the emergence of the legal community and for the specific legal structural conditions of the

61 U. Haltern, see n. 16, 353.

62 E. Stein, see n. 3; A. Slaughter, A. Stone Sweet and J. H. H. Weiler, see n. 59; A. Stone Sweet, see n. 34; A. Stone Sweet, see n. 3; M. P. Maduro and L. Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart, 2010); N. Fernanda and B. Davies, *EU Law Stories* (Cambridge University Press, 2017).

63 A. von Bogdandy and J. Bast, see n. 42, 24; M. Höpner, see n. 13, 7–17; M. Rasmussen, see n. 22, 111–117; W. Phelan, see n. 25, 130–133; A. McNaughton, see n. 42, 147–152; L. Azoulai, see n. 22, 188–194.

64 U. Haltern, see n. 16, 346.

65 L. Azoulai, '"Integration through Law" and us' (2016) 14 *International Journal of Constitutional Law*, 449, 460; U. Haltern, see n. 16, 353; C. Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' (1996) 2 *European Law Journal*, 105; M. Everson and C. Joerges, 'Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism' (2012) 18 *European Law Journal*, 644, 645.

66 M. Ioannidis, 'Europe's new transformations: How the EU economic constitution changed during the Eurozone crisis' (2016) 53 *Common Market Law Review*, 1237.

67 A. von Bogdandy, 'Was ist Europarecht?' (2017) 72 *Juristenzeitung*, 589, 593.

68 A. von Bogdandy, see n. 67, 593; similar: M. Ioannidis, see n. 66, 1237.

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European Union, it does not capture the many facets and working variables of integration processes applicable nowadays and certainly over time.

While the law has been used increasingly as an instrument of integration, the political power of the European Union has not developed on par. Regulation has become the key instrument of European politics through which European (treaty) objectives are translated into legal obligations of the Member States (to apply European law), supported by the adjudication and not least the sanctioning authority of the Court of Justice (infringement procedures). This has ultimately challenged European law as an *instrument*, but – what's even more important: it challenges the legitimating power of law.[69] The "steering capacity" of law is limited if it cannot establish a lasting connection with politics.[70]

Political limits of *integration through law* concern the whole process from the basic understanding of the concept of law to lawmaking and judicial control: European law depends on implementation by Member States given that the European Union has a limited scope of administrative resources or competences and the Court of Justice only limited power for control.[71] The European Union effectively relies on legislative, executive, administrative and judicial structures of its Member States. This vertical dimension is built into the system of the European Union: The European sphere depends on the individual national political and judicial infrastructures. Non-implementation and issues of non-compliance are naturally part of the system since implementation is inherently imperfect in comparison to political intent. Yet, law remains the key instrument of integration and the origin for "the effectiveness of European law"[72]. In this line of reasoning, the self-commitment by Member States cannot be underestimated as expression of the law's legitimation[73]: the binding force of European law is *de jure* and *de facto* connected to the commitment of the Member States. *Integration through law* thus depends on this commitment of the Member States despite inevitable imperfection of implementation.[74]

69 M. Everson and C. Joerges, see n. 65, 645.
70 M. Everson and C. Joerges, see n. 65, 644.
71 C. Joerges, see n. 65, 118.
72 C. Joerges, see n. 65, 118.
73 M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly*, 495, 514.
74 C. Joerges, see n. 65, 118.

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4. Introducing the Concept of Legal Culture

Scholarly attention rarely focuses on the meaning of law in itself and therefore hardly ever addresses the significance that can be attributed to *law* in the European integration process.[75] Of course it is difficult to grasp the essence of law since "the truth of law lies always beyond the law itself"[76]. *Haltern* partially addresses this gap, expounding on the concept of law with reference to *Paul Kahn's* cultural theory of law, understanding the law as "social practice, a way of being in the world"[77]. In this understanding, rule of law is a practice that "maintain[s] a set of beliefs about the self and community, time and space, authority and representation."[78] From this premise follows thus an expansion from a rather mechanistic to a richer ideational view of law.

In a seminal paper on legal cultures, *Mark van Hoecke* and *Mark Warrington* use this term to combine the formalistic understanding of "law as rules" with "attitudes towards law" and the significance of "law as an instrument to create social cohesion", taking into account the embeddedness of law in society and cultural social practice.[79] The social practice is what they coin the "juridical way of life" that substantially influences the essence of a legal system.[80] For comparative law scholar *Lawrence Friedman*, legal culture is "an essential intervening variable" for social change.[81] In this line of reasoning, the law is "not a collection of doctrines, rules, terms and phrases. It is not a dictionary, but a culture; and it has to be approached as such."[82] Rather, this contextualist approach requires the recognition that law is enacted and lived within processes of social change. This perspective allows for a comprehensive approach that takes into account the historical, socio-economic, psychological and ideological context of a legal system.[83] Such an active concept of law connects it both to a constitutional reading

75 Exceptional: C. Joerges, see n. 65; U. Haltern, see n. 55.
76 U. Haltern, see n. 55, 26.
77 U. Haltern, see n. 55, 17; P. W. Kahn, see n. 55a; P. W. Kahn, see n. 55b;
78 U. Haltern, see n. 55, 17.
79 M. van Hoecke and M. Warrington, see n. 73, 502.
80 M. van Hoecke and M. Warrington, see n. 73, 532.
81 L. M. Friedman, 'The Concept of Legal Culture: A Reply' in D. Nelken (ed), *Comparing legal cultures* (Ashgate, 1997), 34.
82 L. M. Friedman, 'Some Thoughts on Comparative Legal Culture' in D. S. Clark (ed), *Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventieth Birthday* (Duncker and Humblot, 1990), 49–50.
83 M. van Hoecke and M. Warrington, see n. 73, 496.

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(structures, set of beliefs, context) and to the processes of lawmaking as expression and practice of rule of law which can reveal more about the character of a legal system.

Legal culture can thus be conceived as a theoretical, conceptual and methodological approach to grasping the richness of European law in a structured way. The aim is to find out how the legal style of the EU has developed in contract law ('written law') as well as through legislation and case law ('living law'). Each category is examined three-dimensionally according to descriptive, analytical and normative premises of legal culture.[84] The descriptive component refers to an interplay of constitutional law, statutes, procedural law and institutional structures as well as ongoing case law.[85] These elements form structures for the further development of the EU's legal culture,[86] which is why treaty history is a central prerequisite for shaping a political and legalistic culture. There is an interaction between the foundations (constitution) and learning processes (adaptation of the system through legislation and application of the law) in the sense of a "living law".[87] The analytical component for capturing legal culture is based on a system of five paradigms.[88] The concept of law, legal sources, legal method, argumentation theory, legitimation of law and the underlying general ideology are analysed as follows:[89]

1) *Concept of law*: What is law? What is the relationship between law and other social norms?
2) *Sources of law*: Who has the authority – under what conditions – to make law? What hierarchies exist between sources of law? How are conflicts of norms resolved? Are there sources of law outside of legal texts?

84 D. Nelken, 'Puzzling Out Legal Culture. A Comment on Blankenburg' in D. Nelken (ed), *Comparing legal cultures* (Ashgate, 1997), 69; E. Blankenburg, 'Rechtskultur' in M. Greiffenhagen, S. Greiffenhagen and K. Neller (eds), *Handwörterbuch zur politischen Kultur der Bundesrepublik Deutschland* (Westdeutscher Verlag, 2002), 502–503.

85 E. Blankenburg, see n. 84, 502; C. Tomuschat, 'Die Entwicklung der Rechtspolitik und Rechtskultur unter besonderer Berücksichtigung der Urteile der europäischen Gerichte und des Bundesverfassungsgerichts', in W. Weidenfeld and W. Wessels (eds), *Jahrbuch der Europäischen Integration* (Nomos, 2015), 43.

86 J. Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay' in J. Dickson and P. Z. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 138.

87 L. M. Friedman, see n. 81, 36.

88 M. van Hoecke and M. Warrington, see n. 73, 514–515.

89 M. van Hoecke and M. Warrington, see n. 73, 514–515.

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3) *Legal methodology*: How is law developed/made and how is it decided in legal disputes? This largely concerns the question: How is the law interpreted? What methods are used, what freedoms and duties do judges have in interpreting the law? What style is used? (statutes, judicial decisions)
4) *Argumentation theory*: What style of argumentation is used? Which arguments and argumentation strategies are accepted? Is the argumentation exclusively legal, or do other dimensions play a role (social, economic, religious, political, ideological)?
5) *Legitimisation of the law*: Where does the law derive its binding effect from? Is it an exclusively formal legitimisation or (also) an ideological legitimisation (moral/religious values)? What gives the system binding force?

Legal culture also contains a normative dimension when it refers to the legacy of ideas and values, as well as expectations of and attitudes towards law and legal institutions.[90] Attitudes and expectations are linked in various ways to ideas of legitimisation and finality, which at the same time provide meaning for the integration process and are an elementary component for the recognition of the legal system. However, the installed legal institutions also reflect expectations and attitudes towards the law.[91] To this end, strategies of power demarcation and the rule of law, which become visible in the successive constitutional development including dynamics of contestation, are considered.[92] This results in the normative consideration of an underlying common foundation: 'Fundamentally shared ideology' as shared basic values, fundamental conception of the role of law in society and the active or passive role of lawyers. This also entails a common understanding of what is considered a legal problem.

5. Legal Culture and Normativity in the European Union

Legal culture in the European context is shaped by several guiding categories, including treaties, secondary law, and jurisprudence, which provide

90 E. Blankenburg, see n. 84, 503; R. Michaels, 'Rechtskultur' in J. Basedow, K. J. Hopt and R. Zimmermann (eds), *Handwörterbuch des Europäischen Privatrechts* (Mohr Siebeck, 2009), 1255.
91 A. Sarat, 'Studying American Legal Culture' (1977) 11 *Law and Society Review*, 427.
92 T. Eijsbouts, see n. 9.

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a framework for understanding the legal landscape. Additionally, the interaction between EU institutions and the relationship between European and national levels play a crucial role in this legal cultural formation. A general understanding of the binding force of law significantly influences how EU law is perceived, reinforcing its important position within the system. As the EU system becomes increasingly heterogeneous, it tends to adopt a more legalistic and formalistic character, further emphasising the role of law in governance.

Viewing legal culture as an analytical tool to access and study the law on European level means combining descriptive, analytical and normative components. First, the descriptive category captures the interplay of law, institutional structures and the framework that legal institutions provide. The *acquis communautaire* of the European Union refers to the legal framework achieved in the past seventy years of European integration. Second, the analytical perspective focuses on functions of law and jurisprudence, legal conception, sources and methods of law as well as arguments and legitimation for law and its institutions.[93] The legal system of the European Union is built in a way that it expects implementation into national legal systems from the Member States. The sanctioning authority of the European Commission and the Court of Justice are limited. Compliance depends largely on the Member States. In this line of reasoning, the self-commitment by Member States cannot be underestimated as expression of the law's legitimation[94]: the binding force of European law is *de jure* and *de facto* connected to the self-commitment and implementation of the Member States. Turning to the third component of legal culture, the normative component connects the law to the legacy and heritage of ideas and values as well as expectations and attitudes towards law and legal institutions.[95]

The responsibility for upholding principles of law lies essentially with the actors and institutions endowed with political powers, but also with the media and with the voters as the sovereign's source of legitimisation. The law – as becomes particularly clear here – does not inherently carry the good. Law as justice needs a mandate that must stem from the political process[96] and can be susceptible to injustice precisely for this reason, if

93 M. van Hoecke and M. Warrington, see n. 73, 514–515.
94 M. van Hoecke and M. Warrington, see n. 73, 514.
95 E. Blankenburg, see n. 84, 502; D. Nelken, see n. 84, 70;
96 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023), 189.

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the common good is missed or violated by particular interests.[97] This is because normative narratives are clearly associated with law, even if the law of a legal system does not provide any moral characteristics in its own right.[98] Associatively, law is often linked to the constitutionally guaranteed separation of powers and checks and balances, which includes a recognition of fundamental civil liberties of citizens in relation to the state.[99] A number of other components – such as access to justice, legal certainty instead of arbitrariness, equality, the exercise of power with moderation, conflict resolution patterns, fair procedures[100] – require further definitions and demarcations. It is often only in the event of conflict – for example during judicial review, i.e. a major strand of *integration through law* – that the content (values) of a norm is actually defined, i.e. further restricted, expanded or otherwise specified and thus determined whether a norm is compatible with overarching values.[101]

In a similar vein, *Mattias Kumm* draws a connection between rule of law as key republican principle that guides the national and European officials in their practices of government, emphasising that republican constitutionalism is a concept shared by the European Union and its Member States.[102] Hence, there is a close connection between constitutional principles of the European polity (basic values such as human rights, democracy, rule of law) and the meaning of the law as it is translated in rule of law practices.

The significance of a community's values is in constant motion, as pertinently captured by Jacques Derrida with the concept of "iterations".[103] Those iterations are processes which reproduce a concept, but always with variation which results from the interplay with social and political contexts.[104] Democratic iterations, as conceived by *Seyla Benhabib*, convey the "complex processes of public argument, deliberation, and exchange

97 L. Green, 'Book Review: Law's Rule – The Rule of Law: Ideal or Ideology, by A. C. Hutchinson and P. Monahan (eds)' (1987) 24 *Osgoode Hall Law Journal*, 1023, 1024.
98 E. R. Lautsch, see n. 96, 174.
99 T. H. Bingham, *The rule of law* (Penguin, 2011), 37–109.
100 T. H. Bingham, see n. 99, 37–109.
101 D. Grimm, 'Recht und Politik' (1969) 9 *Juristische Schulung*, 501, 508.
102 M. Kumm, 'Beyond Golf Clubs and the Judicialization of Politics: Why Europe Has a Constitution Properly so Called' (2006) 54 *The American Journal of Comparative Law*, 505, 507.
103 J. Derrida, 'Signature, Event, Context' in P. Kamuf (ed), *Derrida Reader: Between the Blinds* (Columbia University Press, 1991), 90; see also: S. Benhabib, *The Rights of Others* (Cambridge University Press, 2004), 179.
104 J. Derrida, see n. 103, 90; S. Benhabib, see n. 103, 179.

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through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned"[105]. This takes place in 'strong' institutional bodies such as the legislative, judiciary and executive as well as in 'weak' society associations and media.[106] Embedded in this broad theoretical approach, legal culture implicates several dimensions to inquire the operating range of European law and to transcend the narrow understanding of *integration through law* and similar formats. It provides a clear framework to analyse not only the general concept of law but also *lively processes of law* resulting in social change, in the sense of *Lawrence Friedman*.[107] The analytical framework can be applied to different periods of European integration and for different policy fields. Considering that the structure of the European Union is dominated partly by supranational and partly by intergovernmental structures, the categories provide an analytical tool to capture a nuanced understanding of the legal culture of the European Union, which may differ both diachronically and synchronically, e.g. over time and across policy fields. In this way, the analytical approach to studying European law with a *legal culture framework* advances our understanding of *integration through law* by capturing various dimensions of law that are constitutive for the European legal community: it is not limited to judicialisation but still considers judicialisation as an important aspect of 'living law'. The combination of a consideration of 'written and living law' together with normative aspects of the general concept of law allows for a broader approach to understanding the legal history and current state of the European Union, i.e. to include processes of juridification through legislation as well as case law with regard to method, argumentation and legitimisation. In principle, the access through legal culture allows for greater openness and thus promises to produce more holistic results that enable a differentiated characterisation of the European legal community and its normativity.

6. Conclusion

Integration through law was originally conceptualised with a legal supranationalism that was accompanied by political bargaining processes. Since the

105 S. Benhabib, see n. 103, 179.
106 S. Benhabib, see n. 103, 179.
107 L. M. Friedman, see n. 82, 49–50.

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1980s, a dynamic integration process has developed in the EU, in which the relationship between law and politics has been continuously re-institutionalised. In this process, the political dimension has become weaker, while legal techniques were used to compensate for the political weakness of the EU. *Integration through law* emphasises processes of both judicialisation and juridification and their significance for the legal system. The legal focus on the political meaning of case law with view to European integration processes provides for rich understanding and has significant explanatory power for the development of the shape of the European Community in the first two decades of its existence as well as the foundational structures persisting today in the European legal community. It lacks however the explanatory power for the transitionary phase towards a political union that transpired when the Maastricht Treaty came into effect, which was further reinforced by the Lisbon Treaty and the 'living law' under those treaties. It is at this juncture that legal culture allows for the study of several legal dimensions.

In contrast, legal culture through its systematic and categorical method can provide an effective tool to capture, define and thus confront normative challenges such as democratic legitimacy. Especially in times of polycrisis and polarisation, it becomes even more important to be able to assess the underlying legitimating structures and narratives of argumentation backing the democratic legitimacy of legal processes in the European Union. In this sense, legal culture serves as a conceptual tool that facilitates the study of legal and political processes related to *integration through law* – including but not limited to judicialisation and juridicification. Beyond that, it is applicable across various policy fields and broader contexts, encompassing 'written law' (treaties, secondary legislation) as well as 'living law' (application of law and jurisprudence). It captures fundamental aspects of law – such as legal methodology, legal argumentation, and legitimacy – while emphasising a crucial normative component that distinguishes it from the more procedural focus of *integration through law*: Through its inquiry into the basic concept of law, accepted argumentation and legitimation of the law, methods of law and the shared ideology stemming from the practice and experiences of the European legal community.

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Law as Narrative in the Democratic Transformation Process: Ideational Power in European Climate Change Litigation

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Abstract

European law has long been a basis as well as product and producer of European integration. Moreover, it serves not only as a regulatory tool but also as a medium for shaping social realities amid ongoing crises such as climate change, digitalisation, and globalisation. However, the increasing emotional fragmentation among citizens, and growing polarisation and, in EU case, euro-skepticism in politics pose challenges to effective governance and democratic engagement. These challenges only magnify when coupled with transformation processes. On the other hand, law may provide a particularly suitable means of coping with these challenges. Accordingly, this chapter aims to explore how law can function as a narrative in political discourses supporting these transformations.

Drawing on theories from neo-institutionalism and narrative studies, the chapter develops an analytical framework to investigate how law is utilised in political narratives during transformative processes. This framework is applied to two significant cases of climate change litigation within the EU multi-level system: the 'People's Climate Case' and the case of the 'KlimaSeniorinnen'. These cases illustrate how legal narratives can frame complex climate issues while seeking legitimacy for policy solutions.

The analysis highlights that political narratives surrounding legal frameworks play a critical role in legitimising policy decisions and addressing pressing societal concerns. The findings also point to the need for further research regarding more policy fields, particularly concerning democratic

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legitimacy and public understanding of complex issues like climate change and digitalisation. Ultimately, this study underscores the importance of examining the discursive potential of law as narrative for maintaining democracy amidst transformative pressures faced by contemporary societies.

1. Introduction: Law as Narrative and Transformation Processes

European integration entails a process that in many ways is at once both law made and a maker of law. It is based on law in resting on treaties and their revisions, while law also provides a key tool of European integration for securing the common good and rights. European regulations were called into question, for example concerning the Schengen regime and regulations on controls at inner-European borders, or on account of offenses against the rule of law in EU Member States.[1] Still, European law has shown a resilient authority and integrative power in withstanding several major crises in the past fifteen years. At the same time, its vulnerability is growing in the face of increasingly emotionally charged politics and dissatisfaction of citizens with government.[2] This is reflected in the case of the EU in the emergence of "constraining dissensus" – as opposed to the long, more or less applicable "permissive consensus" among the general populace vis-à-vis European integration – or even "disintegration".[3] Moreover, multifaceted changes in the world are increasing pressure on democratic politics in general as well as on specific policy areas to adapt and regulate. Several areas stand out as key drivers of transformation processes such as economic structural changes as part of globalisation or various technological advancements, with rapid digitalisation representing but one, albeit major area as a product and producer of social complexity. Another challenge of particular

1 S. von Steinsdorff, 'Vom "rule of law revival" zum "rule of law backsliding": Ein Erklärungsversuch' (2024) *Zeitschrift für Politikwissenschaft*, 57.

2 L. Azoulai, 'Europe is trembling. Looking for a safe place in EU law' (2020) *Common Market Law Review*, 1675, 1677; V. A. Schmidt, 'Rethinking EU Governance: From "Old" to "New" Approaches to Who Steers Integration' in R. Coman, A. Crespy and V. A. Schmidt (eds), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press, 2020), 94, 110.

3 L. Hooghe, and G. Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) *British Journal of Political Science*, 1; E. Jones, 'Towards a theory of disintegration' (2018) *Journal of European Public Policy*, 440; Z. Lefkofridi and P. C. Schmitter. 'Transcending or Descending? European Integration in Times of Crisis' (2015) *European Political Science Review*, 3.

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note pertains to climate change, which not only transcends boundaries posing numerous governance challenges, but also reinforces existing and raises new conflict lines between and within societies.[4]

Transformation processes like globalisation, digitalisation and climate change – and the questions of whether at all and, if so, how they are addressed, managed or coped with – comprise a veritable fault line for effective and democratic governance, both between the current and the future democratic society. Still, despite and even because of these fundamental challenges, we identify the *law* as a crucial *medium* of politics for shaping the social reality of modern societies.

Law is born out of processes of political contestation, and thus as product it may be construed as "congealed politics"[5]. At the same time, it also formalises and stabilises expectations of politics.[6] Law is the decisive instrument for shaping and controlling democracy in a multi-level system organised under the rule of law.[7] The regulatory function of law is characterised by rationalism. Despite the deep anchoring of this rationalism in modern political institutions[8], it increasingly diverges from the paradigm of (post-)modern society,[9] in which the relationship between emotions and politics, argumentative discourse and emotional rhetoric is being renegotiated. The rationalist character of law offers a contrast to the uncertainty and questioning of democratic institutions and authorities in transformation processes. The role of law in the process of transformation in the climate crisis is for example already studied from the perspective of law development[10] and with regard to its potential as a tool to enable transformation (*transformative law*).[11] However, the role of law in political discourse around the democratic governance of transformation processes presents a

4 A. Nassehi, *Muster: Theorie der digitalen Gesellschaft* (C.H. Beck, 2019), 321–323; S. Brechin, and S. Lee (eds), *Routledge Handbook of Climate Change and Society* (Routledge, 2025).

5 D. Grimm, 'Recht und Politik' (1969) *Juristische Schulung*, 501, 502.

6 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023), 175.

7 H. L. A. Hart, 'Positivism and the Separation of Law and Morals' (1958) *Harvard Law Review*, 593, 600; M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) *International and Comparative Law Quarterly*, 495, 515.

8 A. Grimmel, *Europäische Integration im Kontext des Rechts* (Springer, 2013), 46–80.

9 A. Grimmel, see n. 8, 81–82.

10 J. McDonald and P. C. McCormack, 'Rethinking the role of law in adapting to climate change' (2021) *WIREs Climate Change*, 1, https://doi.org/10.1002/wcc.726.

11 P. F. Kjaer, 'What is transformative law?' (2022) *European Law Open*, 760.

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research gap. It appears that the potential of law – not just as a regulatory tool, but as a meaningful narrative within political transformative processes – has received less attention. At the same time, uncountable research articles have tackled and underlined the significance of discourse and ideas for public problem-perception, political agenda-setting, policy-development as well as – from a perspective of European integration – regional political integration processes.[12]

In political science research, the structuring of discourse processes through narratives is recognised and methodologically processed.[13] This invites a research agenda that builds on these insights in order to broaden our understanding of the role of law in discourses through transformative processes. This also seems necessary to us in the face of an increasingly emotionally, fragmented public, which – we assume – is in danger of overlooking that dispute and the struggle for political solutions, not to mention the attainment of complex compromises, form components of a lively and healthy democracy in general, and as part of the process of European integration as well. What is more, law and narratives of law may offer in the case of the European Union – on account of several particularities as unique multilevel political system of people and Member States that is itself not a conventional state, but far more extensive in scope and trajectory than an international organisation – particularly appropriate avenues for coping with the tensions between democratic and effective governance of

12 V. Schmidt, 'EU Leaders' Ideas and Discourse in the Eurozone Crisis: A Discursive Institutionalist Analysis' in C. Carta and J.-F. Morin (eds), *EU Foreign Policy through the Lens of Discourse Analysis: Making Sense of Diversity* (Routledge, 2014); A. Crespy and V. Schmidt, 'The clash of Titans: France, Germany and the discursive double game of EMU reform' (2014) *Journal of European Public Policy*, 1085; A. Crespy and L. Schramm, 'Breaking the Budgetary Taboo: German Preference Formation in the EU's Response to the Covid-19 Crisis' (2024) *German Politics*, 46–67.

13 M. R. Somers, 'The Narrative Construction of Identity: A Relational and Network Approach' (1994) *Theory and Society*, 605, 606; M. A. Hajer, 'Argumentative Diskursanalyse: Auf der Suche nach Koalitionen, Praktiken und Bedeutungen' in A. Hirseland, R. Keller, W. Schneider and W. Viehöver (eds), *Forschungspraxis* (Verlag für Sozialwissenschaften, 2008), 271; R. Keller, *Diskursforschung: Eine Einführung für SozialwissenschaftlerInnen* (Verlag für Sozialwissenschaften 2011); W. Viehöver, 'Diskurse als Narrationen' in R. Keller, A. Hirseland, W. Schneider and W. Viehöver (eds), *Handbuch sozialwissenschaftliche Diskursanalyse* (Verlag für Sozialwissenschaften, 2011), 193, 197; F. Gadinger, S. Jarzebski and T. Yildiz, *Politische Narrative: Ein neuer Analysezugang in der Politikwissenschaft* (Verlag für Sozialwissenschaften, 2014); S. Münch, *Interpretative Policy-Analyse. Eine Einführung* (Springer, 2016).

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transformation processes. This applies to current societies and Member States as well as their posterities or futures.

Against this backdrop, our contribution inquires *how is law used in political discourses around transformation processes?* To this end, we aim to provide an analytical framework, drawing on theories of neo-institutionalism, and its variants of discursive institutionalism and ideational institutionalism in particular. Furthermore, we also build on a rich spectrum of groundworks and empirical contributions from *narrative studies* in political science. The novelty here, again, lies with the focus on *law* as medium of politics in this context.

In the following section, we briefly review the state for research on political discourses, their institutional and ideational bounds and dynamics, as well as particularly relevant discursive elements on the one hand, and law in transformative processes on the other hand. On this basis, we develop a conceptual framework to analyse law as narrative. Subsequently, we undertake an illustrative application of this analytical framework on an especially suitable case of transformation processes: the management of climate action in the EU multilevel system and the field of climate change litigation. These narratives can be analysed as *ideational power* through the accompanying public relations work of the plaintiffs and their supporters and the public response to the lawsuits.[14] In addition to trial documents, press releases and statements by the lawsuit collectives and defendants represent the materials to be used. Finally, we discuss our conceptual considerations and insights from the case study as well as their limitations, and draw implications for future research, while also prompting a preliminary reflection of law as narrative in connection with its potential for democratic maintenance.

2. Ideas and Narratives in Politics and Political Discourse

Law and politics are not only complexly interwoven in terms of processes and rules. They are also embedded in spaces of meaning. Political contestation and discourse related to law thus do not only concern assessing 'facts'

14 See similar approach in S. Lenhart, A. Töller and A. Wenz-Temming, 'Die Macht der Ideen: Können Klimaklagen das Denken und Reden über Klimapolitik ändern?' (2025), unveröffentlichtes Paper für die Jahrestagung der Sektion „Policy-Analyse und Verwaltungswissenschaft" 20.-21. März 2025, TU Darmstadt.

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and negotiating 'interests', but also revolve around competing, concurring and otherwise different ideas, norms and their interpretation. Such premises are hardly self-evident. They are rather grounded in theories of social construction of reality[15] in general and a variety of theoretical strands in social science research connected to various social and ideational *turns*.[16] Accordingly, framing[17] and narratives[18] have increasingly become subject of investigation since the constructivist turn in international relations that recognises the importance of culture, norms and perceptions of participating actors.[19] Framing captures the essence of a political issue to further an actor's political goals to influence opinions and political decisions of others.[20] Following authors of the Narrative Policy Framework (NPF), narratives contain a temporally structured sequence of events that are embedded in a narrative thread (*plot*), which is fed by actors (*characters*), dramatic moments (*disruption/crisis*) and an overarching sense of meaning (*morale*).[21]

15 See seminally, P. Berger and T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin, 1966).

16 See overview, e.g. J. Checkel, J. Friedman, M. Matthijs and R. Smith, 'Roundtable on Ideational Turns in the Four Subdisciplines of Political Science' (2016) *Critical Review. Journal of Politics and Society*, 171.

17 For an overview, see D. Chong and J. N. Druckman, 'Framing Theory' (2007) *Annual Review of Political Science*, 103; Z. Oxley, 'Framing and Political Decision Making: An Overview' (2020) <https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-1250> accessed 17 April 2025.

18 K. Freistein, F. Gadinger and S. Groth, 2024, 'Studying Narratives in International Relations' (2024) *International Studies Perspectives* <https://doi.org/10.1093/isp/ekae019> accessed 17 April 2025.

19 M. Finnemore, *National Interests in International Society* (Cornell University Press, 1996); P. Katzenstein (ed), *The Culture of National Security: Norms and Identity in World Politics* (Columbia University Press, 1996); A. Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Cornell University Press, 1995); N. Onuf, *World of Our Making: Rules and Rule in Social Theory and International Relations* (University of South Carolina Press, 1989).

20 Most importantly in the arena of political decisions, it makes sense to distinguish emphasis frames (highlighting features while ignoring others) and equivalence frames (presenting an issue in logically equivalent but different ways, see Z. Oxley, see n. 17.

21 M. D. Jones and M. K. McBeth, 'A Narrative Policy Framework: Clear enough to be wrong?' (2010) *Policy Studies Journal*, 329 with further references; E. A. Shanahan, M. D. Jones, M. K. MacBeth, C. M. Radaelli, 'The Narrative Policy Framework' in C. Weible and P. A. Sabatier (eds), *Theories of the Policy Process*, (Routledge, 2022), 173, 176.

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Narratives help to simplify complex issues[22] and give meaning and legitimacy to political positions.[23] Political changes are categorised through narratives, which not least serve the basic social concern "to make sense of the world"[24], a need that is also starkly pronounced in particularly complex European politics.[25] The narrative turn[26] emphasises the importance of interpretive scholarship, grounded in the assumption that political actors use *the structural power of narratives to make sense of the world* in order to (de)legitimise political projects by linking the past, present and future.[27] It constitutes an approach to social inquiry rather than a theory, based on the assumption that "the environment in which agents/states take action is social as well as material."[28] This creates a significant connection between the *reasoning for* policy choices and *democratic legitimacy*.

In the European context, the reasoning can be conceived in terms of so-called "two-level games", in line with the concept first introduced by *Robert Putnam*.[29] The concept of "two-level games" is an established model in the literature to capture the significance of rational preference formation on national level for the position of a country on the international level but also the interactions between the two levels, how they – and e.g. their respective logics, constellations and constraints – interact and affect one another.[30] The European Union is a highly advanced international

22 S. Münch, see n. 13, 85.

23 F. Gadinger, S. Jarzebski and T. Yildiz, see no. 13, 10.

24 J. Kuhlmann and S. Blum, 'Narrative plots for regulatory, distributive, and redistributive policies' (2021) *European policy analysis*, 276, 278; N. Onuf, *Making Sense. Making Worlds. Constructivism in Social Theory and International Relations* (Routledge, 2012).

25 I. Manners and P. Murray, 'The End of a Noble Narrative? European Integration Narratives after the Nobel Peace Prize' (2016) 54 *Journal of Common Market Studies*, 185, 186.

26 D. Stone, 'Causal Stories and the Formation of Policy Agendas' (1989) *Political Science Quarterly*, 281; M. Patterson and K. Renwick Monroe, 'Narrative in Political Science' (1998) *Annual Review of Political Science*, 315; S. R. Shenhav, 'Political Narratives and Political Reality' (2006) *International Political Science Review*, 245.

27 K. Freistein, F. Gadinger and S. Groth, see n. 18; see also: S. Groth, 'Political Narratives/Narrations of the Political: An Introduction' (2019) *Narrative Culture*, 1; M. Kurki. 'Relational Revolution and Relationality in IR: New Conversations' (2022) *Review of International Studies*, 821.

28 J. T. Checkel, 'Review: The Constructivist Turn in International Relations Theory' (1998) *World Politics*, 324, 325.

29 R. D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) *International Organization*, 427.

30 R. D. Putnam, see n. 29, 427.

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organisation with tight legal ties between the national and European level, comprising together meanwhile a unique multilevel governance system.[31] These ties extend to the public sphere as well, though at the latest since the financial and state debt crisis as of 2010 with high politicisation.[32] European politics have become "two-level games" not only of executive-laden intergovernmental relations and rather technocratic inter-administrative coordination networks, but also with further horizontal and vertical dimensions: The state representing negotiators must consider not only their national preferences (and e.g. coalition partners, parliamentary majorities), but also the reactions emanating from other Member States (e.g. not just their elites, but also the different public discourses) as well as the impact that such a preference might have for the European community – to the extent, that the European preferences of a Member State (functioning of the Single Market and currency union) may outweigh the national preference not to grant solidary fiscal transfers (as in the case of Next Generation EU).[33] Accordingly, one finds the increasingly prominent argument positing the establishment and expansion of a "double two-level game"[34] on European level with an overlap of vertical and horizontal deliberative processes and communication. Especially in crisis situations, problem construction becomes a decisive explaining variable for potential crisis solution mechanisms.[35]

This complex and multidimensional as well as dynamic background of interactions, interlinkages and discourses in the European Union can be particularly adequately captured from discursive institutionalism perspec-

31 C. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon. Ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht* (Mohr Siebeck, 2010), 47–54; cf. also e.g. S. Piattoni, *The Theory of Multi-level Governance. Conceptual, Empirical and Normative Challenges* (Oxford University Press, 2010).

32 U. Beck, *Das deutsche Europa* (Suhrkamp, 2015); A. Séville, 'From "one right way" to "one ruinous way"? Discursive shifts in "There is no alternative"' (2017) *European Political Science Review*, 449; S. Fabbrini, 'Differentiation or Federalisation: Which Democracy for the Future of Europe?' (2021) *European Law Journal*, 9; K. K. Patel, *Europäische Integration: Geschichte und Gegenwart* (C.H. Beck, 2022), 100; A. von Bogdandy, *Strukturwandel des öffentlichen Rechts: Entstehung und Demokratisierung der europäischen Gesellschaft* (Suhrkamp, 2021), 49.

33 A. Crespy and L. Schramm, see n. 12, 50.

34 A. Crespy and V. Schmidt, see. 12, 1085; A. Crespy and L. Schramm, see n. 12, 50; C. Fontan and S. Saurugger, 'Between a Rock and a Hard Place: Preference Formation in France During the Eurozone Crisis' (2020) *Political Studies Review*, 507.

35 A. Crespy and L. Schramm, see n. 12, 50.

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tive:[36] The concept conceives discourse as an *ideational process* which aims *to make sense of the world* by giving meaning to (crisis) events and successive political exchanges, decisions and activities, which moreover unfold in (often different) institutional settings and arenas. This discourse is thus embedded in *both* the national and European arena with actors participating in vertical and horizontal dimensions, trying to convince each other and gain influence in the policy process with their ideas. Complex – multidimensional, multilevel compounded and/or network-type – institutional arrangements are prone to logics of communication. While this may apply to any system and its interactions, complex ones cannot be centrally or hierarchically steered, but rely on deliberation and coordination in order to operate, for variegated (collective) actors to reach compromises and so forth.[37]

Finally, political processes are not only structured by formal institutional rules, but also essentially by discourses. Narratives that create meaning and provide legitimation play a vital role here. In addition to pursuits of persuasion and influence, there is also a fundamentally discursive importance of democratic politics, not only but perhaps especially in the EU as polycentric, multilevel system that is only partially characterised by partisan and majoritarian politics more typical of conventional political systems or states. Heads of State and Government as well as other Ministers are required to justify intergovernmental negotiations and choices for legal commitment on the supranational level, as they remain accountable – and thus must *account for* – their (in)actions to their parliaments, electorates, public in general.[38] These accounts are induced by institutional and ideational settings in a broad sense – e.g. constraints, incentives, but also norms and principles – of democracy and the rule of law in general and in the EU multilevel, law- and treaty-based integration system in particular. This invites, in short, an in-depth analysis of *law as a narrative in the political process*.

36 V. A. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' (2008) *Annual Review of Political Science*, 303; V. A. Schmidt, see n. 2.

37 V. A. Schmidt, see n. 36, 303.

38 A. Crespy and L. Schramm, see n. 12, 49.

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3. Law as Narrative in Transformation Process: Towards an Analytical Framework

In addition to drawing on strands of research at the interface between law and politics, the analytical framework builds on the theory of social constructivism in general[39] and its further development in the context of the EU and international and multi-level politics.[40] Accordingly, socialisation processes, rules and sets of rules are not only *exogenous* incentive structures or limitations for decision-making and action, but are themselves formative and co-constitutive for actors and their interactions.[41] Law is thus the result of human collective action. However, these, in turn, are mediated ideationally, communicatively and interactively within the existing institutional framework. Law and law-making within and beyond the state thus create a political and social space that is to a certain extent open to interpretation.[42]

Sociological institutionalism also emphasises the importance of the institutional embedding of actors for their perceptions, attitudes and actions.[43] New information or shifts in normative understandings influence interests.[44] Furthermore, discursive institutionalism points to the explanatory

39 See, for example, P. Berger and T. Luckmann, see n. 15; A. Wendt, *Social theory of international politics* (Cambridge University Press, 2010).

40 See, for example, T. Christiansen, K. E. Jorgensen and A. Wiener, 'The Social Construction of Europe' (1999) 6 *Journal of European Public Policy*, 528; M. Finnemore and K. Sikkink, 'Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics' (2001) *Annual Review of Political Science,* 391; J. Checkel, 'International Institutions and Socialization in Europe: Introduction and Framework' (2005) *International Organization*, 801; S. Saurugger, 'The constructivist turn in EU public policy approaches' in H. Heinelt and S. Münch (eds), *Handbook of European Policies* (Edward Elgar, 2018), 19.

41 See also e.g. C. Hay, 'Good in a crisis: the ontological institutionalism of social constructivism' (2016) *New Political Economy*, 520.

42 D. Dreyer-Plum, 'The substance and effects of EU law and jurisprudence under a social constructivist research agenda' in L. Burazin, D. Gardasevic and A. Sardo (eds), *Law and State. Classical Paradigms and Novel Proposals*; Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook (Peter Lang Verlag, 2015), 137.

43 S. Bulmer, 'Domestic Politics and European Community Policy-Making' (1983) *Journal of Common Market Studies*, 349; J. G. March and J. P. Olsen, *Rediscovering institutions: the organizational basis of politics* (Free Press, 1989).

44 T. Risse, 'Social Constructivism and European Integration' in A. Wiener, T. Börzel and T. Risse (eds), *European Integration Theory* (Oxford University Press, 2019), 128, 131 with further references.

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potential of discursive and communicative elements.[45] Ideas are the substantive content of discourses that are expressed at different levels (*policies, programmes, philosophies*) and in different categories (cognitive, normative) and have a formative power.[46] A basic assumption of discursive institutionalism as well as *ideational* institutionalism is that "ideas matter" for political processes *and* their outcomes,[47] also, as summarised by *Berman*, "by shaping actors' interests and preferences *as well as* the constraints and opportunities they face".[48]

Against this background, the concept of *ideational power* can be understood as the capacity of individual and collective actors: for example, to influence (*reasoned*) or determine (*coercive*) the normative and cognitive convictions of other actors. At the same time, this capacity is also structural – i.e. (also) included in institutional frameworks. Martin Carstensen and Vivien Schmidt further differentiate this *ideational power* into three forms: First, as "power through ideas", i.e. the ability to *persuade* other actors through ideational elements.[49] Secondly, "power over ideas", i.e. the power to present one's own perception as *having no alternative*.[50] Thirdly, "power in ideas", i.e. the *institutionalisation of* certain ideas that become dominant through structural integration.[51]

Focusing on law as narrative, we want to investigate *ideational power* in policy processes and their occurrence in political narratives including law. We link narratives of problem definition (*power through ideas*) with legislative and legal mobilisation processes that contribute to the institutionalisation of ideas (*power in ideas*). We argue that law as narrative provides a

45 V. A. Schmidt, see n. 36, 303; V. A. Schmidt, 'Taking ideas and discourse seriously: explaining change through discursive institutionalism as the fourth "new institutionalism"' (2010) *European Political Science Review*, 1; V. A. Schmidt, 'Discursive Institutionalism: Scope, Dynamics, and Philosophical Underpinnings' in F. Fischer and J. Forester (eds), *The Argumentative Turn Revisited. Public Policy as Communicative Practice* (Duke University Press, 2012), 85; V. A. Schmidt, see n. 36, 94.

46 V. A. Schmidt, see n. 36, 303.

47 D. Béland, 'The Idea of Power and the Role of Ideas' (2010) *Political Studies Review,* 145; M. B. Carstensen and V. A. Schmidt, 'Power through, over and in ideas: conceptualizing ideational power in discursive institutionalism' (2016) 23 *Journal of European Public Policy*, 318.

48 S. Berman, 'Ideational Theorizing in Social Sciences since "Policy Paradigms, Social Learning, and the State"' (2013) *Governance*, 217, 232.

49 M. B. Carstensen and V. A. Schmidt, see n. 47, 323–326.

50 M. B. Carstensen and V. A. Schmidt, see n. 47, 326–329.

51 M. B. Carstensen and V. A. Schmidt, see n. 47, 329–332.

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framework both for the structure of problems and their solution. In policy development and governance of transformation processes, by framing the issue at stake as *legal problem*, it becomes tied to the institutionalised legitimacy of the law/constitution (*power through ideas*). At the same time, there are elements of law (rule of law, human rights) that are less visible but effectively feed into the political system as values to which law in discourse of transformation processes appeals (*power through ideas*). The *ideational power through law* bears manifold significance, as an element of control, legitimation and stabilisation as well as to create meaning.[52]

In the following section, we apply our analytical framework to the field of climate change litigation. Here we want to capture which narratives unfold and are used to introduce law as *ideational power* into the climate governance process, in the cases at hand with a particular view to civil society engagement via recourse to the judicial arena.[53]

4. Climate Politics and the Use of Law within Narrative Strategies

It is the complexity of climate change, its causes and consequences that creates the potential to strengthen understanding and support for climate policy through political narratives as *power through ideas*.[54] Climate change threatens natural ecosystems and human societies while at the same time causing an unequal distribution of responsibilities and impacts.[55]

52 For *ideational power*, we refer to M. B. Carstensen and V. A. Schmidt, see n. 47, 318; V. A. Schmidt, see n. 36, 303; V. A. Schmidt, see n. 45, 1; V. A. Schmidt, see n. 45. See in more detail section 3 and 4.

