



UNIVERSITÉ DE STRASBOURG

European Master's Programme in Human Rights and Democratisation

A.Y. 2019/2020

Defending the Rule of Law in the European Union

Is it Sufficient to “Police” EU Values?

Author: Giovanni Martino

Supervisors: Prof. Florence Benoît-Rohmer, Prof. Jean-Paul Jacqué

ABSTRACT

Ongoing events in the European Union (EU), particularly in Hungary and Poland, have seen an aggressive government-driven dismantling of prominent Rule of Law (RoL) elements such as the separation of powers and the independence of the judiciary, a phenomenon identified as “RoL backsliding”. Since the RoL is one of the values the EU is founded on, as established in Article 2 of the Treaty on the European Union, the situation sparked a debate over how to best defend EU values, and particularly the RoL, within the EU. This thesis contributes to the debate by showing through an evaluation of the state of play alternative ways to effectively defend the RoL. After outlining the principle of the RoL and its legal status in the EU, this research explores the nature of RoL backsliding and why this is problematic for the Union. The EU’s response to RoL backsliding since its onset in 2011 is then critically assessed. This case illustrates that initial challenges hindering effective RoL protection through non-legal or soft mechanisms have shifted the EU’s response to favour an enforcement-oriented top-down approach. It is argued that this approach fails to deter RoL backsliding as it does not address its social dimension, i.e. the understanding and practice of the RoL in society, which actively shapes the phenomenon. An alternative bottom-up and citizen-enhancing approach where civil society organisations are central to the EU’s strategy is illustrated, leading to recommendations for further EU action.

Keywords: Rule of law, EU values, EU law, rule of law backsliding, civil society, civil society organisations

ACKNOWLEDGMENTS

I would like to thank Prof. Benoît-Rohmer for the warm welcome to Strasbourg, the precious insights, and the supporting comments she gave me throughout the writing process of this thesis. I would also like to thank Prof. Jacques for his pointers which were critical to direct my research.

I would then like to thank Mario, Tamara, and Jason who helped me greatly with the proofreading. My family and my friends, who affectionately supported me during challenging times. And Jasmien, who did all of this and more.

TABLE OF ABBREVIATIONS

CoE	Council of Europe
Commission	European Commission
Council	Council of the European Union
CJEU	Court of Justice of the European Union
CSO(s)	civil society organisation(s)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EEC	European Economic Community
EESC	European Economic and Social Committee
ESI Funds	European Structural and Investment Funds
EU	European Union
Fidesz	Fiatal Demokraták Szövetsége
FRA	European Union Agency for Fundamental Rights
GA	United Nations General Assembly
GAC	General Affairs Council
GONGO(s)	government-organised non-governmental organisation
MPF	Multiannual Financial Framework
NCJ	National Council of the Judiciary (Poland)

NGO(s)	non-governmental organisation(s)
OSCE	Organisation for Security and Cooperation in Europe
PiS	Prawo i Sprawiedliwość
RoL	Rule of Law
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNODC	United Nations Office on Drugs and Crime

TABLE OF CONTENTS

1. INTRODUCTION	8
1.1 Problem diagnosis	8
1.2 Aim and research questions	9
1.3 Scope and limits	9
1.4 Method of inquiry	10
<i>1.4.1 Methodology</i>	10
<i>1.4.2 Structure</i>	10
2. THE RULE OF LAW IN THE EU	12
2.1 Conceptualising the rule of law	12
2.2 The rule of law in the EU legal framework	16
2.3 Rule of law backsliding	21
3. ASSESSING THE EU’S APPROACH TO RULE OF LAW BACKSLIDING	30
3.1 The EU’s initial response	31
<i>3.1.1 Unreadiness leading to delay</i>	31
<i>3.1.2 The Commission’s Framework and the Council’s Dialogue</i>	35
<i>3.1.3 Article 7 TEU</i>	38
3.2 Why did soft and political mechanisms fail?	41
<i>3.2.1 Optimism in democratisation</i>	41
<i>3.2.2 Lack of political incentives</i>	44
<i>3.2.3 The Commission’s ‘blueprint for action’</i>	47
<i>3.2.4 Towards an enforcement-based approach</i>	48
3.3 Hard mechanisms: legal and economic measures	49
<i>3.3.1 Preliminary rulings</i>	49

3.3.2 <i>Infringement proceedings</i>	51
3.3.3 <i>Rule of law conditionality for EU funding</i>	53
3.4 The shortcomings of a hard response	55
 4. FROM POLICING TO PROMOTING THE RULE OF LAW	65
4.1 Civil society organisations as central actors	65
4.1.1 <i>Promoting rule of law societal embedment</i>	67
4.1.2 <i>The lack of civic engagement in backsliding countries</i>	69
4.1.3 <i>Weak CSO sector in backsliding countries</i>	72
4.2 The EU's shortfalls in promoting CSOs and recommendations	75
4.2.1 <i>EU funding to CSOs</i>	77
4.2.2 <i>EU platforms for CSOs</i>	79
4.2.3 <i>CSOs' business models</i>	82
 5. CONCLUSION	84
 BIBLIOGRAPHY	87