53 On strategic litigation as a tool for political participation see G. Fuchs, '"Strategische Prozessführung" als Partizipationskanal' in D. Nève (ed), *Politische Partizipation jenseits der Konventionen* (Barbara Budrich, 2012), 51–74.

54 Cf. in relation to environmental policy in general, Sachverständigenrat für Umweltfragen (SRU), *Für eine entschlossene Umweltpolitik in Deutschland und Europa*. Umweltgutachten 2020 (Berlin, 2020), 10; E. Wolters, M. D. Jones and K. Duvall, 'A Narrative Policy Framework Solution to Understanding Climate Change Framing Research' in M. D. Jones, M. K. McBeth and E. A. Shanahan (eds), *Narratives and the Policy Process. Applications of the Narrative Policy Framework* (Montana State University Library, 2022), 222, 232.

55 Intergovernmental Panel on Climate Change (IPCC), 'Summary for Policymakers' in H. Lee and J. Romero (eds), *Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (IPCC, Geneva 2023); on the threat to democracy J.

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The major challenges therefore include not only (1) limiting global warming through effective action, but also (2) distributing the burdens arising from climate change mitigation and adaptation fairly. A sustainable response appears to be possible only through democratic negotiation involving the various social and economic interests, even if the complexity of developments puts the problem-solving capacity of democratic government systems under pressure.[56] It is against the background of regularly detected deficiencies of climate mitigation measures to meet national or international climate targets, that legal complaints in the field of climate change are increasingly filed before national, international and regional courts, including courts on the European level.[57]

Complaints are held against states as well as against companies, claiming for greater efforts to address climate change or against climate-damaging business models in the past, present and future.[58] The concrete legal conflicts regularly pertain to questions of responsibility for climate change and burden-sharing of the costs for mitigation as well as climate adaptation.[59] Thus, with a legal complaint, a conflict rooted in the political sphere may be transferred (also) into a legal setting. Frequently, the addressed legal conflicts offer elements of a narrative treatment of the (climate) policy debate.[60] Correspondingly, cases of strategic climate litigation are

Schaible, *Demokratie im Feuer. Warum wir die Freiheit nur bewahren, wenn wir das Klima retten – und umgekehrt* (DVA, 2024).

56 A. E. Töller, 'Scheitert die Demokratie an der Klimapolitik? Überlegungen zur Input- und Output-Legitimation der deutschen Klimapolitik' in W. Muno, C. Wagner, T. Kestler and C. Mohamad-Klotzbach (eds), *Staat, Rechtsstaat und Demokratie* (Springer VS, 2022), 485.

57 See database of climate change litigation of the Sabin Center for Climate Change Law at Columbia Law School and the law firm Arnold & Porter <https://climatecasechart.com/> accessed 17 April 2025.

58 J. Setzer and C. Higham, 'Global Trends in Climate Litigation: 2023 Snapshot' (2023) <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf.> accessed 17 April 2025.

59 A. Wenz-Temming, 'Im Namen des Klimas: Klagen für mehr Klimaschutz im demokratischen Rechtsstaat' (2024) *INDES,* 141; McDonald and McCormack point to climate litigation as one trend in the development of adaptation law: J. McDonald and P. C. McCormack, see n. 10.

60 A. Graser, 'Strategic Litigation: Ein Verstehensversuch' in A. Graser and C. Helmrich (eds), *Strategic Litigation. Begriff und Praxis* (Nomos, 2019), 37.

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regularly accompanied by a "political impact objective"[61] to influence public discourse on climate politics beyond the specific legal dispute and its legal consequences.[62] This can be interpreted as the use of *ideational power*. Winning an argument in court and the corresponding explanatory court ruling may lead to the institutionalisation of new arguments in the sense of *power in ideas*. In addition, we regard the political impact objective as focusing on *power through ideas* for the purpose of political narratives.[63] Therefore, climate change litigation represents a fruitful field of climate politics, to investigate political narratives revolving around the legitimising source of *law as a narrative element*.

For this purpose, two significant proceedings of climate change litigation in the European multi-level system are examined more closely in this section. These include the so-called *People's Climate Case*, brought before the Court of Justice of the EU (CJEU) in 2018 and finally dismissed in 2021, and the complaint of the so-called "KlimaSeniorinnen" from Switzerland, which was successful before the European Court of Human Rights in 2024. While the first case was filed before the CJEU against the climate policy of the EU, the second case addressed national climate policies and thus touches upon the complex dynamics of multilevel litigation.

Starting with the *People's Climate Case* of 2018, this case was filed before the European General Court by 36 individuals stemming from ten families from different countries of Europe, Kenya, and Fiji. In addition, the Sámi national youth organisation Sáminuorra from Sweden appeared as formal plaintiff.[64] The plaintiffs claimed that the European Union's climate mitigation measures and reduction targets for the period until 2030 were inadequate and violated legal obligations from international law, especially

61 A. Wenz-Temming and A. Töller, *Climate, courts and conflict resolution – climate change litigation as a strategic tool for political contestation?* (ECPR General Conference Dublin 2024).

62 U. Müller, 'Begriffe, Ansprüche und deren Wirklichkeiten. Ein Systematisierungsvorschlag für sogenannte strategische Prozessführung, cause lawyering und andere Formen intentional gesellschaftsgestaltender Rechtspraxen' (2019) *Zeitschrift für Rechtssoziologie*, 33, 49.

63 For the discussion on the legitimacy of strategic litigation as potentially questioning the separation of powers see L. Hahn and M. von Fromberg, 'Klagekollektive als "Watchdogs"' (2021) *Zeitschrift für Politikwissenschaft*, 217.

64 Rechtsanwälte Günther, 'Application before the General Court of the EU of May 23, 2018' (*Climate Case Chart*, 23 May 2018) <https://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/> accessed 17 April 2025.

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from the Paris Agreement and its climate mitigation goals, as well as fundamental rights of the plaintiffs referring to the Charter of Fundamental Rights of the EU (EU Charter), setting the scene in a legal context.[65]

Instead of a 40 percent reduction target of emissions compared to 1990 levels, plaintiffs demanded 50 to 60 percent.[66] The complaint was supported by environmental non-governmental organisations, especially the German organisations Protect-the-Planet, Germanwatch and Climate Action Network Europe as well as by *Roda Verheyen,*[67] a "cause lawyer"[68] specialised in climate litigation. This "litigation collective"[69] clarified their problem definition and policy solution in their complaint as well as in the accompanying public relations work.

The plaintiffs saw themselves as already suffering from the consequences of anthropogenic climate change with special concern because of their professional activities in agriculture and tourism. The inadequate reduction of climate-damaging emissions by the EU is said to contribute to these effects. With the references to insights from climate science and "evidence [...] drawn from official documents, and scientific and economic studies, mostly from the universally accepted Intergovernmental Panel on Climate Change, IPCC"[70], we find the use of *cognitive arguments*, which gives the background for the central legal as well as narrative plot.

The plaintiffs as *victims* of climate change and inadequate EU climate policy must go to court to request effective protection of their fundamental rights.

> "The complaint addressed to the European General Court asserts that the EU's existing 2030 climate target to reduce domestic greenhouse gas emissions by at least 40% by 2030, as compared to 1990 levels, is inadequate with respect to the real need to prevent dangerous climate

65 G. Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) *Transnational Environmental Law*, 137 <https://www.gerd-winter.jura.uni-bremen.de/invokinghumanrights.pdf> accessed 24 April 2025.

66 Rechtsanwälte Günther, see n. 64.

67 G. Winter, see n. 65.

68 A. Sarat and S. Scheingold, 'What Cause Lawyers Do For, and To, Social Movements: An Introduction' in A. Sarat and S. Scheingold (eds), *Cause lawyers and social movements* (Stanford University Press, 2006), 1.

69 In original "Klagekollektiv", L. Hahn, 'Strategische Prozessführung' (2019) *Zeitschrift für Rechtssoziologie*, 26.

70 Rechtsanwälte Günther, see n. 64.

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> change and not enough to protect their fundamental rights of life, health, occupation and property."[71]

In addition, the complaint referred to fundamental rights "to equal treatment of young people and people living in developing countries (Article 20), and to the welfare of children (Article 24 (1))" laid down in the EU Charta.[72]

By locating the problem (consequences of climate change) and the proposed policy solution (i.e. raising the reduction targets as the policy solution) into the legal sphere (as the *setting*), these were linked to the authority of the law (*law as narrative*) materialised in international climate agreements, fundamental and human rights and the rule of law. In addition, the *power through ideas* is further promoted through the *normative argument* and interpretation of the "EU as a place of values and rights" that the complaint wants to strengthen.[73] What is more, the legal proceeding is not interpreted as circumventing European democratic institutions (whose decisions could also be influenced by voting for political parties with preferences for strong climate policies), but the court system is displayed as a safeguard of democracy (functioning as a *hero*): "In European politics, there is a concrete urgency to take a step back and consider the principles of democracy. The EU must now listen to its citizens who are impacted by climate change and implement the necessary measures to protect them."[74]

However, the case was decided as being inadmissible not only by the European General Court in May 2019. After an appeal of the plaintiffs, the European Court of Justice reached the same conclusion in March 2021. The *individual concern* was deemed as not being fulfilled, since the plaintiffs were not more affected than other people – which is a necessary condition for successful litigation within the European judicial system.[75]

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71 CAN, 'The People's Climate Case' (*Climate Action Network Europe*, 24 May 2018) <https://caneurope.org/the-people-s-climate-case/> accessed 17 April 2025.

72 G. Winter, see n. 65.

73 Original: "Die Klage soll die EU als einen Ort stärken, an dem zentrale Werte und Rechte gelebt, gewahrt und durchgesetzt werden können." Germanwatch, 'Der People's Climate Case: Das Recht auf Klimaschutz', (*Germanwatch*, 29 November 2018) <https://www.germanwatch.org/de/16065> accessed 17 April 2025.

74 CAN, see n. 71.

75 So called Plaumann-formula, G. Winter, see n. 65; General Court of the European Union, Order of the General Court (Second Chamber) of May, 8, 2018, (*Climate Case Chart,* 8 May 2018) <https://climatecasechart.com/non-us-case/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council/> accessed 17

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In contrast, in 2024 the European Court of Human Rights (ECtHR) found the complaint lodged by the association of "KlimaSeniorinnen" admissible. This group of Swiss senior women was founded based on activities of Greenpeace Switzerland to take legal action against Switzerland's inadequate climate policy, following the role model of the *Urgenda* case in the Netherlands.[76] Older woman were regarded as a suitable group of plaintiffs, as older women are particularly affected by heat waves caused by climate change and thus might fulfil the requirements for plaintiffs in the judicial system.[77]

Swiss courts dismissed the legal complaints filed by the "KlimaSeniorinnen", so they continued to submit their case to the European Court of Human Rights. The legal complaint contested Swiss climate policies as insufficient and thus in violation of the plaintiffs' rights to life and health (Art. 2 and 8 European Convention of Human Rights, ECHR). Furthermore, they saw their rights to a fair trial and right to an effective remedy violated by the Swiss Courts (Art. 6 and 13 ECHR; KlimaSeniorinnen 2020a). The "KlimaSeniorinnen" pointed to scientific evidence of their particular vulnerability to heat waves, which are already affecting them today (*cognitive argument*).

What is even more interesting here is the reference to a "human rights-based duty to protect the climate"[78] based on Article 2 and Article 8 European Convention on Human Rights, as well as the Swiss Federal Constitution.[79] Again, we see the location of a conflict, which is also contested in the political sphere, in the legal arena (*setting*), including problem definition

April 2025; Case C-565/19 P *Appeal – Action for annulment and for damages – Environment – 2030 climate and energy package – Fourth paragraph of Article 263 TFEU – Lack of individual concern* [2021]; Court of Justice of the European Union, 'Press release No. 51/21, Luxembourg, March 25, 2021'.

76 S. Keller and B. Bornemann, 'New Climate Activism between Politics and Law: Analyzing the Strategy of the KlimaSeniorinnen Schweiz' (2021) 9 *Politics and Governance*, 124, 126.

77 KlimaSeniorinnen Schweiz and Greenpeace, 'Medienunterlagen «Verein KlimaSeniorinnen Schweiz and Others v. Switzerland»' (*Klimaseniorinnen*, 7 March 2023) <https://www.klimaseniorinnen.ch/medien/> accessed 17 April 2025.

78 Original: "menschenrechtlich begründete Pflicht zum Klimaschutz", 'Sieg für KlimaSeniorinnen: Klimaschutz ist ein Menschenrecht' (*Klimaseniorinnen*, 9 April 2024) <https://www.klimaseniorinnen.ch/wp-content/uploads/2024/04/Gemeinsame-Medienmitteilung-der-KlimaSeniorinnen-Schweiz-und-Greenpeace-Schweiz.pdf> accessed 28 August 2025.

79 KlimaSeniorinnen Schweiz and Greenpeace, see n. 77; KlimaSeniorinnen Schweiz, 'Offener Brief an den Gesamtbundesrat und das UVEK' (*Klimaseniorinnen*, 8 Octo-

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in a legal language, referring to fundamental rights in particular. Thus, in referring to the threat for human rights caused by climate change and insufficient climate policy, the authority of law as institution in court is addressed as a procedural pathway to enforce the position of the plaintiffs. Their arguments are embedded in institutional and ideational parameters, encompassing for instance charters and/or constitutions prescribing fundamental rights as well as courts for adjudication. In addition, we can find hints of narrative strategies based on the legal dispute to conduct *power through ideas*. In similar vein, *Keller* and *Bornemann* point in their study of frames used by the "KlimaSeniorinnen" to this normative dimension in the sense that the climate seniors' communication not only refers to the state's responsibility for its elderly citizens, but also to the "altruistic motives"[80] of protecting younger generations through their activities.

Although the ECtHR considered the complaints of individual women as inadmissible, it accepted the complaint lodged by the association of "KlimaSeniorinnen" with reference to the Aarhus Convention.[81] The court found that the plaintiffs' rights of private and family life were violated due to Switzerland's insufficient climate policy and denial of access to legal justice.[82] In doing so, the court acknowledged a legal, human-rights based obligation of states to implement adequate climate mitigation policy.[83] However, against the background of Switzerland's special political culture of direct democracy – which stands at odds with the principle of a constitutional court endowed with judicial review as a counterweight to

ber 2020) <https://klimaseniorinnen.ch/wp-content/uploads/2020/10/Offener-Brief_def_logos.pdf> accessed 28 August 2025.

80 S. Keller and B. Bornemann, see n. 76, 124, 130; they call it the "injustice frame" and the "grandchildren frame".

81 T. Weber, 'KlimaSeniorinnen: Changing Legal Opportunity Structures in the Face of the Climate Crisis' (2024) *Austrian Law Journal*, 101.

82 ECtHR (European Court of Human Rights), 'Violations of the European Convention for failing to implement sufficient measures to combat climate change', Press release ECHR 087 (2024), <https://hudoc.echr.coe.int/eng-press#{%22kpdate%22:[%222023-12-07T00:00:00.0Z%22,%222024-12-07T00:00:00.0Z%22]}> accessed 28 August 2025.

83 S. Arntz and J. Krommendijk, 'Historic and Unprecedented Climate Justice in Strasbourg' (*Verfassungsblog*, 9 April 2024) <https://verfassungsblog.de/historic-and-unprecedented/> accessed 17 April 2025; A. Fuchs, 'Five key points from the groundbreaking European Court of Human Rights climate judgment in Verein KlimaSeniorinnen Schweiz v Switzerland' (2024) *Environmental Law Review*, 91.

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the democratic majority[84] – the implementation of the ECtHR ruling was followed by fierce political controversy. Moreover, some alleged that the ECtHR had overstepped the boundaries of the judiciary.[85] Nevertheless, these cases reveal the dynamics and political efficacy of ideational contestation in general and in a complex constellation in particular, the latter encompassing in turn the institutional parameters of a multi-level system, a simultaneity of various concurring legal orders and value sets, and a complex policy problem.

5. Conclusion and Outlook: Law as Narrative

Democratic systems have come under pressure worldwide. This applies in particular to the Member States of the European Union and the political system of the EU itself. In summary, this complex of challenges can be traced back to a range of factors and development trends. Among other things, of particular note are various transformations that are related, for example, to shifts in international relations and security issues, as witnessed not least in the Russian invasion of Ukraine, in digital technology – most recently artificial intelligence – and, as addressed in this contribution, to climatic and ecological changes. In addition to being part of, if not invoking transformation processes, they are also of an extraordinarily cross-border nature. In the democratic EU multi-level system based on the rule of law, complex approaches are needed in order to both regulate problems effectively and adequately and at the same time do justice to democratic norms and practices.

84 W. Linder and S. Mueller, *Swiss Democracy. Possible Solutions to Conflict in Multicultural Societies* (Palgrave Macmillan, 2021), 17–20; cf. also e.g. comparing different notions of sovereignty in democratic, rule-of-law systems, H. Abromeit, 'Volkssouveränität, Parlamentssouveränität, Verfassungssouveränität: Drei Realmodelle der Legitimation staatlichen Handelns' (1995) *Politische Vierteljahresschrift*, 49; and the seminal work by J. Ely. *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980); for a reconciliation of the democratic and – the even more challenging inter-/supranational – judicial review principles, see e.g. A. Føllesdal, 'Why International Human Rights Judicial Review Might Be Democratically Legitimate' (2007) *Scandinavian Studies in Law*, 371.

85 C. E. Blattner, 'Separation of Powers and KlimaSeniorinnen' in M. Bönnemann and M. A. Tigre (eds), *The Transformation of European Climate Litigation* (Verfassungsbooks, 2024), 125.

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In the context of democracies in transition, democratic innovations have spread in practice and received intensive attention in political science.[86] However, little attention seems to be paid to the law and the associated processes of law-making, implementation and interpretation in the specific context of democratic change. Yet this subject remains of enormous and elementary importance in democratic constitutional systems. This is because governance in modern democratic political systems is still largely exercised through legal processes, even in the context of transformation processes. In a democratic context, *law as a narrative* also seems to have significant potential here. Indeed, there is much reason to explore *law as a narrative* in a democratic context. In our article, we developed an analytical framework to capture elements of law as narrative in transformation discourses and applied it to the example of two cases of climate change litigation filed before European courts. We were able to reveal different references to *law as narrative* to tell a convincing story of the complex climate change dynamics as well as to gain legitimacy for policy solutions. The analytical framework conceived here, moreover, may thus be appropriate for application and transfer to cases of transformation processes in other policy areas, for one, but also for further conceptualisation of law *as a narrative to democracy* in terms of democratic theory, and in particular regard to repairing and maintaining democracy.[87]

In further research, democratic and democracy-maintaining or *repairing* narratives of law in the EU multi-level system need to be explored in different policy fields: which narratives of law with democracy-promoting, maintaining and sustaining references exist, and to what extent do they play a role in the political processes examined?

Accordingly, further research could examine whether, and if so, how *narrative communication* is decisive for the *legitimacy* of policy decisions in at least two dimensions:

1) *Democratic legitimacy*: to secure justification and legitimacy for European policies – which is especially significant for contested and affective policy areas such as Digitalisation Policy and Climate Action. Both policy fields display characteristics of a crisis mode (high pressure for

86 See S. Elstub and O. Escobar (eds), *Handbook of Democratic Innovation and Governance* (Edward Elgar, 2019) for a comprehensive example.

87 See, for example, J. Sonnicksen, 'Demokratische Reparatur. Zwischen Resilienz und Vulnerabilität von Demokratien aus institutionalistischer Perspektive' (2024) *INDES,* 160.

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change/action) given the technological development (Artificial Intelligence) and climate change (Climate Action). Both policy fields are connected to affective perceptions ranging from insecurities to existential fears related to the technological fast-track development and the unresolved strategy and implementation of cost-intensive climate action.

2) *To make sense of the world*: Narrative communication not only enables but requires policy actors to explain and justify the contested policy choices to shape the (normative) framework of political communities and, in the EU, European society. Artificial Intelligence and Climate Action cannot be addressed by the European Union alone, but the European community as well as Member States and their citizens can make a significant contribution to the perception and dealings with these global challenges.

The current transformation processes in the areas of climate change as well as digitalisation pose cross-border challenges that confront the territorially bound democratic political order. Accelerated social change, but also the embedding in the supranational legal system of the European Union, affect the territorially constituted democracy not only of the EU as whole but also of the Member States themselves, so that coping with complex transformation processes will be of decisive importance for the future of the democratic constitutional state. This emphasises the relevance to further study the use, potentials and risks that are associated with *law as a medium of politics* through the *narrative structure of law*.

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Sovereignty and Legitimacy: Contrasting Claims of EU Institutions with Member State Perspectives and Strategies

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Vertical and Horizontal Dynamics of Integration Through Law at the Member State Level

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Abstract

The EU's integration through law depends on member states' administrations implementing EU policies and complying with EU law. For their electorates, it is thereby hardly transparent which are EU requirements and which domestic policy decisions. The paper is interested in the dynamics, when integration through law is contentious and politicised. Why do member-state administrations follow EU rules against political domestic opposition, risking their political support for the sake of integration through law? There are vertical dynamics between the Commission, the European Court of Justice and Member States, as the former oversee implementation. But there are also horizontal dynamics as Member States are mutually dependent on their implementation of European legal requirements. Integration through law confronts member-state administrations with constraints and requirements partly challenging their legitimacy.

1. Introduction: Vertical and Horizontal Dynamics and Integration Processes

European integration relies on integration through law. Law that is set at the European level requires implementation in the Member States; it is via law that integration proceeds, also because the European level does neither have a large budget nor significant administrative capacity. But when implementing integration through law, Member States use their political le-

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gitimacy, we learn from *Scharpf*, towards the ends of European integration.[1] The EU depends for the implementation of EU policies on Member States.

But what happens, if this is contentious and politicised? Why do member-state administrations follow EU rules against domestic political opposition, risking their political support for the sake of integration through law? And given their dependence on compliance of the Member States, in how far do EU actors respond? Moreover, all Member States as member of the EU face interdependencies. They also have stakes in whether their fellow members comply with EU law or ignore integration through law, as integration deepens mutual interdependence and non-compliance imposes costs on others – as is the case if Member States exploit integration for beggar-thy-neighbour policies. In this paper, I am interested in the dynamics following from the dependence of integration through law on Member States' implementation of EU policies. These dynamics are first of all in the vertical relation between EU actors and the Member States. But there is also a horizontal dimension among Member States, where non-compliance imposes costs on others or where some may use the positive and negative externalities evolving from the common economic and political space to their own fortune.

In the following, I start by discussing the concept of integration through law, to then turn to the challenges Member States are being confronted with, when putting it to work. I differentiate between the dynamics in the vertical dimension between Member States and European actors, the Commission and the European Court of Justice, and the horizontal dimension, of Member States among themselves. Just as the Commission can initiate infringement procedures, so can Member States, but they rarely do, although they bear costs and benefits of their respective (non-)compliance. The Commission and the European Court of Justice, for their part, are ultimately dependent on Member States, and have no means to force them into action. We are thus faced with interesting endogenous tensions in the multi-level system.

1 F. W. Scharpf, 'Legitimacy in the Multilevel European Polity' (2009) 1 *European Political Science Review*, 173.

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2. Integrating Through Law

Integration through law is an influential concept in European integration studies, and one having several different dimensions.[2] The EU is lacking a strong central government, and therefore it relies on law as its major governance mechanism. This law needs to be subsequently implemented by Member States for this integration to materialise – when replacing national policies with policies that were agreed at the EU-level, Member States work towards European integration. But integration through law has yet another dimension. It also points at the importance of dynamic case law development of the European Court of Justice for integration. Because EU law was constitutionalised with the rulings declaring direct effect and supremacy in 1963/64, the development of EU law does not rely only on political processes.[3] The European Court of Justice can replace political decisions with its case law development, spelling out those requirements the Member States have to adhere to, without relying on previous political decisions.

These different dimensions of integration through law capture most aspects of European integration research. The lack of core-state powers with the need to largely govern through rules[4], the reach of dynamic case law development,[5] and the question of implementation.[6] But the dominance of integration through law is also an important backdrop to the politicisation

2 R. B. Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' (2017) 18 *German Law Journal*, 6; M. Cappelletti, M. Seccombe, and J. H. H. Weiler, *Integration Through Law. Europe and the American Federal Experience. Volume 1: Methods, Tools and Institutions* (De Gruyter, 1986).

3 J. H. H. Weiler, 'The Transformation of Europe' (1991) 100 *The Yale Law Journal*, 8.

4 P. Genschel and M. Jachtenfuchs (eds), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (Oxford University Press, 2014).

5 D.S. Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press, 2015); S. K. Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case Law* (Oxford University Press, 2018).

6 T. A. Börzel, *Why Compliance. The Politics of Law in the European Union* (Cornell University Press, 2021); R. D. Kelemen and T. Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' (2023) 75 *World Politics*, 4.

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of the integration process.[7] For a long time, integration through law kept the politicisation of integration low.

My focus in this paper is on the member-state level. The EU is a "government of governments".[8] The EU not only borrows Member States' administrations for the implementation of EU policies, it also borrows their legitimacy, *Scharpf* holds.[9] But why do member-state governments use their legitimacy to implement EU law, where it does not further their interests? Which are the dynamics when bringing integration through law to work at the member-state level? And how does the EU-level respond, given that it utterly depends on Member States' cooperation?

We can think of several aspects when analysing how Member States put to work integration through law. Whenever EU law results from the legislative process, and governments have agreed to it, we should assume their willingness to also implement EU rules. However, there are some caveats. When the underlying policy problem resembles a prisoner's dilemma in its problem structure, also those Member States that agree with the thrust of the policy have the incentive to defect. They are better off, if all the others implement, say, environmental measures, but they themselves free-ride. The risk of non-compliance is even larger with those Member States not having agreed to the EU legislation, or those having had a change in government in between.

It is thus not trivial that integration through law actually works. An additional aspect needs mentioning. EU laws, once agreed, are relatively difficult to change. EU policies have a significant status-quo-bias, so that costs arise from having policies that are difficult to be reformed. The saga of the working-time directive is a telling example.[10] But also the reform of the social-security coordination has not been possible since 2016.[11] Conflict rules on the responsible national system of social security were first enacted

7 L. Hooghe and G. Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) 39 *British Journal of Political Science*, 1.

8 F. W. Scharpf, see n. 1.

9 F. W. Scharpf, see n. 1, 181.

10 T. Nowak, 'The Working Time Directive and the European Court of Justice' (2008) 15 *Maastricht Journal of European and Comparative Law,* 447.

11 C. Grabbe, 'Free Movement and Access to Social Security in the EU: The Challenge of Exporting Unemployment Benefits' (2023) 25 *European Journal of Social Security,* 20.

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in regulations No. 3 and 4 in 1958, and have been periodically reformed.[12] Regulations 883/2004 and 987/2009 contain the current rules.

On the one hand, the EU's legislative process is demanding, as it needs a proposal by the European Commission and subsequent majorities in the Council and the European Parliament (EP). On the other hand, many EU policies create path-dependencies, as actors adapt and institutions are established in line with these policies. Because rules often have distributive effects, some actors will resist reform. If laws are clearly in need for reform, it becomes even more difficult to expect that Member States comply with them.

Successful implementation at the member-state level can therefore rely on the European Commission pursuing non-compliance with infringement procedures, or on litigants that address the courts and push for their rights under EU law, with member-state courts addressing the European Court of Justice potentially with preliminary reference procedures. Next to the vertical pressure on Member States from the Commission and/or the European Court of Justice, there could also be horizontal pressure from Member States towards other Member States, which mutually rely on their implementation for integration through law to succeed.

Putting integration through law to work successfully can be expected to be even more problematic, when this law roots in case law development rather than in political decisions. *Scharpf's* distinction between negative and positive integration is relevant here.[13] Where positive integration refers to common policies overcoming differences among Member States, negative integration creates markets via the lifting of national regulatory restrictions. However, negative integration via case law may be particularly demanding on national political legitimacy when being implemented. In this case, authorities have to refrain from using domestically available policy options, though these could realise domestic political preferences.

To sum up: Integration through law captures that law is the primary instrument for the European Union to pursue its integration efforts. Dynamic case law development of the European Court of Justice has supported integration through law throughout the EU's history. However, the EU relies on Member States' administrations for integration through law to

12 P. Pierson and S. Leibfried, 'Multitiered Institutions and the Making of Social Policy' in S. Leibfried and P. Pierson (eds), *European Social Policy Between Fragmentation and Integration* (The Brookings Institution, 1995).

13 F. W. Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press, 1999).

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work – and it not only borrows administrative capacity but also the greater political legitimacy of member-state governments. It is therefore not trivial for integration through law to work. We now turn to analysing the vertical and horizontal dynamics resulting from this dependence.

3. *The Implementation Dimension – Bringing Integration Through Law to Work in the Member States*

Being dependent on national administrations to implement its policies, the EU borrows member-state governments legitimacy towards their electorates. This introduces tensions. Drawing on the distinction between positive and negative integration, we can analytically differentiate dynamics that result for Member States in the vertical and horizontal dimensions.

Table 1: Vertical and horizontal dynamics among Member States (MS)

	Positive integration	Negative integration
Vertical dimension	Where MS were outvoted, they nevertheless have to comply with EU law. There are partly incentives to free-ride in implementation. Reform problems imply the need to implement outdated policies.	EU law constrains governments' policy options, e.g. free movement rules or non-discrimination on the basis of nationality
Horizontal dimension	Implementation can imply uneven costs among MS; also, free-riding imposes costs on others.	Regulatory competition results between MS as they lose the means to close their markets

Altogether, the table makes plausible that one should not necessarily expect integration through law to work smoothly at the member-state level. Why would Member States implement EU law that does not bring benefits or even impose costs? The European Commission, of course, has the means to bring pressure via infringement procedures to push Member States into compliance. However, the Commission can only risk a certain amount of conflict with the Member States – and as *Kelemen and Pavone* argue, it is increasingly abstaining from using this legal instrument, as it rather wants

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to push its policy agenda and wants to refrain from alienating Member States.[14]

In the following, I give examples for the four cells of the above table. This is not systematic evidence in any way. Integration through law can only function, if Member States are willing to implement EU law, but they need to do this at the expense of their own political legitimacy. Consequently, one needs to look for cases which are politically contentious, to see how actors cope in these instances.[15] The main thrust is to explore the dynamics integration through law faces at the level of the Member States.

3.1 The Vertical Dimension

In the vertical relationship between the EU and Member States, the implementation of jointly decided EU policies is particularly demanding, whenever Member State governments have not agreed to EU policies under qualified-majority rule.[16] Why should they use their legitimacy to enforce these rules against potential opposition in their country? But non-implementation need not be directly linked to opposition to the EU-policy's goals, it may also be due to the height of implementation costs. Thus, Germany still has not implemented the EU working-time directive (2003/88/EU) in many parts of the public sector.[17] Member States may see formerly agreed rules in need of reform and be therefore unwilling to implement them.

In addition to implementing positive integration, Member States have to abide by the constraints of negative integration. Next to realising the single market via the four freedoms and competition law, Member States may not discriminate based on nationality. This imposes particular challenges on democratically elected Member State governments. They were elected to realise certain policy goals, but these may no longer be legally feasible as a member of the EU. Though they are not part of the constituency, EU citizens may not be discriminated against – and this may even result in a reverse discrimination of nationals, whenever governments continue

14 R. D. Kelemen and T. Pavone, see n.6.

15 D. Beach and R. Pedersen, *Process-Tracing Methods: Foundations and Guidelines* (University of Michigan Press, 2013).

16 Strategic objections in the interest of blame avoidance are the exception.

17 D. Creutzberg, 'Stechuhr für alle? Nicht für Richter' *Frankfurter Allgemeine Zeitung* (Frankfurt 1 April 2023) <https://zeitung.faz.net/faz/wirtschaft/2023-04-01/aeb92371379d70f798079d02d70819ae/?GEPC=s5> accessed 17 January 2025.

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to enforce regulation domestically, while actors from other Member States benefit from their more favourable home rules.[18] *Scharpf* mentioned the case of German medical students in Austria; a saga that took long to resolve as the smaller Austria initially could not restrict the access of Germans to its universities.[19] Given increased inner-EU migration following rounds of Eastern accession, the general constraints governments face when aiming to restrict welfare benefits for EU citizens have been figuring high in attention. This is also because Brexit was so closely connected to this question.[20] I will first discuss the vertical relationship when it comes to implementing contentious EU law, and then turn to the compliance with case law constraints.

3.1.1 Implementing Agreed Secondary Law

In the literature on Member States' compliance with EU law are different positions in the literature – some regard the Commission as turning a blind eye to non-implementation, and others regard the small number of infringement cases as a sign of compliance.[21] In the following, I start with the example of the services directive (2006/123), which was an unusual contentious piece of legislation.[22] It demonstrates how the EU pressure on national legitimacy is being mediated – this is done giving actors time to adapt, as implementation partly takes very long. This allows integration through law to work, even if its demands are contentious.

Take the granting of Italian beach concessions. They have been under pressure for long to be awarded under transparent procedures for a limited period, as demanded by the services directive and the freedom to provide

18 E. Ambrosini, 'Reverse Discrimination in EU Law: An Internal Market Perspective' in L. S. Rossi and F. Casolari (eds), *The Principle of Equality in EU Law* (Springer International Publishing, 2017); M. van den Brink, 'A Typology of Reverse Discrimination in EU Citizenship Law' (2023) 2 *European Law Open*, 57.

19 F. W. Scharpf, see n. 1.

20 S. K. Schmidt, 'No Match Made in Heaven: Parliamentary Sovereignty, EU Over-constitutionalization and Brexit' (2020) 27 *Journal of European Public Policy*, 779.

21 T. A. Börzel, see n. 6; R. D. Kelemen and T. Pavone, see n. 6.

22 A. Crespy and K. Gajewska, 'New Parliament, New Cleavages after the Eastern Enlargement? The Conflict over the Services Directive as an Opposition between the Liberals and the Regulators' (2010) 48 *Journal of Common Market Studies*, 5; M. D. Jensen and P. Nedergaaed, 'From "Frankenstein" to "Toothless Vampire"? Explaining the Watering Down of the Services Directive' (2012) 19 *Journal of European Public Policy*, 6; K. Nicolaïdis and S. K. Schmidt, 'Mutual Recognition "on Trial": the Long Road to Services Liberalization' (2007) 14 *Journal of European Public Policy*, 5.

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services. However, typically, this is a family business where concessions are passed on from one generation to the next. Several Court rulings have dealt with the question, such as infringement procedures initiated by the Commission C-458/14 and C-67/15 as well as the recent preliminary ruling C-348/22. The European Parliament commissioned a study in 2017 as to the unresolved issue.[23] Finally, in 2024 it appeared that the granting of concessions would be restructured as of 2025, also under the pressure of an Italian association Mare Libero, domestically organising protests against the privatisation of Italian beaches through these concessions.[24]

Another example comes from Germany and concerns the prohibition of third-party ownership for law firms. Again, this is an issue for the freedom to provide services and the services directive, but also the freedom of establishment and free movement of capital. A preliminary reference decided in late 2024 (C-295/23) was the result of a 'constructed' case, where an Austrian investor bought a German law firm, both parties being personal friends, with the intention to start litigation aiming to abolish the German prohibition.[25] The Federal Ministry of Justice under a liberal Minister, *Marco Buschmann*, certainly promised favourable scope conditions. But the Federal Bar Association was strictly opposed to the move, arguing that the prohibition of third-party-investors protects the professional spirit of lawyers, and that the proportionality test allows for such restrictions; it is used to assess the reach of the fundamental freedoms and also relevant under the services directive.[26] While the Advocate General in his opinion clearly argued for a violation of EU law, the Grand Chamber let the restrictions pass under the general interest exception of the fundamental freedom.

23 Policy Department C Citizens' Rights and Constitutional Affairs, 'Italian state beach concessions and Directive 2006/123/EC, in the European context. Study for the PETI Committee' (PE 596 809, European Parliament 2017) <www.europarl.europa.eu/RegData/etudes/STUD/2017/596809/IPOLSTU(2017)596809_EN.pdf> accessed 17 January 2025.

24 AP, 'Beach Wars: Are EU and Italy close to resolving beach concession feud?' (*euronews* 23 August 2024) <www.euronews.com/business/2024/08/23/beach-wars-are-eu-and-italy-close-to-resolving-beach-concession-feud> accessed 17 January 2025.

25 M. Kudermann, 'Die Finanzialisierung der Anwälte' (*Jacobin* 26 August 2024) <https://jacobin.de/artikel/fremdbesitzverbot-marco-buschmann-eugh> accessed 17 January 2025.

26 Bundesrechtsanwaltskammer, 'Stellungnahme gegenüber dem BMJ zum EuGH-Vorlageverfahren AGH München, Beschluss vom 20. April 2023 – BayAGH III – 4 – 2021' (Stellungnahme Nr. 41 July 2023) <www.brak.de/fileadmin/05_zur_rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2023/stellungnahme-der-brak-2023-41.pdf> accessed 17 January 2025.

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Different to the case of the Italian beaches it appears that notable domestic support for this liberalisation has not built up sufficiently, though legal tech companies and insurers would very much welcome a liberalisation of the legal professional code in Germany. For the time being, therefore, the German law profession can continue with its traditional restrictions- with likely repercussions on other German professions.[27]

We now turn to an example of compliance difficulties, where Member States violate existing secondary law that they feel is no longer adequate.

The indexation of child benefits has become a politically salient issue with much more significant intra-EU mobility after Eastern enlargement – and the greater differences in cost-of-living among Member States. Social security systems remain national and are not harmonised. Coordination rules determine whether the country of work or of habitual residence is responsible for social security. According to Article 67 of regulation 883/2004, the country of work is responsible for the benefits also of family member living in other Member States.

Motivated by the concessions the European Commission had granted the United Kingdom prior to the Brexit vote, Austria introduced the indexation of child benefits in 2019. The United Kingdom had gotten the right to indexation under its renegotiation terms. Austria wanted to cut back on subsidies from social benefits for migrants from Eastern Europe, though indexation meant that child benefits for children living for instance in Scandinavia would need to be higher.

Blauberger et al. criticise the indexation policy, given its high administrative costs, as showing that even the free movement of labour is no longer taken for granted in the EU, because governments bow to pressure of politicisation from right-wing populists.[28] In fact, the actual costs of exporting child benefit are only high in small countries such as Luxembourg. In Germany, merely 1% of all benefits goes to children living abroad.[29] The Commission initiated an infringement procedure against Austria. The

27 'Luxemburg verwehrt Investoren den Zugang zu Anwaltskanzleien' *Frankfurter Allgemeine Zeitung* (Frankfurt 20 December 2024) 23.

28 M. Blauberger, A. Heindlmaier and C. Kobler, 'Free Movement of Workers under Challenge: The Indexation of Family Benefits' (2020) 18 *Comparative European Politics*, 925.

29 'Arbeitsagentur überweist rund halbe Milliarde Euro an Kindergeld ins Ausland' *WELT* (Berlin 27 December 2024) <www.welt.de/politik/deutschland/article254977550/Kindergeld-Rund-500-Millionen-Euro-fliessen-ins-Ausland.html> accessed 17 January 2025.

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European Court of Justice ruled in June 2022 (C-328/20) the indexation to violate the social security coordination as well as the prohibition to discriminate according to nationality, bringing the end to Austrian indexation. The case shows how the EU is divided by the issue – the Commission was supported by Czech, Croatian, Polish, Slovenian, Slovak governments, and the EFTA surveillance authority, while Austria was supported by Denmark and Norway.

Different to *Blauberger et al.*, *Ruhs* and *Palme* argue against the exportability of child benefits, supporting a change from linking the benefit to the employment status to shifting it to habitual residence. They see a strong normative claim that states offer the same benefits to all children residing in their country, and explain the politicisation of the export of child benefits with the unfairness of the EU's approach.[30]

Despite the ruling of the European Court of Justice, indexation is still a relevant issue, showing that integration through law reaches limits here. Bavaria offers social benefits for families with children, which are lowered if children live in a Member State with lower cost-of-living expenses. The Commission has threatened to initiate an infringement procedure during 2024. Italy also introduced benefits for families with children, but eligibility depends on a two-year residence in Italy, where children also have to live.[31]

Germany had also responded to poverty migration in 2019 by restricting access to child benefits in the first three months of residence for EU citizens with no employment. But the European Court of Justice ruled in 2022 (C-411/20) that this is not possible under EU law, also because returning Germans are not banned from benefits.[32] Child benefits can support exploitative relations, as they are the only benefit, economically inactive EU

30 M. Ruhs and J. Palme, 'Free Movement and European Welfare States: Why Child Benefits for EU Workers Should Not Be Exportable' in N. N. Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press, 2023).

31 M. Wolf, 'Familiengeld in Bayern ungerecht? EU-Kommission droht mit Klage' *BR24* (Munich 25 July 2024) <www.br.de/nachrichten/deutschland-welt/familiengeld-in-bayern-ungerecht-eu-kommission-droht-mit-klage,UJYwjXa> accessed 17 January 2025.

32 K. Gelinsky, 'Kindergeldsperre für Ausländer ist EU-rechtswidrig' *Frankfurter Allgemeine Zeitung* (Frankfurt 1 August 2022) <www.faz.net/aktuell/wirtschaft/kindergeld-sperre-fuer-auslaender-ist-eu-rechtswidrig-18214351.html?GEPC=s5> accessed 17 January 2025; N. Bugaj-Wolfram, 'EuGH: Kindergeldsperre für erwerbslose EU-Bürger*innen in den ersten drei Monaten ist rechtswidrig' (*Der Paritätische Gesamtverband*, 8 August 2022) <www.der-paritaetische.de/alle-meldungen/eugh-ki

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citizens can have immediate access to, once taking habitual residence in Germany. After the accession of Bulgaria and Romania had broadened the socio-economic divide in the EU substantially, some German municipalities faced the problem of poverty migration.[33]

In these examples, vertical pressure relates to existing secondary law. We proceed to discussing pressure arising from case law constraints.

3.1.2 Complying with Case Law Constraints

Already the implementation of the services directive shows that EU liberalisation does not come with a bang but as a slow process. In it, typically, groups of domestic actors form and start supporting the change. Whether obligations are mediated via secondary law (like with the services directive), or directly stem from the Treaty (to which we now turn), protracted implementation may allow for incremental adaptations that are more easily legitimated. Seikel already showed with view to the different impact of the infamous Laval ruling in Sweden and Denmark, how in Sweden construction business went for confrontation with the unions, while in Denmark the consensus between employers and unions could be stabilised.[34]

But when rulings imply higher costs, it remains difficult to follow the demands of integration through law. Similar to the case of German medical students in Austria, the European Court of Justice opened the non-means tested and generous Danish study grants to some EU students in 2013 (C-46/12) – if they qualify, for instance, via an EU worker status, thereby falling under the prohibition to discriminate along national lines.[35] The free movement of workers applies under a low threshold. In *Genc* (C-14/09), the European Court of Justice even argued that working five hours per week suffices. Denmark requires working 10–12 hours weekly. Thanks to a highly digitised administration, study grants are given and withdrawn according

ndergeldsperre-fuer-erwerbslose-eu-buergerinnen-in-den-ersten-drei-monaten-ist-rechtswidrig/> accessed 17 January 2025.

33 S. K. Schmidt, 'Ein Kampf der Staatsgewalten? Die schwierige soziale Absicherung des europäischen Freizügigkeitsregimes' (2019) 65 *Zeitschrift für Sozialreform*, 29.

34 D. Seikel, 'Class Struggle in the Shadow of Luxembourg. The Domestic Impact of the European Court of Justice's Case Law on the Regulation of Working Conditions' (2015) 22 *Journal of European Public Policy*, 1166.

35 D. Kramer, J.S. Thierry and F. van Hooren, 'Responding to Free Movement: Quarantining Mobile Union Citizens in European Welfare States' (2018) 25 *Journal of European Public Policy*, 1501.

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to sufficient employment. Nevertheless, Denmark in 2021 decided to cut down on its degree programmes in English language, as the expenses for international students surpassed the threshold set in a political agreement in response to the European Court of Justice ruling.[36] English language degree-courses were only in the national interest if foreign students are likely to stay and work in Denmark.[37] While the extensive non-discrimination jurisprudence of the European Court of Justice aims to overcome borders, this initial Danish reaction – enabled by the non-widely spoken national language – actually enforced these borders.

Scharpf argued that by opening up benefit schemes based on non-discrimination, the European Court of Justice may undermine the financing of support: "By replacing the reciprocal link between entitlements and contributions with the assertion of unilateral individual rights, the Court may seem generous. But its generosity ignores the club-good character of most of the benefits and services provided by the solidaristic nation state".[38]

For Member States, it has been particularly contentious to give economically inactive EU citizens access to non-contributory social benefits in the 2010s.[39] Legally, the extent of rights was unclear – and we are dealing here with a mixture of Treaty interpretation and secondary law. The citizenship directive of 2004, agreed on at the eve of Eastern enlargement, in fact had granted this right only after five years of legal residence with own financial means and a health insurance. But the coordination regulation for social security (883/2004) that was reformed at the exact time, implied that the

36 Ministry of Higher Education and Science Denmark, 'A new political agreement limits SU spending on foreign students from the EU' (*ufm.dk*, 5 July 2021) <https://ufm.dk/en/newsroom/press-releases/2021/a-new-political-agreement-limits-su-spending-on-foreign-students-from-the-eu> accessed 17 January 2025.

37 J. P. Myklebust, 'New reforms include bid to attract international students' (*University World News*, 11 March 2023) <www.universityworldnews.com/post.php?story=20230310131707 51> accessed 17 January 2025; The Local, "Crazy": Opposition parties hit out at Danish limits on international students' (*The Local DK*, 2 August 2023) <www.thelocal.dk/20230802/crazy-opposition-parties-hit-out-at-danish-limits-on-international-students> accessed 17 January 2025; ICEF monitor, 'Lessons from Denmark: The downside of limiting international student flows' (20 March 2024) <https://monitor.icef.com/2024/03/lessons-from-denmark-the-downside-of-limiting-international-student-flows/> accessed 17 January 2025.

38 F. W. Scharpf, see n. 1, 195.

39 M. Blauberger and S. K. Schmidt, 'Welfare Migration? Free Movement of EU Citizens and Access to Social Benefits' (2014) 1 *Research and Politics*, 1.

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country of habitual residence was responsible.[40] It took the European Court of Justice a decade to follow the citizenship directive and restrict the access to social benefits for economically inactive EU citizens. For quite some time, the EU citizenship and non-discrimination rules of the Treaty helped the Court to construct rights to equal treatment also for the economically inactive, thereby sidestepping the directive.[41] The citizenship jurisprudence of the European Court of Justice is a very telling example of the way integration through law works – with the Court extending the rights beyond the political consensus.[42] But in 2014, in view of the political contestation, the European Court of Justice stopped its hitherto line of ever expanding the non-discrimination of economically inactive EU citizens with the case of *Dano* (C-333/13).

The underlying problem is as complex as the rules. With many Member States not offering their citizens the security of basic social benefits, the immediate opening is linked to fears of substantial poverty migration. It may be good to remember that also in federal states, the poor of one state often cannot count on immediate access to benefits outside of their normal place of residence.[43] Two issues are particularly relevant – poverty migration with its burden on public finances, public services and housing[44], and the subsidisation of low paid jobs, often inviting exploitation of the migrating working poor.

3.1.3 Coping with Vertical Dynamics

What kind of dynamics do we see, when it is politically contentious to put implementation through law to work at the member-state level, threatening

40 S. K. Schmidt, 'The Limits of Judicialising Transnational Welfare: Progression and Retrogression of the ECJ Case Law on Access to Social Benefits' in D. Kostakopoulou and D. Thym (eds), *Research Handbook on European Union Citizenship Law and Policy* (Edward Elgar, 2022).

41 M. van den Brink, *Legislative Authority and Interpretation: Political Judgment in European Union Law* (Oxford University Press, 2024).

42 M. Wind, 'Post-national Citizenship in Europe: the EU as a "Welfare Rights Generator"?' (2009) 15 *Columbia Journal of European Law*, 2.

43 W. Maas, 'Boundaries of Political Community in Europe, the US, and Canada' (2017) 39 *Journal of European Integration*, 575.

44 HAMBURG Journal, 'Obdachlose in Hamburg: Lage laut Straßenmagazin teils "dramatisch"' *Norddeutscher Rundfunk* (Hamburg 4 November 2024) <www.ndr.de/nachrichten/hamburg/Obdachlose-in-Hamburg-Lage-laut-Strassenmagazin-teils-dramatisch,obdachlose578.html> accessed 17 January 2025.

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the legitimacy of national political actors? When regulatory change like liberalisation is the issue, a drawn-out implementation process mediates the pressure and facilitates integration through law.

When integration through law imposes costs, granting more time is no solution. There is significant national politicisation of the opening of social systems in response to larger intra-EU mobility. Underlying it is that courts grant rights to free movement and non-discrimination, although social-security systems are the result of political processes. The lack of political decision-making behind non-discrimination decisions makes them particularly vulnerable to politicisation and populism. This also explains the will of open non-compliance, which we saw with child benefit indexation. In Germany, the right-wing populist Alternative für Deutschland (AfD) thrives on parliamentary questions regarding the costs resulting from refugees or EU citizens requiring social benefits.[45] Given general EU support, the relevance of the problems is difficult to assess.

There are also instances of politicisation from other Member States, for example the Netherlands. There was a conflict particularly about Polish workers, using the portability of unemployment payments to live for some time in their home country, to come back to the Netherlands afterwards to take up new employment. Dutch unemployed, in contrast, are immediately activated in view of a good labour market.[46] The problem here is that unemployment insurance consists, on the one hand, of payments that are portable; but on the other hand, activation of the unemployed is just as much part of the unemployment insurance. This activation is much higher in the Netherlands, as Polish authorities have less of an incentive with benefits being paid from another country. The lower price level in Poland, at the same time, implies less de facto pressure to take up work again. The example of the opening of Danish study grants to EU students was already mentioned above.[47]

The extent of politicising vertical constraints of EU law appears dependent on the extent to which the respective government is willing to garner or prevent politicisation of the relationship. The examples of Denmark and the Netherlands show that it is hardly possible to assess the costs and benefits of unemployed EU citizens or opening students grants. Denmark checked to which extent graduates of international programmes worked in

45 See: BT Drs 19/754; BT Drs 19/9817; BT Drs 19/2473.
46 C. Grabbe, see n. 11.
47 D. Kramer, J.S. Thierry and F. van Hooren, see n. 35.

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the country after graduation. Regarding unemployment insurance, this is more difficult to do, as one would have to consider that in cases of longer crises migrant workers are more likely to move on than are members of the native population.[48]

Altogether, there are not many options open to governments, given vertical constraints of EU law. Open non-compliance as with the indexation of child benefits is unlikely to be successful, but rather fosters EU-scepticism. EU-friendly governments are likely to cover-up the cost, while EU sceptical governments will be prone to blow-up and exaggerate the constraints – and this implies that the way vertical constraints are being perceived is very volatile, depending on politicisation.

But we also see reactions at the EU-level, at the European Commission and also at the European Court of Justice. The pressure stemming from the EU is not invariant. After all, the EU's legitimacy suffers as well, should member-state governments come too much under pressure. Thus, the EU actors European Commission and European Court of Justice do not operate in a vacuum, they are dependent on the cooperation of actors from the Member States. As *Blauberger et al.* argued with view to the European Court of Justice and its about-turn in the question of the access of non-economically active EU citizens to social benefits, "judges read their morning papers"; in view of high politicisation, they slow down developing case law.[49] We saw this above with the cases of Italian beaches and the German restrictions on law firms. Similarly, the Commission may be more cautious regarding the constraints of EU law on Member States.[50] A further example may be its position towards the Danish ghetto policy. In order to reverse the development of segregated living quarters, Denmark enacted quite a radical housing policy in 2018, targeting residential areas with dominant non-Western tenants. In reaction to the displacement of particularly

48 Thus, in calculations as to the benefits of migration from Bulgaria and Romania the expectation that many will leave Germany after retirement is taken in as an advantage for the social-security systems. See: Carsten Wolf, 'Erfolgsgeschichte statt "Armutszuwanderung"' (*Mediendienst Integration*, 29 December 2021) <https://mediendienst-integration.de/artikel/erfolgsgeschichte-statt-armutszuwanderung.html> accessed 30 January 2025.

49 M. Blauberger, A. Heindlmaier, D. Kramer, D. Sindbjerg Martinsen, J. Sampson Theirry, A. Schenk, B. Werner, 'ECJ Judges Read the Morning Papers. Explaining the Turnaround of European Citizenship Jurisprudence' (2018) 25 *Journal of European Public Policy,* 1422.

50 R. D. Kelemen and T. Pavone, see n. 6.

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Muslim families from their neighbourhoods, a preliminary reference was handed to the European Court of Justice, with the hearing in autumn of 2024 (C-417/23). Residents of Mjølnerparken in Copenhagen had brought the legal action against their eviction from housing, arguing that it was racially discriminatory.[51] Interestingly, the Commission's legal service argued the policy to be only indirectly (and not directly) discriminatory, thereby leaving scope for justifying such a policy out of general interest considerations in a proportionality assessment.[52] It remains to be seen how the Court will judge this policy. The Advocate General, for her part, argued that the policy was directly discriminatory, implying that Denmark could not use this policy option.[53]

We can take from this discussion that the pressure *Scharpf* analysed from the tension between EU opening via non-discrimination and free movement, and Member States financing via national solidaristic systems has become less apparent in open financial constraints, but more in the domestic politicisation of migrants' access to the welfare state. How Member States react to vertical constraints as part of the multi-level system is volatile; EU-friendly governments are likely to downplay constraints, while more integration-sceptical actors may blow them up.

3.2 The Horizontal Dimension

Integration through law not only establishes obligations of Member States towards the EU-level, it also establishes them towards each other. The single market as well as other EU policies such as the Euro regime or home affairs deeply interconnect member states. Cooperation benefits and the

51 Open Society Justice Initiative, 'EU Top Court to Review Denmark's "Racially Discriminatory" "Ghetto Package"' (*Open Society Foundations*, 17 June 2024) <www.justiceinitiative.org/newsroom/eu-top-court-to-review-denmark-s-racially-discriminatory-ghetto-package> accessed 17 January 2025.

52 Europäischer Gerichtshof, 'Rechtssache C-417/23 Zusammenfassung des Vorabentscheidungsverfahrens gemäß Art. 98 Abs. 1 der Verfahrensordnung des Gerichtshofs' (6 July 2023) <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=276705&pageIndex=0&doclang=de&mode=req&dir=&occ=first&part=1&cid=2890091> accessed 17 January 2025.

53 Court of Justice of the European Union, 'AG Ćapeta: The Danish legislation on public housing in transformation areas constitutes direct discrimination based on an ethnic criterion. Advocate General's Opinion in Case C-417/23. PRESS RELEASE No 18/25' (13 February 2025) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2025-02/cp250018en.pdf> accessed 4 March 2025.

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avoidance of negative externalities require that Member States comply with their prior legislative commitments. However, if they had different policy preferences to begin with, why should they? Moreover, if the underlying problem structure resembles a prisoners' dilemma, non-implementation allows having the cake and eating it. Member States then free ride on the implementation efforts of others.

When harmonised regulations are agreed with positive integration, this can achieve positive externalities and avoid negative externalities. In fact, the same is true for negative integration. The broad interpretation of the fundamental freedoms as prohibition of restrictions avoids that Member States enact new trade barriers via regulation. Member States are forced to take into account repercussions on other Member States.[54] Similarly, the prohibition to discriminate on the basis of nationality assures equal treatment throughout the EU, while constraining Member States' policies – as the example of German medical students in Austria already showed. At the same time, harmonised common policies or the lifting of restrictions leads to spill-over in other policy fields. One example are open borders that facilitate trade but put pressure to enact a common asylum policy.

In the following, I focus first on Member States' mutual compliance with secondary law and then on problems driven by the integrated economic and political space, that invites regulatory competition and, possibly, beggar-thy-neighbour policies.

3.2.1 Member States' Reactions to Non-Compliance

Just as the Commission can push for compliance with the initiation of infringement procedures, Member States can initiate these against each other at the European Court of Justice. After all, they incur costs if other Member States defect and opt towards free-riding with implementation deficits. However, Member States hardly ever make use of their possibility to start infringement procedures against each other. Only six cases are known.[55] Although non-compliance directly concerns them, Member States rely on the Commission and the vertical relationship to enforce EU law.

54 C. Joerges, 'Deliberative Political Processes' Revisited: What Have we Learnt About the Legitimacy of Supranational Decision-Making' (2006) 44 *Journal of Common Market Studies*, 779.

55 Case C-141/78 *France v. UK* [1997] CJEU; Case C-388/95 *Belgium v. Spain* [2000] CJEU; Case C-145/04 *Spain v. UK* [2006] CJEU; Case C-364/10 *Hungary v. Slovakia*

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This relaxes the horizontal dynamics of interference between Member States.

Interestingly, in Justice and Home Affairs, we are confronted with horizontal dynamics that we do not see in other areas of insufficient compliance with EU law. There are many decisions of domestic courts objecting to the national administration following EU rules, thereby preventing that integration through law works. With regards to asylum, national courts take it upon themselves to control whether human rights standards are sufficiently honoured in other Member States, for instance concerning accommodation in refugee camps. Similar questions rise with the European Arrest Warrant regarding judicial procedures and prisons. Thus, despite the common policies of the Dublin accord, German courts have prohibited renditions to Greece and Bulgaria, given the dire conditions of accommodation there. The European Court of Justice allows this as a sign of systemic deficiency, lifting the duty to cooperate in mutual trust following from Article 2 TEU.[56] Insufficient compliance with EU law, leading to domestic court cases when individual rights are concerned, constitutes and strengthens mutual interest in previously purely domestic affairs. In the course of these growing horizontal externalities among Member States, the EU has strengthened its vertical grip on Member States. Just as happened in the Euro crisis regarding

[2012] CJEU; Case C-591/17 *Austria v. Germany* [2019] CJEU; Case C-457/18 *Slovenia v. Croatia* [2020] CJEU.

56 In German called „systemischer Mangel". Fundamental is C-411/10 N.S. regarding the transfer of refugees to Greece, in the suite of which MS ended the rendition to Greece on the basis of the Dublin regulations (see Recommendation of the Commission 2016/1117). See also C-163/17 regarding the transfer to Italy. Mutual trust is foregone if Article 4 of the Charter of Fundamental Rights regarding inhuman or degrading treatment is not safeguarded. Thus, the administrative court in Freiburg (04.02.2016, A 6 K 1356/14) refused sending back a refugee to Bulgaria; as did the administrative court of Oldenburg (01.07.2014, 12 B 1387/14). The administrative court in Munich did the same regarding sending back a refugee to Croatia (22.02.2024, M 10 K 23.50597) as well as to Cypris (15.12.2022, M 3 S 22.50694). The upper administrative court of North Rhine-Westphalia addressed a preliminary reference to the European Court of Justice regarding the announcement of the Italian administration in December 2022 to no longer accept renditions because of systemic deficiencies (14.02.2024, 11 A 1255/22.A). See: Legal Tribune Online, 'Keine Abschiebungen nach Griechenland' (24 November 2022) <www.lto.de/recht/nachrichten/n/ovg-saarland-2-a-81-22-abschiebungsverbot-griechenland-systemische-maengel/> accessed 17 January 2025. Regarding Hungary, there are contradictory assessments, which are summarised in Administrative court Würzburg 23.02.2017, where the court affirmed the rendition of a pregnant refugee. See: VG Würzburg, 'Beschluss vom 23.02.2017 – W 2 S 16.50198', <https://openjur.de/u/2282247.html> accessed 17 January 2025.

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Member States' spending regimes, national institutions related to the rule of law are increasingly subject to streamlining, implying a centralisation tendency.[57]

Different to Justice and Home Affairs raising questions of human rights, we do not see domestic courts act with view to other examples of non-compliance. This difference also exists with view to the attention of external border. While problems resulting from insufficient controls of external borders are widely discussed regarding asylum, there was surprisingly little attention when it became known that Bulgaria had failed for years to control agricultural goods entering from Turkey sufficiently with view to pesticides.[58]

Regarding Member States mutual interests in each others' implementation, it is also interesting to note that implementation demands may affect member-state administrations in an asymmetric way. Sometimes, national administrations enforce rules predominantly to the benefit of other Member States. Controlling borders are a case in point, but it may also be that exports in an area are more important than domestic consumption. In this case, it is not so much that their own population benefits from high standards of product safety, although they face the expenses for administrative controls. In such situations, either the costs of compliance or of non-compliance are being externalised. Other countries may benefit from these administrative controls or they pay for insufficiently controlled rules and companies.

That the enforcement of rules in one Member State is predominantly to the benefit of others, is, for instance, the case in transborder-services provision such as posting. Here, administrations enforce the preconditions of secondment, such as the remuneration of workers according to conditions in the host country to the benefit of these host countries. Thereby, they constrain competitive pressures, while foregoing their own competitive benefits.[59]

57 M. M. Manriquez and T. Pavone, 'Follow the Leader: the European Commission, the European Court of Justice, and the EU's Rule of Law Revolution' (2024) 32 *Journal of European Public Policy*, 444.

58 S. Nowotny, 'Pestizide: Warum die bulgarischen Grenzkontrollen fragwürdig sind' *Schweizer Radio und Fernsehen* (Zurich 1 June 2023) <www.srf.ch/news/international/fruechte-fuer-europa-pestizide-warum-die-bulgarischen-grenzkontrollen-fragwuerdig-sind> accessed 17 January 2025.

59 M. Blauberger and S. K. Schmidt, 'Negative Integration Is What States Make of It? Tackling Labour Exploitation in the German Meat Sector' (2023) 61 *Journal of Com-*

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3.2.2 Regulatory Competition in the Single Market

Regulatory competition as a result of the single market is probably the most widely discussed horizontal implication for Member States.[60] Wherever economic pre-conditions are not harmonised, like qualifications, energy costs, social security contributions, taxes (etc.), companies or individuals have incentives to settle in cheaper Member States. For instance, higher inheritance or wealth taxes may be very desirable for Member States but impossible to enact under conditions of open borders. In early 2023 Norway – a member of the European Economic Area – made headlines due to the high numbers of rich Norwegians settling in Switzerland after the government raised the wealth tax.[61] An extreme example of regulatory competition are corporate taxes in Ireland. In this context, Apple was ruled to being liable to pay €13 billion in taxes to the Irish government[62] – an extent of repayment, actually imposing problems to the Irish budget. That many examples for regulatory competition concern taxes points to an interesting aspect of regulatory competition – causes of asymmetry. In tax competition, this concerns the differences between small and large countries. Small Member States are particularly prone to benefit from tax competition, as the losses of lower taxation in the comparatively small tax base are much less relevant than the significant increases, if companies choose the country for their establishment.[63]

Not all asymmetries are as insurmountable as country size. Institutional and socio-economic differences as well as cultural preferences also cause asymmetric conditions. Thus, *Zöllmer* and *Grethe* analyse the difficulty pressure groups faced in Germany lobbying for higher standards on hus-

mon Market Studies, 917; N. Rennuy, 'Posting of Workers: Enforcement, Compliance, and Reform' (2020) 22 *European Journal of Social Security*, 212.

60 J-M. Sun and J. Pelkmans, 'Regulatory Competition in the Single Market' (1995) 33 *Journal of Common Market Studies*, 67.

61 D. Vonplon, '«Dass so viele Kunden aus einem Land in die Schweiz umziehen wollen, habe ich noch nie erlebt»' *Neue Züricher Zeitung* (Zurich 27 January 2023) <www.nzz.ch/schweiz/dass-so-viele-in-schweiz-umziehen-wollen-habe-ich-noch-nie-erlebt-ld.1721229> accessed 17 January 2025.

62 T. Hartmann, 'Top EU court orders Apple to pay €13 billion tax bill' *Euractiv* (Brussels 10 September 2024) <www.euractiv.com/section/competition/news/top-eu-court-orders-apple-to-pay-e13-billion-tax-bill/> accessed 17 January 2025.

63 V. H. Dehejia and P. Genschel, 'Tax Competition in the European Union' (1999) 27 *Politics and Society*, 403.

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bandry.[64] Though public opinion had favoured the introduction of stricter standards than the existing EU minimum harmonisation for years, the fear of seeing the national production of piglets decline due to the cost of better caring for sows, prevented action. Altogether, instances of regulatory competition set incentives for harmonisation in those Member States that are harmed by it – but others enjoying competitive advantages are unlikely to agree.

Because of the asymmetries among the Member States, some may also be lured into openly exploiting the interdependencies among each other. This is akin to the problem of tax competition. Such is the case with investment citizenship programmes, which some Member States have installed particularly in the course of the Euro crisis. Notably Malta, Cyprus and Bulgaria have to be mentioned here; in fact, most Member States offer at least residence by investment schemes. But notably Malta 'sells' its citizenship to rich Russians or other citizens of states with passports offering less privileges, demanding investment but hardly any residence in the country as a precondition.[65] Malta's citizenship, of course, would be of little worth, were it not for the EU citizenship being tied to it, with the freedom to move in all of the EU. Several law firms are active in this business, which extends also to countries such as the Caribbean islands that benefit from privileged access to Schengen visas. Law firms not only help their clients acquiring the passports, but also assist the states in 'vetting' the candidates, making for an attractive service business. The European Parliament first critically debated these practices as free-riding in 2014, calling repeatedly upon the Commission for action.[66] The Commission became active a few years later,

64 J. Zöllmer and H. Grethe, 'Enabling Free Movement but Restricting Domestic Policy Space? The Price of Mutual Recognition' (2024) 10 *European Policy Analysis*, 380.

65 Think Tank European Parliament, 'Aspects of golden passport and visa schemes in the EU. Briefing' (11 September 2024) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762395> accessed 4 March 2025.

66 Legislative Train Schedule European Parliament, 'Citizenship and residence by investment schemes. In "A New Push for European Democracy"' (*European Parliament*, 23 June 2022) <www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-citizenship-and-residence-by-investment-schemes?sid=6001> accessed 17 January 2025; Think Tank European Parliament, 'Avenues for EU action on citizenship and residence by investment schemes – European Added Value Assessment' (*European Parliament*, 21 October 2021) <www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2021)694217> accessed 17 January 2025.

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resulting in some reports.[67] The Russian war against Ukraine then not only halted the possibilities for Russians acquiring EU citizenship but also led the Commission to put in a higher gear and refer an infringement procedure against Malta to the European Court of Justice (C-181/23). Cyprus and Bulgaria had ended their practices under Commission pressure before.

The case is interesting not only because of the Commission attempting to end the outgrowth of the strengthening of individual liberal rights, it has done itself so much to foster. Alongside the European Parliament, it aims to morally refer to solidarity as the essence of EU citizenship that may not be up for sale. But it finds few legal backings in the Treaty for its argument, pointing mainly to EU citizenship of Article 20 TFEU and to the principle of sincere cooperation of Article 4.3 TFEU. Interestingly, Advocate General *Collins* in his opinion of August 2024 backed Malta.[68] The Commission, it seems, cannot get rid of the spirits it called.[69]

In selling their citizenship or residence, Malta or other countries clearly rely on exploiting the common European space, created through law. But there are also examples of very indirect externalities on neighbours stemming from seemingly purely domestic policy choices. Thus, a Czech minister complained about German social transfers like the high child benefits. Already German wages imposed high competitive pressure on his country, aiming to retain workers, added social benefits actually made it impossible to compete.[70] And recently, the Hungarian decision on facilitating visas for

67 European Commission, 'Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; Investor Citzenship and Residence Schemes in the European Union COM(2019)12 final' (*EUR-Lex*, 23 January 2019) <https://eur-lex.europa.eu/legal-content/DE/TXT/?uri=COM:2019:0012:FIN> accessed 17 January 2025.

68 S. Coutts, 'On mutual recognition and the possibilities of a "Single European Polity": The opinion of AG Collins in Case C- 181/23 Commission v Malta' (2024) 9 *European Papers*, 818; E. Fripp, 'Maltese "golden passports": Advocate General rejects European Commission claim of "genuine link" requirement for naturalisation' (*EJIL:Talk!*, 8 November 2024) <www.ejiltalk.org/maltese-golden-passports-advocate-general-rejects-european-commission-claim-of-genuine-link-requirement-for-naturalisation/#:~:text=On%2021%20March%202023%2C%20the,EU%2C%20could%20be%20created%20by> accessed 17 January 2025.

69 M. Höpner, 'Darf Malta seine Unionsbürgerschaft verhökern?' (2025) *Merkur*.

70 A. Zachová, 'Deutsche Sozialleistungen locken tschechische Arbeiter' *Euractiv* (Brussels 14 May 2018) <www.euractiv.de/section/soziales-europa/news/deutsche-sozialleistungen-locken-tschechische-arbeiter/> accessed 17 January 2025.

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Russia and Belarus led to criticism, as these persons can then go on to be posted, for instance, to other Member States.[71]

In addition, we can note here the recent complaints particularly from Sweden and Norway about ultra-high electricity prices in the EU, caused by Germany having to import record amounts of electricity in the winter of 2024, as a side-effect of its exit from nuclear power despite the Ukrainian war.[72] The decision about nuclear power had, however, been taken as a purely domestic one.

In sum, integration through law and the common economic and political space implies that regulatory decisions of Member States have repercussions on other Member States. These may be targeting the potential of regulatory competition and exploitation, or take external repercussions merely as an unintended consequence.

3.3 Perpetual Dynamics?

As we saw, vertical constraints on Member States can be mediated, so that the pressure on Member States legitimacy is less apparent than *Scharpf* expected in 2009. Since then, horizontal interdependencies have become rather important. Constraints appear to play out with the movement of persons than for other economic factors. The politicisation and rise of right-wing populism is one consequence. Member States increasingly rely on each other, and thereby have legitimate interest in domestic policy decisions, though it would hardly appear legitimate were they to intervene on decisions such as the end of nuclear power or the height of social transfers. Yet, in the conflict about 'Golden Passports', there is an interesting void as to the reactions of other Member States – though this is a case of open free-riding, the discussion among the other Member States is notably absent. It is not politicised by or in other Member States that citizenship for sale implicitly relies on the membership of their countries in the EU citizenship space.

71 A. Brzozowski, 'Ungarn bleibt stur: Einreiseerleichterungen für Russen und Belarussen' *Euractiv* (Brussels 20 August 2024) <www.euractiv.de/section/eu-aussenpolitik/news/ungarn-bleibt-stur-einreiseerleichterungen-fuer-russen-und-belarussen/> accessed 17 January 2025.

72 M. S. Wolf, 'Deutsche Energiepolitik in der Kritik: Schweden und Norwegen beklagen hohe Strompreise' *Merkur* (Stuttgart 15 December 2024), <www.merkur.de/wirtschaft/deutsche-energiepolitik-in-der-kritik-schweden-und-norwegen-beklagen-hohe-strompreise-zr-93466919.html> accessed 17 January 2025.

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This differs in the case of asylum, as it did in the case of the Euro crisis. In the latter, setting-up strict conditionality rules strengthened the vertical grip on Member States.[73] Regarding asylum, we saw that declined human-rights standards lead domestic courts to stop renditions. Rule of law deficits, particularly in Hungary, moreover, raise concern that the different redistributive funds of the EU serve to stabilise authoritarian leaders.[74] While negative externalities of authoritarian changes in Member States are most apparent in questions of Justice and Home Affairs, declining rule of law standards also matter in general, by undermining mutual trust in law abidance. As a consequence, particularly rulings of the European Court of Justice, often triggered by preliminary references, have tightened the vertical grip on rule-of-law questions, leading to a judicially grounded definition of polity requirements.[75] Needless to say, such a revolution from above raises important issues of legitimacy as there is no 'standard' way of the separation of powers and the institutionalisation of judicial independence.[76]

4. Conclusion

Integration through law can only be successful in the EU, if Member States implement policies and comply. Several dynamics result from this need. In the vertical dimension, the EU imposes constraints that can be costly for the legitimacy of Member States governments as political options are taken away. Governments can cover-up and downplay these constraints, or blow them up and exaggerate. This implies that the support for the EU risks being subject to significant volatilities. While support may appear secured, also due to the pro-EU bias of governments compared to their electorate[77], EU sceptical parties may suddenly succeed with their exaggeration of constraints.

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73 F. W. Scharpf, 'Forced Structural Convergence in the Eurozone' in A. Hassel and B. Palier (eds), *Growth and Welfare in Advanced Capitalist Economies How Have Growth Regimes Evolved?* (Oxford University Press, 2021).

74 R. D. Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 *Journal of European Public Policy*, 481.

75 M. M. Manriquez and T. Pavone, see n. 57.

76 M. Nettesheim, 'Europäische Werte und mitgliedsstaatliche Verfassungsautonomie – über einen Machtkampf in der EU' in F. Michl and T. P. Holterhus (eds), *Die schwache Gewalt? Zur Behauptung judikativer Autorität* (Mohr Siebeck, 2022).

77 H. Döring and P. Manow, 'Electoral and Mechanical Causes for Divided Government in the European Union' (2008) 41 *Comparative Political Studies*, 1349.

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But Member States depend also on each other's implementation, when agreeing on common policies. Partly, this interdependence is asymmetric – Member States incur implementation costs less for their own, but more to the benefit of other Member States. In addition, with integration progressing partly purely domestic policy decisions have externalities on other Member States. And, moreover, Member States may actively exploit asymmetries, such as with investment citizenship programs.

Member States have been surprisingly lenient with each other when it comes to not honouring promises and commitments stemming from EU law. They rely on the Commission. However, when it comes to EU laws concerning human rights, it is national courts that have stepped in, hindering national administrations in the rendition of refugees, for instance. In single market issues, despite problems, Member States hardly litigate each other, preferring diplomatic principles. Domestic courts, neither, bar products from another Member State because of, say, problems in the control of the implementation of product safety laws.

We therefore come full circle, as the exploitation of interdependencies of individual Member States via beggar-thy-neighbour policies strengthens the mandate of the supranational level to intervene. After it has been well-established in the case of single-market policies, also rule-of-law questions are increasingly judicialised to support supranational intervention, often with measures of conditionality involving EU funds.[78] With integration through law becoming important for the rule of law, Member States' institutional and political heterogeneity is under pressure. The dynamics in this polity dimension stemming from the implementation of EU policies thereby underline the difficulty of the EU to allow for legitimate diversity.[79]

78 A. Hoxhaj, 'The CJEU Validates In C-156/21 and C-157/21 The Rule of Law Conditionality Regulation Regime to Protect the EU Budget' (2022) 5 *Nordic Journal of European Law*, 131.

79 F. W. Scharpf, 'Legitimate Diversity: the New Challenge of European Integration' (2003) 1 *Zeitschrift für Staats- und Europawissenschaften*, 32.

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Regulation for Governance: The Commission's Response to Member States' Demands

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Abstract

This paper first sets out the channels of influence that stakeholders and Member States as well as the European Parliament in particular, can use in order to provide input to the Commission as it sets its policy agenda, decides its work programme and shapes its concrete policy and legislative initiatives. It then reports, by way of two case-study examples, on the interaction that has taken place between the Member States and the Commission in specific policy areas closely connected to sovereignty claims made by the Member States, namely asylum and migration, including Schengen, on the one hand, and travel restrictions during the COVID pandemic on the other hand. The examples suggest that the paradigm of *positive integration* has gained greater weight in recent times, that policy areas marked by national sovereignty claims are closely interconnected with the core EU objective of free movement of persons, and that there are ever stronger horizontal interdependencies between Member States. Finally, some factors are identified that prove essential for the resilience of the EU legal order in the current times of crises.

1. Introduction: Regulation for Governance

The topic of this article could in principle give rise to discussing a wide range of issues. Bearing in mind that this impulse is one of three introducing a broader, multi-disciplinary discussion on *Sovereignty and Legitimacy vs. Commission and Court of Justice*, this paper describes how, in practice, the Commission is listening and responding to policy demands and expec-

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tations formulated by Member States, as it develops its policy and legislative proposals in certain areas particularly close to traditional notions of national sovereignty. Thus, this impulse will not look at how national positions that Member States claim to be linked to their sovereignty have been considered in the case law of the Court of Justice, nor in the Commission's pleading in cases before the Court.

This paper comprises two parts:

A first section sets out, in a more general overview, channels of influence that stakeholders in general and Member States as well as the European Parliament in particular, can use in order to provide input to the Commission as it sets its policy agenda, decides its multiannual and annual work programme (thereby also initiating the Union's programme, see Article 17 (1) TEU) and shapes its concrete policy and legislative initiatives.

A second section will report, by way of case-study examples, on the interaction that has taken place between the Member States and the Commission in two specific policy areas closely connected to sovereignty claims made by the Member States, namely asylum and migration on the one hand and travel restrictions during the COVID pandemic on the other. We are deliberately using the term "sovereignty claim" for both areas. Indeed, both these areas are not at all characterised by an *absence* of Union competence; on the contrary the Commission has been able to rely on clear legal bases under the Treaties. Still, both areas are marked by an interplay between EU competences and strong aspects of national responsibility.

2. Channels for Input to the Commission's Legislative Work Programme

It should first be recalled that, contrary to how the EU's political process is sometimes misleadingly portrayed, while the Commission disposes of a monopoly of initiative under the Treaties, in setting its (multi)annual agenda and preparing its concrete initiatives, this political institution does not put forward ideas conceived by some isolated bureaucrats working in a vacuum in Brussels. On the contrary, the Commission's policy initiatives and proposals are the result of an elaborate process, in which all relevant stakeholders provide input under modern standards of better law-making surpassing those existing in most democracies at national level.[1] In reality,

1 For an up-to-date overview, see the Commission's communication "Better regulation: joining forces to make better laws" of 29 April 2021, COM(2021) 219 final. Under

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in most cases the Commission takes up regulatory needs only once it is clear that they are being carried by strong political forces across Europe, so that its proposals have a realistic chance of being adopted by the EU's co-legislator. In this context, the voices of Member States and of the European Parliament (as a whole or of its political groups) quite obviously carry special weight. That is also in keeping with the principle of representative democracy (Article 10 (2) TEU). This is why in this section, we will now focus on input channels that Member States are using, also in comparison with those at the disposal of the European Parliament.

A first, formal set of rules on interinstitutional cooperation on setting the EU's multiannual and annual agenda has, since 2016, been agreed in the Interinstitutional Agreement on Better Law-Making, implementing Article 17 (1) TEU as introduced by the Lisbon Treaty.[2] These rules are the first to be considered in terms of channels of influence for the Member States (through the Council) and the Parliament.

As regards the multiannual level, the Interinstitutional Agreement is relatively rudimentary and only addresses what happens *following* the appointment of a new Commission, where the three institutions will exchange views on their principal policy objectives and priorities for the new term and may as appropriate draw up joint conclusions.[3] This, in itself, is far from telling the full story. At the latest since *José Manuel Barroso's* second election in 2009, the Commission's – and in a sense the EU's – central multiannual policy strategy document has been the 'Political Guidelines' which the new candidate for Commission President, once nominated by the European Council, has issued before, and in view of, his/her election by the European Parliament. In establishing these Political Guidelines, the candidate needs, on the one hand, to take due account of policy demands and expectations made to him/her by the European Council and by individual Member States at Head of State or Government level. The European Council has developed the practice of adopting, every five years "in the context of the European elections and ahead of appointment of the new

previous mandates, the Commission had already paid attention to better law-making standards and procedures, see, e.g., the communications "Better regulation for growth and jobs in the European Union" of 2005 (COM(2005) 97), and "Better Regulation: Delivering better results for a stronger Union" of 2016, COM(2016) 615.

2 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, OJ L 123, 12.5.2016, 1–14.

3 See point 5 of the Interinstitutional Agreement.

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Commission", a "Strategic Agenda" for the EU.[4] This document is, in practice, adopted at the June European Council meeting, a moment normally coinciding with the proposal of a candidate of Commission President, and while of undeniable importance it is nonetheless much more abstract than the 'Political Guidelines' of the designated Commission President. During the process of election of President *Ursula von der Leyen* in 2019 and again in 2024, her Political Guidelines had been strongly informed by her intense consultations with the various political groups in the European Parliament that took place before the election.[5] It is hence fair to say that the Political Guidelines are a moment offering a particularly strong channel of influence exercised from the Parliament on the Commission's five-year agenda.

When it comes to the Commission's annual work programme, input to be provided by the Parliament and the Council, and interaction with them, is now governed in some detail in points 6 to 8 of the Interinstitutional Agreement. These provisions set up an elaborate annual process for interinstitutional dialogue. In practice, a key moment triggering each year this process is the 'State of the Union' address which the Commission President delivers in the European Parliament Plenary in mid-September.[6] There he/she announces his/her political priorities for the year ahead, and these are, more operationally, detailed in a 'letter of intent' which the President, together with the Commissioner in charge of interinstitutional relations sends to the Parliament and the Council at the same time.

On this basis, still in September or in early October the President meets the European Parliament's Conference of Presidents. The Commission also takes into account the views of the European Parliament's Conference of Committee Chairs; it hears the views of the European Economic and Social Committee and the Committee of the Regions, and in mid-October it adopts its annual work programme and presents it in the European Parliament and to the other institutional partners. On the basis of that work programme, the Commission, the European Parliament and the Council

4 European Council, *Strategic Agenda 2024–2029* (2024) <https://www.consilium.europa.eu/en/european-council/strategic-agenda-2024-2029/> accessed 11 February 2025.

5 European Commission, *Europe's Choice – Political Guidelines for the next European Commission 2024–2029* (18 July 2024) <https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ff-b2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf> accessed 11 February 2025.

6 The first State of the Union address was delivered by *José Manuel Barroso* in September 2010.

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establish a Joint Declaration on the EU legislative priorities[7], usually in mid-December.

But how can the various actors, and in particular the political forces in Parliament and the Member States, influence the political priorities which the Commission President unveils in his/her annual State of the Union Address? Obviously, parliamentarians on the one hand and Member States on the other hand use manifold occasions to get their demands across the individual Commissioner responsible for a policy area and who attend Parliament Committee meetings or meetings of the various Council formations, be it orally or through letters addressed to Commissioners or the President him/herself. Such letters carry special weight when they are signed on behalf of an entire political group in the Parliament or by several Member States – the larger the group the stronger the message. Moreover, for Member States in particular, a channel of influence not to be underrated lies in the many experts of "comitology" committees in which, on a daily basis, officials from the national ministries meet senior Commission officials. All this input provided to the Commission informs also the President's own deliberations ahead of each State of the Union address.

One channel of input for Member States' demands of highest importance that has steadily grown in importance are the meetings of the European Council, of which the Commission President is him/herself a member. The European Council has, since the Lisbon Treaty, held regular formal meetings at least four times a year, plus at least two informal meetings. But in reality it has met much more often, not least due to the multiple crises the Union has had to handle. The European Council conclusions regularly formulate the Member States' most important expectations towards the Commission as regards policy assessments or initiatives to bring forward, often with a concrete timetable. Moreover, in the margins of a European Council meeting, the Commission President has many bilateral meetings with his/her peers, the Heads of State or Government, where these can express their wishes for, or their reservations against, envisaged Commission action. As we will see below in the context of migration, the Commission President has recently adopted a practice of addressing formal letters to the European Council ahead of the latter's meetings.

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7 European Commission, *The Joint Priorities of the EU Institutions for 2021–2024* (2024) <https://commission.europa.eu/strategy-and-policy/joint-priorities-eu-institutions-2021-2024_en> accessed 11 February 2025.