*‘It is hardly possible to build anything if frustration, bitterness and a mood of
helplessness prevail’*

Lech Walesa

‘But where the danger lies, also grows the saving power’

Friedrich Hölderlin, Patmos

1

INTRODUCTION

1.1 PROBLEM DIAGNOSIS

Ongoing events in Hungary and Poland sparked a debate over how to best defend the Rule of Law (RoL) in the European Union (EU). The RoL is one of the values the EU is founded on as established in Article 2 of the Treaty on the European Union. That the RoL (rather than other EU values) has been singled out in the debate can be explained by the specific nature of the events, which centre on aggressive and rapid dismantling of prominent RoL elements such as the separation of powers, the independence of the judiciary and the transparency of the legislative process. The phenomenon has been identified with the expression ‘RoL backsliding’¹, described as a new type of threat ‘to the legal and democratic fabric of our European states’². Accordingly, after the last European elections in 2019, it has been argued that ‘[s]trengthening rule of law protection is perhaps the EU’s single most important necessity for the post-election period.’³ At least two factors make this an especially crucial moment to write about defending the RoL in the EU. First, the above-mentioned challenges to the RoL stand to this day. Second, because these challenges constitute an *egregious* threat to the RoL, they can be considered a crucial benchmark to fully assess the capacity of the EU to defend the RoL internally.

¹ Pech L. and Kim L. S., ‘Illiberalism Within: Rule of Law Backsliding in the EU’, in *Cambridge Yearbook of European Legal Studies*, 2017, p.19.

² Barroso J., President of the European Commission, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg, Speech/12/596, 12/09/2012.

³ de Búrca G., Morijn J., *Strengthening EU rule of law protection: start with freedom of expression*, Euractiv, 20/05/2019, <<https://www.euractiv.com/section/justice-home-affairs/opinion/strengthening-eu-rule-of-law-protection-start-with-freedom-of-expression/>> accessed 02/08/2020.

1.2 AIM AND RESEARCH QUESTIONS

This paper will analyse the main reasons and challenges in defending the RoL in the EU, assess the EU’s reaction to RoL backsliding, and illustrate how civil society organisations (CSOs)⁴ are *key* to the EU’s strategy to contrast the phenomenon. Since its beginning, the dynamics of RoL backsliding in the context of effective RoL protection in the EU have been closely scrutinised by academics and commentators. This thesis aims to contribute to the debate by showing through an evaluation of the state of play alternative ways to effectively defend the RoL in the EU. To do so, this paper aims at answering the following correlated research questions: (1) *To what extent does the EU effectively defend the RoL internally?* and (2) *How can the EU improve defence of the RoL internally?* These give rise to the following sub-question: *How can the EU prevent, curb, or turn around RoL backsliding?*

1.3 SCOPE AND LIMITS

The scope of this thesis is limited to EU internal action. International instruments and organisations and EU external RoL policy will therefore be touched upon only to the extent that they help clarifying EU action internally, which might constitute a weakness.

It will be seen that RoL dismantlement does never concern exclusively the RoL but broadens to undermine other EU values (such as democracy and human rights). This thesis however addresses the RoL independently, hence it is focused on the challenges to the RoL as are taking place in Hungary and Poland, rather than on how to better uphold EU values in all EU member states. Therefore, this research will refer to the RoL whenever it speaks of “EU values”. Nevertheless, it should be borne in mind that what is said of defending the RoL as an EU value might apply to all other EU values to the extent that this is plausible.

⁴ For many, the term “non-governmental organisation(s)” or “NGO(s)” has been subsumed within the broader category of “civil society organizations” or “CSO(s)”. Hence, this study has chosen to use the term “CSO(s)” rather than “NGO(s)”. See United Nations Development Programme (UNDP), *Working with civil society in foreign aid: possibilities for south-south cooperation?*, September 2013, Annex 1, p.123, <https://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/2013_UNDP-CH-Working-With-Civil-Society-in-Foreign-Aid_EN.pdf> accessed 02/08/2020. For a definition of CSOs, see further below.

Furthermore, it must be underlined that the position of all stakeholders involved in RoL protection could not be studied in this thesis. In focusing mainly on EU bodies and CSOs, this research could not provide a fully comprehensive picture of the RoL debate, which might constitute a bias.

Finally, for practical reasons, the timeframe of this study will stop in early August 2020.

1.4 METHOD OF INQUIRY

1.4.1 Methodology

To identify the state of play of the RoL debate, extensive and in-depth qualitative research was conducted. Together with primary sources such as EU official documents and national legislative instruments, a wide variety of secondary sources including statements, communications or press releases from EU institutions and agencies, books, specialised academic literature, newspaper articles, international reports, surveys and official speeches were examined. Quantitative data was also relied on to a lesser extent. Moreover, semi-structured and open interviews were conducted with representatives of civil society organisations to confirm hypotheses or dispel doubts.

In order to present the main reasons and challenges in defending the RoL in the EU, doctrinal legal research was employed, with an analysis of the legal principle of the RoL and its development in EU law. Finally, the thesis drew from sociological and democratisation theories to outline through the lens of the social reality of the law how CSOs are *key* to the EU's strategy to contrast RoL backsliding. This framework was also used to critically assess where the EU's approach to defend the RoL internally failed and how it can be improved.

1.4.2 Structure

Following this introductory chapter, this thesis will be organised in five additional chapters. Chapter 2 will identify the main reasons and challenges in defending the RoL in the EU. In particular, the chapter will outline the principle of the RoL and its significance, what the legal status of the RoL in the EU is, and whether the RoL has a specific importance at the EU level. Finally, the chapter will introduce RoL backsliding and explain why this is problematic for the Union. Following that, chapter

3 will assess the EU’s response to RoL backsliding since its onset in Hungary in 2011. More specifically, the chapter will evaluate to what extent current RoL protection mechanisms are effective in addressing RoL backsliding, discuss challenges hindering the mechanisms’ implementation, illustrate whether the mechanisms can be improved and whether there are alternative ways for the EU to address RoL backsliding. A central problem of the current EU’s enforcement-based approach will be laid bare. In illustrating an alternative bottom-up, citizen-enhancing approach to RoL backsliding, chapter 4 will show how CSOs can contribute to addressing RoL backsliding and how the EU can support CSOs in this regard, laying out recommendations for further EU action. Chapter 5 will summarise and conclude.

2

THE RULE OF LAW IN THE EU

‘We risk to move from the Rule of Law to the Right of Power, and when the first — the one on which the EU is based — comes to an end, Europe itself is destined to vanish.’

Frans Timmermans, First Vice President of the European Commission⁵

The goal of this chapter is to identify the main reasons and challenges in defending the Rule of Law (RoL) in the European Union (EU). To do so, this chapter firstly outlines the principle of the RoL and shows not only that the RoL acts as a bulwark against arbitrary power, but that it is interrelated with democracy and human rights. Secondly, the chapter provides a succinct summary of the place of the RoL in the EU legal makeup as an EU value. Owing to recent developments of EU law, compliance with the RoL has become a legally binding standard for the organization of national judiciaries, reflecting the instrumental importance of the RoL for the functioning of the EU. Lastly, the chapter introduces RoL backsliding and its government-driven, deliberate nature, explaining how it fundamentally threatens the credibility of a Union “founded” on values.

2.1 CONCEPTUALISING THE RULE OF LAW

The modern understanding of the RoL can be traced back to different historical strands⁶. These include the struggle of popes and kings for supreme power, provisions of Germanic customary law

⁵ *The future of European Union in Frans Timmermans vision*, Il Trentino, 02/06/2018, <<https://www.ufficiostampa.provincia.tn.it/Comunicati/The-future-of-European-Union-in-Frans-Timmermans-vision>> accessed 02/08/2020.

⁶ For an overview of the different meanings, developments and interactions in draft documents of the expressions *rule of law*, *état de droit/prééminence du droit* and *Rechtsstaat* see Pech, L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, Reconnect, Working Paper No. 7 (March 2020).

granting people a right to resistance when the king was breaching the law, as well as the clash between aristocracy and royalty that eventually resulted in the *Magna Charta*⁷. In later phases, with the development of commerce, the newly formed *bourgeoisie* allied with the nobility to protect its property and increase its political status, often limiting royal powers by forcing authorities to acknowledge their rights or by participating in the government themselves⁸. The shared feature between these historical strands is the attempt to restrain government tyranny through power sharing arrangements. Indeed, the significance of the RoL lies exactly in its role as a bulwark against arbitrary power⁹.

The totality of UN member states has endorsed ‘the need for universal adherence to an implementation of the Rule of Law at both the national and international levels’¹⁰, therefore it is fair to say that the concept enjoys ‘universal validity’¹¹. Even so, today there is no universally accepted definition of the RoL¹². The core of the RoL has been defined as the requirement that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.’¹³ The idea is that individuals and institutions should act within the law and should be under its control by virtue of an independent and impartial justice system.

Though EU member states conceptualise the RoL differently, it is possible to find overlapping elements in their constitutional traditions¹⁴. A 2011 report by the Venice Commission (an advisory body of the Council of Europe (CoE) focusing on constitutional matters) states that ‘a consensus (...)

⁷ Tamanaha, B. Z., *On the Rule of Law: History, Politics, Theory*, 2004, Cambridge: Cambridge University Press, p.15; Reid J. P., *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and the Eighteenth Centuries*, DeKalb: Northern Illinois University Press, 2004.