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Finally, one should not forget one formal right, given by the Treaties both to the European Parliament and the Council in Articles 225 and 241 TFEU respectively, to request the Commission to submit a proposal. These requests are not binding, given the Commission's monopoly of initiative. However, in relation to the European Parliament, in 2019 President *von der Leyen* made the political pledge to respond to every resolution adopted by the European Parliament pursuant to Article 225 TFEU in principle with a legislative act, qualifying however her commitment in the sense that the Commission will do so in full respect of the proportionality, subsidiarity and better law making principles.[8] This further reinforced the commitments already contained in the Framework Agreement between the European Parliament and the Commission of 2010.[9] Interestingly, the Parliament makes much more frequent use of this Treaty right to request a Commission proposal than the Council, whose formal requests pursuant to Article 241 TFEU have remained very rare, even though only a simple majority in the Council suffices to adopt such a request.[10] Apparently, Member States find the various other channels at their disposal, not least via the European Council, more efficient to present the Commission with their demands.

8 European Commission, *Political Guidelines for the Next Commission 2019–2024* (2019) <https://commission.europa.eu/document/download/063d44e9-04ed-4033-acf9-639ecb187e87_en?filename=political-guidelines-next-commission_en.pdf> accessed 11 February 2025, 20.

9 See point 16 of the Framework Agreement (OJ L 304, 20.11.2010, p. 47): "The Commission shall commit itself to report on the concrete follow-up of any request to submit a proposal pursuant to Article 225 TFEU (legislative initiative report) within 3 months following adoption of the corresponding resolution in plenary. The Commission shall come forward with a legislative proposal at the latest after 1 year or shall include the proposal in its next year's Work Programme. If the Commission does not submit a proposal, it shall give Parliament detailed explanations of the reasons." – This topic is likely to be included in the upcoming next revision of the Framework Agreement, see point 8 of the Joint Statement by Presidents *von der Leyen* and *Metsola* of 21 October 2024.

10 In the term 2019–2024, the European Parliament adopted 25 resolutions pursuant to Article 225 TFEU, whereas the Council adopted only three requests to the Commission pursuant to Article 241 TFEU.

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3. Case Studies in Areas Close to Member States' Sovereignty Claims

3.1 Migration, Asylum and Border Controls

The policy area of migration, asylum and border controls is one where the EU has been active already since the Treaty of Maastricht, when the intergovernmental 'Third Pillar' of the EU on Justice and Home Affairs was introduced to cover that area. In the Amsterdam Treaty, now more than 25 years ago, this area was 'communitarised': the traditional Community method of decision-making became applicable with clearly defined competences. These were again enlarged and consolidated in Title V of the TFEU through the Lisbon Treaty, which enshrined a Common European Asylum System, an integrated external border management system and a common integration policy (Articles 77–80 TFEU). Ultimately, a common European asylum system is a necessary corollary of the EU's historic achievement of abolishing internal border controls in the Schengen area, launched already in 1985. It should also be clear that only a united EU can hope, in today's globalised, crises-ridden world, to manage migration flows efficiently in accordance with its values and interests. Nonetheless, against the background of the general right of States to control access of persons to their territory, until today the Union's action in this area is perceived as affecting national sovereignty claims. What is more, at the latest since 2015, when the refugee crisis became acute, finding common responses to the challenges of managing an ever stronger migration pressure towards Europe has become an existential question for the EU.

It is thus easy to understand that the Commission, in all its action deployed over the last 10 years to tackle the huge policy challenges in this area, has been eager to take the Member States' policy demands, positions and expectations fully into account, while striving to develop policies in the Union's general interest and acting in partnership also with the European Parliament given the latter's prerogatives as co-legislator. At the same time, migration has proven to be amongst the most divisive policy areas, with marked splits in the respective national interests of Member States, which has made the Commission's listening and responding to Member States' conflicting demands even more demanding.

Against this backdrop, it is only natural that, whenever the Commission has prepared major legislative initiatives in this area during the last 10 years, it has devoted even more energy and care than in other areas to consulting

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the Member States informally before it adopted its proposals. Perhaps the most striking example for this attitude was the process of preparation of the Commission's package of proposals of 23 September 2020 forming a "New Pact on Migration and Asylum"[11]. After this initiative had been announced by President *von der Leyen* in her Political Guidelines of July 2019, Vice-President *Margaritis Schinas* and Commissioner *Ylva Johansson*, spent, on request of the President, the first nine months of their mandate almost entirely with intense bilateral consultations of all the Member States (but also with the political groups in the European Parliament and with other stakeholders), in order to calibrate a balanced overall package, in the 'New Pact' proposals, that would stand a chance of being acceptable for all. Nonetheless, following the Commission's presentation of its package of proposals in September 2020, it then still took three years of intense negotiations with, among and within the two co-legislators to pave the way for a final political agreement in December 2023, leading to formal adoption in May 2024 of 10 legislative acts which entered into force on 11 June 2024.[12] While those negotiations were challenging in all aspects, including within the Parliament and in the trilogues, by far the most difficult stage was to reach a sufficient agreement amongst the Member States, crystallised in the 'general approaches' reached in the Council on the various elements in the course of 2023.[13]

Both the general approach and the final adoption were possible in the Council only through a vote by qualified majority, with Hungary and Poland voting against all acts.[14] The persistent divergences of views between Member States may explain that, during the entire negotiation process 2020–2023, the European Council as such – acting by consensus – was able only to give relatively limited impulses towards a compromise on this matter. It had become clear that the European Council had sent an unfortunate

11 All components of the "Pact" as proposed can be accessed here: Migration and Asylum Package: New Pact on Migration and Asylum documents adopted on 23 September 2020 – European Commission.

12 All ten acts were published in the L series of the OJ on 22 May 2024 (Official Journal L series daily view – EUR-Lex).

13 For the most significant breakthrough in the Council, see the Council's press release of 8 June 2023 (Migration policy: Council reaches agreement on key asylum and migration laws – Consilium).

14 Moreover, the Czech Republic and Slovakia abstained (which counts like a vote against), and Austria voted against one element of the package, i.e. the "crisis regulation" 2024/1359.

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message when, in its conclusions of October 2017[15], it had seemed to imply a need for consensus amongst all Member States on asylum reform, contrary to the voting rules in Article 78 TFEU. True, the European Council did show its capacity of defining policy direction as regards the external aspects of migration, on which it deliberated and concluded repeatedly since 2021, and this contributed to more favourable conditions for political agreement also on the EU's internal legislative reforms. Moreover, throughout this period the European Council meetings offered manifold opportunities for highest-level contacts between the Commission President and Heads of State or Government facilitating the way towards overall agreement. Significantly, it is specifically on migration that President *von der Leyen* developed a new practice of addressing, since 2022 at least, very detailed letters to the Members of the European Council ahead of each meeting. In these letters, she has been reporting in a holistic way on the Commission's ongoing various policy action and showing the way on whatever further need she sees for cooperation between Member States to tackle Europe's migration challenges. While these letters have typically had a strong focus on operational action needed in respect of the various migration routes, on EU financial support available and on cooperation with countries of origin and transit, they have also sometimes offered the President's strategic vision on possible further steps including further reform of the legal framework.[16] Also this practice underlines how the European Council serves as a privileged channel for interaction between the Commission and the Member States.

A further telling example for the Commission's particular attention to Member States' demands is how it prepared its proposal for rather substantial amendments to the Schengen Borders Code tabled in December 2021 and how it then negotiated that package up to its formal adoption in May 2024.[17] The key elements of that proposal, be it on the exceptional possibilities to introduce and maintain internal border controls, on police controls that are possible near internal borders or on transfer of persons apprehended in internal border areas (an entirely new provision), can only

15 See point 8 of the conclusions (document EUCO 14/17).

16 Note, in particular, the last three letters: of 25 June 2024, Letter-from-President-von-der-Leyen-to-EU-leaders-on-migration-EUCO-June-2024.pdf; of 14 October 2024, October-2024-EUCO-Migration-letter.pdf, and of 16 December 2024, Letter-from-President-UvdL-on-Migration_EUCO-December-2024.pdf.

17 See Regulation 2024/1717 amending Regulation 2016/399 on a Union Code on the rules governing the movement of persons across borders.

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be properly understood as the result of intense bilateral consultations of the Commission particularly with those Member States who had resorted to repeated reintroductions of internal border controls since September 2015 and those who had been most affected by these controls. The agreement eventually reached by the co-legislators on new rules in the Schengen Borders Code, thanks not least to strong efforts invested by the Commission in identifying common ground between the Member States, is a highly welcome achievement, not least against the backdrop of worrying difficulties experienced in recent years by several Member States in abiding with the Schengen acquis[18], which had the potential of undermining citizens' trust in this core element of *European integration*.

3.2 Travel Restrictions During the COVID Pandemic

A second recent case-study example on the Commission's interaction with Member States is derived from how the extremely sensitive issue of travel restrictions was handled during the COVID pandemic in 2020 and 2021. This area is again characterised by a special mix between well-rooted EU policies and principles on the one hand and a strong sovereignty claim by Member States on the other. Concretely, two different types of travel were at stake during that time: first, how should *external* travel be regulated after the outbreak of the pandemic, i.e. which persons should at all still be admitted to enter the Schengen area from a third country; and second, what about limits to *free movement of persons within the EU*? Both issues were strongly connected to fundamental EU norms: the Schengen Borders Code as regards external travel, and the fundamental freedoms under the Treaty, in particular free movement of persons[19] as regards internal travel. That said, the pandemic caused sudden and unprecedented dangers to public health in the Member States, an area strongly dominated by

18 See the judgment of 26 April 2022 in case C-368/20, NW v Landespolizeidirektion Steiermark, ECLI:EU:C:2022:298, concerning repeated reintroduction of internal border controls by Austria; see the judgment in case C-444/17, Arib, concerning a migrant apprehended by the French authorities in the immediate vicinity of the French/Italian border, and positions such as expressed by Presidential candidate Michel Barnier in September 2021 calling for "judicial sovereignty" over judgments of the European Court of Justice in the area of migration.

19 See Article 21 TFEU and the Free Movement Directive 2004/38, in particular its Article 29 on restrictions due to public health risks.

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national competence.[20] Starting in March 2020, their governments were developing and implementing very different policies aiming at containing the pandemic, notably through severe limitations to personal freedoms such as social distancing rules and lockdowns. More or less simultaneously in March 2020 the EU Member States *collectively* felt the need to protect themselves and the EU against the virus by closing their borders rigorously for travellers coming from third countries, and *individually* also started to shield themselves from each other by restricting movements across internal EU borders. This markedly 'anti Community' reflex was, notably in the beginning, motivated by strong variances of infection rates between Member States.

The Commission was in constant touch with Member States' administrations in its attempts both to coordinate the latter's responses to the pandemic and to uphold the EU's fundamental freedoms, in the interest of all persons and families severely affected in their daily lives. Moreover, it quickly became clear that purely unilateral internal border closures by Member States would have disastrous economic consequences which would only further aggravate the severe economic consequences of the pandemic.[21] As regards *external* travel, Member States understood quickly that only coordinated action at all external borders would allow them to protect the Schengen area. The Commission used a number of fora for its daily crisis management action in this field, but one channel became particularly important: the integrated political crisis response (IPCR) arrangements within the Council.[22]

Looking back to this particular field of common crisis management by Member States and Commission to address an existential health threat, one may distinguish three phases, characterised by different modes of operation and legal instruments:

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20 Pursuant to Article 6 TFEU, EU competence in this area is limited to supporting, coordinating or supplementing Member State action. Pursuant to Article 168 (7) TFEU, Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care.

21 On this aspect, see the Commission's "Green Lanes" initiative in two communications, C(2020) 1897 of 23 March 2020 and COM(2020) 685 of 28 October 2020.

22 The IPCR has legally been established by Council Implementing Decision 2018/1993 of 11 December 2018; it was fully activated on account of the Covid outbreak on 2 March 2020 by the Council Presidency, COVID-19 outbreak: the presidency steps up EU response by triggering full activation mode of IPCR – Consilium.

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A first phase, starting in March and extending to the beginning of the summer 2020, was marked by coordination through purely political instruments such as joint statements, conclusions of the European Council and Council and communications of the Commission, whereas concrete action on the ground was determined, legally, only by the Member States. This approach became manifest, first, as regards restrictions of external travel from third countries to the EU: only one week after the US administration had enacted a unilateral travel ban affecting also travel from the EU, the EU – Commission and Member States – realised that a unified response of similar scale would be essential. Already on 16 March 2020, in a communication[23] to the other institutions, the Commission recommended a coordinated decision by the Heads of State or Government of the EU plus the associated Schengen States to restrict (i.e., ban) all 'non-essential travel' from third countries into the EU+ area for 30 days, specifying that EU citizens and legal residents returning home should be exempted and listing other travellers with an essential function or need who should also not be affected. It justified the need for instant coordinated action as follows:

> "Any action at the external border needs to be applied at all parts of the EU's external borders. A temporary travel restriction could only be effective if decided and implemented by Schengen States for all external borders at the same time and in a uniform manner. Uncoordinated travel restrictions by individual Member States for their parts of external borders risk being ineffective. Any unilateral decision of a Schengen State to apply a temporary travel restriction at its own part of the external borders could be easily undermined by those who would enter the Schengen area at another part of the external borders: likewise a coordinated decision requires the participation of all."[24]

Already the day after, the members of the European Council, meeting via videoconference, agreed to follow the approach recommended by the Commission, which was communicated through conclusions of the President of the European Council. Legally speaking, this politically coordinated joint line had to trickle down via instructions of each Minister of the Interior to the respective Border Guards – in those dramatic days the Commission services had concluded that the Schengen Borders Code, while not address-

23 European Commission, 'COVID-19: Temporary Restriction on Non-Essential Travel to the EU' (Communication) COM(2020) 115 final.

24 European Commission, see n. 23, 1.

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ing the situation directly, must be interpreted as allowing a Member State administration not only to adopt ad hoc individual entry bans, but also to decide a generalised prohibition of entry to entire categories of persons. The same restrictions of non-essential travel were extended several times until end of June 2020 through the same technique of politically coordinated action by Member States following a Commission communication. As regards limitations to internal free movement within the EU, the Member States' action in the first months of the pandemic was less coordinated: while all Member States, virtually at the same moment, started imposing restrictions to cross border traffic, immediately triggering Commission communications calling on Member States to let pass at least the most essential travel, the Commission's and European Council Presidents' 'joint Roadmap' of 15 April 2020 towards lifting the COVID containment measures were implemented gradually and in a different way by the various Member States until summer 2020, when the infection rates were clearly going down – before they again increased, prompting Member States to reintroduce restrictions to free movement.[25]

The Union entered into a *second phase* from summer 2020 onwards, when Member States and the Commission realised that it would be advantageous to set out a uniform policy on restrictions of non-essential travel into the Schengen area in a more formal and transparent way. To achieve this, the Council, acting upon a Commission proposal, adopted a formal Recommendation addressed to all Schengen States.[26] This Recommendation contained a list of those third countries whose residents should be exempted from the restrictions, given their favourable epidemiological situation, and a methodology for gradually adapting that list to changing circumstances. It also defined those categories of essential travellers who should in any case be allowed to enter the Schengen area. While formally non-binding, this Recommendation, iteratively amended by the Council, remained for almost two years the tool governing the Schengen area's policy on the matter. It had been devised following a call from the Commission to the Member States. Very pragmatically and in deviation from its

25 Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic [2020] OJ L337/3.

26 Council Recommendation (EU) 2020/912 of 30 June 2020 on the temporary restriction on non-essential travel into the EU and the possible lifting of such restriction [2020] OJ L208I/1.

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normal institutional position, the Commission even agreed to allow the Council to amend the Recommendation, as regards adding or removing individual third countries from the 'blacklist',[27] without acting upon a formal Commission proposal each time. As regards free movement *within* the EU, in autumn 2020 when COVID infection rates went up drastically again and new lockdowns became necessary, the Commission and the Member States decided to follow the same institutional pattern: a flexible but transparent framework for a coordinated approach to the restriction of free movement was set up via a Council Recommendation.[28] It contained general principles and common criteria guiding Member States' decisions, a 'traffic light' system to indicate risk areas across the EU on a map (which was published every week by the European Centre for Disease Prevention and Control) and indicative rules as regards testing and quarantine to be observed by persons crossing internal borders. This Recommendation left more leeway to Member States than Recommendation 2020/912, and while it proved useful in establishing a coordination framework, it did not entirely prevent a patchwork of diverging rules and decisions by Member States as regards testing and quarantine affecting all persons who needed or wished to exercise their basic free movement rights, up until the moment when vaccination against COVID became widely available. Therefore, during this entire period, the pragmatic coordination between Member States and the Commission needed to be complemented by the Commission's vigilance, as guardian of the Treaties, towards potentially discriminatory or excessive restrictions of free movement. At times, the Commission had to recall the possibility of infringement proceedings, and it succeeded in convincing Member States to end or amend the most problematic schemes.

The *third stage* was reached in 2021 when COVID vaccinations became available. It was marked by the "Digital Covid Certificate",[29] which fortunately brought back free travel within the EU to vaccinated people from summer 2021 onwards. As of February 2021, the Member States' and the

27 Council Recommendation (EU) 2020/1475, see n. 25.

28 Council Recommendation (EU) 2020/1475, see n. 25.

29 This proposal led to Regulation (EU) 2021/953 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic, based on Article 21 (1) TFEU (the free movement legal basis). For technical-legal reasons linked to the specificities of the Schengen acquis, that Regulation was complemented by a "twin Regulation" (EU) 2021/954 based on Article 77(2)(c) TFEU.

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Commission's experts started working feverishly on a common digital certificate, which would enable each EU citizen and resident easily to prove his or her vaccination status digitally, when crossing borders but then also for various domestic purposes (such as admissions to restaurants) regulated at national level. Timewise, it became clear that the certificate imperatively had to be up and running before the start of the summer 2021 holiday season. At first, the Member States governments supposed that setting up this digital certificate would again be realised through informal cooperation amongst them, with technical assistance by the Commission, and that perhaps its most important features might be contained in another Council Recommendation. But then, the Commission – upon personal instigation by her President – took the decision to make a legislative proposal for a regulation establishing the Digital Covid Certificate.[30] This rather courageous and at first controversial move was prompted by the observation that the two Council Recommendations, due to their non-binding character, had not fully prevented Member States from at times unilaterally breaking off from the discipline they had agreed, and also by the consideration that the data protection dimension of the certificate would require a binding regulation. However, the big question was whether the European Parliament and the Council would really reach agreement on this important, far-reaching regulation within only three months, also bearing in mind that the Commission's proposal, mainly based on the free movement legal base of the Treaty, nonetheless had clear repercussion on the Member States' health policies and related sovereignty claims. Remarkably, the three institutions working together with the necessary political will did manage to adopt this regulation in record time, thus giving the citizens the tool they needed to travel unhindered again within Europe (and gradually also beyond).[31] Here, Member States in the Council let themselves be convinced by the Commission on the need for a binding EU instrument.

Moreover, the Commission, perhaps counterintuitively but wisely, defined the legal effect of the Digital Covid Certificate regulation in a modest way: the regulation as such only required Member States to recognise the certificates issued by another Member State for what the certificate stated, namely the fact of COVID vaccination, testing or recovery. The EU legisla-

30 Regulation (EU) 2021/953, see n. 29.

31 The Digital Covid Certificate Regulation contained a mechanism for recognising interoperability with vaccination certificates issued by third countries. Many third countries used this possibility and obtained an interoperability recognition.

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tor did *not* oblige individual Member States to draw precise consequences from that fact for their decisions on free movement – it did not prohibit any restrictions for vaccinated people.[32] The assumption was that Member States would quickly lift such restrictions anyway, and it proved right. The approach of the EU Digital Covid Certificate worked extremely well and is widely regarded, together with the Commission's and Member States' coordinated purchases of vaccines for the EU's entire population, as a major EU policy success during the COVID pandemic.

Looking back at these three stages, it is interesting to see a gradual move from an entirely intergovernmental approach, via the intermediate step of Council Recommendations, towards the application of the Community method through the adoption of the Digital Covid Certificate Regulation, adopted in record time and establishing a key instrument with the necessary legal certainty. This gradual move was the result of an approach of extremely close and constant cooperation between the Commission and the Member States, where the Commission listened carefully to the Member States demands but at the same time performed its role to safeguard free movement and facilitate together with Member States a proper management of the Schengen area. It was a collective learning process that ultimately showed the merits of the Community method, which was successfully applied to the benefit of citizens despite the strong health policy dimension on which Member States had strong sovereignty claims.

4. Conclusion

This paper aimed to give an updated overview of the Commission's standards and practices that allow Member States, together with other stakeholders, to feed their input into the Commission's shaping of policy and legislative initiatives, and to give concrete insights through two recent case-study examples on how the Commission has been listening to Member State demands in areas deemed particularly close to the latter's sovereignty claims. For the more general discussion on an updated *integration through law* theory and on the necessary legitimacy for the EU's supranational

32 The Regulation only set up an information exchange mechanism for Member States' decisions on free movement restrictions, see Article 11. Legally speaking, according to the Commission's conviction the EU's competence under Article 21 TFEU would have extended also to obliging Member States to lift free movement restrictions for vaccinated persons, but this was contested by some Member States.

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institutions, the overview and examples given here may serve to illustrate four points:

First, it appears that, in the last two decades, the *relative weight*, in the EU's political reality, of *positive integration* (i.e. through positive action of the EU's political institutions) *has increased* over that of *negative integration* (through case law limits for Member State freedom derived from EU primary law). *Positive integration* has often taken the form of important legislation in large packages, e.g. the comprehensive reform of the EU's asylum laws adopted in 2024, but, particularly since 2010, crisis management through operative action has been just as important and it is often interlinked with legislative action. Such crisis management can only succeed where the Commission and Member States work hand in hand together. Examples for such cooperative, non-legislative action include the intense work that has been done towards and with third countries of origin and transit in order to manage migration, or the Commission's interaction with Member States' governments during the pandemic. In this context, it is telling that, in a mutual 'learning process' between Member States and EU institutions during the pandemic, the benefits of the Community method have gradually become clear again.

Second, both case studies concern policy areas where free movement of persons – as an original, core objective of *European integration* from its beginnings – has become inextricably connected with further areas of EU policies such as migration and public health on which Member States have strong sovereignty claims. The Schengen area, with its promise of an area without internal borders, cannot be sustained without a functioning common European asylum system. In the pandemic, national decision-makers were, domestically, themselves competent for the hardest choices of public health policy, as regards lockdowns and social distancing. However, the measures they had to take would have been inefficient in protecting the European population from the virus without coordinated restrictions of inward travel at the EU's external borders. Moreover, but for the close cooperation promptly established between them and the Commission, those measures could easily have ended up eliminating the basic virtue of free movement within the EU, with disastrous human and economic repercussions.

Third, the two case-studies also illustrate just how much in recent times *horizontal interdependencies* between the Member States, created through EU legal regimes, have become more and more important and need to

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be better taken into account in any updated discussion on legitimacy of the European project as a whole.[33] From the first days of the pandemic, it had become clear that the commonly decided restrictions of travel from third countries into the EU would only work to protect Europeans' health if all Schengen States implemented them rigorously at the external borders. One vulnerability in the external border would potentially have undermined public health everywhere. Similarly, in the common European asylum system, deficient implementation by one Member State, for example by omitting to practise Eurodac fingerprinting on third country nationals arriving at an external border or by refusing to cooperate on Dublin transfers, has the potential of undermining citizens' trust in the whole system. Furthermore, only a common asylum system with built-in mechanisms of solidarity, offering concrete help to frontline Member States where most asylum seekers reach the EU's external borders, will be accepted as fair and legitimate by the citizens in those Member States. These horizontal interdependencies were very much in the mind of all actors when the EU's asylum rules were reformed. This factor explains why the Commission spent so much time in listening to all Member State governments before tabling its proposals on the "New Pact on Migration and Asylum" in September 2020, and why finding agreement within the Council on a comprehensive package, which would be workable for all was the hardest nut to crack.

Fourth and lastly, the case-studies bear out some factors that prove essential for the resilience of the EU legal order in these times of crises: Preparing EU initiatives through state-of-the-art procedures of better lawmaking; listening carefully to Member States' positions in particular when fundamental EU values and objectives are intertwined with strong national sovereignty calls; resorting to the Community method wherever possible, since it ensures efficiency, legitimacy and uniform application of laws; and proving in practice that close cooperation between the Commission and the Member States based on trust does work to tackle crises which are perceived as existential by Europeans.

33 See in detail on this point, S. Schmidt's contribution to this volume, *Legitimacy dynamics in the multilevel EU — analysing integration through law at the member-state level*, section 3.2.

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The Rule of Law and Democratic Commitment within the EU Legal Community: Resilience in Times of Crisis

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Legal Methods and Factors Against Rule of Law Deterioration in Poland

Marcin Górski[*]

Abstract

This chapter provides an insight into the background and nature of the 2015–2023 crisis of the rule of law, as well as the main extra-normative and normative methods and factors relevant to defending the rule of law in Poland. The first section describes the main methods, symptoms and motivations behind the processes devastating the rule of law, the problem of weak legal culture of Polish society, the immanent ineffectiveness of mechanisms protecting the rule of law and the societal landscape surrounding the deterioration processes. The second and the third sections discuss, respectively, certain extra-normative methods or characteristics pertaining to the protection of the rule of law in Poland and the normative methods or factors relevant to inhibiting the processes impairing the rule of law. Finally, the third section presents reflections on the existing deficits and possible improvements likely to contribute towards the strengthening of the rule of law if the challenges reoccur.

1. Introduction and Background

The process of the deterioration of the rule of law in Poland in 2015–2023 has not been fully completed or comprehensively remedied so far – to say the least. Neither has it been fully unique when compared to other processes of democratic backsliding worldwide (e.g. in Hungary as the most obvious example). It has been extensively reported and vividly debated by legal scholars.[1] But certainly, bitterly aware of the possible future undemocratic developments in certain jurisdictions, one could be interested in a sort of

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1 E.g. W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press, 2019); Komisja Europejska, Przedstawicielstwo w Polsce, J. Barcz, A. Grzelak and R. Szynd-

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inventory of legal methods or social factors. Those could be important tools against the deterioration of the rule of law in this 'laboratory of illiberal constitutionalism' – a role which has been infamously played by Poland for eight years of the rule of the far-right government.

This chapter presents, first of all, the background of the topical process, being certain legal and socio-legal phenomena pre-existing the episode of 2015–2023. Further, it takes inventory of legal methods against the rule of law deterioration, while distinguishing between normative methods (such as methods of interpretation and adjudication or legal procedures employed) and extra-normative methods being the social environment surrounding the normative developments and retarding the ambitions and projects aimed at by the political branches of government in Poland (e.g. the blooming of civil society structures defending the rule of law). Thirdly, this chapter will also provide a list of deficits or deficiencies that have not been overcome and which are likely to burden the future efforts against possible restoration of the non-democratic *Ancien Régime* as well as the processes of restoration of the rule of law now taking place in Poland. None of these lists is probably exhaustive, but in the author's view (being himself an insider, a practising lawyer and member of the Euro-constitutional academia at the same time), they are aimed at indicating the most relevant factors.

In this chapter, the author briefly presents the process of the deterioration of the rule of law as well as certain factors defining the background which made the whole process possible to accomplish by some eager politicians.

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lauer, *Problem praworządności w Polsce w świetle dokumentów Komisji Europejskiej: okres „dialogu politycznego" 2016–2017* [The problem of the rule of law in Poland in the light of the European Commission documents: the period of "political dialogue" 2016–2017] (Urząd Publikacji, 2020); European Commission: Representation in Poland, J. Barcz, A. Grzelak and R. Szyndlauer, *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)* [The problem of the rule of law in Poland in the light of the case law of the Court of Justice of the EU (2018–2020)] (Publications Office of the European Union 2021); J. Barcz and A. Grzelak, Problem praworządności w Polsce w świetle orzecznictwa TSUE. Tom IV (2022–2023) [The problem of the rule of law in Poland in the light of the case law of the European Court of Justice. Volume IV (2022–2023)] (Dom Wydawniczy Elipsa, 2024); A. Bień-Kacała and T. Drinóczi, *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary Within the European Union* (Routledge, 2021).

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1.1 How the Rule of Law was Deteriorated in Poland – Methods, Symptoms and Motivations

The deterioration of the rule of law in Poland began as early as in autumn 2015, after the Law and Justice party, a far-right populist movement, won the general election. Already before the election, the then-ruling liberal coalition elected five judges to the Constitutional Court, including three lawfully elected judges to replace those whose terms had elapsed and two more "in advance" in order to take positions of judges whose terms had still been pending on the day of the election of their successors.[2] The winners of the 2015 general election in turn decided to adopt a parliamentary resolution declaring the ineffectiveness of the election of all these judges (including those three lawfully elected) and to elect five judges to the Constitutional Court, consequently including three so-called "doubles" (i.e. unlawfully elected for the positions already occupied), as well as to amend the Law on the Constitutional Court. The latter amendment was opined by the Venice Commission, which found, among others, that:

> "The provisions of the Amendments of 22 December 2015, affecting the efficiency of the Constitutional Tribunal, would have endangered not only the rule of law, but also the functioning of the democratic system, as set out above. They cannot be justified as a remedial action against an absence of 'pluralism' in the composition of the Tribunal. Rather than speeding up the work of the Tribunal these amendments, notably when taken together, could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective as a guardian of the Constitution."[3]

That, together with gradual supplementation of the Constitutional Court with lawfully elected but 'exotic' judges whose predominant common feature was political dependence on the political powers of the State, allowed the ruling majority to 'switch off' the Constitutional Court, meaning that instead of strictly scrutinising the legislation, it became the "guardian of

2 Constitutional Court of Poland, judgment of 3 December 2015, K 34/15 (items 8 (b) and (c)).

3 Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), CDL-AD(2016)001-e, item 137.

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the interests of the parliamentary majority"[4]. Having accomplished that, the ruling majority could adopt any laws it wished, knowing that there was no effective constitutional review capable of scrutinising it.

Further developments appeared a logical consequence of the absence of constitutional scrutiny: re-subordinating the public prosecution to the politician being the minister of justice (who became again the head of the prosecution), which allowed the ruling party to freely choose which prosecutions would be pursued and which of them would be denied or discontinued,[5] appointing disciplinary officers for judges in order to persecute those unwilling to satisfy expectations of the political majority in the performance of their judicial duties,[6] or extending the illegal surveillance of citizens aimed at suppressing the opposition.[7] At the same time, the majority re-channelled the public subsidies to NGOs according to the political criteria,[8] or turned the public media into a 'political mouthpiece' spreading hate speech and the government's propaganda.[9]

1.2 Constitutional Background: Immanent Ineffectiveness

Foreigners observing the events happening in Poland from 2015 to 2023 may have a wrong impression that the entire society opposed the devasta-

4 M. Pyziak-Szafnicka, 'Trybunał Konstytucyjny *á rebours*' (2020) [M. Pyziak-Szafnicka. 'Constitutional Tribunal à rebours'], 5 *Państwo i Prawo*, 25. The author noted that, contrary to the constitutional function of the Court: "Indeed, the ruling majority is a guardian of the law it creates", 44.

5 *Żurek v. Poland* App no 39650/18 (ECtHR, 2022).

6 *Tuleya v. Poland* App no 21181/19; 51751/20 (ECtHR, 2023); Case C-791/19 *Commission v. Poland*, [2021] CJEU ECLI:EU:C:2021:596.

7 *Brejza and 8 other applicants v. Poland* App no 27830/23 (ECtHR, 22 July 2024).

8 Rządowy projekt ustawy o Narodowym Instytucie Wolności – Centrum Rozwoju Obywatelskiego wykonawczych, Druk Sejmu RP VIII kadencji nr 1713, Załącznik nr 1, Zestawienie uwag zgłoszonych w toku konsultacji publicznych do projektu ustawy o Narodowym Centrum Rozwoju Społeczeństwa Obywatelskiego, [Government bill on the National Institute of Freedom – Centre for the Development of Civic Society executive, Sejm Print No. 1713, Appendix No. 1, Summary of comments submitted during public consultations on the bill on the National Centre for the Development of Civil Society] https://orka.sejm.gov.pl/Druki8ka.nsf/0/C57CFC456352A1B5C1258155005FF00E/%24File/1713.pdf <accessed 17 February 2025.

9 A. Ambroziak and A. Szcześniak, 'Landmark ruling of the CJEU in the case against public broadcaster TVP' (*Rule of Law*, 12 January 2023) <https://ruleoflaw.pl/landmark-ruling-of-the-cjeu-in-the-case-against-public-broadcaster-tvp/> accessed 10 December 2024.

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tion of the rule of law and the ruling party lost their support gradually while it was deteriorating the democracy. In fact, their gain in the 2015 elections was 37.58%, and four years later (after they already attacked the Constitutional Court, politicised the prosecution and attempted to politically colonise the Supreme Court and the common courts) the popularity rose to 43.59%. In the meantime, in 2018 they won the local elections, getting 34.13% of the votes to regional councils (*sejmiki*). In 2019 they also won the election to the European Parliament, obtaining a share of 45.38%. In 2023 they lost the majority in the parliament but still got the highest share of votes (35.38%) and they defeated the liberals in the regional elections in 2024 (34.27%).

While maintaining their popularity, the far-right exploited the argument that the "reforms" they proposed were supported by the society. Their main theme was that they represent the 'sovereign' (i.e. the society). And actually, this argument is hardly rebuttable, even if one connotates it with the infamous decisionism of Carl Schmitt. The truth is therefore that the rule of law – ridiculed by the far-right by labelling it 'impossibilism' (i.e. inherent non-openness to accept unbridled choices of the *voluntas politica*) – is inevitably ineffective when faced with the will of the society.

1.3 The Society Deeply Divided with Large Societal Sectors Underprivileged and Discriminated

It would be a tremendous oversimplification to believe that the Constitutional Court existing prior to the 2015–2023 democratic backsliding had been a courageous and uncompromised defender of the rule of law, fundamental rights and democratic foundations of the republic. In reality, this institution was rather conservative and concentrated on preserving the privileges of some and the general state's interests rather than individuals' rights and freedoms. Just to mention some examples: The Constitutional Court ruled in 1997 that the rule of law excludes allowing for termination of pregnancy on grounds of difficult living conditions or a difficult personal situation of a pregnant woman.[10] The same Constitutional Court held in 2005 that there is a constitutional rule of treating marriage as a union between a man and a woman.[11] In 2015 it confirmed the constitutionality

10 Constitutional Court of Poland, judgment of 28 May 1997, K 26/96.
11 Constitutional Court of Poland, judgment of 11 May 2005, K 18/04, item III.16.5.

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of depenalisation of 'offending religious feelings' (understood in practice as the crime of blasphemy) and held that the application of the *nullum crimen sine lege certa* rule did not affect that stance.[12] It was also the same Constitutional Court that held that the one-time change in the pension indexation method (violating the principle of protection of acquired rights) was compatible with the Constitution because "the ideas of social equality and solidarity require that the burden of the economic crisis falls on all social classes and does not affect only some of them in a special way"[13] and that taking away funds accumulated by citizens in their individual retirement accounts did not violate the Constitution because otherwise the public debt would be excessive.[14] It was, finally, the same Constitutional Court that did not find the violation of the Constitution in the 'collective responsibility' of former communist state officers whose pensions were reduced for political reasons.[15]

This is against this background that the far-right campaigned against the independent Constitutional Court. One should understand that large sectors of the Polish society could see no reasons to defend this court.

1.4 Very Weak Legal Culture and Deep Distrust of State Institutions

Before the far-right formed their government in 2015, the social trust in courts was already relatively weak in Poland. In the preceding six years (2010–2015), it varied between 20% and 26% of those who expressed their positive opinion about the functioning of courts, whereas negative opinions constantly dominated, varying between 36% and 64%.[16] The overall level of social trust (whether other people generally can be trusted?) varied

12 Constitutional Court of Poland, judgment of 6 October 2015, SK 54/13, item III.4.3.3. The Constitutional Court held that "the understanding of the object of religious worship in relation to the religions commonly practiced in a given cultural environment is specified in the social perception, that is, on the linguistic level". Thus, it was presumed *a contrario*, that the protection of "religious feelings" of believers of other religions than the Roman Catholic one did not result from the disputed penal provision; *Rabczewska v Poland* App no 8257/13 (ECtHR, 2015).

13 Constitutional Court of Poland, judgment of 19 December 2012, K 9/12, item III.6.1.23.

14 Constitutional Court of Poland, judgment of 4 November 2015, K 1/14, item III.2.3.

15 Constitutional Court of Poland, judgment of 24 February 2010, K 6/09.

16 Centrum Badania Opinii Społecznej, 'Komunikat z badań nr 131/2015. Ocena instytucji publicznych' [Public Opinion Research Center, 'Research Report No. 131/2015.

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between 2002 and 2022 from only 17% to 26%, whereas the general distrust was expressed between an overriding majority of 72% up to 81%.[17] Also, the level of 'legal culture' of the society, characterised by the approaches to the functioning of law and legal institutions, has been very low.[18] In fact, according to the latter study,[19] the results of the opinion surveys show deep popular distrust of the state institutions (including courts), a declared sense of vagueness of law, or the lack of fairness of court proceedings. One should add, out of one's own experience, the lack of awareness of legal procedures and the lack of understanding of basic institutions of law. That, again, may explain the relative easiness of impairing the rule of law by the far-right during the times of democratic backsliding.

2. Relevant Methods and Factors

In this chapter, extra-normative and normative factors relevant in Poland to prevent or inhibit the violations of the rule of law shall be presented. The chapter is composed of two parts, the first part discussing certain extra-normative methods (methods other than pertaining to the use of legal procedures), and the second part focused on normative methods.

2.1 Extra-normative Methods and Factors

Amongst the methods applied to prevent the demolition of the rule of law, extra-normative methods (or socio-legal characteristics) were perhaps the most important. This is because, when the mechanisms of the rule of law were seriously affected by political decisions they became – to a significant extent – dysfunctional. Therefore, extra-normative defences, i.e. social phenomena constituting the environment in which law operates, gained special

Assessment of Public Institutions'] (2015), < www.cbos.pl/SPISKOM.POL/2015/K_131_15.PDF> accessed 13 December 2024, 14.

17 Centrum Badania Opinii Społecznej, 'Komunikat z badań 37/2022. Zaufanie społeczne' [Public Opinion Research Center, 'Research Announcement 37/2022. Social Trust'] (2015), <www.cbos.pl/SPISKOM.POL/2022/K_037_22.PDF> accessed 13 December 2024, 2.

18 M. Pękala, R. Zyzik, 'Społeczny obraz prawa. Opis obszaru badań i wyniki pilotażu' [The social image of law. Description of the research area and pilot results] (2018) 18 *Zeszyty Prawnicze*, 35.

19 M. Pękala and R. Zyzik, see n. 18, 57–58.

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significance. Certain extra-normative tools used for the defence of the rule of law shall be described below.

2.1.1 Social Networking of the Civil Society

In spite of political pressure, the professional organisations of lawyers – predominantly judges,[20] but also other legal professions[21] – resisted against the demolition of the rule of law by organising strategic litigations, defending their members, publishing manifestos or educating the general public in the framework of regular open lectures on constitutional matters. Their crucial role was manifested e.g. in providing *pro bono* legal aid for parties or submitting third-party observations in court proceedings[22] or in publishing reports which influenced the reasoning of courts.[23] These structures of social networking also included NGOs, informal collectives[24] and individuals acting in defence of democratic rules, such as Mr. Bart Staszewski who campaigned against the so-called "non-LGBT zones"[25]. Resolutions adopted by different levels of local and regional government expressing their hostility towards LGBT persons and proclaiming their intentions to defend 'traditional families'.

The relevance of social networking did not only manifest in the actions undertaken by institutions of civil society, but also in making the impression that social circles independent from the far-right government were broad and gathered large numbers of citizens.

20 Two main organisations of judges were *Stowarzyszenie Sędziów Polskich Iustitia* and *Themis*.

21 For instance the prosecutors' association *Lex Super Omnia*.

22 *Grzęda v Poland* App no 43572/18, §§ 222–226 (ECtHR, 2022); *Advance Pharma sp. z o.o. v Poland* App no 1469/20, §§ 281–286 (ECtHR, 2022).

23 E.g. Polish Supreme Court, judgment of 19 September 2018, III PO 9/18, on the reference for preliminary ruling concerning the discrimination of judges on grounds of age, § 32.

24 E.g. the „Dziewuchy Dziewuchom" (literally „Guls for Guls") collectively organising protests against violations of reproductive rights.

25 P. Nodzyńska, '"Masowy atak na jednego obywatela". Bart Staszewski wygrał w sądzie z TVP' [P. Nodzyńska, '"Mass attack on one citizen". Bart Staszewski won in court against TVP'] *Wyborcza.pl* (17 October 2024) <https://wyborcza.pl/7,75398,31392689,zmasowany-atak-na-jednego-obywatela-aktywista-lgbt-wygral.html> accessed 9 January 2025.

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2.1.2 Relatively Strong Private Sector

The private sector in Poland is relatively strong: Prior to 2015 it generated around 80% of the GDP[26] as well as jobs.[27] After the far-right won the elections in autumn 2015, they fired thousands of people from state institutions. This replacement was not limited to strictly political jobs but extended to many at least relatively well-paid state jobs. Those who could not be fired, due to the uniqueness of their qualifications, had to manifest their loyalty towards the party and its government, or at least, to keep indifferent in relation to political affairs. Any public manifestation of opposition or independent views was punished with firing from work or some sort of persecution (e.g. disciplinary proceedings).

Nonetheless, thanks to rapidly shrinking unemployment (having now one of the lowest rates EU-wide) and a variety of options available in the strong private sector, people could remain independent and simply disregard expectations of political supervisors or quit the public sector jobs.

Obviously, the correlation between the powerfulness of the private sector and democracy exemplified by the situation in Poland does not need to be a rule applicable everywhere and in any context. As exemplified by outrageous comments made publicly by the IT tycoon Elon Musk about extremist movements and international relations, the private sector is not enough to protect democracy because much depends on who owns the capital. But in the particular Polish context, the strength of the private sector contributed to protecting the rule of law.

2.1.3 Independent Media

A crucial element for the protection of the rule of law in Poland was the pluralism of media. The far-right government was well aware of that and therefore it attempted to suppress media pluralism in several ways. First of all, after gaining control over the public media (Polish Television and

26 Główny Urząd Statystyczny, *Zatrudnienie i wynagrodzenia w gospodarce narodowej w 2014 r.* [Central Statistical Office, Employment and wages in the national economy in 2014], (Główny Urząd Statystyczny, 2015), 13.

27 Główny Urząd Statystyczny, *Rocznik Statystyczny Rzeczypospolitej Polskiej 2016* [Central Statistical Office, Statistical Yearbook of the Republic of Poland 2016], (Główny Urząd Statystyczny, 2016), 700.

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Polish Radio),[28] they rechannelled the stream of public (or quasi-public i.e. from state-controlled enterprises) advertising money exclusively to media controlled by the far-right.[29] Secondly, they purchased (via the state-owned Orlen company) the Polska Press company, the publisher of some 140 local and regional newspapers, from the German Verlagsgruppe Passau, turning the local media into a propaganda mouthpiece of the government. Thirdly, they tried to reject the extension of broadcasting licences for independent (owned by American Discovery) TVN television and imposed unsubstantiated sanctions on independent broadcasters.

Nevertheless, the majority of opinion-making newspapers remained (more or less) independent.[30] Also, Internet news portals and television channels (except for the public broadcaster) remained beyond the control of the government.[31] For example, main channels of independent television broadcasters (Polsat and TVN groups) maintained their share of some 30% of average daily viewership, whereas the state-owned broadcasting group TVP reached approximately 20% of average daily viewership in 2021 and 2022.[32] The relative media independence – when compared to

28 A. Wójcik, 'Restoring Poland's Media Freedom' *(verfassungsblog.de*, 20 October 2023), <https://verfassungsblog.de/restoring-polands-media-freedom/> accessed 17 January 2025.

29 Media Freedom Rapid Response (MFRR), 'Media freedom at a crossroads: Journalism in Poland faces uncertain future ahead of election' *MFRR* (5 October 2023) <www.ecpmf.eu/media-freedom-at-a-crossroads-journalism-in-poland-faces-uncertain-future-ahead-of-election/> accessed 17 January 2025, 5, where authors found that "private media are denied access to state advertising income, weaponised by PiS to fund favourable media outlets and undermine independent journalism. The move exacerbates the financial pressure on media, particularly print, that are still developing new and sustainable income streams to support the digital transition".

30 All nine principal nationwide newspapers in 2023 were owned by private companies – see 'Wzrosła sprzedaż "Gazety Wyborczej". Liderem pozostał "Fakt"' bankier.pl (12 February 2024) <www.bankier.pl/wiadomosc/Sprzedaz-dziennikow-w-IV-kw-2023-r-wyniosla-334-tys-sztuk-8693871.html> accessed 17 February 2025.

31 interaktywnie.com, *Oto najpopularniejsze portale internetowe i apliacje w polskim internecine* [Here are the most popular web portals and applications on the Polish Internet] <https://interaktywnie.com/oto-najpopularniejsze-portale-internetowe-i-aplikacje-w-polskim-internecie/> accessed 17 February 2025 (information for December 2023).

32 Michal Kurdupski, 'TVP1 liderem w 2022 roku w 4+, TVN na czele w 16–49. Duże wzrosty TVN24, TVP Info i Polsat News' [TVP1 the leader in 2022 in 4+, TVN in the lead in 16–49. big increases for TVN24, TVP Info and Polsat News] *Wirtualnemedia.pl* (9 January 2023) <www.wirtualnemedia.pl/artykul/ogladalnosc-telewizja-2022-rok-lider-tvp1-tvn-liderzy-hity> accessed 17 February 2025.

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Czechia, Hungary or Romania – was the result of the fact that "one of the distinguishing factors of the Polish market is that, unlike other CEE countries, there remains a strong presence of foreign investors."[33] This was an important element of resisting the democratic backsliding. The public debate remained pluralistic and presented multiple views, unlike e.g. in Hungary.

2.2 Normative Methods and Factors

The normative methods against the deterioration of the rule of law in Poland were employed by different actors, i.e. international courts (CJEU and ECtHR) and national courts, but also by private individuals and NGOs. Some of them are briefly discussed below.

2.2.1 Dispersed Constitutionality Review

Although the Constitution of Poland is, in principle, directly applicable,[34] until the constitutional crisis courts (other than the Constitutional Court) have normally refrained from dispersed review of the constitutionality of statutes (laws adopted by the Parliament), while arguing that they should instead refer to a preliminary ruling of the Constitutional Court on the alleged unconstitutionality of a statutory provision.[35] However, from the beginning of the democratic backsliding in 2015, and especially following the ECtHR judgment in *Xero Flor,*[36] the Supreme Court and ordinary and administrative courts intensified dispersed (decentralised) review of constitutionality, as a remedy to the political delegitimisation and self-dele-

33 Media Freedom Rapid Response (MFRR), 'Media freedom at a crossroads', see n. 29, 10.

34 Article 8 §2 of the 1997 Constitution of the Republic of Poland ("The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise").

35 Supreme Court of Poland, judgment of 16 April 2004, I CK 291/03.

36 *Xero Flor w Polsce sp. z o.o. v Poland,* App no 4907/18 (ECtHR, 2021), where the Strasbourg Court (inspired by the Grand Chamber's judgment in *Guðmundur Andri Ástráðsson v Iceland*, App no 26374/18 (ECtHR, 1 December 2020), held that "the applicant company was denied its right to a *tribunal established by law* on account of the participation in the proceedings before the Constitutional Court of Judge Mariusz Muszyński, whose election was vitiated by grave irregularities that impaired the very essence of the right at issue" (§ 290).

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gitimisation of the Constitutional Court.[37] In that way they played crucial roles in defending the rule of law.

2.2.2 Constitutional Neuroplasticity – International Courts Taking over the Role of "the [Polish] Constitutional Court in Exile"

The two most prominent international courts operating and interplaying in the European constitutional space became crucial for the maintenance of the rule of law in Poland – CJEU and ECtHR. The Strasbourg Court developed – thanks to the interpretative mechanism of 'living instrument' assuming a dynamic interpretation of the European Convention in accordance with the ever-changing social, economic, cultural or technological developments[38] – the new standard of interpretation of the right to a fair trial concerning the right to a "tribunal established by law"[39] which was subsequently applied in cases against Poland[40] and then also applied by Polish courts.[41] Later, the Luxembourg Court developed the standard of interpretation of Article 19 (1) TEU (and Article 47 CFR) strengthening the significance of the rule of law in the context of 'reforms' concerning

37 J. Podkowik, 'O przyczynach, przejawach i skutkach rozproszonej kontroli konstytucyjności ustaw (w świetle orzecznictwa sądów powszechnych i Sądu Najwyższego)' [On the causes, manifestations and effects of dispersed control of the constitutionality of laws (in the light of the case law of common courts and the Supreme Court)], (2022) 2 *Studia Prawnicze*, 107, 112. See also G. Maroń, 'Stanowisko polskich sądów w przedmiocie rozproszonej kontroli konstytucyjności ustaw' [The position of Polish courts on the dispersed review of the constitutionality of laws] (*CBPE*, 2023) https://cbpe.pl/stanowisko-polskich-sadow-w-przedmiocie-rozproszonej-kontroli-konstytucyjnosci-ustaw/ accessed 14 December 2024.

38 *Tyrer v the United Kingdom* App no 5656/32, § 31 (ECtHR, 1978) ("the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards").

39 *Guðmundur Andri Ástráðsson v Iceland* App no 26374/18, §§ 235–252 (ECtHR, 2020) (the three-element threshold test).

40 For the first time in *Xero Flor w Polsce sp. z o.o. v Poland,* App no 4907/18 (ECtHR, 2021) later on numerous occasions starting from *Broda and Bojara v Poland* App no 26691/18; App no 27367/18 (ECtHR, 2021) and most recently in *Wałęsa v Poland* App no 50849/21 (pilot judgment) (ECtHR, 2023) and *M. L. v Poland* App no 40119/21 (ECtHR, 2023).

41 E.g. the Supreme Administrative Court of Poland, judgment of 13 May 2021, II GOK 4/18, or the Supreme Court, order of 16 September 2021, I KZ 29/21.

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national judiciaries.[42] Having done this, both courts took over the role of a constitutional court of Poland 'in exile'. They substituted the national Constitutional Court of Poland, which had been 'switched off' by the political branches of national government. This phenomenon can be described as *constitutional neuroplasticity*: a process of developing functions of defective parts of a *constitutional brain* by other parts of this *organ* – in this case the two international courts. The proposed concept of constitutional neuroplasticity is a term inspired by medical science and refers to the phenomenon consisting of international courts consciously taking over the role of the rule of law protectors, thus substituting dysfunctional domestic (notably constitutional) courts. This process happened in response to the politicisation of the Constitutional Court of Poland and the role of the international rule of law protector (the constitutional court in exile) was jointly (within the limits of their respective jurisdictions) taken over by the ECtHR and the CJEU.

2.2.3 Preliminary References

Polish courts have been resorting extensively to preliminary references, ranking fifth in the EU in 2019–2023 (and third after their German and Bulgarian counterparts in 2023).[43] Many references concerned the systemic and generalised deficiencies in the administration of justice resulting from the 'reforms' launched by the far-right government.[44] By referring to the Court of Justice for preliminary rulings, Polish Courts aimed at clarification (and development) of the interpretation of Article 19 (1) TEU[45] and Article 47 of the EU Charter of Fundamental Rights,[46] but also at obtaining a shield from the EU constitutional court to protect the rule of law internally.

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42 E.g. Case C-824/18 *A.B. and others v Krajowa Rada Sądownictwa* [2021] CJEU ECLI:EU:C:2021:153.

43 CJEU, 'Annual Report 2023' (*CJEU*, 2023) <https://curia.europa.eu/jcms/jcms/Jo2_7000/en/> accessed 20 January 2025, 11.

44 E.g. joined cases C-585/18, C-624/18 and C-625/18 *A.K. v Krajowa Rada Sądownictwa*, ECLI:EU:C:2019:982, and the preliminary references in case C-671/20 *M.M.,* C-615/20 *Y.P.*, C-496/20 *M.F. v. J.M.,* C-132/20 *Getin Noble Bank S.A.,* C-55/20.

45 More precisely, the duty of the Member States to provide for remedies sufficient to ensure effective legal protection in the fields covered by Union law.

46 More specifically, as regards the right to a 'tribunal established by law'.

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2.2.4 Applications to the ECtHR

During the period 2015–2023, Poland remained one of the top ECHR State Parties against which applications were brought to the Strasbourg Court, scoring the seventh position in total at the end of 2023.[47] An interesting feature of statistics concerning Polish cases before the ECtHR was that the Strasbourg mechanism was employed in order to challenge violations of the right to a *tribunal established by law* (Article 6 (1) ECHR) on account of attempts of the political branches of the government to politically supervise[48] the judiciary while violating the principle of separation of powers.[49]

2.2.5 More Extensive Use of Provisional Measures by International Courts

The deterioration of the rule of law in Poland triggered the first-ever use of Rule 39 of the Rules of the Court (ECtHR)[50] in respect of the application targeting Article 6 ECHR – in *Wróbel v. Poland*.[51] The interim measures were also ordered by the EU Court of Justice e.g. in respect of the Commission's action concerning the politically motivated lowering of the retirement age of the Supreme Court's judges.[52] And even though the government failed to observe some of these instruments, they were nevertheless seen by the general public as important indicators and authoritative confirmations of the violations of the rule of law by the political rulers, which in turn resulted in the voters' awareness of international human rights and rule of law scrutiny pertaining to the situation in Poland.[53] In

47 ECtHR, 'Analysis of statistics 2023' (*European Court of Human Rights*, 2024) <https://www.echr.coe.int/statistical-reports> accessed 10 January 2025.

48 *Wałęsa v Poland* App no 50849/21 (ECtHR, 2023).

49 *Xero Flor w Polsce sp. z o.o. v Poland,* App no 4907/18 (ECtHR, 2021) (see in particular §§ 281–283).

50 Pursuant to Rule 39 (1) of the Rules of the Court (ECtHR), "The Court may, in exceptional circumstances, whether at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted".

51 ECtHR, interim measure decision, *Wróbel v Poland* App no 6904/22 (ECtHR, 2022). See the press release: <https://hudoc.echr.coe.int/eng> accessed 12 December 2024.

52 Case C-619/18 R *Commission v Poland* [2019] CJEU ECLI:EU:C:2019:615.

53 ECtHR press release of 16 February 2023, ECHR 053 (2023), concerning the refusal to implement the interim measures ordered in cases *Leszczyńska-Furtak v. Poland* (application no. 39471/22), *Gregajtys v Poland* (no. 39477/22) and *Piekarska-Drążek v. Poland* (no. 44068/22).

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that way they were effective in terms of their political dimension, i.e. possible impact on voters' decisions and ultimately change of political landscape in Poland.[54]

2.2.6 Increasing Use of Interpretative Strategies Against Strategic Lawsuits Against Public Participation

One of the intriguing features of the Polish illiberal democracy episode was the extensive use of *State-sponsored Strategic Lawsuits Against Public Participation*. What is meant here is that these type of litigations are not only those traditionally understood as civil-law litigations aimed at silencing free expression, but more generally and broadly, any litigations targeting the speech or simply harassing political opponents.[55] In Poland, such litigations were often initiated by institutions or bodies controlled by the government and they were targeted against opposition members or simply those who publicly expressed their criticism against the governmental policies.[56] The extensive use of such practises resulted in labelling Poland by prominent

54 Results of public opinion polls concerning the relevance of particular characteristics of liberal democracy and the assessment of their practical implementation in Poland: Centrum Badania Opinii Społecznej, 'Zasady demokracji' [Public Opinion Research Center, 'Principles of Democracy'] (*CBOS*, 2021) <www.cbos.pl/SPISKOM.POL/2021/K_066_21.PDF> accessed 10 January 2025.

55 See P. Canan and G. W. Pring, 'Strategic Lawsuits Against Public Participation' (1998) 35 *Social*, 506; P. Canan and G. W. Pring, 'Strategic Lawsuits Against Public Participation: An Introduction for Bench, Bar and Bystanders' (1992) 12 *Bridgeport Law Review Quinnipiac College*, 937; P. Canan and G. W. Pring, 'Studying Strategic Lawsuits against Public Participation: Mixing Quantitative and Qualitative Approaches' (1988) 22 *Law & Society Review*, 385; G.W. Pring, 'SLAPPs: Strategic Lawsuits Against Public Participation' (1989) 7 *Pace Environmental Law Review*, 3.

56 E.g. the SLAPP unsuccessfully initiated by the ruling Law and Justice party against Professor Wojciech Sadurski for criticising their anti-democratic political agenda (Article 19, 'Poland: Court of Appeal dismisses SLAPP lawsuit against Professor Wojciech Sadurski', 10 November 2020) <www.article19.org/resources/appeal-court-slapp-sadurski/> accessed 10 January 2025), or the SLAPP initiative announced by the state-owned oil and gas company Orlen against Professor Michał Romanowski for criticising their business decisions, 'Naukowcy-prawnicy protestują przeciwko zapowiedzi złożenia przez Orlen powództwa typu SLAPP przeciwko prof. Romanowskiemu') ['Scientists-lawyers protest against Orlen's announcement to file a SLAPP lawsuit against Prof. Romanowski'] <https://konstytucyjny.pl/naukowcy-prawnicy-protestuja-przeciwko-zapowiedzi-zlozenia-przez-orlen-powodztwa-typu-slapp-przeciwko-prof-romanowskiemu/> accessed 10 January 2025.

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free speech scholars "the European SLAPP champion"[57]. Reacting to this situation, Polish courts developed interpretations against 'Strategic Lawsuits Against Public Participation' (SLAPP) in their case law, thus limiting the fear of negative consequences of exercising freedom of expression and the possible chilling effect of state-sponsored lawsuits suppressing anti-government criticism, as well as contributing towards pluralistic debate on matters of general interest, being the indispensable element of democratic society.[58]

3. Deficits and Methods Recommended for Application in the Future

In this chapter, certain deficits likely to affect adversely the protection and preservation of the rule of law in the future, as well as certain recommendations for improving this situation will be discussed. Some of these deficits and proposals are interlinked with the issues presented in the first chapter of this paper.

3.1 Insufficient Legal-Constitutional Education of the Society

When compared to the situation in Germany, the constitutional education in Poland is, to say the least, not overly extensive.[59] Issues related to human rights and the Constitution are just a small portion of the curriculum within the compulsory course on *Knowledge about the society* for pupils of the last year of primary school, and the topics related to historical developments of Polish constitutionalism are taught during the course on History.[60] The constitutional education for adults (e.g. in the form of state-sponsored social campaigns about the Constitution and fundamental rights) is absent.

57 D. Bychawska-Siniarska and A. Gliszczyńska-Grabias, 'Polska niechlubnym liderem SLAPP-ów' [Poland the inglorious leader of SLAPPs], 11 April 2024) <www.rp.pl/opinie-prawne/art40146201-bychawska-siniarska-gliszczynska-grabias-polska-niechlubnym-liderem-slapp-ow> accessed 10 January 2025.

58 E.g. Regional Court in Warsaw, judgment of 12 July 2022, XXII GW 155/22.

59 COE, '2016 Report on the State of Citizenship and Human Rights Education in Europe' <www.coe.int/en/web/edc/germany> accessed 3 January 2025.

60 Regulation of the Minister of Education of 5 July 2024 amending the Regulation on the core curriculum for preschool education and the core curriculum for general education for primary school, including for students with moderate or severe intellectual disabilities, general education for vocational schools of the first degree, general education for special schools preparing for work and general education for post-secondary schools (O.J. 2024/996).

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3.2 Insufficient International Financing of NGOs and Independent Media

The European Economic and Social Committee has rightly reproached the EU for insufficient financing of the human rights defenders inside the EU and externally.[61] One of the methods undermining the rule of law in Poland was to cut down the distribution of public funds to organisations defending the democratic principles while at the same time re-channelling the funding to organisations set up by the far-right politicians and their allies amongst, e.g. the academia (for example, the Ministry of Justice published an interactive map in 2024 precisely showing the amounts of money distributed in order to increase the popularity of far-right candidates in the 2023 general election).[62] It is of utmost importance to create a strong and efficient EU-financed mechanism transferring the funds, without the intermediary of national governments, directly to civil society institutions dedicated to the protection of fundamental rights and the rule of law, as well as to independent media.

3.3 Strict Scrutiny versus 'Permissive' Constitutional Adjudication and Insufficient Clarification of Judicial Decisions

As mentioned above, the constitutional rights and freedoms of significant sectors of the society were somewhat insufficiently protected throughout the past three decades.[63] That resulted in turn in the weak identification of these societal sectors with the constitutional adjudicator and their – justified – disbelief and distrust towards the Constitutional Court as the protector of their individual and collective rights. This can be reflected by the public opinion polls showing already in 2015 that, even though 42% of polled citizens declared positive opinions about the Constitutional

61 EESC, 'The EU has to ensure that civil society is protected, not attacked' (*The European Economic and Social Committee*, 21 September 2023) <www.eesc.europa.eu/en/news-media/press-releases/eu-has-ensure-civil-society-protected-not-attacked> accessed 20 December 2024.

62 Ministry of Justice, *Środki przyznane w Funduszu Sprawiedliwości poza naborami i konkursami w latach 2019–2023 – interaktywna mapa* [Funds allocated in the Justice Fund outside the concours and competition process in 2019–2023 – interactive map], 28 May 2024 <www.gov.pl/web/sprawiedliwosc/FS-raport-przyznanych-srodkow> accessed 17 January 2025.

63 See section 1.3. above.

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Court, an even bigger segment of 46% did not have any opinion and 12% expressed their negative attitude.[64] One should not be surprised if one considers a long record of 'permissive' adjudication lacking strict scrutiny in relation to the governmental propositions, presented as an example in section 1.3. This can be compared to the practice of the German Federal Constitutional Court which generally shows a tendency to take the public opinion into consideration while deciding cases.[65] Another problem is the low quality of judicial reasoning in Poland,[66] sometimes making the impression of the denial of justice.[67]

3.4 Lack of Accession to Protocol 16 to the ECHR (Advisory Opinions)

Protocol No. 16 to the ECHR, providing for a jurisdiction of the Court to deliver advisory opinions on the requests from the highest national courts, was opened to ratification on 2 October 2013, i.e. two years prior to the victory of the far right in the general election in Poland in autumn 2015. Since

64 K. Sobczak, 'Tylko co czwarty Polak ufa Trybunałowi Konstytucyjnemu' [Only one in four Poles trusts the Constitutional Tribunal], 30 November 2020 <www.prawo.pl/prawnicy-sady/zaufanie-do-trybunalu-konstytucyjne-tylko-26-proc,504866.html> accessed 21 December 2024.

65 S. Sternberg, T. Gschwend, C. Wittig and B. G. Engst, 'On the influence of public opinion on decisions of the federal constitutional court. An analysis of abstract judicial reviews and federal state disputes 1974–2010' (2015) 56 *Politische Vierteljahresschrift*, 570; see also: S. Sternberg, S. Brouard and C. Hönnige, 'The legitimacy-conferring capacity of constitutional courts: Evidence from a comparative survey experiment' (2022) 61 *European Journal of Political Research*, 973.

66 Ośrodek Szkolenia Ustawicznego i Współpracy Międzynarodowej KSSiP, Dział Badań i Analiz, 'W poszukiwaniu optymalnego modelu uzasadnienia orzeczenia sądu' [KSSiP Centre for Continuing Education and International Cooperation, Research and Analysis Department, 'In Search of an Optimal Model of Justification for a Court Decision'] (*Krajowa Szkoła Sądownictwa i Prokuratury*, 2021) <www.kssip.gov.pl/sites/default/files/raport_z_realizacji_projektu_badawczego.pdf> accessed 19 December 2024.

67 As the ECtHR held in *Ahorugeze v. Sweden* App no 37075/09 (ECtHR, 2011), 115: "[A] flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." A summary reasoning which fails to explain the reasons behind a judicial decision may possibly be, in extreme cases, qualified as a denial of justice.

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then (as of the end of 2024), 24 states ratified the protocol.[68] Based on the experience of the preliminary rulings of the CJEU on the requests of Polish courts in the context of the right to a fair trial, one should expect the significance of the ECtHR advisory opinions in mitigating the adverse effects of political pressure on the judicial interpretation of law. The far-right lawyers, somewhat rightly, fear that advisory opinions "can potentially constitute an additional tool for imposing systemic solutions on states in matters such as the limits of life protection in the context of both abortion and euthanasia, the system of the national judiciary, the institutionalisation of same-sex unions or the admissibility of the conscience clause"[69], meaning that, in a non-ideological language, they can sustain the rule of law and fundamental rights.

3.5 Insufficient Mechanism of Judicial Execution of Judgments of the ECtHR

Even though the present coalition parties, alongside the human rights NGOs, declared in 2021 that they would execute the ECtHR judgments if they win the general election,[70] the process of restoring the rule of law and assuring observance of international human rights obligations is far from satisfactory.[71] Of course, at least to a certain extent, this slow pace can

68 Ratification chart <www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=214> accessed 21 December 2024.

69 Translation (author's own) of the opinion delivered by Ordo Iuris, the far right lawyers' think tank, 'On the legal consequences of the ratification of Protocol No. 16 to the European Convention on Human Rights for the Republic of Poland' (9 October 2016) <https://ordoiuris.pl/wolnosci-obywatelskie/opinia-nt-skutkow-prawnych-ratyfikacji-protokolu-nr-16-do-europejskiej#_ftn26> accessed 20 December 2024.

70 M. Jałoszewski, 'Ważne. Cała opozycja i organizacje społeczne będą razem walczyć o wolne sądy i niezależną KRS' ['Important. The entire opposition and social organizations will fight together for free courts and an independent National Council of the Judiciary'], 7 December 2021 <https://oko.press/wazne-cala-opozycja-i-organizacje-spoleczne-beda-razem-walczyc-o-wolne-sady-i-niezalezna-krs> accessed 20 December 2024.

71 E.g. M. Szwed, 'Rebuilding the Rule of Law. Three Guiding Principles' (*verfassungsblog.de*, 29 April 2024) <https://verfassungsblog.de/rebuilding-the-rule-of-law/> accessed 18 February 2025; M. Skóra, 'Restoring the Rule of Law. Politics in the Service of Democracy' (*verfassungsblog.de*, 18 December 2024) <https://verfassungsblog.de/restoring-the-rule-of-law/> accessed 18 February 2025.

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be explained by the fear that the far-right president would veto the laws adopted by the parliament. However, this does not explain why the ruling coalition parties have failed to declare their full and unconditional support for the execution of the ECtHR pilot judgment *Wałęsa v. Poland,*[72] or why some members of the government and MPs declared their non-eagerness to execute the ECtHR ruling *Przybyszewska and others v. Poland*[73] specifying the duty to provide an adequate legal framework for legal recognition and protection of same-sex couples.

3.6 Insufficient Enforcement of Lawyers' Deontology by Disciplinary Panels

It was not car mechanics or plumbers but genuine lawyers who decided to participate in defective judicial appointment procedures impairing the individuals' right to a fair trial (tribunal established by law).[74] They consciously decided to violate Article 45 of the Polish Constitution, as well as Article 6 ECHR and Article 47 ChFR, all of which provide for the right to a *tribunal established by law* as an essential guarantee of the right to a fair trial. This violation was clear and premeditated. Above all, it was committed by people who can and should be expected and required to obey the fundamental rules of law. They did it for personal advantages, mostly financial and prestigious. And even though such a conduct and motivation should be condemned by the academia and professional disciplinary panels and such people, due to their gross violation of professional dignity and rudimentary public morals, should be expelled from judicial professions and/or academia, to the great surprise of some, they function quite normally.

72 *Wałęsa v Poland* App no 50849/21 (ECtHR, 2023).

73 *Przybyszewska and others v. Poland* App no 11454/17 and 9 others (ECtHR, 2023).

74 Search engine provided by judicial network Forum Współpracy Sędziów in <https://wyszukiwarka.forumfws.eu/> accessed 18 February 2025. According to the Helsinki Foundation of Human Rights, some 2,200 lawyers (approximately 25% of the total number of judges) obtained nominations or promotions in the judiciary in 2018–2023 i.e. after the entry onto force of the law of 2017 which resulted in the systemic violation of the right to a tribunal established by law, see Helsinki Foundation of Human Rights, 'Powołania sędziów w latach 2018–2023 na wniosek tzw. „nowej" Krajowej Rady Sądownictwa. Analiza statystyczna' ['Appointments of judges in 2018–2023 at the request of the so-called "new" National Council of the Judiciary. Statistical analysis'], September 2023 <https://hfhr.pl/upload/2023/10/raport_powolania_sedziow_przez_nowa_krs.pdf> accessed 18 February 2025.

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The lesson that can be learnt by lawyers, especially young legal professionals or law students, is that it doesn't pay to be decent, and it's much better to ignore basic principles of law and rudimentary professional (and general) decency and to accept professional promotions in violation of the constitution because no one will ever question or take it away. Poland has once again (the first time was after 1989 and the democratic breakthrough) taught its lawyers that one should be dishonest and morally filthy because it pays off. If Poland has any genuine ambition of restoring the rule of law, it must understand that justice has to be administered and impunity is destructive to law obedience.

3.7 Unclear and Insufficiently Legitimised Processes of Judicial Appointments

The Law and Justice party unduly politicised the mechanism of judicial appointment (and promotions), but the system was far from perfect also before the 'reforms' implemented by the far-right. From the insider's perspective, judicial appointments were often (far too often) decided on the basis of family and social ties (and sometimes even much more intimate ones). These are cases known in the lawyers' community, but there is a dignified silence about them, which is not good.

Desiring an effective and well-functioning judiciary, one should opt for a major reform of judicial careers. If judges are to be, really, the crown jewels among legal professions, they should be experienced and well paid. Only after reaching a certain professional experience in other legal professions should lawyers be eligible for judicial appointments. Otherwise, the dissatisfaction with the functioning of courts will persist.

4. The EU Context

Before conclusions, one should address the broader context of the constitutional backsliding in Poland, pertaining to its membership in the European Union. First of all, the anti-democratic challenges occurring in Poland gave new impetus to the mechanism of protection of axiological foundations of the Union. They provoked a series of rulings of the CJEU pertaining to the separation of powers and the substantive elements of the right to a fair trial. They also dynamised the discussion on the significance of the rule of law

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for the distribution of EU funds, resulting in the adoption of the regulation on the general regime of conditionality.[75] Secondly, the role of the Union in protecting the rule of law in Poland cannot be underestimated. Although one may criticise the interim measures ordered by the CJEU for lack of immediate effectiveness, at the end of the day, they proved effective in the sense that their imposition was one of the factors mobilising the society to vote against the far-right government in the 2023 general election.[76] Rulings of the Court, issued under Articles 258 (coercive action against a Member State) or 267 TFEU (preliminary reference) were important shields protecting the judiciary against politicisation and political abuses from the government. Thirdly, the case law of the Court concerning the rule of law in Poland made many judges realise (although no statistics are available, therefore one may base this opinion on one's own experience resulting from practising a legal profession) that they are European judges in the sense designed by the Court in *Simmenthal II*.[77] It is too early to assess how this CJEU-induced development of self-awareness of judges will impact the future case law of Polish courts, but certainly it cannot be disregarded. Fourthly, the deterioration of the rule of law in Poland resulted in putting the question of democracy on the agenda of the EU. Never before has this issue been so deeply discussed. After the series of crises (financial crises, the Brexit, and the pandemic) the axiological self-identification of the Union was triggered as a consequence of the challenges to democracy in Poland.

5. Conclusion

The main reason why – at least so far – the rule of law was defended in Poland despite the episode of backsliding from 2015 to 2023, was probably that it had been sufficiently embedded in the society and its structures already before the deterioration of the rule of law occurred. Although the legal culture had been insufficient and the distrust in state institutions,

75 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433 I/1.

76 See e.g. order of the Vice-President of the Court of 21 April 2023, C-C-204/21 R-RAP *Commission v. Poland*, ECLI:EU:C:2023:334.

77 Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SA*[1978] CJEU ECLI:EU:C:1978:49, 24.

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including courts, had been significant, the majority of the society was nevertheless convinced that the rule of law was worth defending – perhaps due to the historical experience of the authoritarian era of 1944–1989. Therefore, even though large sections of the society (most notably women and minorities) had not been sufficiently protected by democratic institutions and the distrust of democratic institutions had been significant, the existing mechanisms and factors (such as e.g. independent media, relatively strong private capital and NGOs) sufficed to protect the democracy. Normative methods crucial for the protection of the rule of law encompassed internal strategies (e.g. dispersed constitutionality review or anti-SLAPP interpretations) and external methods, i.e. methods of resorting to international courts ("constitutional neuroplasticity", preliminary references to the CJEU, applications to the ECtHR, extensive use of interim measures by international courts).

Poland's illiberal democracy episode of 2015 to 2023 may reoccur. Therefore, certain deficits need to be addressed in order to strengthen democratic militancy and prepare for the future challenges to the rule of law: constitutional education should become a central element of curriculums of any high school graduate, EU financing should be provided to human rights NGOs and independent media, the quality of constitutional adjudication should be radically increased, judicial appointments should be transparent and merit-orientated, and enforcing lawyers' deontology should become more effective. Also, Poland's accession to Protocol No. 16 to the ECHR is highly recommendable, as well as better execution of the Strasbourg case law.

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

Darinka Piqani[*]

Abstract

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

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

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1. Introduction: Rule of law as Constitutional Principle

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Preamble to the Treaty of Maastricht [1993].

13 Case C-294/83 *Parti Ecologiste 'Les Verts',* see n. 8.

14 Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECLI:EU:C:2008:461; Opinion 2/13, ECLI:EU:C:2014:2454.

15 C. Hillion, 'The Creeping Nationalisation of the EU Enlargement Policy' (Swedish Institute for European Policy Studies, 2010/6).

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

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

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

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

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

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

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

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

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

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

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

21 R. Janse, see n. 20.

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

23 B. De Witte, see n. 19.

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

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

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

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

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

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

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

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

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

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

4.1 The Commission

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

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

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

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

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

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

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

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

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

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

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

4.2 The Role of the Court of Justice

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

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

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

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

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

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

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

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

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

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

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

Since this case, judicial independence

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

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

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

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

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

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

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

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

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

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

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

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

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

56 Regulation, see n. 54, Article 1.

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

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

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

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

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

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

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

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

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

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5. On Rationale and Enforcement

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

63 L. Pech, 'The Rule of Law as a well-established and well-defined principle of EU law' (2022) 14 *Hague Journal on the Rule of Law*, 107, 118.

64 V. Borger, see n. 58, 1797.

65 See e.g. in the Polish context, Case C-204/21 R [2021] ECLI:EU:C:2021:878.

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5.1 Cementing a Constitutional Order Beyond Effectiveness and Autonomy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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6. Conclusion

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

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EU Perceptions on Financial Instruments and Crisis Management

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Understanding the EU's Self-conception Through its Financial Integration

Ruth Weber[*†]

Abstract

Can *European integration* be understood by looking at how the European Union (EU) is financed? This paper takes a three-step approach to address this question. First, the link between financing and self-conception is presented as an expression of different understandings of integration – a more static one versus a more dynamic one. Second, the historical development and the current state of financing of the EU are outlined, noting recurring calls to link EU policies to financing methods. This is illustrated by the switch from contributions to own resources in the 1970s, which coincided with deeper market integration. In the 1980s, the introduction of own resources based on gross national income brought the financing method back closer to the original contributions. The 2020 Own Resources Decision introduced a change of financing, with the issuance of earmarked bonds and own resources based on plastic waste. Third, the paper discusses possible legal limits to these developments, focusing on Article 311 of the Treaty on the Functioning of the European Union (TFEU), which allows for a broad interpretation in principle. Introducing new own resources, including borrowing and taxation, however, requires the approval of all Member States. Additionally, the German Federal Constitutional Court (FCC) has set limits regarding the interpretation of Art. 311 TFEU. Historical developments in EU financing, especially the evolution of own resources, show that there is an ongoing demand for reform driven by diverging interests. Due to sparse ECJ case law on questions of EU financing, the role of law remains

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limited, with national courts such as the German Federal Constitutional Court playing a key role. The concept of integration through funding, linked to the emergence of NextGenerationEU, offers a new perspective on EU integration by increasing the EU's financial influence over Member States. Unlike the concept of integration through law, however, it is not yet a fully developed theory. In light of the prevailing crises, integration through funding could emerge as a complementary approach to integration through law.

Introduction

Since the beginnings of European integration in the 1950s, there have not only been different European Treaties and European Communities. The EU's financing arrangements have also been subject to change.[1] This raises the question of how financial integration is linked to the EU's self-conception and how this relates to the legal framework of European integration.

To understand the connection between the EU's self-conception and its financial integration, this text is divided into three sections. The first step is to analyse the different understandings of European integration in the context of its financial structure. To this end, two different approaches found in the literature are compared in the following: One side suggests a rather static understanding, according to which a certain established state of affairs is an expression of integration. Others place more emphasis on the processual nature of European integration. As a result, the former stance is less open to fundamental change than the latter, which emphasises a dynamic approach.

In order to better understand the two perspectives on European integration, in the second step an overview of EU financing and its historical development is provided. In the 1950s, various models were discussed and implemented, including a tax-based financing model in the European Coal and Steel Community (ECSC). However, the European Economic Community (EEC) initially followed the classic model of international organisations, i.e. contribution-based financing. This paper explains why the own resources model, which remains extant to this day, prevailed in the early 1970s, and how it is linked to the democratic legitimacy of the

1 Here and in the following, I use the term 'EU' for reasons of readability. It also refers to the EU's predecessors, the European Communities, and their financial organisation.

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Community level. The paper provides an overview of the developments that EU financing has undergone in recent years, offering insights into ongoing discussions concerning potential reforms.

The third step will focus on the legal limits of such developments. On the one hand, the constitutional law of the Member States will be addressed. The case law of the Federal Constitutional Court (FCC) on European integration will be presented, especially the line of case law on budgetary powers that began with the decision on the Treaty of Lisbon. By analysing the 2022 decision on the NextGenerationEU economic recovery fund, it will be possible to examine the extent to which German constitutional law sets limits on further debt-making at EU level. On the other hand, European primary law will be analysed in more detail. A prime example of the debate on the future financing of the EU is the discussion evolving around the so-called plastic own resources, which are often referred to as 'non-genuine EU taxes'. Their implementation raises the question of the extent to which the principles of democracy and institutional balance enshrined in the European Treaties set limits on such financing options.

1. The Link Between Financing and Self-Conception as an Expression of Different Understandings of Integration

The design of the EU's financial constitution is often described as a 'mirror' of *European integration*. This metaphor builds on the accounts of financial and constitutional history, that suggest comparable images, such as a parallelism between the form of government and the type of taxation.[2] In describing the interrelationship between *European integration* and its financial constitution, two major trends can be observed in the literature: One side suggests a rather static understanding, according to which a certain established state of affairs is an expression of integration (1.1). Others, however, place more emphasis on the processual nature of *European integration* (1.2). As a result, the former stance is less open to fundamental change than the latter, which advocates for a dynamic approach that is more open to changes in the own resources system.

2 For an example see A. Schwennicke, *»Ohne Steuer kein Staat«. Zur Entwicklung und politischen Funktion des Steuerrechts in den Territorien des Heiligen Römischen Reichs (1500-1800)* (Vittorio Klostermann, 1996).

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1.1 Static Understanding

The image of the financial constitution as a mirror of integration often seems to be associated with the idea that a certain state of affairs should be preserved: In this view, the financial regulations reflect the integration achieved in the EU as a given and well-established state of affairs.[3] Accordingly, the financial constitution is said to fulfil "a serving role"[4]. The "asymmetry in the EU financial sector" is seen as an indicator of the degree of integration so far achieved.[5] The current own resources system is considered an "adequate reflection" of *fiscal integration*.[6] As reference to the established state of affairs suggests, this state is to be maintained. Authors representing this understanding are often sceptical about future reforms of the own resources system through EU taxes. This is linked to other prominent assessments of *European integration*: Emphasising the EU's status as an association of sovereign states (Staatenverbund) usually leads to the argument that taxes at EU level contradict this concept. Taxes are thus seen as an expression of sovereign statehood.

According to this line of argument, the EU's status as a legal community (Rechtsgemeinschaft) points in only "one direction": Competences should only be transferred once a sufficient basis of legitimacy has been created.

3 For examples, albeit in relation to different objects, see K. Bergfeld, *Lenkungsabgaben im Europäischen Finanzrecht* (Nomos, 2008), 112; R. Caesar, 'Haushalts- und Finanzwirtschaft', in R. Hrbek (ed), *Die Reform der Europäischen Union. Positionen und Perspektiven anläßlich der Regierungskonferenz* (Nomos, 1997), 281, 283; B. Meermagen, *Beitrags- und Eigenmittelsystem. Die Finanzierung inter- und supranationaler Organisationen, insbesondere der Europäischen Gemeinschaften* (Beck, 2002), 174; D. Biehl, 'Zur Rolle der öffentlichen Finanzen in der Europäischen Integration' (1978) 1 *integration*, 35, 37-38.

4 C. Ohler, *Die fiskalische Integration in der Europäischen Gemeinschaft* (Nomos, 1997), 30: "dienende Rolle" (original German version).

5 C. Waldhoff, 'Überforderung nationaler Parlamente durch die Globalisierung? Grenzen am Beispiel der Budgetverantwortung' in C. Franzius, F. C. Mayer and J. Neyer (eds), *Modelle des Parlamentarismus im 21. Jahrhundert* (Nomos, 2015), 109, 128: "Asymmetrie in der EU-Finanzwirtschaft" (original German version); see also C. Waldhoff, 'Stärkung der Einnahmenautonomie als Zukunft der EU-Finanzen?' (2017) 70 *ifo Schnelldienst* 12, 14; see also C. Waldhoff, 'Steuerhoheit für die Europäische Union? ' (2012) Zentrum für Europäisches Wirtschaftsrecht, Vorträge und Berichte Nr. 195, 13.

6 H. Kube, 'EU-Steuern: Zuständigkeit zur Regelung und Erhebung sowie Ausgestaltungsmöglichkeiten' in M. Lang (ed), *Europäisches Steuerrecht, 42. Jahrestagung der Deutschen Steuerjuristischen Gesellschaft e.V.* (Otto Schmidt, 2018) 69, 99: "Stand der fiskalischen Integration […] durch das Eigenmittelsystem nach Art. 311 AEUV angemessen widergespiegelt" (original German version).

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The lack of legitimacy is essentially linked to its alleged absence in the existing legal framework, which, according to this view, is not sufficient to legitimise certain developments. At the same time, the interpretation of the legal framework is based on a particular understanding of integration. If a sufficient basis of legitimacy is not seen as possible in the foreseeable future, the way in which the EU is financed is essentially tied to the status quo.[7]

1.2 Dynamic Understanding

Other authors emphasise the dynamic nature of the relationship between *European integration* and its financial constitution. The expansion of the European Parliament's budgetary powers from the 1960s to the 1980s is often compared to the historical struggle for budgetary powers in favour of parliamentarisation and democratisation.[8] This development seems to follow a historically familiar pattern. The direction of strengthening the parliament is clearly set and applied to *European integration* itself. Some even suggest that the history of *European integration* is synthesised in the historical course of the creation and extension of budgetary powers.[9]

The importance of the EU budget for the integration process is also stressed in more recent contributions. Compromises in budgetary law are seen as crucial for integration.[10] Budgetary breakthroughs are said to have

7 C. Waldhoff, 'Stärkung der Einnahmenautonomie als Zukunft der EU-Finanzen?' (2017) 70 *ifo Schnelldienst* 12, 14: "[A]ls Rechtsgemeinschaft […] nur eine Richtung" (original German version); see also Bundesministerium der Finanzen (ed), *Gutachten des Wissenschaftlichen Beirats beim Bundesministerium der Finanzen, Reform der EU-Finanzierung: Subsidiarität und Transparenz stärken* (Bundesministerium der Finanzen, 2016), 17.

8 G. Zellentin, *Budgetpolitik und Integration* (Europa Union Verlag, 1965), 23; I. E. Druker, *Financing the European Communities* (Springer Netherlands, 1975), 25.

9 F. Fugmann, *Der Gesamthaushalt der EG* (Libertas Verlag, 1992), 366, with reference to D. Strasser, *Die Finanzen Europas. Das Haushalts- und Finanzrecht der Europäischen Gemeinschaften* (Publications Office, 1991); see similarly also P. M. Schmidhuber, 'Die Notwendigkeit einer neuen Finanzverfassung der EG' (1991) *Europarecht,* 329, 335; I. E. Druker, 'Strengthening Democracy in the EEC. Autonomous instrument of common policy?' (1964) 2 *Common Market Law Review,* 168, 170.