⁸ Unger R. M., *Law in Modern Societies. Towards a Criticism of Social Theory*, 1976, New York: The Free Press.

⁹ Raz J., *The rule of law and its virtue. Id. The authority of law*, 1979, Oxford University Press, pp.210–229.

¹⁰ United Nations (henceforth: UN), General Assembly Resolution 60/1 *2005 World Summit Outcome*, A/RES/60/1, para. 134; See also the UN’s Sustainable Development Goals. Goal 16.3 advocates to ‘[p]romote the rule of law at the national and international levels and ensure equal access to justice for all’, UN, General Assembly, *Resolution on transforming our world: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 25 September 2015.

¹¹ European Commission for Democracy through Law (henceforth: Venice Commission), *Rule of Law Checklist*, Strasbourg, 18/03/2016, Study No. 711/2013, Council of Europe (CDL-AD(2016)007), p.5.

¹² Morlino L., Piana D., Sandulli A., Corkin J., *Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice*, Reconnect, 31/10/2019, pp.7-11.

¹³ Bingham T., *The Rule of Law*, 2010, Penguin Books, p.23. But see also Jacobson F. G., *The Sovereignty of the Law: The European Way*, 2007, Cambridge University Press, who defines it as ‘the reviewability of decisions of public authorities by independent courts’ (p.35). Finally, see Millennium Challenge Corporation’s Rule of Law indicator, <<https://www.mcc.gov/who-we-fund/indicator/rule-of-law-indicator>> accessed 02/08/2020.

¹⁴ Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14 Gauweiler and Others, ECLI:EU:C:2015:7, para. 61.

for the necessary elements of the rule of law (...) can now be found.’¹⁵ The report resulted in the ‘Rule of Law Checklist’¹⁶. Drawing from this checklist, in addition to case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), the European Commission listed (albeit non-exhaustively) defining principles of the RoL:

*‘legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.’*¹⁷

The definition adopted by the Commission shows that the RoL has evolved from merely embodying the “negative” goal of shackling coercive authority, to encompass more substantive aspects, making the RoL a rather comprehensive concept. One could argue that these aspects are corollaries ensuing from a core principle, hence they logically follow. For instance, if nobody is above the law (no government, no public official, no dominant company), then surely everyone *must be* equal before the law, and *if so*, then everyone is entitled to equal procedural guarantees upheld by an arbiter (i.e. the judiciary) which for this very reason must be impartial. This inference in fact brings together features neither inherently nor historically interdependent¹⁸. The Commission’s definition then summarises a process of rationalisation which has accomplished the fundamental normative task of showing that the significance of the RoL transcends its role of protection against arbitrary power.

The RoL is key to protecting all the rights individuals derive from the law, as without application of the law or effective remedy, rights are *lettre morte*¹⁹. The RoL then also *safeguards* democracy and human rights. This can be exemplified by two instances: protection of arbitrary exercise of executive power and protection of equality before the law.

¹⁵ Venice Commission, *Report on the Rule of Law*, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (CDL-AD(2011)003rev), p.10.

¹⁶ *Supra*, note 11.

¹⁷ European Commission, Communication, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM (2019) 163 final, 03/04/2019, p.1.

¹⁸ Rech, W., ‘Some remarks on the EU’s action on the erosion of the rule of law in Poland and Hungary’, *Journal of Contemporary European Studies*, 26/07/2018, p.340.

¹⁹ Sajó A., Uitz R., *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017, ch. 8.

By ‘prohibiting the arbitrary exercise of executive power’²⁰, the RoL promotes the accountability of the executive, meaning that those who wield power must give notice of and justify their actions, suffering punishment in case of misconduct²¹. Accordingly, government officials must (1) comply with the law and (2) abide by limitations for law-making activities²². Without independent courts ensuring this to be the case, the government has no checks on what it can do, and if a head of state finds it conducive to his or her own interests, critical voices in the media and civil society can be muzzled with repressive libel laws and voters cannot get redress if elections are rigged. The RoL thereby protects a comprehensive system of checks and balances which averts concentration of power, ensures political liberty and the involvement of people in the societies’ decision-making processes, without which democracy would be impossible²³.

By protecting ‘equality before the law’²⁴, the RoL demands that elected representatives do not pass laws which discriminate against citizens. This provides, *inter alia*, procedural safeguards for minority rights, a specific but fundamental aspect of human rights²⁵.

There is now international recognition that democracy and human rights would not find an enabling environment without a RoL in place²⁶. This interdependency and mutually reinforcing relationship has led the RoL to form a stable “trinity” with democracy and human rights²⁷. It has been said that, like a three-legged stool, ‘if one is missing the whole is not fit for purpose’²⁸. Thus, it should not come as a surprise that the RoL has become one of the cornerstones of the European legal space. In the next section, how the RoL has been given shape in EU law will be examined.

²⁰ *Supra* note 17.