10 B. Laffan, *The Finances of the European Union* (Palgrave Macmillan, 1997); B. Laffan, 'The big budgetary bargains. From negotiation to authority' (2000) 7 *Journal of European Public Policy*, 725.

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contributed to overcoming serious crises at various stages.[11] EU funding is analysed as a "motor of *political integration*", pointing to parallel developments in the nation states.[12] The importance of funding for the deepening of integration has become even clearer since the expansion of cohesion policy.[13] One can observe parallels between the development of the Community's structural policy and its progressive integration and spatial expansion.[14] According to this interpretation, the development of cohesion and structural policies is crucial for the future direction of integration. Looking at the NGEU legal acts, which are largely based on the cohesion legal basis, the strengthening of cohesion policy seems to be the current focus. This also explains the talk of *integration through funding*.[15] Budgetary policy and integration policy are thus directly linked.[16] If the emphasis is placed on the dynamics of this process, there seems to be considerably more flexibility

11 For examples from the 1960s to the 1990s, see N. P. Ludlow, 'Budgeting for Success. How a Series of Budgetary Breakthroughs Underpinned the EC/EU's 1980s Boom' in R. Weber (ed), *The Financial Constitution of European Integration. Follow the Money?* (Bloomsbury Publishing, 2023), 191; F. Schorkopf, 'The Integration Surplus of the EU's Budgetary Law – or "no representation without taxation"?' in R. Weber (ed), *The Financial Constitution of European Integration. Follow the Money?* (Bloomsbury Publishing, 2023), 205.

12 A. Boissenin, *Le financement de l'Union européenne: moteur d'une intégration politique? Contribution à l'étude du système budgétaire européen* (LGDJ, 2019), 3: "le moteur de son intégration politique" (original French version).

13 For an example, see R. Bieber, 'Die Ausgaben der Europäischen Gemeinschaften' (1982) *Europarecht,* 115, 122; R. Bieber in H. von der Groeben, J. Schwarze and A. Hatje (eds), *Europäisches Unionsrecht* (Nomos, 2015), Art. 311 AEUV, marginal no. 6.

14 B. Schöndorf-Haubold, *Die Strukturfonds der Europäischen Gemeinschaft. Rechtsformen und Verfahren europäischer Verbundverwaltung* (Beck, 2005), 46. See also M. Shackleton, *Financing the European Community* (Cengage Learning EMEA, 1990), 64 and L. van Middelaar, *Vom Kontinent zur Union* (Suhrkamp, 2016), 426.

15 B. De Witte, 'Integration through Funding. The Union's Finances as Policy Instrument' in R. Weber (ed), *The Financial Constitution of European Integration. Follow the Money?* (Bloomsbury Publishing, 2023), 221. Not with this terminology, but emphasising the meaning A. De Feo, 'EU Budget Politics. Looking Forward' in S. Becker, M. W. Bauer and A. De Feo, *The New Politics of the European Union Budget* (Nomos, 2017), 281; P. Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe – Between Continuity and Rupture' (2021) 47 *Legal Issues of Economic Integration*, 337; M. W. Müller, '§ 6 Europäische Finanzsouveränität' in T. P. Holterhus and F. Weber (eds), *Handbuch Europäische Souveränität* (Mohr Siebeck, 2024), 221, 239: "'Steuerung durch Finanzen' auf europäischer Ebene".

16 S. Becker, M. W. Bauer and A. De Feo, 'The New Politics of the European Union Budget: Background, Key Findings, and Outlook' in S. Becker, M. W. Bauer and A. De Feo, *The New Politics of the European Union Budget* (Nomos, 2017), 15, 15-16; D. R.

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for the future. According to this understanding, legitimacy is linked to the ability to evolve and to respond to crises through political decisions. This seems to correspond to a more teleological understanding of law.

2. The Historical Development and the Current State of Financing of the European Union

To better understand the two perspectives on *European integration*, this section provides an overview of the financing of the EU and its historical development. While various models were discussed and implemented in the 1950s, including a tax-based financing model in the ECSC, the EEC initially followed the classic model of international organisations, i.e. contribution-based financing. This section explains why the own resources model, which still exists today, prevailed in the early 1970s and how it is linked to the democratic legitimacy of the Community level. The section is structured as follows: Since own resources only replaced the previous system of contributions in the 1970s, the history of own resources and the background to the change in the system are examined first (2.1). Over time, the Gross National Income (GNI)-based own resources have gained importance and therefore will be discussed in the second section (2.2).

2.1 Transitioning From Financial Contributions to Own Resources to Deepen Integration?

The Treaties of Rome left open the question of how the Communities were to be financed.[17] Neither the EEC Treaty nor the Treaty establishing the European Atomic Energy Community (EAEC) contained any definitive regulations. While the optional possibility of tax-financing provided for in the EAEC Treaty was never realised, the transitional period laid down in the EEC Treaty provided for the gradual transition of financing from contributions to own resources once a common market had been established. This shows the crucial importance of this issue and the link between the deepening of (economic) integration and the way in which the Community

Theato and R. Graf, *Das Europäische Parlament und der Haushalt der Europäischen Gemeinschaft* (Nomos, 1994), 12.

17 See financial provisions in Art. 199–209 EEC Treaty and Art. 171–183 EAEC Treaty.

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was financed. The fact that the EEC stuck to the contribution system, at least initially, also suggests that the supranationalisation of financing by means of a sectoral tax, which had been introduced in the ECSC at the beginning of the 1950s, could no longer find a majority.[18]

Since the mid-1960s, in the context of the 'empty chair crisis', there had been discussions on the development of the Community's financing system. As early as July 1969, the Commission had put forward a proposal to replace financial contributions with own resources and to increase the budgetary powers of the European Parliament.[19] In December 1969, the heads of state and government met in The Hague to mark the end of the twelve-year transitional period.[20] The conflicts that had existed since the 'empty chair crisis' were overcome and the final transition from the contributions system to the own resources system was decided.[21]

The first Own Resources Decision in 1970 stipulated that the Communities' budget should be financed entirely by own resources as of 1 January 1975.[22] Customs duties, which were standardised until 1975, were primarily suitable for this purpose. Agricultural levies were added to this.[23] As both own resources originated in Community policies, the customs union and

18 On the financing of the ECSC and on the possibility of the introduction of a sectoral tax in the EAEC, which has never been realised, see § 10 I.1. and II.2 in R. Weber, *Budgetrecht und repräsentative Demokratie im Mehrebenensystem* (Mohr Siebeck, 2025).

19 Communication from the Commission to the Council on the replacement of financial contributions from member states by own resources and increased budgetary powers of the European Parliament. COM(69) 700, 16 July 1969.

20 To the summit as a whole see F. Schorkopf, *Die unentschiedene Macht* (Vandenhoeck and Ruprecht, 2023), 126; L. van Middelaar, *Vom Kontinent zur Union* (Suhrkamp, 2016), 272.

21 'Communiqué of the meeting of Heads of State or Government of the Member States at The Hague' (2 December 1969) *Centre Virtue de la Connaissance sur L'Europe*.

22 Art. 4 para. 1 subpara. 1 Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, Official Journal of the European Communities, No. L 94/19.

23 Art. 2 Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources, Official Journal of the European Communitie, No. L 94/19. For the development and reform of the own resources system with this resolution, see G. Olmi, 'Les Ressources Propres aux Communautés Européennes' (1971) *Cahiers de droit européen*, 379. On the development of agricultural policy in the transition period see P. Karpenstein, *Die Finanzierung der Agrarpolitik der Europäischen Gemeinschaften* (Universität des Saarlandes, 1985), 6; K. K. Patel, *Europäisierung wider Willen. Die Bundesrepublik Deutschland in der Agrarintegration der EWG 1955-1973* (Oldenbourg Wissenschaftsverlag, 2009), 397.

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the common agricultural policy, they were referred to as "traditional own resources"[24] and are still referred to as such today. The dependence on Community policies led to a particular feature: Although the level of customs duties and agricultural levies was determined by the Own Resources Decision, the level of revenue was largely dependent on factors that did not allow for budgetary control.[25] Moreover, they were not sufficient to cover all Community expenditure. Financial contributions continued to be used even after the introduction of own resources.[26]

To cover the financial needs, Value Added Tax (VAT)-based own resources were to be added. They had already been discussed as an example of own resources during the negotiations of the Treaties of Rome and were adopted in the first Own Resources Decision of 1970. They were intended to enable the Community to finance itself entirely from its own resources from 1975 onwards. This date was chosen because the harmonisation of VAT in the Member States was supposed to have progressed further by then. However, the timetable for harmonisation was delayed and VAT-based own resources were not levied until 1979. The harmonisation of the VAT system is also the reason why VAT was considered an appropriate own resource: VAT was partially harmonised and was considered to be representative of the common economic values in the Community, which should allow an equal distribution of the burdens imposed on it.[27] Until the introduction of the GNI-based own resources, the VAT-based own resources served as residual financing.

All this shows that the transition from the contributory to the own resources system initially linked the Communities' financing more closely to its policies. This can be seen as a deepening of integration. At the same time, the deepened integration is limited to those policy areas where compromises could be reached, notably customs and VAT. Financial autonomy

24 See Working Document No. 1 on the European Communities Own Resources, History of the European Community's revenue (Alain Lamassoure), 27 January 2005, also referred to as "principal resource". See also § 9 I.1. in R. Weber, see n. 18.

25 R. Bieber in H. von der Groeben, J. Schwarze and A. Hatje (eds), *Europäisches Unionsrecht* (Nomos, 2015), Art. 314 AEUV, marginal no. 23; M. Niedobitek in R. Streinz (ed), EUV/AEUV (C.H. Beck, 2018), Art. 311 AEUV, marginal no. 23.

26 For details see B. Meermagen, *Beitrags- und Eigenmittelsystem. Die Finanzierung inter- und supranationaler Organisationen, insbesondere der Europäischen Gemeinschaften* (C. H. Beck, 2002), 135, 143.

27 B. Meermagen, see n. 26, 153; for the calculation method of VAT-based own resources today, see § 9 I.1. in R. Weber, see n. 18.

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did not emerge due to the close link to substantive policies, which did not allow for autonomous budgetary control.

2.2 Introduction of GNI-based Own Resources as a Step Backwards in Terms of Integration?

Following the first Own Resources Decision and the gradual implementation of the own resources it provided for, the Community ran into financial difficulties over the course of the 1980s. In 1984, 1985 and 1988, the Community had to rely on advances from the Member States to cover its excessive debts. Although the acute crises could be overcome by means of grants from Member States, it became clear that a long-term solution was needed for the functioning of the Community and its finances.

During the 1980s, it became increasingly clear that the arrangements for financing the Community, established by the first Own Resources Decision in 1970, needed to be reformed. While the discussions in the 1970s focused on the reform of the expenditure side of the budget, in particular its parliamentarisation, once the ceiling of 1% of VAT-based own resources was reached and the Community's own resources were no longer sufficient to finance it, the focus shifted to the revenue side.[28]

At the end of the 1980s, the Delors I package of 1988 helped overcome budgetary conflicts. The introduction of the Financial Perspectives and budgetary discipline allowed long-term planning and stabilisation on the expenditure side. On the revenue side, the Own Resources Decision of 24 June 1988 introduced the possibility of including revenue resulting from the application of the total Gross National Product (GNP) of all the Member States in the EU budget as own resources.[29] The GNP- (later GNI-) based own resources, which henceforth took over the role of residual financing, together with the increased budgetary discipline, led to a stabilisation of finances. At the same time, they are, in a sense, a step backwards in terms of integration, as they end up being close to the original financial contributions. Since then, Own Resources Decisions and Financial Perspectives

28 J.-P. Jacqué, 'Compétences et pouvoirs en matière de ressources propres' in G. Isaac (ed), *Les Ressources Financières de la Communauté Européenne* (Economica, 1986), 95, 96.

29 Art. 2 para. 1 d) Council Decision No. 88/376/EEC, Council Decision of 24 June 1988 on the system of the Communities' own resources, Official Journal of the European Union, 15.7.1988, No. L 185/24.

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are negotiated together and are coordinated in terms of both timing and content.

2.3 Stagnation of Reform Discussions Ever Since?

The development of the own resources categories required political compromises. These were formed over several years and usually in response to major crises, as illustrated by the introduction of the GNP-based own resources at the end of the 1980s. Political scientists point out that the own resources system and the multiannual financial frameworks follow path dependencies.[30] They emphasise that decision-making has been characterised by stability since the Delors I package of 1988.[31] This made it difficult to deviate from this compromise once it had been reached, despite continued calls for reform. The Treaty of Lisbon has not changed this either, although revised Art. 311 TFEU explicitly mentions the possibility of introducing new own resources, which some saw as a mandate for reform enshrined in primary law. As a result, there has been no reform on the revenue side of the EU budget until the introduction of the plastic own resources in 2020, which will be discussed below.[32]

Regarding other resources, the only change since the 1980s has been the ratio between the various own resources. The now dominant GNI-based own resources promote the 'net contributor' logic. The regressive effect of VAT-based own resources has also increased with the enlargement rounds, particularly through GNI-weak Member States, which has been accom-

30 For fundamental analyses, see A. Wenz-Temming, *Die Einnahmen der Europäischen Union. Zwischen supranationaler Autonomie und intergouvernementaler Kontrolle* (Wiesbaden, 2017); L. Selle, *What Parliamentary Budget-Authority in the EU? The European Parliament and the German Bundestag in the Negotiations of the Multi-Annual Financial Framework 2014–2020* <https://opus4.kobv.de/opus4-euv/frontdoor/deliver/index/docId/273/file/Selle_Linn_Dissertation_17-10-22_final.pdf> accessed 20 March 2025.

31 J. Lindner, *Conflict and Change in EU Budgetary Politics* (Taylor and Francis, 2006); R. Kaiser, H. Prange-Gstöhl, *The European Union Budget in Times of Crises* (Nomos, 2019), 27; on the possibilities for reform within processes dominated by path dependency see R. Ackrill and A. Kay, 'Historical-institutionalist perspectives on the development of the EU budget system' (2006) 13 *Journal of European Public Policy*, 113.

32 See section 3.2.2.

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panied by changes in the rebate system.[33] The different rebates and the resulting complexity of the own resources system have led to an ongoing criticism of the system.

3. Current Developments and their Legal Assessment

This section provides an overview of the developments in EU financing in recent years and assesses them from a legal point of view. It examines the possibility of introducing debt (3.1) and taxes (3.2) at EU level, two phenomena that are particularly relevant today.

3.1 EU Debts

3.1.1 General Legal Framework

The question of whether, for what purposes and how much debt the EU may incur is crucial and merits further examination. Borrowing has been a feature of the European Communities since their inception. Under the ECSC and EAEC Treaties, the respective Communities had access to loans for certain activities.[34] However, the EEC Treaty did not contain any provision on borrowing activities.[35] Nonetheless, the EEC began to borrow occasionally in the 1970s. In 1975, it used bonds for the first time to finance oil price-related payment deficits of the Member States.[36] Bonds were also issued under the New Community Instrument (NCI) to promote invest-

33 Art. 2 (1) (b) of the 2020 Own Resources Decision stipulates that the VAT base to be taken into account for this purpose shall not exceed 50% of GNI for each Member State. For more details on the currently applicable law, see § 9 I.1. in R. Weber, see n. 18.

34 Art. 49, 51 para. 1 ECSC Treaty; Art. 172 para. 4 EAEC Treaty; see R. Scheibe, *Die Anleihekompetenzen der Gemeinschaftsorgane nach dem EWG-Vertrag. Zu den Möglichkeiten und Grenzen der Kreditfinanzierung der EWG sowie zur Finanzverfassung der EWG, zugleich ein Beitrag zur -Allgemeinen Ermächtigungsklausel- des Art. 235 EWGV* (Nomos, 1988), 25; see § 10 III.2 in R. Weber, see n. 18.

35 However, according to Art. 309 (1) sentence 1 half-sentence 2 TFEU, the European Investment Bank may "have recourse to the capital market".

36 Regulation (EEC) No 398/75 of the Council of 17 February 1975 implementation Regulation (EEC) No 307/75 concerning community loans, Official Journal of the European Communities, No. L 46/3.

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ment in the wake of the economic crisis of the 1970s.[37] Balance-of-payments bonds can also be found later.[38] In the 2010s, selective measures were added which, unlike the previous ones, were not based on Art. 352 TFEU but on Art. 122 para. 2 TFEU.[39] These borrowing activities were not recorded in the budget as own resources but as 'other revenue' within the meaning of Art. 311 para. 2 TFEU.

Put simply, borrowing has been a common practice in supranational law for some time. However, the legal basis and the further conditions for EU borrowing are controversial. While there is no explicit prohibition on debt, this does not mean, conversely, that general EU budget financing through debt is permissible. To answer the question of the EU's debt financing competence, Art. 311 TFEU in particular must be analysed more closely, and the provisions contained therein must be placed in the overall structure of primary law. The wording of Art. 311 para. 3 TFEU, which mentions 'new categories of own resources' but does not define them in more detail, argues in favour of the permissibility of raising debt for general budget financing in accordance with the procedure laid down in Art. 311 TFEU.[40] Nevertheless, the question of debt competence is also linked to the question of the autonomy of EU financing. The lack of financial autonomy at the EU level results from the provision according to which own resources are to be determined in an Own Resources Decision and to be ratified by the Member States (Art. 311 para. 3 TFEU); this Decision must also set a ceiling on expenditure. According to the Treaties, the EU therefore does not have unlimited general fiscal competence.

This means that the Treaties do not contain a prohibition on incurring debt, but they do stipulate that the EU has limited financial autonomy.

37 See detailed overview in R. Scheibe, see n. 34, 41-171. See also K. von Lewinski, 'Verschuldungskompetenz der Europäischen Union' (2012) *Zeitschrift für Gesetzgebung*, 164, 167-168.

38 See for example Council Regulation (EC) No. 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, Official Journal of the European Communities, No. L 53/1. Overview at S. Magiera in E. Grabitz, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union* (C. H. Beck, 2023), Art. 311 AEUV, marginal no. 43.

39 Council Regulations (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism; Council Regulation (EU) 2020/672 of 19 May 2020 on the establishment of a European instrument or temporary support to mitigate unemployment risks in an emergency (SURE) following the Covid-19 outbreak; on NGEU, see § 10 III.3. in R. Weber, see n. 18.

40 R. Bieber in H. von der Groeben, J. Schwarze and A. Hatje (eds), *Europäisches Unionsrecht* (Nomos, 2015), Art. 311 AEUV, marginal no. 43.

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Apart from that, however, the provisions of primary law, in particular Art. 311 TFEU, are ambiguous and unclear. Previous European Treaties and their financial provisions provided models for a more precise regulation regarding debt-making. However, the Treaties of Rome only laid down the vague terms that have remained almost unchanged in primary law ever since. Apart from the limitations mentioned above, the question of debt competence thus illustrates the ambivalence of the financial provisions in primary law.

3.1.2 NextGenerationEU

The NextGenerationEU recovery and resilience fund enabled the EU to take on debt on a large scale. As the scope of the fund and its overall legal structure are innovative in many respects, it has led to a re-examination of the question of debt competence at EU level. With the decision of the German FCC on NextGenerationEU, there is now also a supreme court case law on the issue.[41] The Court of Justice of the EU (ECJ) is unlikely to rule on the case in the future.

When the question of debt competence was raised in the context of NextGenerationEU, this also posed fundamental questions as to the interpretation of Art. 311 TFEU. Concerns included the nature of the own resources system, the relationship between own resources and other revenue, and the legal nature of the Own Resources Decision and its compliance with primary law.[42] There are passages in the FCC's ruling on NextGenerationEU that address all three questions. They reflect the Constitutional Court's understanding of the possibility of EU borrowing under both European and national constitutional law. The Court declared constitutional the procedure of the Own Resources Decision 2020 for the determination of other resources, financed by loans, which are earmarked for specific purposes. With regard to the EU's debt competence, the Court expressed no significant reservations either against the inclusion of other revenue in the Own Resources Decision or against borrowing for other revenue.[43] However, the Court's decision clarified the limits of the EU debt compe-

41 BVerfG, Judgement of the Second Senate of 6 December 2022 – 2 BvR 547/21.
42 For these points, see § 9 II.3. in R. Weber, see n. 18.
43 BVerfG, Judgement of the Second Senate, see n. 41. See in closer detail § 9 II.3. and § 10 III.3 in R. Weber, see n. 18.

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tence: it must be limited in time and amount and the other revenue may not obviously exceed own resources.[44]

The FCC refers to the lack of competence for general credit-financed budget financing as a central issue of debt competence.[45] According to the Constitutional Court's understanding, only revenues that are "in the execution of the *European integration* agenda"[46] may be financed by borrowing. In the Court's view, NextGenerationEU fulfilled this condition as it included borrowing limits. It thus appears to be a prime example of the level of EU debt that is legally permissible under constitutional law. This also means that the decision shows the limits set by national constitutional law on the possible further development of the EU's financial resources. According to the FCC, the "system of own resources aims to strengthen the European Union's political leeway". However, according to the decision, the EU's "political leeway" ends where the Member States set the ceilings in the Own Resources Decision.[47]

If the EU itself has competence to borrow, it will have financial obligations in the future, as the loans will have to be repaid. The previous own resources system did not push much of the financing burden into the future. The link between the GNI-based resources in the Own Resources Decision and the multiannual financial frameworks prevented financing gaps from arising in the first place. The debt must now be refinanced via corresponding allocations in the Own Resources Decisions. For the FCC, it is crucial that the loans to be repaid are fixed in advance at a certain level, which is in line with the logic of 'political leeway' within fixed ceilings.

44 BVerfG, Judgement of the Second Senate, see n. 41, marginal no. 189-202.

45 BVerfG, Judgement of the Second Senate, see n. 41, marginal no. 159.

46 BVerfG, Judgement of the Second Senate, see n. 41, marginal no. 159: "im Rahmen des Integrationsprogramms" (original German version).

47 BVerfG, Judgement of the Second Senate, see n. 41, marginal no. 195; see also ibid: "Debt financing of EU operations undermines the financing through own resources intended by the Treaty and could even create a dependency of the European Union on funding provided by the Member States contrary to the aim and intention of the system of own resources."; see similarly M. Nettesheim, '"Next Generation EU". Die Transformation der EU-Finanzverfassung' (2020) 145 *Archiv des öffentlichen Rechts*, 381, 394.

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3.2 EU Taxes

3.2.1 General Legal Framework

On the question of the EU's tax competence, a distinction must first be made, as there is no fixed concept of EU taxes.[48] A distinction is often made between so-called 'genuine' and 'non-genuine' EU taxes.[49] 'Genuine' or 'own' EU taxes are generally understood to be taxes for which the EU has both the power to adopt legislation and the power to raise revenue.[50] Based on the principle of conferral and the provision in Art. 311 para. 1 TFEU, genuine EU taxes cannot be introduced without a ceiling. However, it is conceivable to amend primary law in certain areas and to allow the introduction of genuine EU taxes.[51]

Another question is the extent to which Member States can agree to a genuine EU tax based on national constitutional requirements. According to the FCC's case-law, Art. 311 para. 1 TFEU does not provide for an "exclusive competence" (literally: "Kompetenz-Kompetenz") for the financing of the EU. In the Maastricht judgement, the FCC ruled that the TEU (Art. F para. 3 TEU) does not empower the EU to "acquire by itself the financial or other means it believes it requires". Rather, the relevant provision of the TEU "merely states the political intention that the Member States forming the Union wish to provide it, within the scope of the required procedures,

48 For a systematisation of the uses, see P. Kreibohm, *Der Begriff der Steuer im Europäischen Gemeinschaftsrecht* (Karl Heymanns Verlag, 2004); H. Kube, 'EU-Steuern: Zuständigkeit zur Regelung und Erhebung sowie Ausgestaltungsmöglichkeiten' in M. Lang (ed), *Europäisches Steuerrecht, 42. Jahrestagung der Deutschen Steuerjuristischen Gesellschaft e.V.* (Otto Schmidt, 2018), 69, 70-74.

49 On both categories, see § 10 IV.2. and 3. in R. Weber, see n. 18.

50 The term "genuine" is used by T. V. Meickmann, 'Das Steuererfindungsrecht der Europäischen Union' (2023) *JuristenZeitung*, 748; the term "own" by C. Waldhoff, 'Stärkung der Einnahmenautonomie als Zukunft der EU-Finanzen?' (2017) 70 *ifo Schnelldienst* 12; see also H. Kube, 'EU-Steuern. Kompetenzrechtliche Lage und Entwicklungsperspektiven' (2022) 18 *Heidelberger Beiträge zum Finanz- und Steuerrecht*, 51, 52; J. Hey, 'Das Einnahmesystem der Europäischen Union. Neue Steuern als neue Eigenmittel? Zugleich zum Zustimmungsgesetz zum Eigenmittelbeschluss 2020/2053' (2021) *Europäische Zeitschrift für Wirtschaftsrecht*, 277, 280; A. Buser, 'Die Finanzierung der EU. Möglichkeiten und Grenzen einer EU-Steuer nach Europarecht und Grundgesetz' (2014) *Zeitschrift für europarechtliche Studien*, 91, 93-95.

51 For an example see W. Schön, 'Steuergewalt und Demokratieprinzip in der Europäischen Union' in J. Hey and W. Schön (eds), *Europäisches Steuerverfassungsrecht. Symposion aus Anlass der Verabschiedung von Professor Dr. h.c. Rudolf Mellinghoff als Präsident des Bundesfinanzhofs* (Springer, 2023), 47, 74-79.

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with the means necessary to attain its objectives and carry through its policies".[52] According to the Lisbon judgement, the German Bundestag's budgetary powers may not be transferred "if the type and level of public spending were, to a significant extent, determined at the supranational level".[53] This means that 'significant' decisions on revenue cannot be transferred to the EU. According to the Lisbon judgement, the introduction of a genuine EU tax without the Own Resources Decision limiting it to a certain amount, would therefore violate the Basic Law.

While national constitutional law provides arguments against the introduction of 'genuine' EU taxes, another group of taxes needs to be analysed. Taxes that do not or do not primarily serve financing purposes but have harmonisation and steering objectives are referred to as 'non-genuine' taxes. For these EU taxes, the competence to legislate lies wholly or partly with the Member States; the competence to raise revenue does not lie, or does not lie directly, with the EU.[54] This makes 'non-genuine' EU taxes a broader category, and their specific characteristics more varied.[55] An example of a 'non-genuine' EU tax with an impact on the own resources system is the VAT-based own resources. EU law stipulates minimum harmonisation for VAT.[56] Harmonisation competences in tax law arise in particular from Art. 113 to 115 TFEU. However, harmonisation alone is not sufficient for in-

52 BVerfGE 89, 155 [194-195]. English translation according to <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf> accessed 20 March 2025.

53 BVerfGE 123, 267 [361]; on both decisions see § 5 VII.1. and 2. in R. Weber, see n. 18.

54 T. V. Meickmann, see n. 50, 748, 748-749.

55 According to the ECJ, levies can in principle be introduced on the basis of material competences and the mere fact that they also generate revenue does not mean that the procedure under Art. 311 (3) TFEU would have to be followed, see ECJ, Judgement, EU:C:1989:303, marginal no. 11, to the former provision of Art. 201 EEC Treaty. For the introduction of levies on the basis of harmonisation competences, see M. Lienemeyer, *Die Finanzverfassung der Europäischen Union. Ein Rechtsvergleich mit bundesstaatlichen Finanzverfassungen* (Nomos, 2002), 126-166; C. Ohler, *Die fiskalische Integration in der Europäischen Gemeinschaft* (Nomos, 1997), 173-243; T. V. Meickmann, see n. 50, 748, 749-750; for the introduction of levies on material competences C. Müller, *Parafiskalische Abgaben im Unionsrecht. Konkretisiert an den Plänen der Europäischen Kommission zur Schaffung einer vergemeinschafteten Einlagensicherung aus dem Jahre 2015* (Duncker and Humblot, 2020); K. Bergfeld, *Lenkungsabgaben im Europäischen Finanzrecht* (Nomos, 2008); F. S. M. Heselhaus, *Abgabenhoheit der Europäischen Gemeinschaft in der Umweltpolitik* (Duncker and Humblot, 2001).

56 Council Directive 2006/112/EC of 18 November 2006 on the common system of value added tax, Official Journal of the European Union No. L 347/1.

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clusion in the EU budget as an own resource. Rather, the calculation of the amount of the VAT-based own resources results from the Own Resources Decision and is in principle independent of the specific requirements of minimum harmonisation.[57]

Another example is the plastic own resources introduced with the 2020 Own Resources Decision.[58] Again, the Own Resources Decision defines the basis of assessment. However, unlike the VAT-based own resources, there is no substantive legislation on environmental policy for the harmonisation or introduction of levies on plastics. The Member States are therefore not obliged to introduce such a levy in their national law. Considering them as own resources merely increases the incentive to reduce the corresponding plastic waste through the introduction of a levy in Member State law.[59] This example shows that non-genuine taxes can also take the form of 'fictitious' taxation.[60]

In conclusion, non-genuine EU taxes are used to finance the EU budget through the Own Resources Decision. However, they also pursue policy objectives. In accordance with the principle of conferral, the substantive policy objective requires the existence of a substantive competence in the EU Treaties.

3.2.2 Plastic Own Resources

As a rare novelty in EU financing, plastic own resources deserve to be examined in more detail. In the case of the plastic own resources, the Own Resources Decision not only contains the specific basis for assessment, but also substantive rules, however without building on existing EU legal provisions. The plastic own resources provide an incentive to reduce non-recycled plastic packaging waste. This means that the Own Resources Decision contains substantive rules to encourage Member State legislation to reduce plastic waste. The question arises as to whether this breaches primary law. This is problematic because the procedures for adopting an Own Resources Decision and substantive legislation are different. According to Art. 311

57 See § 9 I.1. in R. Weber, see n. 18.

58 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, Official Journal of the European Union, No. L 424/1.

59 See § 10 IV.3. in R. Weber, see n. 18.

60 H. Kube, see n. 50, 51, 54; W. Schön speaks of an "as-if tax amount" (original German version: "Als-Ob-Steuerbetrag"), see W. Schön, see n. 51, 47, 59.

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para. 3 TFEU, the European Parliament is only consulted in the procedure for the Own Resources Decision, whereas it can, in principle, co-decide in the ordinary legislative procedure. If the Own Resources Decision also pre-decides on substantive matters, the substantive decision is therefore not taken in accordance with the procedure provided for substantive competences, but is overridden by the Own Resources Decision. Opinions are divided as to whether this is problematic.

On the one hand, it can be argued that the lack of co-decision by the European Parliament is irrelevant. As all Member States have to agree to the Own Resources Decision, there is no deficit in democratic legitimacy. According to this view, taxes that do not merely pursue financing purposes (such as the plastic own resources) can be introduced under Art. 311 TFEU.[61] This view emphasises the need for Member State approval and their role as 'masters of the treaties'.[62]

On the other hand, however, there is a risk of undermining the differentiated order of competences in the Treaties, which could lead to an "unlimited field of fiscal nudges".[63] According to this view, the EU may only include substantive regulations in its Own Resources Decisions in cases where it also has substantive competence. And even then, the requirements of the Member States approval and of the unanimity in the Council cannot justify any content in the Own Resources Decision procedure. Rather, the Own Resources Decision has to respect previous political decisions of the Council and the European Parliament.[64] The obligation arises from the principle of institutional balance. According to the case law of the ECJ, the "observance of the institutional balance" requires that "each of the institutions must exercise its powers with due regard for the powers of the other institutions"; this requires that "it should be possible to penalize any breach of that rule which may occur".[65] The principle of institutional balance requires the institutions to exercise their competences in such a way that there are no "structural shifts in the political roles among the institutions of the Union".[66]

61 T. V. Meickmann, see n. 50, 748, 749, 754.
62 T. V. Meickmann, see n. 50, 748, 754.
63 C. Neumeier, 'Political Own Resources. Towards a Legal Framework' (2023) 60 *Common Market Law Review,* 319, 337.
64 C. Neumeier, see n. 63, 319, 339; T. V. Meickmann, see 50, 748, 754.
65 See ECJ, Judgement, EU:C:1990:217, marginal no. 22.
66 C. Neumeier, see n. 63, 340.

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If the principle of institutional balance at the EU level is taken seriously, non-genuine taxes such as the plastic own resources can only be used to finance the EU under certain conditions. Moreover, they must remain within certain limits due to the requirements of national constitutional law, as described in the context of genuine taxes.

Looking at the development of own resources in a broader historical context, it can be seen that the idea of supporting EU policies through own resources, first raised in the Treaties of Rome and partly implemented in the 1970s, has been revived. This strategy has been pursued by the Commission in particular. The introduction of plastic own resources with the Own Resources Decision 2020 may indicate that this strategy of supporting EU policies is being implemented. At the same time, the implementation is inconsistent: An excessively regressive effect on national contributions due to an excessive burden resulting from the new own resources led to the introduction of flat-rate reductions in the contributions of Member States with a GNI per capita below the EU average.[67] This brings the plastic own resources closer to the GNI-based own resources and weakens the intended effect of supporting environmental policy. The GNI-based own resources in turn are close to the original financial contributions. This shows a discrepancy between the supranational aspirations and the actual implementation, which resembles the financing mode of an international organisation.

Conclusion and Outlook: 'Integration Through Funding' and/or 'Integration Through Law'?

As indicated above, the concept of *integration through funding* has recently come to the fore.[68] This concluding section explores the relationship between this emerging concept and the one of *integration through law*. It should be stressed at the outset that, unlike *integration through law*, *integration through funding* is not a fully-fledged and widely discussed

67 Art. 2 para 2 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, Official Journal of the European Union, No. L 424/1.

68 See section 1.2.

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theory of European integration.[69] Whether it will ever become a theory remains to be seen. Talk in the literature of *integration through funding* is closely linked to the emergence of NextGenerationEU: If the financial resources available at EU level grow, the argument goes, the EU will be able to exert a stronger influence on Member States' policies 'through funding'. In addition to NextGenerationEU, instruments at EU level that could support such a thesis include the rule of law mechanism, which makes the disbursement of EU funds dependent on the fulfilment of certain criteria. Many of the developments described in this text appear to be only indirectly related to *integration through funding*. The development of own resources, for example in relation to non-genuine taxes, is distinct from a 'money for reform' policy. Therefore, the point of view taken in this text could rather be described under an even broader approach of *integration through financing*.

By linking the history of integration and the financing of the EU, a first step towards examining the thesis of *integration through financing* was taken. Summarising the results, it has become clear that the transitional period of the EEC shows how closely the issue of financing was linked to market integration. The transition from a contributory to an own resources system was envisaged from the outset as a way of bringing the financing method closer to the Community's policies. This idea also underlies the constant and current calls for reform of the own resources system. In the 1970s, it quickly became apparent that the 'traditional' own resources originally envisaged were inadequate. Even the VAT-based own resources were not sufficient to cope with the financial crises caused by the enlargement rounds and the high expenditure on agricultural and regional policies in the 1980s. The solution to this problem was found in the introduction of the GNP/GNI-based own resources, which, however, moved away from the original idea of own resources linked to Community policies.

As the importance of GNI-based own resources has grown over time, so has the demand for own resources linked to EU policies. However, due to the diverging interests of different institutional actors and Member States, no major reform has yet taken place. Nevertheless, the introduction of plastic own resources with the Own Resources Decision 2020 is an example of the potential of the EU Treaties, more precisely Art. 311 TFEU. It is a provision that, due to its vagueness and openness, could provide a

69 On the conception of 'integration through law' see the articles in this volume by Domenica Dreyer-Plum.

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legal basis for future reforms with regards to the revenue side of the EU budget. As NextGenerationEU and its future refinancing have increased the pressure on the own resources system, a discussion on its reform seems even more urgent. Moreover, the first large-scale borrowing at European level also introduces a new financing model that is independent of specific policies.

This leads to the final question of the role of law in the development of the EU's financing, which lies at the heart of integration. The approach of *integration through law*, characterised in particular by the far-reaching case law of the ECJ, can only be applied to the question of financing to a limited extent: This is because the case law of the ECJ in this area is extremely sparse, which is also due to the fact that legal issues such as those relating to NextGenerationEU are not even brought before the ECJ. This also means that the case law of a single national constitutional court – the German FCC – is very influential in the development of the law on the financing of integration. It remains to be seen what consequences the FCC's decision on NextGenerationEU will have in practice for the further development of EU financing. It is clear, however, that the possibilities of legal interpretation are also linked to the general understanding of *European integration*. For the academic discussion of the law and its limits, this means that it must reflect its understanding of *European integration*.

Finally, in the area of EU financing – whether through debt or taxes – further developments seem not unlikely in times of polycrisis, even if the general consensus on the finality of an 'ever closer union' seems to be eroding. In particular, the future financing of European defence and security is highly controversial in the current political debate. Depending on how the situation develops, there could be a new dynamic in the law on the financing of integration. From this perspective, the concept of *integration through financing* does not seem too far-fetched and could complement the one of *integration through law*.

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No Hamiltonian Moment: How New Budgetary Instruments Replicate Persistent Financial Ideas

Domenica Dreyer-Plum, Anna Wenz-Temming[*†]

Abstract

When the negotiations on the 2021–2027 Multiannual Financial Framework (MFF) of the European Union (EU) were in their final round, the COVID-19 pandemic induced an economic shock. Member States agreed to adopt the MFF coupled to the EU Recovery program NextGenerationEU (NGEU) – a financial instrument unprecedented as it enhances budgetary powers of the EU with the potential to promote *integration through funding*. The interpretation of NGEU as a potential Hamiltonian moment remains controversial in the literature. This article contributes to the understanding of COVID19-crisis response policies and their consequences for European integration by comparing *integration induced by crisis* at the cases of the financial and state debt crisis (2011) and the pandemic crisis (2020). Hence, we address the research question: Does the COVID-19 crisis response display a critical juncture for EU budgetary politics? Following our analysis, there is (1) a continuity in intergovernmental control on negotiation processes but at the same time (2) substantial change regarding bargaining situations and as a result (3) new forms of EU budget financial instruments with an unprecedented level of risk-sharing and liabilities, while (4) former institutional and financial ideas stay in place. The focus in this paper is

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directed to the relational connection between ideational concepts and their support by differing coalitions. We situate our findings within the theory of liberal intergovernmentalism, considering contributions from new intergovernmentalism and discursive approaches.

1. Integration Induced by Crisis – Promoting Integration Through Funding

The COVID-19 crisis struck the EU as profound exogenous shock with multidimensional effects. Particularly the steep economic decline resulting from inevitable lockdown policies, combined with financial compensation payments to support individuals and enterprises, has challenged the budgets of EU Member States. With the first comprehensive lockdowns in March 2020, discussions started on providing European financial assistance to Member States that had been struck very hard by the first wave of the COVID-19 pandemic (Italy, Spain, France). This debate was surprisingly embedded into the regular negotiations of the Multiannual Financial Framework (MFF) (2021–2027) of the EU, which were in their final round, and channeled towards the NGEU. Major steps in the negotiation process have been coalition proposals and hard bargaining between the Heads of States and Governments to achieve a package deal on the MFF, and the recovery program. At the end, the agreement included debt-financed grants and the recovery funds were coupled to the MFF. This constituted a striking move allowing common European crisis management and enabled the European Commission to act as borrower on international financial markets to a previously unknown extent. Meanwhile, new European debts – this time for defence – are discussed. We therefore inquire in this paper: Does the Covid-19 crisis response display a critical juncture for EU budgetary politics? And building on that, does NGEU depict a major change for European integration with effects on the further development in the sense of advancing integration through legal instruments hence qualifying as *integration induced by crisis* or more specifically in this case: *integration through funding*?[1] We want to follow up on the question raised whether NGEU represents a critical juncture in the socio-economic governance by

1 B. De Witte, 'Integration through Funding. The Union's Finances as Policy Instrument' in R. Weber (ed), *The Financial Constitution of European Integration. Follow the Money?* (Bloomsbury Publishing, 2023), 221–236, 221.

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focusing on the influence of the state debt crisis.[2] We argue that adjustments towards less conditionality, more joint liabilities and increasing fiscal capacity-building indicate a major shift in preferences and qualify indeed as *integration through funding*.

In addition, we ground the policy choices in response to the COVID-19 pandemic crisis with the hindsight to positions, coalition-building and power relations during the financial crisis derived from Liberal Intergovernmentalism. While both crises have been caused by an exogenous shock, they were accompanied by a fundamentally different framing resulting in different perception and support for solidary problem-solution.[3] We conduct a comparative analysis between the financial and the COVID-19 crisis. Our research is based on data and information derived from primary sources such as legal documents, official statements of European and national institutions as well as the reception of the conceptual and empirical literature on the crisis response policy mechanisms. Our approach combines arguments from Liberal Intergovernmentalism[4] and discursive approaches.[5]

In the following, we review the state of the literature on explaining both the management and results of the financial and COVID-19 crisis. Building on those insights, we explain our research design and contribution to the debate. This is followed by our empirical analysis on preference formation in relation to policy priorities, coalition-building and power relations in relation to *integration through funding*.

2 A. Crespy and L. Schramm, 'Breaking the Budgetary Taboo: German Preference Formation in the EU's Response to the COVID-19 Crisis' (2021) *German Politics*, 1, 18.

3 A. Crespy and L. Schramm, see n. 2; S. Saurugger, 'What do the negotiations about the Multiannual Financial Framework 2021–2027 mean for theories of European integration? Reflections from an actor-centred constructivist perspective' in S. Münch and H. Heinelt (eds), *EU Policymaking at a Crossroads: Negotiating the 2021–2027 Budget* (Edward Elgar Publishing, 2022), 251–271, 267.

4 F. Schimmelfennig, 'Liberal Intergovernmentalism and the Crises of the European Union' (2015) 22 *Journal of European Public Policy*, 177–195; F. Schimmelfennig, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises' (2018) 25 *Journal of European Public Policy*, 969–989.