²¹ Schedler A., ‘Conceptualizing Accountability’, in (eds.) Schedler A., Diamond L., Plattner M. F., *The Self-Restraining State: Power and Accountability in New Democracies*, 1999, Lynne Rienner Publishers, pp.13-28.

²² Tamanaha B. Z., ‘A Concise Guide to the Rule of Law’, in (eds.) Palombella G., and Walker N., *Relocating the Rule of Law*, 2009, Hart Publishing, pp.4-8.

²³ Carugati F., *Democratic Stability: A Long View*, Annual Review of Political Science, 2020, 23:pp.59-75.

²⁴ *Supra* note 17.

²⁵ Rosenfeld M., ‘Constitutional Identity’, in (ed.) Rosenfeld M., Sajó A., *Oxford Handbook of Comparative Constitutional Law*, May 2012.

²⁶ See UN, Human Rights Council, Nineteenth session, Agenda item 3, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, A/HRC/RES/19/36, 19/04/2012.

²⁷ See for instance, UN, Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 30 November 2012.

²⁸ Carrera S., Guild E., Hernanz N., *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, CEPS, 2013, p.20.

2.2 THE RULE OF LAW IN THE EU LEGAL FRAMEWORK

The RoL already figured in prominent documents of international law, notably the Preamble of the 1945 UDHR²⁹, Article 3 of the Statute of the Council of Europe in 1949, and the preamble of the ECHR in 1953, as an element of ‘common heritage’.

At the EU level, the concept was firstly employed in Article 33 of the 1951 European Coal and Steel Community Treaty, where it regulated the functioning of its Court of Justice. The special significance of the RoL was reinforced when nine EEC member states adopted the Declaration on European Identity in 1973. The Declaration mentioned the resolve to defend ‘fundamental elements of the European Identity’ such as the principle ‘of the rule of law’³⁰. Until then however, the RoL was merely an inspiring principle of the Community, informing standards and aims but lacking any legal recognition. Nonetheless the Declaration led the way to the 1986 *Les Verts* judgment, where the CJEU³¹, in its first judicial reference to the principle, described the Community as ‘based on the rule of law’³². In 1992, the Treaty of Maastricht was the first of the EU founding treaties confirming in its Preamble the attachment of the member states to ‘the rule of law’³³. The 1993 Copenhagen criteria formalised the RoL as a condition for EU membership³⁴, a condition later codified in Article 49 of the Treaty on European Union (TEU). In the Preamble of the Charter of Fundamental Rights of the European Union, which entered into force with the Treaty of Lisbon in 2009, the RoL figures as one of the ‘principles’ the EU is ‘founded on’.

The Treaty of Lisbon also amended the Maastricht Treaty into the TEU. According to the TEU, the EU is now founded no longer on ‘principles’ but on ‘values’. Values are drawn from the member states’ established common practices and constitutional traditions³⁵. They are laid down in Article 2 TEU, which reads:

²⁹ Stating that it is ‘essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the *rule of law*’ (my italics), see UN, General Assembly, (1948), Universal Declaration of Human Rights.

³⁰ Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities, December 1973, No 12. Luxembourg: Office for official publications of the European Communities, p. 118.

³¹ At the time called “Court of Justice of the European Communities”.

³² Case 294/83 *Les Verts v. Parliament*, ECLI:EU:C:1986:166, para. 23.

³³ Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002.

³⁴ European Council, Presidency Conclusions, Copenhagen, 21-22 June 1993, <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> accessed 02/08/2020.

³⁵ Jacobson F., *The sovereignty of law: The European way*, The Hamlyn Lectures 2006, 2007, Cambridge University Press.

‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

The values are alternatively described as ‘EU values’³⁶, ‘European values’³⁷, ‘Article 2 TEU values’³⁸, ‘EU founding values’³⁹ or ‘EU fundamental values’⁴⁰. These terms will be used interchangeably throughout the thesis. Following Article 2 TEU then, at the EU level the RoL enjoys explicit treaty blessing as a fundamental value. The EU pledges to ‘promote (...) its values’⁴¹.

Controversy has arisen however over the *justiciability* of the RoL in the EU, i.e. on whether compliance with the RoL could be legally enforced through EU law or not. This is an important question. If the RoL can be legally enforced, a firmer basis for any EU protection mechanism is ensured. This in turn might have a higher impact on member state compliance than if the RoL were to be treated as a mere desideratum. The European Commission has tried to draw a distinction between values and law, arguing that ‘beyond its task to ensure the respect of EU law, [it] is also responsible (...) for guaranteeing the common values of the Union’⁴². This would situate the values ‘beyond’ EU law, giving support to their inspiring, yet non-binding force. On the other hand, some have posited that because the TEU is a legally binding document, and because fundamental values are laid down in the TEU (and not only in its declaratory preamble, but in its operative part, i.e. Article 2), it follows that member states are legally bound to respect the RoL⁴³. It *also* follows, that EU values are *fundamental*

³⁶ European Commission, *The EU values*, <<https://ec.europa.eu/component-library/eu/about/eu-values/>> accessed 02/08/2020.

³⁷ Kochenov D. and Bard P., *The last soldier standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, 2019, University of Groningen Faculty of Law Research Paper Series No. 5/2019.

³⁸ Ibid.

³⁹ Mader O., ‘Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law’, in *Hague Journal on the Rule of Law*, 11:2019, pp.133–170.

⁴⁰ Wennerström E. O., ‘Can the EU Protect Its Fundamental Values?’, in (eds.) Bakardjieva E. A., Bremberg N., Michalski A., Oxelheim L., *The European Union in a Changing World Order*, 2020, Palgrave Macmillan, pp.245-272.

⁴¹ Article 3(1) TEU.

⁴² European Commission, *Recommendation 2018/103 regarding the rule of law in Poland*, OJ L17/50, 20/12/2017, recital (3).

⁴³ von Bogdandy A., *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, 2019, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-14, p.14.

legal principles which ‘demand to enact normative requirements that public institutions can enforce in the form of law’⁴⁴.

The CJEU, as the EU law’s interpretative authority⁴⁵, has eventually endorsed this second understanding in a recent seminal case: *Associação Sindical dos Juízes Portugueses*⁴⁶. In *Associação*, the CJEU gave a preliminary ruling, i.e. a final and binding decision on the interpretation of EU law in response to a request from a court or tribunal of a member state⁴⁷. The question posed was whether Portuguese salary-reduction measures affecting the Court of Auditors’ judges as part of European budget deficit requirements breached the principle of judicial independence found in Article 19(1) TEU and in Article 47 of the Charter of Fundamental Rights of the European Union. The Court answered that the measures did not impair the independence of judges, as they were temporary and affected the whole public sector personnel⁴⁸. However, the Court handled the facts of the case well beyond the purpose of solving it. Significantly, independence of the judiciary forming an integral part of the RoL, the Court had a chance to expand upon RoL protection in reference to its being a fundamental value. The Court affirmed that Article 19 TEU ‘gives concrete expression to the value of the rule of law stated in Art. 2 TEU’⁴⁹. It further ruled that because ‘Member States share a set of common values on which the European Union is founded’, a principle of ‘mutual trust’ holds between member states and their courts⁵⁰. According to this principle, all member states (and their courts) have a legal requirement to presume that all member states (and their courts) respect common values⁵¹. However, *actual* compliance with those values is the ‘fundamental premiss’ on which mutual trust is founded upon⁵². Member states consequently have a responsibility to comply and ensure compliance of national courts with common values. Specifically for the independence of the judiciary, every member state ‘*must* ensure’ that courts or tribunals ‘meet the requirements of effective judicial protection’ by establishing ‘a system of legal remedies and procedures’⁵³.

⁴⁴ *Ibid.* p.14.

⁴⁵ The Court must ensure that ‘in the interpretation and application of the Treaties the law is observed’, as per Article 19 TEU.

⁴⁶ Judgment of the Court (Grand Chamber) of 27 February 2018, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, Case C-64/16.

⁴⁷ Stipulated by Article 267 of the Treaty on the Functioning of European Union (TFEU).

⁴⁸ *Ibid.* para. 53.

⁴⁹ *Ibid.* para. 32.

⁵⁰ *Ibid.* para. 30.

⁵¹ On this, see also CJEU, Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454, para. 191.

⁵² *Supra* note 46, para. 30.

⁵³ *Supra* note 46, para. 40.

Therefore, in *Associação* the CJEU clearly endorsed the view that EU member states have a legal obligation to respect the RoL as a *fundamental legal principle*.

However, the Court went even further than this. When it came to finding a justiciable clause for the RoL as contained in Article 2 TEU, the Court preferred Article 19(1) TEU, which ensures judicial protection ‘in the fields covered by EU law’, to Article 47 of the Charter, which only applies when EU law is implemented⁵⁴. This approach widens the extension of RoL protection, insofar as a national provision unconnected to EU law but nonetheless violating the RoL creates a dispute ‘in the fields covered by EU law’, namely in the RoL domain. The Court was probably mindful that, as we will see in the next section, certain member states violated the RoL without breaching EU law as such. For instance, most changes occurring in recent years in the organisation of the judicial system in Poland (such as constitutional changes) have no link to any specific EU provision. After *Associação*, EU member states must respect the RoL whether they are implementing EU law or not. By ruling so, the Court opened the door to operationalising the RoL as a standard for the organization of the national judiciary. In other words, it is up to member states to identify their own model for their justice system (e.g. whether to have district courts or provincial courts, regional courts or courts of appeal, or whether there should be special departments for family cases, for business cases, etc.), but this should be done in a way that respects the RoL.