5 A. Crespy and L. Schramm, see n. 2; S. Saurugger, see n. 3.

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2. State of the Art: Differing Approaches to Explaining EU Crisis Management

The different crises of the EU during the last decade have attracted major scholarly attention.[6] With the aim to identify influential actors and to explain the emergence of crisis response instruments as well as their impact on European integration, the contributions account for classic integration theory approaches from intergovernmental theory,[7] less prominently so from neofunctionalist viewpoints[8] as well as fusions of the major two theory approaches drawing on historical institutionalism.[9] From the latter originates the concept of path dependencies and critical junctures. While path dependency conceptualises a stable development over time produced by consecutive decisions, a critical juncture is understood as an interruption typically occurring in times of crisis and instability, deploying a starting point of new path dependent developments.[10] In addition, especially with

6 M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021).

7 C. Bickerton, D. Hodson and U. Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 *Journal of Common Market Studies*; S. Smeets, A. Jaschke and D. Beach, 'The Role of the EU Institutions in Establishin the Euroepan Stability Mechanism: Institutional Leadership under a Veil of Intergovernmentalism' (2019) 57 *Journal of Common Market Studies*; F. Biermann, N. Guérin, S. Jagdhuber, B. Rittberger and M. Weiss, 'Political (non-)reform in the euro crisis and the refugee crisis: a liberal intergovernmentalist explanation' (2019) 26 *Journal of European Public Policy*; A. Wenz-Temming and J. Sonnicksen, 'The double bailout: assessing new intergovernmentalism in the euro-crisis and the implications for European integration and democracy' (2020) 42 *Journal of European Integration*; A. Crespy and L. Schramm, see n. 2.

8 S. Hobolt and C. Wratil, 'Public opinion and the crisis: the dynamics of support for the euro' (2015) 22 *Journal of European Public Policy*; A. Niemann and D. Ioannou, 'European Economic Integration in Times of Crisis: A Case of Neofunctionalism' (2015) 22 *Journal of European Public Policy*.

9 E. Jones, D. Kelemen and S. Meunier, 'Failing Forward? The Euro Crisis and the Incomplete Nature of European Integration' (2016) 49 *Political Studies*; S. Ladi and D. Tsarouhas, 'EU economic governance and COVID-19: policy learning and windows of opportunity' (2020) 42 *Journal of European Integration*; F. Nicoli, 'Neofunctionalism revisited: integration theory and varieties of outcomes in the Eurocrisis' (2020) 42 *Journal of European Integration*; W. Schelkle, 'Fiscal Integration in an Experimental Union: How Path-Breaking Was the EU's Response to the COVID-19 Pandemic?' (2021) 59 *Journal of Common Market Studies*.

10 G. Capoccia, 'Critical Junctures' in O. Fioretos, T. G. Falleti and A. Sheingate (eds), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press, 2018), 89–106.

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regard to the COVID-19 crisis, approaches focusing on learning processes, discourses, framing and ideational aspects became more prominent.[11]

All of those contributions address more or less extensively (1) the outcome of negotiations especially with respect to burden-sharing and solidarity,[12] (2) the bargaining processes to develop crisis response instruments,[13] (3) the significance of different actors such as governments, supranational institutions, financial markets,[14] and (4) the impact on European integration in general.[15] In an effort to join the prominent theoretic approaches of intergovernmental and neofunctionalist interpretations, Erik Jones, Dan Kelemen, and Sophie Meunier[16] argue that bargaining processes in crisis situations are determined by the "lowest common denominator"[17], which enables nothing but incomplete integration arrangements in the sense of *failing forward*. Arguing along those lines, the deficient negotiation results

11 S. Ladi and D. Tsarouhas, see n. 9; A. Crespy and L. Schramm, see n. 2; J. Miró, 'Debating fiscal solidarity in the EU: interests, values and identities in the legitimation of the Next Generation EU plan' (2022) 44 *Journal of European Integration*; S. Saurugger, see n. 3; V. Schmidt, 'EU Leaders' Ideas and Discourse in the Eurozone Crisis: A Discursive Institutionalist Analysis' in C. Carta and J. Morin (eds), *EU Foreign Policy through the Lens of Discourse Analysis. Making Sense of Diversity* (Routledge, 2014), 245–264.

12 B. Laffan, 'Framing the crisis, defining the problems: decoding the Euro area crisis' (2014) 15 *Perspectives on European Politics and Society*; F. Schimmelfennig, see n. 4; P. Becker, 'The negotiations about the Multiannual Financial Framework 2021–2027: what happened when with what result?' in S. Münch and H. Heinelt (eds), *EU Policymaking at a Crossroads: Negotiating the 2021–2027 Budget* (Edward Elgar Publishing, 2022), 30–54.

13 E. Jones, D. Kelemen and S. Meunier, see n. 9; D. Finke and S. Bailer, 'Crisis bargaining in the European Union: Formal rules or market pressure?' (2018) 20 *European Union Politics*; C. de la Porte and M. D. Jensen, 'The next generation EU: An analysis of the dimensions of conflict behind the deal' (2021) 55 *Social Policy & Administration*.

14 A. Niemann and D. Ioannou, see n. 8.; S. Smeets, A. Jaschke and D. Beach, see n. 10; M. G. Schoeller, 'The Rise and Fall of Merkozy: Franco-German Bilateralism as a Negotiation Strategy in Eurozone Crisis Management' (2018) 56 *Journal of Common Market Studies*, 1019; Tesche, 'Pandemic Politics: The European Union in Times of the Coronavirus Emergency' (2022) 31 *Journal of Common Market Studies*, 480.

15 F. Schimmelfennig, see n. 5; F. Scharpf, 'The costs of non-disintegration: the case of the European Monetary Union', in D. Chalmers, M. Jachtenfuchs and C. Joerges (eds), *The end of the Eurocrats' dream: adjusting to European diversity* (Cambridge University Press, 2016), 29–49; S. Saurugger, see n. 3.

16 E. Jones, D. Kelemen and S. Meunier, see n. 9, 1016.

17 A. Moravcsik, 'Preferences and Power in the European World: A Liberal Intergovernmentalist Approach' (1993) 31 *Journal of Common Market Studies*, 487, 501.

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create neofunctionalist effects over time since incomplete policy solutions provoke crises and again yield intergovernmental bargaining with incomplete integration results.[18] Such an approach provides us with a theoretic grounding of state preferences, distributional conflict and crisis bargaining.[19]

More pointed to fiscal policies, *Christopher Bickerton*, *Dermot Hodson* and *Uwe Puetter* as New Intergovernmentalists address instruments chosen during the state debt crisis in their analysis. They classify credit facilities such as the European Stability Mechanism (ESM) as "de novo bodies"[20] and explain their growing importance with a dilemma of national governments that is rooted in politicisation. While Member States regard further integration as a necessary tool for effective problem-solving, public support for further delegation to established supranational institutions lapses.[21] Therefore, programs to assist Eurozone states with financial difficulties were outsourced in separate institutions under strict intergovernmental control. Nevertheless, *Tobias Tesche* sees also the institutional arrangements in response to the COVID-19 crisis, which were linked to the EU budget, derived from the willingness to carry European integration forward, while managing domestic opposition.[22] In a similar vein, *Amandine Crespy* and *Lucas Schramm*[23] emphasise the ever-closer interrelation between national and European (negotiation) processes. They see domestic interests as well as ideational aspects to influence intergovernmental bargaining. This enriches integration-theory-driven analyses with new variables, not least to compensate shortcomings of Liberal Intergovernmentalism stemming from its origin in explaining European integration in quiet periods rather than in times of crisis.[24]

Meanwhile, the discussions on institutional results of the COVID-19 crisis management circle around the buzzword of a "Hamiltonian moment"[25] exploring whether the new financial arrangements lay the ground for a

18 E. Jones, D. Kelemen and S. Meunier, see n. 9, 1015, 1017, 1027.
19 F. Biermann, N. Guérin, S. Jagdhuber, see n. 7.
20 C. Bickerton, D. Hodson and U. Puetter, see n. 7, 713–714.
21 C. Bickerton, D. Hodson and U. Puetter, see n. 7, 713–714.
22 T. Tesche, see n. 14.
23 A. Crespy and L. Schramm, see n. 2.
24 F. Schimmelfennig, see n. 4, 972–973.
25 G. Celi, D. Guarascio and A. Simonazzi, 'A fragile and divided European Union meets COVID-19: further disintegration or "Hamiltonian moment"' (2020) 74 *Journal of Industrial and Business Economics*.

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fiscal union, which would indicate a deepening of European *integration induced by crisis* and channelled *through funding*. Establishing common debt without strict conditionality may then pave a way for further debt programs and deeper integration.[26] Equally, we see contributions in the literature rebutting the "Hamiltonian moment" argument and instead emphasising the deliberate choice of less visible forms of fiscal capacity-building with respect to domestic audiences.[27]

3. Theoretical Approach and Research Design

The scholarly literature still provides little knowledge on the influence of the financial crisis and its management on the responses given to the COVID-19 pandemic. Therefore, we consider and contrast the implications of both chosen and not-chosen instruments during the state debt (2011) and pandemic crisis (2020). Having in mind the impact on the socio-economic policy design of the EU and based on aspects mainly discussed in the literature, we focus on (1) conditionality, (2) joint liabilities and (3) fiscal capacity-building created with the chosen instruments in the following section. Conditionality is understood as conditions for the disbursement of funds. These could be requirements to be met regarding the use of the disbursed funds or accompanying political programs and reforms.[28] Joint liability can follow an intergovernmental approach with strict national liability shares or a more supranational approach with a common European liability.[29] Finally, fiscal capacity-building addresses the European ability of financial action, which can differ both in terms of the amount of funds available and the freedom to decide how to spend them. Building on that, we investigate in the empirical analysis the underlying reasons for the policy choices with a focus on the impact of the financial crisis response

26 S. L. Greer, A. de Ruijter and E. Brooks, 'The COVID-19 Pandemic: Failing Forward in Public Health' in M. Riddervold, J. Trondal and A. Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021), 747, 760.

27 D. Howarth and J. Schild, 'Nein to "Transfer Union": the German brake on the construction of a European Union fiscal capacity' (2021) 43 *Journal of European Integration*, 222; U. Krotz and L. Schramm, 'Embedded Bilateralism, Integration Theory, and European Crisis Politics: France, Germany, and the Birth of the EU Corona Recovery Fund' (2022) 60 *Journal of Common Market Studies*, 536.

28 P. Becker, see n. 12.

29 A. Wenz-Temming and J. Sonnicksen, see n. 7.

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instruments on the COVID-19 Recovery Program. For this, we structure our further comparative analysis along three variables in line with Intergovernmentalist approaches focusing on actors and negotiation processes,[30] while in addition considering discursive effects over time:[31] (1) We analyse positions and their ideational foundations that have been brought forward during the negotiation process by Member States. (2) We examine coalition strategies between Member States and European institutions and (3) derive insights on the power relations and influence based on the policy regime outcome.

Conceptually, we aim to explain *European integration* processes theoretically as they unfold in crisis situations. We argue that crises as "open decision-making situations"[32] both require and enable substantial political and institutional change. We integrate the explanatory power of discursive and communicative elements in the sense of discursive institutionalism.[33] Following this understanding, "ideas matter"[34] in terms of policies, programs and philosophies, both on the level of cognition and norms.[35] The response to the financial and state debt crisis serves as exemplary for a political battle of ideas[36] with ordoliberal preferences of austerity on the one hand (Germany/North) and pragmatic Neo-Keynesian approaches on the other side (France/South). In that reading, the crisis response policies to the COVID-19 pandemic situation displayed a continuation of the political battle of ideas in 2020 – with a surprisingly different outcome.[37] Following this

30 A. Moravcsik, see n. 17; F. Schimmelfennig, see n. 4.
31 E. Jones, D. Kelemen and S. Meunier, see n. 9.; A. Crespy and L. Schramm, see n. 2.
32 F. Schimmelfennig, see n. 4, 969.
33 V. Schmidt, 'Discursive Institutionalism: The Explanatory Power of Ideas and Discourse' (2008) 11 *Annual Review of Political Science*; V. Schmidt, 'Taking ideas and discourse seriously: explaining change through discursive institutionalism as the fourth "new institutionalism"' (2010) 2 *European Political Science Review*; V. Schmidt, 'Discursive Institutionalism: Scope, Dynamics, and Philosophical Underpinnings' in F. Fischer and H. Gottweis (eds), *The Argumentative Turn Revisited. Public Policy as Communicative Practice* (Duke University Press, 2012); V. Schmidt, 'Rethinking EU Governance: From "Old" to "New" Approaches to Who Steers Integration' in R. Coman, A. Crespy and V. Schmidt (eds), *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press, 2020).
34 V. Schmidt, see n. 11, 303.
35 M. Carstensen and V. Schmidt, 'Power through, over and in ideas: conceptualizing ideational power in discursive institutionalism' (2016) 23 *Journal of European Public Policy*, 318.
36 V. Schmidt, see n. 35, 333.
37 A. Crespy and L. Schramm, see n. 2.

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approach, we study relational connections between the ideational concepts brought forward during crisis response negotiations,[38] their support by differing coalitions with divergent normative views on favourable instruments and finally evaluate the empirical outcome of interests, ideas, and bargaining power that merge in instruments and effectively shape European *integration induced by crisis*. We evaluate the emerging socio-economic policy design of the EU against the background of *integration through funding*.

4. Empirical Results

The financial crisis concerned the Member States a number of years starting in 2008. The adopted instruments comprised short-term solutions with bilateral and multilateral credit facilities in order to prevent imminent national default and contagion effects.[39] The ad-hoc 2010 created credit facility European Financial Stability Facility (EFSF) coupled with the European Financial Stability Mechanism (EFSM) was superseded in 2012 by the medium- and finally long-term ESM which is still in place. The issuance of common state bonds (Eurobonds) was intensively discussed but not implemented.

4.1 Results of Bargaining During the Financial Crisis

The legal framework of the Economic and Monetary Union (EMU) did not provide guidance, rules or means to deal with neither Member States nor systematically relevant banks in financial difficulty.[40] Therefore, both the rules and the means had to be set-up amid the crisis situation which resulted in hard bargaining negotiations between the Member States and the involved European institutions. Risks of disintegration and the worst-case scenario of a collapse of the European currency union constituted the bargaining framework.[41] Keeping in mind that the later NGEU fund created considerable and seemingly new community liabilities, our focus lies on two instruments with the strongest display of liabilities: the temporary EFSM and the permanent ESM.

38 Similar approach in A. Crespy and L. Schramm, see n. 2.
39 F. Schimmelfennig, see n. 4, 983.
40 F. Schimmelfennig, see n. 4, 976.
41 F. Schimmelfennig, see n. 4, 976.

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The EFSM was developed as temporary instrument based on Art. 122 TFEU and adopted as Regulation (EU) No 407/2010. The EFSM allowed immediate support for Greece based on EU law and facilitated by European institutions. While the Council of the EU decided with majority voting to provide credits, the loans were conducted by the Commission which refinanced itself on the credit market.[42] The EFSF serves as technical device to bridge the intergovernmental coordination of loans by the Council of the EU, performed under private law building on provisions of international law. Similarly, the subsequently developed ESM was established as international organisation based of the Member States of the eurozone area. Conditionality on receiving funds has been a "crucial issue"[43]. Art. 3 (1) Regulation (EU) No 407/2010 requires a credit-demanding Member State to develop a strategy to adjust its budget policies (i.e. cuts in social expenditures) in dialogue with the European Commission and the European Central Bank (ECB) based on Art. 3 (1) Regulation (EU) No 407/2010. The conditionality generates securities for the created liabilities despite moral hazard risks and the general bailout prohibition of Art. 125 TFEU.[44] This strict conditionality of the ESM has been characterised as "significant strings attached"[45].

Regarding liabilities, additional payments to the EU budget or waiving funds of the EU budget would have been required as the EFSM borrowing was guaranteed by the EU budget. In contrast, liabilities for the ESM funds were only shared by the Member States of the eurozone according to the respective national economic capacity. The ESM treaty is legally grounded in Art. 136 (3) which has explicitly been introduced as treaty amendment in March 2011 for the purpose of legitimising the adoption of the ESM.

Hence, fiscal capacity-building was introduced with a limited volume of funds constituted by the EFSF and EFSM. The fiscal capacity of the EMU was extended in volume and liabilities with the ESM and although coupled to strong conditionality it effectively provided unprecedented means of fiscal support to Eurozone states and thus initiated processes of *integration through funding* that were evoked by the crisis.

42 Council Regulation (EU) 407/2010 establishing a European financial stabilisation mechanism, OJ L 118/1 [2020], Art. 2–3.

43 D. Finke and S. Bailer, see n. 13, 124.

44 Bandilla, R. Art. 125 AEUV, in E. Grabitz,, M. Hilf and M. Nettesheim (eds), *Das Recht der Europäischen Union, Kommentar* (C.H. Beck, 2011), recital 27.

45 D. Hodson, 'The Eurozone in 2011' (2012) 50 *Common Market Studies*, 188.

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4.2 Conditionality vs. Confidence in Financial Crisis Resolution

Seeing crisis response policies during the financial crisis with some time lag, learning processes seem to reveal that confidence proved more important than conditionality. The statement of *Mario Draghi* in September 2012 that the European Central Bank (ECB) would do "whatever it takes" to preserve the euro calmed the international markets. The political debates circling around moral hazard inherent to the constraints of Art. 125 TFEU (no-bailout) effectively delayed the Greek rescue and increased crisis resolution costs.[46]

In contrast to austerity and conditionality concepts, Eurobonds were another crucial issue in negotiations. *Ramunas Vilpisauskas* rightly points to the fact that discussions "from the start revolved around the centralised pooling of financial resources"[47]. The idea was to alleviate the impact of speculation attacks on government bonds of Member States in extreme financial difficulty. By proponents of Eurobonds, it was expected that a pooling of government bonds would merge the differing interest rates. In contrast, especially Northern creditor Member States pursued budgetary discipline to achieve stability and anticipated that Eurobonds would be an incentive for moral hazard and further spending.[48]

The former president of the German Central Bank criticised in June 2012 that Eurobonds would essentially skip several important integration steps such as a substantive European fiscal capacity which effectively requires a partial waiver of national sovereignty to the European level.[49] In this reading, Eurobonds are not per se excluded from policy options but should be embedded in an institutional set-up of a fiscally capacitated EMU.[50] The introduction of Eurobonds could arguably have displayed a Hamiltonian moment as a nucleus for a European fiscal union but remained politically unthinkable hence an impossible route of *integration through funding*.

46 F. Scharpf, see n. 15, 38.
47 R. Vilpisauskas, 'Eurozone Crisis and European Integration: Functional Spillover, Political Spillback?' (2013) 35 *Journal of European Integration*, 370.
48 A. Crespy and L. Schramm, see n. 2, 2.
49 J. Weidmann, 'So wird der Euro stabil' *Süddeutsche Zeitung* (27 June 2012).
50 European Commission, Green Paper on the feasibility of introducing Stability Bonds, COM(2011) 818 [2011].

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4.3 Partners and Coalition-Building in Financial Crisis Resolution

During the financial debt crisis, we saw a strong North-South divide of the EU related to the different concepts of national budget policies, savings and investment orientation which is linked to the different underlying national economic structures. *Desmond Dinan* reminds us that France and Germany have been "far apart" in 2010 when bargaining towards financial crisis response policies started,[51] which was similar to the situation in 2020. It is important to emphasise that the Franco-German duo not only comprises the biggest economies in the EU, but at the same time they are the leaders of two very different coalitions within the currency union representing the cleavage of fiscal policies.[52]

The electorate in all European states noticed the crisis response policies which affected their lives negatively – to a degree of deferring severity.[53] In line with this development, the German position was hardened due to the perceived contestation by the electorate accompanied by the rapid rise of a single-issue populist right-wing party. The German preference was primarily grounded in the preservation of the single market and the currency union.[54] Secondary preferences concerned the shape and guiding principles of practices in the currency union and the single market. This explains why Germany consented to the creation of the EFSF and the ESM despite caveats against any forms of fiscal capacity-building and fiscal transfers.[55] Conditionality was the key to achieving compromises. The German position was therefore more nuanced and complex than just to contradict any forms of fiscal capacity-building. The initial reactions to potential financial rescue packages for Greece were rejected in Germany – and other frugal Northern countries such as the Netherlands, Austria and Finland – mostly with reference to the no-bailout principle of Art. 125 TFEU and an intention to minimise risk-sharing.[56] Given Germany's pos-

51 D. Dinan, 'Governance and Institutions: Implementing the Lisbon Treaty in the Shadow of the Euro Crisis' (2011) 49 *Journal of Common Market Studies*, 107.
52 D. Finke and S. Bailer, see n. 13, 130.
53 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 979.
54 D. Howarth and J. Schild, see n. 27, 222.
55 D. Howarth and J. Schild, see n. 27, 222.
56 H. Degner and D. Leuffen, 'Brake and broker: Franco-German leadership for Saving EMU' (2020) 20 *Journal of European Public Policy*, 95.

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ition as "Europe's largest contributor to any potential EU rescue fund"[57], it had a strong negotiation position. But given the pressure of German banks – significantly involved in Southern countries, France, the ECB and other Member States finally managed to adjust the German position, although coupled to strict austerity conditions.[58]

Another significant step were the negotiations on the permanent ESM, again pre-negotiated by Germany and France. While the German government refused permanent funds categorically in mid-2010, it accepted the establishment of the ESM in December that same year.[59] During the negotiations, the German delegation achieved concessions by way of limiting the capacity of the ESM to 500 billion Euro and a commitment to strict conditionality[60] which is in line with the conviction to keep a close connection between risks, liabilities and control. However, the German Central Bank acknowledged in legal proceedings that joint liabilities are implicit to the ESM corresponding to an imbalanced lack of control.[61] The key argument for the coming-into-being of those instruments despite burden-minimising intentions of creditor states was the strong interdependence between North (surplus) and South (deficit) banking relations.[62] Essentially, all negotiations circled around the questions on how to distribute crisis burdens and costs of reform.[63]

4.4 Power Relations in Financial Crisis Governance

The unique combination of significant transfers on the one hand and fiscal discipline on the other hand is the result of bargaining processes

57 D. Dinan, see n. 51, 108.
58 H. Degner and D. Leuffen, see n. 56, 95.
59 A. Crespy and V. Schmidt, 'The clash of Titans: France, Germany and the discursive double game of EMU reform' (2014) 21 *Journal of European Public Policy*, 1091.
60 D. Howarth and J. Schild, see n. 27, 215.
61 Bundesbank, 'Stellungnahme gegenüber dem Bundesverfassungsgericht zu den Verfahren mit den Az. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1439/12, 2 BvR 1824/12, 2 BvE 6/12', 21.12.2012, <https://www.bundesbank.de/de/startseite/stellungnahme-gegenueber-dem-bundesverfassungsgericht-zu-den-verfahren-mit-den-az-2-bvr-1390-12-2-bvr-1421-12-2-bvr-1439-12-2-bvr-1824-12-2-bve-6-12-799684> accessed 1 April 2025.
62 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 982.
63 F. Schimmelfennig, see n. 4, 'Liberal Intergovernmentalism and the Crises of the European Union', 182–183.

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with differing preferences among the Member States.[64] It reflects ideational conceptions (i.e. ordoliberalism in fiscal discipline) and pragmatic necessities (transfers to keep the eurozone afloat and prevent contagion) without developing federal fiscal instruments that would supplement the monetary union.[65] This underlines that debtor Member States were in a weak(er) position since they were dependent on the approval of the creditor states, but creditor states were vulnerable too, given their involvement in the currency union.[66] Furthermore, the politicisation of the state debt crisis has contributed significantly to a hardening of creditor Member State positions since the attention of the electorate and the rise of populist parties in several Member States limited the scope of bargaining.[67]

Surprisingly, it was the veto power of Austria and Slovakia that prevented further fiscal institutionalisation of the currency union and hence set clear boundaries for fiscal capacity-building.[68] Despite Germany's strong emphasis on fiscal discipline, Germany did not reject institutionalisation in general, arguably because of Germany's vulnerability given the prospect of failure of the eurozone.[69] However, ideational conceptions favoured by Germany have strongly impacted the negotiation process during the state debt crisis. Creditor Member States have successfully demanded substantial reforms and conditions that resulted however in painful outcomes: recession, unemployment, the rise of left-wing and right-wing populist parties and critical attitudes towards the EU were side phenomena of the austerity programs.[70]

Given both the medial and effective dominance of Member States in the crisis response policies, European institutions acted on secondary roles, i.e. the technical design of credit facilities, monitoring processes, draft legislative packages to reform the EMU. There was no visible aim for a power shift towards European institutions or an expansion in European budgetary policy and responsibilities. Member States were unquestionable the key actors in the summit negotiation regime with a Franco-German

64 D. Finke and S. Bailer, see n. 13, 123.
65 R. Vilpisauskas, see n. 47, 372.
66 ECB, Financial Stability Review (Frankfurt, 2011) <https://www.ecb.europa.eu/pub/pdf/other/financialstabilityreview201106en.pdf> accessed 1 April 2025, 47–51.
67 D. Dinan, see n. 51, 108.
68 D. Finke and S. Bailer, see n. 13, 123.
69 D. Finke and S. Bailer, see n. 13, 114.
70 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 979.

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partnership that dominated negotiation outcomes and failed to take along Member States in a weaker position.

4.5 Results of Crisis Response Bargaining During COVID-19

The COVID-19 virus reached Europe in January 2020. Initially, national solo efforts to protect one's own population and national economy dominated. Nevertheless, during the following month, various measures were taken at the European level to deal with the crisis leading to unexpected deepening of European integration.[71] The centrepiece of financial crisis management was the NGEU program.

The NGEU program was designed to support Member States and their economies to recover from the COVID-19 pandemic. The biggest part of the spending is channelled through the Recovery and Resilience Facility.[72] To receive grants or loans, which should be disbursed (only) until 31 December 2026, national governments have to submit "national recovery and resilience plans" which should focus on six thematic areas like green transition and digital transformation.[73] The national plans are assessed by the Commission and have to be approved by the Council.[74] Next to these procedures, an intergovernmental "emergency clause"[75] was included: in case of concerns regarding the fulfilment of a national recovery plan a Member State can ask the President of the European Council to take the issue to the European Council.[76] Thus, this construction ensures to maintain a unity of risks-liabilities-control known from state debt crisis instruments. Nevertheless, its conditionality is not comparable to the state debt crisis programs not at least as it aims at national design of expenditure.[77]

71 W. Schelkle, see n. 9, 44; D. Dimitrakopoulos and G. Lalis, 'The EU's initial response to the COVID-19 pandemic: disintegration or "failing forward"?' (2022) *Journal of European Public Policy*, 29, 1396.

72 Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

73 Regulation (EU) 2021/241, see n. 72, Art 3 and 17 (1).

74 Regulation (EU) 2021/241, see n. 72, Art 19 and 20 (1).

75 L. Schramm, U. Krotz and B. de Witte, 'Building "Next Generation" after the pandemic: The implementation and implications of the EU COVID Recovery Plan' (2022) 60 *Journal of Common Market Studies*, 117.

76 Regulation (EU) 2021/241, see n. 72, recital 52.

77 L. Schramm, U. Krotz and B. de Witte, see n. 75, 116–117.

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To finance the NGEU program, the European Commission borrows money in the name of the EU at the capital markets based on Art. 122 TFEU comparable to the EFSM.[78] However, the size of the NGEU program went far beyond previously known dimensions. At the end of 2019, the EU budget covered debts of 80 billion Euro outstanding, with the EFSM as the highest maximum volume of 60 billion Euro.[79] The Recovery instrument comprises 750 billion Euro. The borrowing should be completely repaid by 31 December 2058.[80] As the EU budget serves as a guarantee, liabilities were effectively lifted. Correspondingly, Member States agreed to pay higher budget contributions to service the debt repayment if necessary.[81] Even more striking, 390 billion Euro of these NGEU funds are foreseen to finance grants to Member States. This is in contrast to preceding programs, which were limited to loans and conditioned to repayment.[82] In addition, the repayment of these NGEU grants was left open for future discussions. Options are to introduce new European resources, increase national payments to the EU budget, to cut down on European spending programs or to further extend European borrowing.[83]

In a wider context, the establishment of NGEU is already interpreted by scholars as a *rebalancing* of EMU by providing financial power for a European economic policy as counterpart to the EU's monetary competences.[84] The recovery program should not only help the economy to recuperate, but also to push European political and economic goals. Inter alia 20 percent of the nationally planned spending has to foster digitalisation and 37 percent climate change prevention.[85] Thus, the European Commission was

78 Council Regulation (EU) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis [2020] OJ L433/23.

79 Report from the Commission to the European Parliament and the Council on Guarantees Covered by the General Budget Situation at 31 December 2019, COM(2020) 677 final, 28.10.2020.

80 Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom [2020] OJ L/1, Art 5 (2).

81 Council Decision (EU, Euratom) 2020/2053, see n. 80, Preliminary Note No. 16.

82 B. de Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 *Common Market Law Review*, 648.

83 L. Schramm, U. Krotz and B. de Witte, see n. 75, 115–116; 121.

84 F. Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU beyond the Pandemic' (2022) 60 *Journal of Common Market Studies*, 186.

85 Regulation (EU) 2021/241, see n. 72, Art. 18 IV e, f.

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successful by joining the European crisis support with its wider, ideational approach of *greening* the European economy.[86] This corresponds with former analysis on EU budget reform and its conclusion: It is easier to invent future-oriented spending through new, additional funds than to reform the existing budget structure.[87]

Summing up, in contrast to state debt crisis instruments, NGEU was equipped with conditionality but in a less rigorous form.[88] It effectively establishes considerable liabilities for Member States and fiscal capacity-building at the European level and indicates deeper integration by way of extended European funding strategies.

4.6 Solidarity and Conditionality in COVID-19 Pandemic Crisis Resolution

In the COVID-19 pandemic crisis we observed a profoundly different conceptual framing – especially in Germany.[89] Political leaders immediately emphasised the European dimension of the crisis.[90] The "problem construction"[91] included the attribution of an exogenous shock and the division into 'good and bad states' was eliminated in comparison to the financial crisis.[92] As a result, calls for solidarity fell on more fertile ground.[93] In order to prevent burden-minimising strategies and populist exploitation,[94] political leaders accepted almost with the occurrence of the COVID-19 crisis in March 2020 that the latter comes with costs. At the same time, Germany and France – just like during the state debt crisis – entered

86 S. Saurugger, see n. 3.
87 C. Blankart and G. Koester, 'The Lisbon Treaty, the Financial Crisis and Exit from Budget Gridlock' in G. Benedetto and S. Milio (eds), *European Union Budget Reform. Institutions, Policy and Economic Crisis* (Palgrave Macmillan London, 2012), 79–102, 79; R. Ackrill and A. Kay, 'Historical-institutionalist perspectives on the development of the EU budget system' (2006) 13 *Journal of European Public Policy*, 113.
88 L. Schramm, U. Krotz and B. de Witte, see n. 75, 116–117.
89 S. Saurugger, see n. 3, 267.
90 A. Crespy and L. Schramm, see n. 2, 3; W. Schelkle, see n. 9.
91 A. Crespy and L. Schramm, see n. 2, 3.
92 W. Schelkle, see n. 9, 46; L. Quaglia and A. Verdun, 'Explaining the response of the ECB to the COVID-19 related economic crisis: inter-crisis and intra-crisis learning' (2023) 30 *Journal of European Public Policy*, 635, 639–640.
93 T. Tesche, see n. 14, 481.
94 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 978.

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the discussions with different starting positions, while their coordination became later decisive for the negotiation process.

During the first weeks of the pandemic and the early exchanges about possible European measures, France was in favour of joint European bonds, while Germany aligned with the so-called 'Frugal Four's' opposition to substantial, redistributive support programs.[95] Just like during the state debt crisis, financially more stable countries like Austria and the Netherlands rejected both grants and Coronabonds since they were alarmed that such instruments could pave a path for fiscal capacity-building to the extent of a European fiscal union.[96] The French position should be seen against the background of the French president *Emmanuel Macron's* initiative to deepen European integration including further fiscal capacities and also regarding its own limited fiscal flexibility and strong affectedness by the COVID-19 crisis.[97] Already on 25 March 2020, a letter demanding "a common debt instrument" to finance joint crisis management was published and signed by nine Member States including France. This demand was rejected inter alia by Germany, which preferred support lines through ESM loans.[98] The compromise found during the Eurogroup meeting in April 2020 was to look for a new solution – averting ESM funding as well as Coronabonds. While strict conditionality – and also the ESM as a whole[99] – was especially rejected by southern states as a symbol for being dominated by the troika,[100] Coronabonds in analogy to Eurobonds were not an option for Northern States, given the vague connection between risks and liabilities.

In the following, it was a Franco-German initiative in May 2020, which put forward the proposal for a new support mechanism linked to the MFF 2021–2027 that included the option of loans as well as grants.[101] Shortly thereafter, the Commission presented a revised proposal for the new MFF accompanied by a proposal for the NGEU program, picking and extending the Franco-German initiative: Grants received a prominent place in the

95 A. Crespy and L. Schramm, see n. 2, 2; U. Krotz and L. Schramm, see n. 27, 527.
96 U. Krotz and L. Schramm, see n. 27, 533.
97 C. de la Porte and M. D. Jensen, see n. 13, 392.
98 A. Crespy and L. Schramm, see n. 2, 11.
99 T. Tesche, see n. 14.
100 W. Schelkle, see n. 9, 47.
101 W. Schelkle, see n. 9, 48.

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proposal and were accompanied by an outlook on new own resources enabling the repayment of NGEU borrowing.[102]

In addition, following *Tobias Tesche*[103] and *Waltraud Schelkle*,[104] the approval of NGEU was facilitated for the Northern States (including for Germany) by a reapproval of considerable discounts for net payers.[105] While the 'Frugal Four' recalled their position to establish only back-to-back loans accompanied by conditionality (while accepting a link to the MFF), the retention of rebates to their own resources payments to the EU budget represent an effective compensation.[106] Furthermore, the temporal limitation of the crisis support mechanism – resembling the discussions around the establishment of the European Stability Mechanism back in 2012 – corresponded to this group's position. In sum though, the chosen legal instruments to endure the pandemic crisis extend European financial capacities and foster *integration through funding*.

4.7 Partners and Coalition-Building in Pandemic Crisis Resolution

Germany surprises in this coalition-building process by departing from the coalition of Northern countries. While Germany used to be a persistent advocate of ordoliberal saving and austerity principles during the state debt crisis and remains a key opponent of common state bonds, Germany admitted to compromise on a generous granting scheme. This move has been widely discussed in the literature.[107] It is considered to be "exceptional".[108] Particularly surprising is the fact that Germany let go of a longstanding stance to favour intergovernmental solutions and to empower the European Commission.[109] At the same time, the shift relates to key rational economic

102 Communication COM(2020) 442 from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The EU budget powering the recovery plan for Europe [2020].
103 T. Tesche, see n. 14, 483.
104 W. Schelkle, see n. 9, 49.
105 Council Decision (EU, Euratom) 2020/2053, see n. 80, Art 2 (4).
106 Council Decision (EU, Euratom) 2020/2053, see n. 80, Art 2 (4); W. Schelkle, see n. 9, 49; T. Tesche, see n. 14, 483.
107 A. Crespy and L. Schramm, see n. 2, 13–17; W. Schelkle, see n. 9, 49; D. Howarth and J. Schild, see n. 27, 220, 222.
108 S. Saurugger, see n. 3, 264.
109 D. Howarth and J. Schild, see n. 27, 220.

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interests: Given Germany's export-oriented structure that strongly depends on the functioning of the internal market.[110] Domestic audience costs feed into this line of reasoning since the chosen mechanism was much less visible than other forms of fiscal capacity-building such as common state bonds.[111] Moreover, scholars argue that the policy shift might be the result of policy-learning regarding growing populism and anti-European resentments in response to the state debt crisis.[112] Thereby, a different framing of the crisis substantially contributed to the different perspective on institutional development.[113] While the French government gave up its early demand for Eurobonds, the German side has moved towards approval of grants and fiscal capacity-building. By referring to a "clearly defined scope and time limit"[114], Germany kept its red lines with the rejection of a fiscal union. This mutual approach paved the way for the compromise of the different coalitions under the EU Member States.[115]

4.8 Power Relations in COVID-19 Crisis Governance

Obviously, the decisions of 2020 did not result in an European fiscal union. However, the agreement on the recovery fund coupled to the MFF established new path dependencies for European financial structures.[116] Although it is hardly possible to label this change a Hamiltonian moment, we want to raise awareness that this move requires the Member States to define new revenues for the EU, if they do not want to increase their national contributions. Given the need for additional own resources to repay the funds of NGEU, there is a realistic chance for a supranationalisation of EU funds. Establishing further resources, which are independent from national budgets, should ease net-payer-debates and facilitate the allocation of EU

110 U. Krotz and L. Schramm, see n. 27, 534.
111 D. Howarth and J. Schild, see n. 27, 216.
112 C. de la Porte and M. D. Jensen, see n. 13, 392; B. de Witte, see n. 1, 636; A. Crespy and L. Schramm, see n. 2, 14.
113 A. Crespy and L. Schramm, see n. 2, 14–16.
114 Bundesregierung, 'Deutsch-französische Initiative zur wirtschaftlichen Erholung Europas nach der Coronakrise', (2020) Press release 173 of 18 May 2020 <https://www.bundesregierung.de/breg-de/service/archiv/deutsch-franzoesische-initiative-zur-wirtschaftlichen-erholung-europas-nach-der-coronakrise-1753760> accessed 1 April 2025.
115 U. Krotz and L. Schramm, see n. 27, 533.
116 P. Becker, see n. 12.

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funds oriented on real European common good. This hypothesis is reinforced by the fact that the Commission was not only equipped with further responsibilities of borrowing and the disbursement of NGEU funds, but it was actually successful in coupling the recovery program to its wider – ideationally based – policy goals for a green and more sustainable Europe.[117]

In parallel, we observe that the preservation of national capacity is inherent to European empowerment. For example, Germany's economic strength is to an important part dependent on the functioning of the internal market, which should be sustained by the new institutional arrangements. Through the whole process of 2020, Member States have been at the steering wheel[118] and again the Franco-German partnership dominated negotiation outcomes.[119] In contrast to the financial crisis though, the duo acted more inclusively towards its fellow Member States. Thereby, national positions and coalitions were based again on economic as well as ideational aspects, which included the preservation of the crisis-torn European integration project. Against this background, the Franco-German proposal searched for a balance of interests of its fellow Member States. Both the concerns of Southern Member States regarding conditionality and the 'red line' of unlimited joint liability merging into Coronabonds brought forward by Northern Member States, which would have been a qualitatively more far-reaching move towards a fiscal union, were considered.

Conceptually though, the pandemic displayed yet again a case of distributional conflict and the agreed solutions display a classic redistributive character.[120] It is due to the early framing of the COVID-19 pandemic as exogenous shock and challenge to the whole community, that "burden-minimising"[121] strategies have been prevented, which would have made it difficult to reach European solidary solutions.[122] Thereby, even if the finally taken institutional path deviates from former crisis management, the underlying interests and ideas relate back to issues of the financial and state debt crisis.

117 S. Saurugger, see n. 3, 262.
118 H. Kassim, 'The European Commission and the COVID-19 pandemic: a pluri-institutional approach' (2023) 30 *Journal of European Public Policy*.
119 U. Krotz and L. Schramm, see n. 27, 535.
120 C. de la Porte and M. D. Jensen, see n. 13; L. Schramm, U. Krotz and B. de Witte, see n. 75, 116.
121 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 978.
122 S. Saurugger, see n. 3, 267.

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5. Conclusion

The NGEU instrument and its coupling to the MFF is arguably a paradigm shift compared to a pre-crisis situation which qualifies being labelled as *integration through funding*. But the paradigm shift relates back to the state debt crisis. Hence the critical juncture must be attributed to the crisis response policies as of 2011, which induced several reforms on European level that substantially enhanced European integration in the monetary union and hence qualifies as *integration induced by crisis*. And although they seemed incomplete and imperfect at the time, we see a continuous path dependency towards fostering and extending the introduced mechanisms and liabilities in line with the "failing forward"[123] argument that identifies a tandem of intergovernmental processes in urgency and long-term neofunctional developments. This resulted in a situation, where Member States effectively agreed on financial liabilities created through the ESM.[124] In 2020, there is no way back but only forward. Similarly, the agreement on joint liabilities by the Heads of State and Government reaches further than ever before.

Obviously, the point of comparison matters. We look at the COVID-19 pandemic crisis and see surprising developments compared to discourses during the state debt crisis a decade earlier. While it astonishes at a first glance that Germany supported fiscal capacity-building on European level by establishing the NGEU programme,[125] some key criteria have been met that where already key issues during the financial crisis.[126] The new set-up still meets essential ordoliberal principles: the NGEU program is temporary (until 2058), its scope is limited and there are control mechanisms by the Commission and an intergovernmental security break. Most importantly: liabilities mainly remain with the individual Member States – and their contribution to the EU budget. Yes, we are dealing with new forms of risk-sharing, but they continue to remain limited in comparison to the fiscal needs of the visions for a fiscal union.[127]

123 E. Jones, D. Kelemen and S. Meunier, see n. 9, 1027.
124 F. Schimmelfennig, see n. 4, 'European Integration (Theory) in Times of Crisis. A Comparison of the Euro and Schengen Crises', 980.
125 S. Saurugger, see n. 3, 267.
126 D. Howarth and J. Schild, see n. 27, 220.
127 E. Macron, 'Initiative pour l'Europe – Discours d'Emmanuel Macron pour une Europe souveraine, unie, démocratique', (2017) <https://www.elysee.fr/emmanuel

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Following our analysis, there is (1) a continuity in intergovernmental control on negotiation processes.[128] However, (2) we see substantial change regarding coalition-building which departs from traditional positions but still relates strongly back to national interests and policy ideas. The fact that Germany changed its position from a classic frugal Northern country, towards a promoter of fiscal capacity-building on European level is a novelty. Germany decided proactively to accept early crisis response costs in order to act more promptly, European and solidary but with a design that still meets some of the key principles of German fiscal ideals.

And again, similar to the situation during the state debt crisis, the European Commission's main job was to develop the technical design of credit facilities. Obviously, the European Commission benefits from the adopted instruments, but all its activities are closely linked to and observed by the Council of the European Union. Finally, we see (3) new forms of EU budget financial instruments with an unprecedented level of risk-sharing and liabilities which were clearly processes of *integration induced by crisis* and have effectively enhanced European *integration through funding*. But we are still far from substantiating the fiscal capacity of the existing monetary union in a constitutional Hamiltonian dimension. Time will tell whether further own resources will be implemented and whether they will make a difference to the budgetary constitution of the European Union, but neither negotiations since the MFF agreement nor during the energy crisis have indicated that the EU is breaking new ground.