Associação is consequently a landmark case for having established *both* that RoL compliance can be legally enforced *and* that member states must always guarantee compliance with the RoL. This case law development reflects that the commitment to EU values is shared between two layers of governance: member states’ commitment stands alongside the EU’s institutions and both have to function appropriately to guarantee full compliance.

One reason for this is that RoL deficiencies in a member state threaten vital areas of EU cooperation. Therefore, the RoL has a *specific* importance at the EU level, one we could call *instrumental* to the proper working of the Union. This can be exemplified by first, its functionality to the integrity of the EU legal order and second, its underpinning successful economic cooperation in the EU single market.

An independent national judiciary is essential for the functioning of the EU legal order. This can be illustrated by how RoL deficiencies affect European Arrest Warrants (EAWs).

⁵⁴ See Article 51(1) of the Charter of Fundamental Rights of the European Union.

Courts in the EU have an obligation to recognise and enforce judicial decisions coming from other EU member states⁵⁵. In line with this, a EAW requires a member state to arrest and transfer a criminal suspect or a sentenced person to the issuing state so that the person can be trialled or imprisoned⁵⁶. As per *Associação*, courts *also* have an obligation to comply with EU values, including the RoL. These two obligations may come into conflict. For example, what should courts do with transnational judgments originating from a court which is not independent? When this happens in the context of EAWs, courts are caught in a double bind. If they refuse to implement the EAW, they can be in breach of EU law. If, on the other hand, courts *do* carry out the EAW, they can be in breach of their obligation to respect the RoL, likewise an EU law violation. This problem was raised in another important recent judgment, *LM*, just two weeks after *Associação*.

In *LM*⁵⁷, an Irish court was issued a EAW by a Polish judicial authority against a person prosecuted for a drug-related crime. Due to reforms of the judiciary in Poland, which will be discussed in more detail below, there was a risk of denial of the person's right to fair trial if transferred to Poland⁵⁸. The Irish court asked the CJEU whether, when having cogent evidence that these conditions took hold, it should 'make any further assessment (...) as to the exposure of the individual concerned to the risk of unfair trial'⁵⁹. The CJEU answered positively, holding that if, after a carefully drawn assessment⁶⁰, the court has substantial grounds to believe that the person risks a breach 'of his fundamental right to a fair trial'⁶¹, this rebuts the presumption of mutual trust that law is enforced in an even-handed way and the court can 'refrain from giving effect to the European arrest warrant'⁶², thus effectively suspending the mechanism of mutual recognition. Therefore, if the functioning of a national judiciary is under threat, the CJEU established that legal cooperation between different courts

⁵⁵ Article 81 and Article 82 TFEU establish judicial cooperation in civil and criminal matters.

⁵⁶ See Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), Article 1(2).

⁵⁷ Judgment of the Court (Grand Chamber) of 25 July 2018, *LM*, Case C-216/18 PPU.

⁵⁸ See Krajewski M., *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma*, European Papers, Vol. 3, 2018, No 1, pp.395-407.

⁵⁹ Judgment of the Court (Grand Chamber) of 25 July 2018, *LM*, Case C-216/18 PPU, para 25.

⁶⁰ *Ibid.* para 61-78. The Court set out a two-pronged test for judicial independence as established in the *Aranyosi* case, i.e. first, a systemic assessment of whether generalised deficiencies in the issuing country can have an impact on the proceedings (para. 61-68), and if so, a specific assessment of an actual risk of breach of right to the person (para. 69-78). The executing court does not have to make its own assessment if the issuing state is subject to Article 7(1) TEU (para 68). We will see the functioning of Article 7 TEU below. For the *Aranyosi* case, see Judgment of the Court (Grand Chamber) of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU.

⁶¹ *Ibid.* para 47.

⁶² *Ibid.* para 78.

can be revoked. And if legal cooperation between different courts can be revoked, the integrity of the EU legal order is endangered, as some parts of it simply cease to exist.

The RoL also underpins successful economic cooperation in the EU single market. It promotes legal certainty, i.e. the guarantee that judgments can be enforced in all national jurisdictions, and that ultimately CJEU judgments ‘have to be respected by all’⁶³. This is essential to conduct business in the EU. Without a RoL in place, creditors are less likely to lend, businesses can engage in opportunistic behaviour and politicians can influence courts’ decisions to pursue protectionist policies thereby shielding domestic industries from foreign competition. All these raise considerable obstacles to the EU single market⁶⁴.

Because damage to the RoL can *prima facie* severely undermine the working of the EU, the fact that the RoL has been by now systemically undermined for a number of years in some EU member states stands out as a particularly important issue. This issue is analysed in the next section.