-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique> accessed 1 April 2025.

128 U. Krotz and L. Schramm, see n. 27, 535.

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Conclusion and Outlook

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Integration Through Law and the European Union: Concepts of Law, Legitimacy, Rule of Law and Self-Conception

Domenica Dreyer-Plum[*†]

> *"European Integration can no longer rely on the basis of the traditional assumption that law is the natural cement that holds the member states, their peoples, and social and legal structures together."*[1]

> *"I believe we need an ambitious reform agenda to ensure the proper functioning of a larger Union, to ensure we are equipped to tackle our geopolitical challenges and to improve democratic legitimacy, notably through citizen's participation."*[2]

Integration through law and the European Union (EU) – the title of this volume combined a classic theory of European integration with our current conception of the EU. Keeping in mind the political and legal achievements of this supranational legal community over the past 70 years, we have adopted a critical yet broad-minded integrationist view departing from the law as both the technical and normative foundation of the European community. Additionally, political and legal dimensions as well as the polycrisis experience since the financial and state debt crisis strongly inform our view on the EU, its capabilities, democratic structures and legitimacy challenges.

This book brought together theoretical, conceptual and empirical approaches in relation to *integration through law* not limited to the classic understanding of integration through jurisprudence, but extending to various formats such as *integration through legislation*, *integration through*

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1 L. Azoulai, '"Integration through law" and us' (2016) 14 *International Journal of Constitutional Law* 2, 449, 462.

2 U. von der Leyen, 'Europe's Choice – Political Guidelines for the next European Commission 2024–2029' (European Commission, 2024), 30.

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funding and *integration induced by crisis*. What unites these approaches is their focus on the law not only as a tool and necessary medium, but powerful variable to strengthen integration in the sense of *constitutionalisation* of the European integration process. While *legislation* creates legal obligations for Member States and intensifies the legal entaglement in the multi-level system, *funding instruments* create liabilities and thus increase interdependencies between EU institutions and Member States. Finally, crisis resolution via European legal means further increases the European political scope with consent of the Member States.

The authors of this volume have analysed both the long-term integration developments and the role of law in the process of Europeanisation.[3] It became evident that jurisprudence from the early years of the European communites as well as recent case law, provides insights into the various policy areas in which the extension of European integration is implemented by means of law. Following up on this path, several authors have addressed coping strategies in recent crises, with law and legal culture serving as means to stabilise European integration.[4] Overall, the handling of the crises since the financial and sovereign debt crisis indicates that the EU has succeeded in stabilising and securing its own constitution and developing further legal elements.[5] The diversification of the EU's financial architecture, prompted by crisis situations, provides a deeper understanding of the self-conception and objectives of the EU (and its constitution).[6]

The significance of law in the integration process has steadily grown over time.[7] It provides the most important framework for cooperation among Member States, facilitating a multi-layered approach to governance that balances national interests with collective objectives. Thereby, the balance

3 See in this volume: Domenica Dreyer-Plum (Pages 33 to 53); Domenica Dreyer-Plum, Anna Wenz-Temming and Jared Sonnicksen (Pages 55 to 75); Susanne K. Schmidt (Pages 79 to 104) and Darinka Piqani (Pages 149 to 172).

4 See in this volume: Clemens Ladenburger (Pages 105 to 122); Darinka Piqani (Pages 149 to 172) and Marcin Gorski (Pages 125 to 147).

5 See generally M. Riddervold, J. Trondal and A. Newsome, *The Palgrave Handbook of EU Crises* (Palgrave Macmillan, 2021); R. Coman, A. Crespy and V. A. Schmidt, *Governance and Politics in the Post-Crisis European Union* (Cambridge University Press, 2020).

6 See in this volume: Ruth Weber (Pages 175 to 196), Domenica Dreyer-Plum and Anna Wenz-Temming (Pages 197 to 219).

7 See generally J. Bast and A. von Bogdandy, *Unionsverfassungsrecht. Eine Neubestimmung anhand der Grundlagen im EU-Vertrag* (C. H. Beck, 2025).

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between legitimacy claims from EU institutions and demands from Member States remains crucial for upholding democratic principles.[8]

In light of increasing politicisation and polarisation since the financial crisis,[9] it is clear that the European legal community faces challenges that require both coping and resilience strategies. It is precisely this challenging constellation: the polycrisis experience since the financial and state debt crisis, the polarisation and politicisation of European politics, and the increasing density and constitutionalisation of the legal community, that give continuous reason for our research interests about:

(1) the changing meaning and scope of *law* in this political system,
(2) the changing nature of *legitimacy* claims and accountability between European institutions and Member States,
(3) the normative concept of *rule of law*, its (judicial) development in the European integration process and in relation with backsliding processes in several Member States,
(4) the *self-conception* – and: finality – of the EU in terms of its capacity to act.

To conclude on the results of both our conference and this volume, we will connect in this chapter the study results of the different contributions with regard to the EU's conception of *law*, *legitimacy*, *rule of law* and *self-conception*.

1. Law and Integration Through Law

Law in the formal sense is a set of rules within a legal system that "regulates the relationship of a group of people to each other or to the superior sovereigns or between them".[10] Apart from these fundamental structures that are created by legal relationships, the law has an important function in shaping social relationships that are reflected in the outcome of politi-

8 See in this volume: S. K. Schmidt (Pages 79 to 104).
9 S. Hutter and H. Kriesi, 'Politicizing Europe in times of crisis' (2019) 26 *Journal of European Public Policy*, 996; V. A. Schmidt, 'Politicization in the EU: between national politics and EU political dynamics' in J. Zeitlin and F. Nicoli (eds), *The European Union Beyond the Polycrisis?* (Routledge, 2020), 67.
10 W. Weidenkaff, 'Allgemeine Rechtsbegriffe', in C. Creifelds and K. Weber (eds), *Rechtswörterbuch* (C.H. Beck, 2017), 1062.

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cal decision-making processes.[11] In this way, the law fulfils an important stabilising function for the community.[12] The law can only fully fulfil this stabilising function if it is binding. This binding force, in turn, is fed by the legitimisation of the law.[13] The outstanding importance of law for political systems lies in the fact that law is the decisive medium through which the social reality of today's societies is shaped. Law is regarded as the epitome of civilisational achievements: it replaces power and (violent) rule by exchange, dialogue and negotiation in the process of legislation. The law is thus incrementally incorporated into the structures of democracy, if it is linked to basic liberal democratic principles. In that sense, the law is "congealed politics"[14], as it operationalises democratic processes.

European law has developed into a category of law in its own right: It is neither comparable to national law nor to international law.[15] It is located on an intermediate level between national and international law, with an incomparably high degree of binding force which sets clear demands to be met by its Member States.[16] This is where the European legal community differs most clearly from conventional international organisations in the sense that it displays a deeper and more profound legal structure.[17]

The daily law-making processes developed in close cooperation between the European institutions[18] combined with jurisprudence[19] and ad-hoc cri-

11 D. Grimm, 'Recht und Politik' (1969) *Juristische Schulung*, 501, 502.
12 E. R. Lautsch, *Integration durch Recht* (Mohr Siebeck, 2023).
13 M. van Hoecke and M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law' (1998) 47 *International and Comparative Law Quarterly*, 495, 515.
14 D. Grimm, see n. 11, 502; taken up by G. F. Schuppert, 'Rigidität und Flexibilität von Verfassungsrecht. Überlegungen zur Steuerungsfunktion von Verfassungsrecht in normalen wie in „schwierigen" Zeiten' (1995) 120 *Archiv des öffentlichen Rechts*, 32, 37.
15 W. Phelan, 'The revolutionary doctrines of European law and the legal philosophy of Robert Lecourt' (2016) EUI, LAW, Working Paper; A. Vauchez, *Brokering Europe: Euro-lawyers and the making of a transnational polity* (Cambridge University Press, 2015); A. von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 *European Law Journal*, 95.
16 K. K. Patel, *Europäische Integration. Geschichte und Gegenwart* (C. H. Beck, 2022), 45–47.
17 K. K. Patel, see n. 16, 45–47.
18 See in this volume: Clemens Ladenburger (Pages 105 to 122).
19 See in this volume: Susanne K. Schmidt (Pages 79 to 104); Darinka Piqani (Pages 149 to 172)

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sis management[20] illustrate the various components of *integration through law* that have formed over the past decades.

The *integration through law* theory movement focuses on analysing the role of law and legal institutions in the process of European integration.[21] In fact, many scholars have demonstrated how a handful of fundamental decisions effectively developed structural principles of European law through judge-made law.[22] Although law is at the centre of the theory, the concept of law has remained largely technical. Law is understood as a tool for integration, as an object, as a form of enforcing political decisions.[23] Current scholarship emphasises that *integration through law* peaked in the 1960s and 1970s with a few 'mythical' judgments. The Single European Act enabled an important transition to *integration through legislation* rather than *integration through law* (jurisprudence) with the facilitation of European harmonisation. This need for harmonisation followed from individual decisions of the Court of Justice and resulted in the insertion of Art. 100a EEC Treaty, which effectively enabled *integration through legislation*.[24] What followed, was a "dialectical relationship between the EU Court ('law') and

20 See in this volume: Clemens Ladenburger (Pages 105 to 122); Ruth Weber (Pages 175 to 196); Domenica Dreyer-Plum and Anna Wenz-Temming (Pages 197 to 219

21 M. Cappelletti, M. Seccombe, J. H. H. Weiler, *Integration through law: Europe and the American federal experience* (Walter de Gruyter, 1986); U. Haltern, 'Integration durch Recht', in H.-J. Bieling and M. Lerch (eds), *Theorien der europäischen Integration* (Springer, 2012).

22 A. von Bogdandy and J. Bast, 'Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge', in A. von Bogdandy and J. Bast, *Europäisches Verfassungsrecht* (Springer, 2009), 13, 24; M. Höpner, 'Usurpation statt Delegation. Wie der EuGH die Binnenmarktintegration radikalisiert und warum er politischer Kontrolle bedarf' (2008) MPIfG Discussion Paper, 7; L. Azoulai, 'The Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) 4 *European Journal of Legal Studies*, 178, 188–194; M. Rasmussen, 'Law Meets History: Interpreting the van Gend en Loos Judgment', in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 103, 111–117; W. Phelan, 'Goodbye to all that: Commission v. Luxembourg & Belgium and European Community Law's Break with the Enforcement Mechanisms of General International Law', in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 121, 130–133; A. McNaughton, 'Acts of Creation: The ERTA Decision as Foundation Stone of the EU Legal System', in F. Nicola and B. Davies (eds), *EU Law Stories* (Cambridge University Press, 2017), 134, 147–152.

23 F. Schorkopf, 'Rechtsgeschichte der europäischen Integration: Ein Themengebiet für Grundlagenforschung in der Rechtswissenschaft' (2014) 69 *JuristenZeitung*, 421, 424.

24 K. K. Patel and H. C. Röhl, *Transformation durch Recht: Geschichte und Jurisprudenz europäischer Integration 1985–1992* (Mohr Siebeck, 2020), 40–49.

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the EU legislator ('politics')".[25] This paved the way for the "spectacular rise of EU legislation".[26]

This emphasises once again that *integration through law* is neither automatic nor self-evident, but that it took committed actors (*agency*) to give law the position it has today in the European legal community. Both the Heads of State and Government[27] and actors within the European institutions are actively involved as authors of this law.[28] In fact, the law has gained this important role based on a combination of jurisprudence (of the Court), treaty development (by the Heads of State and Government), legislation (by Commission and Council, increasingly the European Parliament) and the general and continuous support of the Member States. Thus, the agency behind *integration through law* is not only concentrated in supranational institutions – as it appears to be in the theoretical approach of *integration through law* with a strong emphasis on the Court. Ultimately, this intricate interplay between law and politics illustrates that for European integration to thrive, a balance must be maintained between legal authority and political confirmation.

The first section on *conceptual approaches to understanding the link between law and European integration* fundamentally addressed the connection between law and *integration through law*. We can draw several conclusions from the two contributions to situate the significance of law within European integration processes. *Domenica Dreyer-Plum* conceptualised *law* and *integration through law* as essential components of the EU's legal and political framework. *Integration through law* is rooted in the EU's early judicial decisions, enabling individuals to become subjects of EU law. Thus tracing the historical evolution of EU law from its inception to its current role in shaping governance, illustrates how past decisions have laid the groundwork for contemporary legal principles such as direct effect and supremacy. This effectively bridges legal studies and political science, highlighting how law functions not only as a regulatory mechanism but also as a narrative that shapes political discourse and public understanding

25 R. Schütze, '"Integration-through-Law": grand theory, revisionist history' (2025) *European Law Open*, Doi:10.1017/elo.2025.15, 1, 1–39.

26 R. Schütze, see n. 25, 1.

27 Milestones: Treaties of Rome 1957, Single European Act 1986/1987; Maastricht Treaty 1992/1993; Lisbon Treaty 2007/2009.

28 Especially the Court of Justice in the 1960s, the Council and Commission until the mid-1980s, and only since the Lisbon Treaty has the European Parliament also been involved as an equal legislator.

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within the context of European integration. From this contribution, we can conclude that both 'written' (formal legislation) and 'living' law (implementation) help us to enhance our understanding of the law's significance in shaping the EU's identity and functioning as a multilevel governance system. This comprehensive approach is reflected in the concept of *legal culture* as a framework for understanding how legal norms interact and influence democratic legitimacy. The suggested operationalisation of legal culture allows for a nuanced exploration of how legal norms are intertwined with social practices and political contexts, thereby enriching the understanding of *integration through law*.[29]

Advancing the discussion on the connection between law and social practices, the chapter by *Anna Wenz-Temming, Jared Sonnicksen* and *Domenica Dreyer-Plum* discussed the significance of law and *integration through law* in the context of democratic transformation processes, particularly focusing on European climate change litigation. We followed their argument that law not only serves as a regulatory tool but also functions as a narrative that shapes political discourse and public understanding during times of crisis. Legal frameworks can provide legitimacy for policy solutions while addressing complex societal challenges, such as climate change. This conceptual approach underscores that *integration through law* is closely linked to political processes, where legal arguments are used to justify policy choices and engage citizens in democratic governance. By examining two significant cases of climate change litigation, it is possible to demonstrate how legal narratives are applied in order to influence public perception and foster engagement with pressing issues.[30]

Law can provide legitimacy to political narratives and policy solutions, acting as an authoritative framework through which societal issues are addressed. By framing conflicts in legal terms, law facilitates discourse around democratic governance. Since effective governance in democratic systems relies heavily on legal processes, this gives reason to further explore law as a narrative to maintain democracy amidst transformative pressures. Generally, this underscores that understanding the interplay between law,

29 See in this volume: Domenica Dreyer-Plum (Pages 33 to 53).

30 See in this volume: Domenica Dreyer-Plum, Anna Wenz-Temming and Jared Sonnicksen (Pages 55 to 75).

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narratives, and democracy is vital for navigating current and future challenges within the EU multi-level system.[31]

Concluding on the link between law and European integration, we can draw from these contributions that the significancy of *law* is paramount since it serves both as the foundation of the EU and constitutes the key instrument both in everyday and crisis politics as well as in continuous transformation processes. *Integration through law* has evolved from early judicial decisions to a more legislative focus also affecting integration as a narrative that shapes public perceptions. This is likely to be crucial for addressing contemporary challenges within the EU's multi-level governance system.

2. Legitimacy and Integration Through Law

In political science, legitimacy is defined as the recognition and acceptance of an authority, usually a governing body or institution, *by the governed*. Legitimacy furthermore encompasses the belief that the authority's right to rule is *justified and appropriate*, which is essential for maintaining social order and stability. Additionally, the ability to deliver results that meet citizens' needs enhances the legitimacy of the authority by way of *effectiveness*.[32]

Several scholars have shaped our perspective on legitimacy in the EU with different focus: While *Andrew Moravcsik* highlighted the significance of Member State interests on EU integration processes and those implications for the legitimacy of EU institutions,[33] *Giandomenico Majone* addressed issues of accountability, transparency and legitimacy in non-majoritarian institutions and thereby enhanced our understanding of the regulatory state and governance in the EU.[34] More generally, *Jürgen Haber-*

31 See in this volume: Domenica Dreyer-Plum, Anna Wenz-Temming and Jared Sonnicksen (Pages 55 to 75).

32 For a comprehensive understanding of legitimacy in political science, see: J. Knight and M. Schwartzberg, *Political Legitimacy* (New York University Press, 2019); for its application to the European Union, see: D. Beetham and C. Lord, *Legitimacy and the European Union* (Routledge, 1998) and F. W. Scharpf, *Governing in Europe: Effective or Democratic?* (Oxford University Press, 1999).

33 A. Moravcsik, 'Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach' (1993) 31 *Journal of Common Market Studies*, 473.

34 G. Majone, 'Regulatory Legitimation in the European Union' (1996) 3 *Journal of European Public Policy*, 546; G. Majone, 'Dilemmas of European Integration: The

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mas' considerations on deliberative democracy and the public sphere have been influential on discussions of democratic legitimacy within the EU context.[35] With a discoursive view on the EU, *Vivien Schmidt* extended our understanding of legitimacy by highlighting how ideas and narratives about Europe influence perceptions of legitimacy within the EU.[36]

Those are just a few of many different approaches to addressing legitimacy issues in the EU with different angles. One of the most comprehensive contributions on legitimacy in the EU has been provided by *Fritz Scharpf*, in which he distinguishes between *input*, *throughput*, and *output* legitimacy.[37] Input legitimacy focuses on accountability in democratic processes and representation in decision-making; throughput legitimacy examines the quality and efficiency of governance processes and whether they are fair, transparent and inclusive; while output legitimacy assesses the effectiveness and outcome of policies and their ability to meet citizens' needs. *Scharpf's* framework emphasises that these three forms of legitimacy are interconnected, suggesting that deficits in one area can undermine overall perceptions of legitimacy within the EU, thereby influencing discussions about democracy and accountability in EU governance.

In the context of the EU, input legitimacy is often critiqued due to perceived democratic deficits, such as limited direct electoral accountability of EU institutions.[38] In contrast, output legitimacy is considered very important on European level: The EU seems to enhance its legitimacy through positive outputs in terms of economic stability and social welfare.[39]

The EU is not a state, but it forms a common legal system with the Member States, in which questions of competence and boundaries of sovereignty arise between the Member States and the European institutions. This de-

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Ambiguities and Pitfalls of Integration by Stealth' (2005) 11 *European Law Journal*, 488.

35 J. Habermas, *The Postnational Constellation: Political Essays* (MIT Press, 2001); J. Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012).

36 V. A. Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput' (2006) 54 *Political Studies*, 1; V. A. Schmidt, 'Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone' (2019) 57 *Journal of Common Market Studies*, 440.

37 F. W. Scharpf, see n. 32; see also: F. W. Scharpf, 'The European Social Model: Coping with the Challenge of Diversity' (2002) 40 *Journal of Common Market Studies*, 645.

38 J. J. H. Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay', in J. Dickson and P. Z. Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012), 137–158.

39 F. W. Scharpf, see n. 32; see also: F. W. Scharpf, see n. 37.

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marcation of competence is fundamental to the democratic accountability within the European multilevel political system and thus to the legitimacy of European politics: This is the cornerstone upon which trust and participation of the European political system are built.

As such, legitimacy relies heavily on a "government of governments"[40], where effective governance must navigate this complexity. The European Commission acts as an active lawmaker and shaper of the legal community, while the Court serves as a retroactive actor that interprets and defines this community's contours. Both institutions derive their legitimacy from treaties; however, their effectiveness hinges on how well they fulfil their mandates in alignment with Member State needs.

However, as *Susanne Schmidt* points out, the Court of Justice operates at a distance from Member States, leading to varied effects and perceptions of its jurisprudence across the heterogeneous landscape of the EU. This diversity creates a paradox: while Member States frequently express specific wants, their differing priorities complicate consensus-building and create challenges for legitimacy. This assessment arises from *Schmidt's* examination in this volume of the dynamics of *integration through law* at the Member State level, focusing on how EU policies are implemented and how this process can become contentious and politicised.

Due to the EU's reliance on Member States for the implementation of EU laws and policies, several legitimacy issues relate to the the lack of strong central governance and administrative capacity. This can create tensions between fulfilling EU obligations on the one hand and maintaining domestic political support on the other hand, particularly when compliance with EU rules contradicts national interests or faces public opposition.[41] Furthermore, the interconnectedness among Member States introduces mutual dependencies, where non-compliance by one country imposes costs on others, complicating trust and cooperation within the EU framework. Additionally, the rise of right-wing populism reflects growing skepticism towards the EU as citizens perceive its regulations as undermining national interests or social welfare systems. While *integration through law* is positioned as a primary mechanism for advancing European integration;

40 S. K. Schmidt, 'Legitimacy dynamics in the multilevel EU – implementing integration through law at the MS level', Bonn, 24 October 2024.

41 See in this volume: Susanne K. Schmidt (Pages 79 to 104).

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however, its success hinges on the willingness of Member States to comply with established legal frameworks.[42]

To ensure effective implementation of EU laws, stakeholder engagement is central to legal processes on European level. This is a key argument brought forward by *Clemens Ladenburger*. The Commission's responsiveness to Member States' demands illustrates this stakeholder engagement in shaping EU policies. Thus, the involvement of various actors, including national governments and the European Parliament, ensures that legislative initiatives align with the interests and sovereignty claims of Member States. This concept of positive integration then gains importance over negative integration,[43] which focuses on legal constraints on Member States. This shift may account for a more collaborative approach to governance and it increases legitimacy of *integration through legislation*.

The gradual shift from intergovernmental approaches to more community-based methods furthermore indicates that collaborative decision-making fosters efficiency and legitimacy in legislation processes. Some areas that are traditionally associated with national sovereignty, such as migration and public health (visible during the COVID-19 pandemic), are increasingly interconnected with core EU objectives like free movement. This interdependence necessitates coordinated action at both national and EU levels. Overall, this illustrates how *integration through legislation* in the EU requires a dynamic interplay between well-prepared initiatives on EU level, attentive listening to Member State concerns and strong cooperation between European and national institutions.[44]

This assessment is connected to one of the key questions we are dealing with in the context of different "*integration through...*"-formats: whether the enhancement of European integration by legal means are compatible with the (limited) competences of the EU. All "*integration through...*"-formats imply the advancement and extension of European jurisdiction. Hence, inquiring for the legitimacy of those extensions is important to maintain a balance between the national and European legal systems – the multilevel system – and to maintain trust and support for the European legal community. Summing up, it is important to emphasise that accepted and recog-

42 See in this volume: Susanne K. Schmidt (Pages 79 to 104).

43 For the distinction between negative and positive integration, see generally R. Schütze, *European Union Law* (Oxford University Press, 2021); see recently: M. van den Brink, M. Dawson and J. Zglinski, 'Revisiting the Asymmetry Thesis: Positive and Negative Integration in the EU' (2023) 32 *Journal of European Public Policy*, 209.

44 See in this volume: Clemens Ladenburger (Pages 105 to 122).

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nised *integration through law* and *integration through legislation* requires cooperation among Member States to implement EU laws while balancing national sovereignty with collective action to address shared challenges effectively.

3. Rule of Law and Integration Through Law

The *rule of law* is not only a key component of the basic values of the EU (see Art. 2 TEU). It is also closely linked to democracy in the EU. What does this mean in practice? Rule of law requires that all individuals and institutions are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated. In this understanding, supremacy of law prevails: Rather than arbitrary decisions of individual government officials, laws are key to govern in any political system and no one is above the law. Political science scholars emphasise that rule of law is crucial to *legitimate* governance and democratic institutions. Rule of law supports principles such as accountability, transparency, participation, and equality before the law.[45]

At this point, normative attributions come into play that are not inherent to the law itself but are instead ascribed to it. These narratives about the law are interwoven with the political order narrative that a society claims for itself. This is because normative narratives are clearly associated with the law, even if the law of a legal order does not provide any moral qualities in its own right.[46] The concept of *rule of law* is a prime example: Associatively, the term is linked to the constitutionally guaranteed separation of powers and checks and balances, which includes the recognition of fundamental civil liberties of citizens in relation to the state.[47] A number of other components – such as access to justice, legal certainty instead of arbitrariness, equality, the exercise of power with moderation, conflict resolution

45 For an exploration of how legitimacy relates specifically to EU governance structures while emphasizing adherence to laws as critical for maintaining legitimacy: D. Beetham and C. Lord, see n. 32. Scharpf has contributed significantly to discussions about legitimacy in relation to governance structures within Europe; his works often address how adherence to the rule of law impacts democratic legitimacy, see F. W. Scharpf, n. 32.

46 E. R. Lautsch, see n. 12, 174.

47 T. H. Bingham, *The rule of law* (Penguin, 2011), 37–109.

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patterns, fair procedures – require further demarcations.[48] At this juncture, there exists a direct conceptual connection to the democratic principles of the rule of law: While the "law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimise the danger created by the law itself".[49] It is often only in times of conflict—specifically during judicial review—that the content (morality) of a norm is truly defined, determining its compatibility with overarching values.[50] The rule of law can itself become a subject of negotiation when the legislature, executive and judiciary negotiate or even damage the principles of the rule of law. In this sense, the rule of law remains a gradual principle that a political system more or less possesses or more or less lacks.[51] *Joseph Raz* emphasised in his theoretical work that the *rule of law* is thus one of the various virtues of a legal system and should not be confused with democracy, justice, equality or the protection of fundamental rights.[52] The *rule of law* only becomes an ideal when it is actually linked to (democratic) values. Law as justice needs a mandate that must come from the political process[53] and can therefore be susceptible to injustice if the good is missed by particular interests.[54] Grasping what *rule of law* means in a community of 27 heterogeneous Member States poses serious challenges given differing legal practices. This raises questions about both the feasibility and legitimacy to establish a coherent normative understanding applicable to the entire EU.[55]

Marcin Gorski discussed in this volume the relationship between *integration through law* and the rule of law, particularly in the context of Poland's legal and political developments from 2015 to 2023. The key message in relation to *integration through law* is that legal frameworks and institutions play a crucial role in maintaining democratic values and the

48 T. H. Bingham, see n. 47, 37–109.

49 J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford University Press, 2009), 224.

50 D. Grimm, see n. 11, 508.

51 J. Raz, see n. 49, 211.

52 J. Raz, see n. 49, 211. A normatively understood rule of law – as advocated in the literature by *Lon Fuller* – requires the regularity of laws in the sense of generalisability, promulgation, legal certainty through freedom from retroactive legal change and instead constancy over time, clarity of the law, freedom from contradiction, and coherence between declared rule and official action, see: L. L. Fuller, *The Morality of Law* (Yale University Press, 1969), 46–90.

53 E. R. Lautsch, see n. 12, 189.

54 L. Green, 'Book Review: Law's Rule – The Rule of Law: Ideal or Ideology, by A. C. Hutchinson and P. Monahan (eds)' (1987) 24 *Osgoode Hall Law Journal*, 1023, 1024.

55 Similar M. Höpner, 'Überdreht: Integration durch Recht' (2022) 76 *Merkur*, 56.

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rule of law. Rule of law is accordingly a foundational principle for successful integration, ensuring that Member States adhere to established laws. The deterioration of the rule of law in Poland illustrates how political decisions can undermine these frameworks, leading to a weakening of democratic principles.

Integration through law – in the narrow understanding of integration through jurisprudence – requires robust legal mechanisms, an independent judiciary, and effective enforcement of rights to ensure that all citizens are protected under the law. International legal standards and cooperation with entities like the European Court of Justice may serve as vital tools for reinforcing national legal systems against authoritarian pressures. In the case of Poland, we saw that societal support for the rule of law has been vital in defending democratic values despite significant backsliding. Ongoing deficits like insufficient legal education and transparency in judicial appointments must be addressed to strengthen future efforts against democratic erosion. Furthermore, fostering a strong legal culture and ensuring accountability within judicial processes are essential for sustaining democracy and preventing future backsliding. Finally, reinforcing commitment to the rule of law as an independent constitutional principle will be crucial for navigating complex political landscapes while promoting deeper integration within Europe.[56]

To stabilise resilience among institutions and electorates in the ongoing battles for the rule of law, it is essential to acknowledge the proactive roles played by both the Court and the Commission in operationalising this principle, especially through mechanisms such as the Rule of Law Framework and landmark rulings like the Portuguese judges case.[57] This was addressed by *Darinka Piqani* in this volume. She explored the relationship between *integration through law* and the rule of law particularly in response to recent challenges faced by Member States like Poland and Hungary.

We conclude from this assessment that the rule of law has emerged as a constitutional principle in the EU legal order, reflecting a commitment to uphold democratic values and judicial independence. Additionally, legislative measures like the Conditionality Regulation define and protect the rule of law, while acknowledging ongoing challenges related to enforcement and clarity within EU law. Thus, while progress has been made in solidify-

56 See in this volume: Marcin Gorski (Pages 125 to 147).

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

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ing the rule of law as a constitutional norm, its autonomous enforcement may still face limitations due to vague definitions and yet unresolved issues of competences between EU institutions and Member States. Furthermore, societal support for the rule of law seems crucial for its defence against backsliding into autocratic governance. This discussion underscores that *integration through law* is not merely about legal frameworks but also involves political dynamics and public perceptions.[58]

The situations experienced in Poland and Hungary reveal contrasting approaches to constitutionalisation; while *Piqani* reminds us of top-down effects of *integration through law* in the classic sense of jurisprudence, *Gorski* highlights the significance of civil society's engagement as a power coming necessarily from bottom-up in order to be sustainable and effective. Together, these perspectives underscore the necessity of cultivating a robust legal culture that promotes democracy and upholds the rule of law from multiple angles – both institutional frameworks and grassroots movements must work hand in hand to ensure lasting resilience against authoritarian tendencies.

This indicates why rule of law is an important concept in the context of the EU: Rule of law has gained normative power within European law as constitutional principle. Since the application of European law resides with the Member States, the realisation of rule of law principles are substantially practiced in the national legal systems, among which are the respect for basic rights, fair trials and independence of justice. Advancing European integration involves various mechanisms, including jurisprudence, legislation, extra-legal activities, funding and conditionality, all aimed at preventing a disconnect between the procedural and normative element of the rule of law.

4. Self-Conception and Integration Through Law

Conception is a broad term that denotes the process through which individuals or groups form ideas and interpretations about aspects of life and knowledge.[59] Self-conception refers to the broader framework of beliefs and

58 See in this volume: Darinka Piqani (Pages 149 to 172).

59 G. Ryle, *The Concept of Mind* (Hutchinson, 1949); G. Lakoff and M. Johnson, *Metaphors We Live By* (University of Chicago Press, 1981).

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ideas that an individual or entity holds about itself.[60] Such a conception is relatively stable, but may change for example due to significant events such as severe crises. Obviously, the EU does not have a personality in itself, but it does constitute a significant political entity that is perceived by its citizens as a relevant place to deal with transnational policy challenges. In our reading, the term 'EU conception' refers to the understanding, interpretation, and representation of the EU as an entity, including its goals, values, and institutional frameworks.[61] It encompasses how the EU perceives itself in relation to its Member States and citizens.

Among the shared values today are democracy, human rights, rule of law and respect for diversity among Member States.[62] Those values were implicit in the founding treaties, and became explicit with the Treaty of Maastricht and the Treaty of Lisbon. The objectives of the EU have always circled around explicit goals such as: economic cooperation,[63] stability and social cohesion within Europe; but were connected to implicit objectives: to foster trust among the Member States and to build for long-lasting peace and security.[64] Another significant changing element is the growth of the EU from originally six to now 27 Member States based on enlargement.[65]

The institutional structure of the EU diverges from international organisations since it combines supranational elements (autonomous bodies among the EU institutions, most prominently the Commission and Court) with intergovernmental elements, in which the executives of the Member States control decisions. Not only the inclusion of supranational bodies but also the trickling down of European law into national systems and the growing interdependence between the national and European legal spheres create a great necessity for accountability and transparence in decision-making processes.

60 While self-perception focuses on immediate views of oneself, self-conception encompasses a more comprehensive understanding of what an organisation represents, see R. F. Baumeister and K. D. Vohs (eds), *Handbook of Self-Regulation* (Academic Press, 2007); M. Rosenberg, *Conceiving the Self* (Basic Books, 1979).

61 J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2013).

62 See Art. 2 Treaty on European Union, see also Charter of Fundamental Rights of the European Union.

63 Art. 26–27, Treaty on the Functioning of the European Union, see R. Baldwin, *The Economics of European Integration* (McGraw-Hill Education, 2020).

64 See K. K. Patel, Projekt Europa: eine kritische Geschichte (C. H. Beck, 2018), 65–107.

65 See F. Schimmelfennig and U. Sedelmeier, *The Europeanization of Central and Eastern Europe* (Cornell University Press, 2005).

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The conception of the EU encapsulates a comprehensive view of its identity, purpose, governance structures, and evolving role in addressing both internal dynamics among Member States and external relations with global partners. It is closely connected to the 'finality' of the EU: a discussion that has been particularly vivid in the 2000s with the development and failure of the Constitutional Treaty.[66] Overall, finality is essential for understanding how institutions define their roles and responsibilities within broader societal contexts.

In this volume, we connected the (self-)conception and 'finality' of the EU with its financial architecture. Why? Because the financial capacities are decisive for the EU's capabilities. Additionally, the budget of the EU is one key aspect where the EU diverges from classic international organisations.[67] The connection between the financial budget of the EU and its self-perception and finality is significant, as the budget reflects the EU's priorities, values, and objectives while shaping its identity and governance. By allocating funds to specific programs (e.g., cohesion policy or the Green Deal), the budget demonstrates how the EU perceives its role in promoting prosperity and addressing challenges within Member States.[68] Funds are also crucial for fostering integration among Member States, particularly through initiatives aimed at – but not limited to – reducing disparities between regions. This financial support embodies the EU's commitment to solidarity among its members, reinforcing its self-image as a community that prioritises mutual assistance.[69]

The self-conception of the EU both develops from and feeds into the self-conception of the legal community. Recently, the financial capacities were further diversified with the expansion of the financial architecture provided by the NextGenerationEU funding opportunities generated in response to the Covid pandemic management. These events have led

66 See exemplary the contrasting speeches of Joschka Fischer (at the time Federal Foreign Minister of Germany) and Jacques Chirac (at the time President of the French Republic): J. Fischer, 'Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration' (2000) Auswärtiges Amt, Humboldt-Universtität in Berlin; J. Chirac, 'Rede des französischen Staatspräsidenten Jacques Chirac vor dem Deutschen Bundestag' (2000) Deutscher Bundestag, Berlin.

67 K. K. Patel, see n. 16, 45–47.

68 See R. Baldwin and C. Wyplosz, *The Economics of European Integration* (McGraw Hill Education, 2022).

69 See J. Bachtler, P. Berkowitz, S. Hardy and T. Muravska (eds), *Cohesion Policy in the European Union* (Routledge, 2016).

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to a consolidation of financial structures, deepening *integration through legislation and funding mechanisms*. The evolution of the EU's financial framework thus illustrates how it adapts to changing circumstances while maintaining its long-term objectives. This adaptability reinforces both its finality (e.g., promoting stability) and self-image (as a resilient entity).[70]

Ruth Weber explored in her contribution the relationship between the financing of the EU and its self-conception, suggesting that financial integration reflects different understandings of European integration. Two perspectives on financial integration are identified: a static view that sees existing arrangements as fixed and a dynamic view that emphasises ongoing change and adaptation in response to crises. Detailing the evolution from contribution-based financing to an own resources model, the argument unfolds in consideration of the implications for democratic legitimacy resulting from that shift. While *integration through funding* is emerging as a concept, it remains distinct from traditional notions of *integration through law*. The latter is primarily characterised by legal frameworks, judicial interpretations, and the authority of institutions like the European Court of Justice (ECJ) to shape European integration, emphasising a structured legal approach to governance and policy implementation.[71] In contrast, *integration through funding* focuses on the financial mechanisms available to the EU, such as budgetary resources and conditional financial support for Member States, which can influence national policies without necessarily relying on established legal processes or frameworks. The emergence of funding-based strategies, particularly evident in initiatives like NextGenerationEU,[72] reflects a shift towards leveraging financial resources as tools for integration and policy alignment among Member States, highlighting a more flexible and adaptive approach compared to the rigid structure associated with legal integration. In this vein, the finality of the EU is increasingly ambiguous and subject to ongoing debate, particularly in the context of evolving financial mechanisms and integration strategies. While the traditional notion of *an ever closer union* has been a guiding principle for EU integration, this consensus appears to be eroding amidst contem-

70 B. De Witte, 'The European Union's COVID-19 recovery plan: The legal engineering of an economic policy shift' (2021) 58 *Common Market Law Review*, 635; M. Ruffert and P. Leino-Sandberg, 'Next Generation EU and its constitutional ramifications: A critical assessment' (2022) 59 *Common Market Law Review*, 433.

71 See in this volume: Ruth Weber (Pages 175 to 196).

72 Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility [2021] OJ L57/17.

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porary challenges and crises. The emergence of concepts like *integration through funding* indicates a shift in how integration may be understood and pursued in the future, potentially complementing existing frameworks based on *integration through law*.[73]

From this we conclude that further developments in EU financing are likely amidst ongoing political debates about defence and security funding, indicating a potential for new dynamics in both legal frameworks and integration strategies. This implies that as political dynamics change, so too does the perception of what the ultimate goals of European integration should be. While there remains an aspiration towards deeper integration, the specific pathways and mechanisms for achieving this goal are becoming more complex and contested, suggesting that the finality of the EU may be more fluid than previously thought.[74]

The chapter by *Domenica Dreyer-Plum* and *Anna Wenz-Temming* similarly addressed the significance of budgetary politics for the constitution of the EU and their connection to funding strategies in past crises. In this reading, *integration through law* is a dynamic process significantly influenced by crises, particularly in the context of the COVID-19 pandemic and the previous financial and state debt crisis. The NGEU programme illustrates how financial instruments can enhance European integration by establishing joint liabilities and increasing fiscal capacity, which is crucial for addressing urgent socio-economic challenges. This may constitute a paradigm shift towards deeper financial *integration through funding* mechanisms, although conditionality remains a crucial aspect of financial assistance measures during crises. Despite advancements in creating new financial instruments, ongoing challenges relate to achieving a fully functional fiscal union within the EU framework due to political resistance and varying national interests. The importance of intergovernmental control over negotiation processes suggest a continuity in how decisions are made within the EU framework. While there is potential for further development in the EU's financial constitution – particularly concerning new revenue sources – the current landscape remains constrained by existing treaties and Member State agreements. Additionally, historical financing decisions have established path dependencies that affect current views on legitimate funding practices, while the financial constitution connects economic policies to broader political goals like democratic governance and rule of law.

73 See in this volume: Ruth Weber (Pages 175 to 196).
74 See in this volume: Ruth Weber (Pages 175 to 196).

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This analysis underscores that "*integration through…*"-formats are not just about legal frameworks but also involve navigating complex political dynamics and responding to pressing challenges in a rapidly changing environment. The interplay between crisis responses and legal integration highlights both opportunities for further development and ongoing limitations in achieving comprehensive fiscal solutions within the EU.[75] Taking the different views together, there is a strong connection between the financial budget of the EU and its self-perception and finality. The budget reflects core values like solidarity and cohesion while facilitating deeper integration among Member States. It also plays a crucial role in establishing legitimacy through transparency and accountability in resource allocation. Additionally, negotiations surrounding funding highlight power dynamics that influence perceptions of national sovereignty versus collective governance.

5. Conclusion and Outlook

The significance of law in the European integration process today cannot be overstated; it is, quite literally, the backbone of the EU. Law underpins the very fabric of this political entity, representing a remarkable achievement and a challenge when it comes to legitimising political choices to be implemented at national level.

Indeed, the law serves as the enduring 'currency' of the EU, highlighting the importance of fostering a shared understanding of the rule of law through ongoing discourse. While profound crises like the financial turmoil have prompted a reevaluation of foundational principles, the collective response to the Covid pandemic demonstrated resilience through initiatives such as NGEU. There is a strong connection between the financial budget of the EU and its self-perception and finality. The budget reflects core values like solidarity and cohesion while facilitating deeper integration among Member States. Ultimately, changes to financing structures demonstrate how the EU adapts to contemporary challenges while striving toward long-term goals related to peace, stability, prosperity, and unity.

However, there are risks associated with overstretching legal instruments beyond what is politically necessary, particularly when justifying *integra-*

75 See in this volume: Domenica Dreyer-Plum and Anna Wenz-Temming (Pages 197 to 219).

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tion through funding mechanisms. As the EU navigates contemporary challenges, fostering a shared understanding of core values will be vital for sustaining integration efforts and reinforcing trust among Member States. Ultimately, *integration through law, integration through funding* and *integration through legislation* must work together to address pressing issues while promoting long-term goals related to stability and unity within the European community.

Nonetheless, the persistent rule of law crisis poses a significant challenge that tests the integrity and cohesion of Europe's legal framework. This situation requires effective navigation of future complexities by harnessing the unique expertise of its legal community.

The normative concepts of legitimacy and the rule of law are closely tied to judicial experience. They are fundamentally connected to the questions of how we wish to shape our society and how we envision political processes functioning within European politics. It is exactly the general approval by political institutions (the legislative lending legitimacy to the political process) and the wider citizenry, which provides for the necessary political confirmation and *legitimacy*. Recent developments in countries like Poland and Hungary illustrate how political decisions can undermine the rule of law, highlighting the need for judicial independence and societal support to maintain democratic values. A bottom-up normative culture, grounded in the rule of law, is essential to complement the strong institutional structures established by EU treaties and enforced by bodies like the European Court of Justice (ECJ) and the European Commission.

While we examined the challenges of accountability and legitimacy in *integration through law* via jurisprudence, legislative processes provide more direct avenues for justification. Similarly, integration formats driven by funding, crisis-induced integration, and further developed through legal instruments occur within frameworks that ensure clear accountability. Yet, the support for the law and legal processes induced by European institutions and the Member States (represented partially also within EU institutions) remains essential to meet rule of law standards and to guarantee for the general legitimacy of shaping the European legal community.

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