2.3 RULE OF LAW BACKSLIDING

In recent years, the RoL has been endangered by the actions of some EU member states. These actions have been referred to by the President of the European Commission as a new type of ‘threats to the legal and democratic fabric of our European states’⁶⁵. As a matter of fact, threats to fundamental values in the EU are not a new phenomenon. In 2000, the newly formed coalition government in Austria included the Freedom Party, known for racist and xenophobic election campaigns supporting what international media described as a ‘far-right’⁶⁶ agenda and whose leader, Jörg Haider, made trivializing remarks concerning the Nazi regime⁶⁷. EU member states, through the Council of the European Union, collectively instigated diplomatic measures against the Austrian government, including a refusal to strike bilateral political contracts and to support Austrian candidates in

⁶³ Lenaerts K., *Upholding the Rule of Law within the EU*, in 2nd Reconnect Conference (5 July 2019) report, p.20, <<https://reconnect-europe.eu/wp-content/uploads/2019/08/RECONNECT-GA-report-web.pdf>> accessed 02/08/2020.

⁶⁴ On the importance of the RoL for ‘attracting businesses and enabling economic growth’, see European Commission, *Annual Growth Survey 2019*, Brussels, 21 November 2018, COM(2018)770final, p.12

⁶⁵ Barroso J., President of the European Commission, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg, Speech/12/596, 12/09/2012.

⁶⁶ Black I., Europe rallies against Haider coalition, *The Guardian*, 04/02/2000, <<http://www.theguardian.com/world/2000/feb/04/austria.ianblack>> accessed 02/08/2020.

⁶⁷ Lachmayer K., ‘Questioning the Basic Values – Austria and Jörg Haider’ in Jakab, A., Kochenov D. (eds), *The Enforcement of EU Law and Values, Ensuring Member States’ Compliance*, 2017, Oxford University Press, p.439.

international organisations, while allowing receipt of Austrian ambassadors only ‘at a technical level’⁶⁸. Haider’s resignation as a party leader and the setting up of an EU’s expert committee on fundamental rights to monitor Austria’s situation ultimately led to lifting the measures⁶⁹. Another notable instance concerned Romania. Here, in 2012, a dispute arose over who should represent the country at the European Council, the Prime Minister or the President. This resulted in a constitutional court judgment (in favour of the latter) that the Prime Minister refused to implement while attempting to dismiss the President, triggering a RoL crisis⁷⁰. The EU was able to resolve the subsequent deadlock by binding Romania’s Schengen accession to the RoL performance in the country⁷¹. These two examples have been hailed as showing that hard political pressure can be an effective tool to enforce compliance with EU values⁷².

However, what started to happen in Hungary since 2011, and in Poland since 2015, was previously unseen. This is so for at least two reasons. First, rather than being a mere isolated one-off, there has been a steady *government-driven action* which allowed an organic targeting of fundamental rights to entrench long-term political rule. Second, governmental policies have often been *specifically aimed* at RoL dismantlement. Indeed, one normally speaks of ‘democratic backsliding’ to indicate the declining quality of a democracy overtime through ‘discontinuous series of incremental actions’⁷³. In Hungary and Poland, this took the specific form of ‘rule of law backsliding’⁷⁴. This can account for the impressive rapidity and determination with which both countries undertook RoL dismantlement.

Hungary and Poland have attracted more scrutiny than other countries in relation to RoL issues. Whereas all member states suffer from at least some RoL deficiencies, the countries have been the most overt and effective in their efforts to undermine fundamental values⁷⁵. Literature has recognised

⁶⁸ Council of the European Union, Statement by the Portuguese Presidency of the EU on behalf of XIV Member States, <https://www.cvce.eu/en/obj/statement_by_the_portuguese_presidency_of_the_eu_on_behalf_of_14_member_states_31_january_2000-en-8a5857af-cf29-4f2d-93c9-8bfdd90e40c1.html> accessed 02/08/2020.

⁶⁹ *Supra* note 67, p.447.

⁷⁰ Hegedus D., *What Role for EU institutions in confronting Europe’s democracy and rule of law crisis?*, The German Marshall Fund of the United States, Policy Paper, March 2019, No. 4.

⁷¹ Reding V., *The EU and the Rule of Law – What next?*, European Commission Speech/13/677, 04/09/2013.

⁷² Hegedus, *op. cit.*, p.15.

⁷³ Walder D., Lust, E., ‘Unwelcome Change: Coming to Terms with Democratic Backsliding’, *Annual Review of Political Science*, 2018, 21 (1):93–113, p.95.

⁷⁴ Pech L. and Kim L. S., ‘Illiberalism Within: Rule of Law Backsliding in the EU’, in *Cambridge Yearbook of European Legal Studies*, 2017, p.19.

⁷⁵ Bond I., Gostyńska-Jakubowska, A., *Democracy and The Rule of Law: Failing Partnership?*, Centre for European Reform, Policy brief, 20/01/2020.

that covert attempts to undermine the RoL, as is happening in Slovenia, may be equally or more harmful (for example they may be more difficult to recognise, develop over a longer period of time and consequently be more problematic to tackle)⁷⁶. However, in considering that overt and covert practices can certainly *coexist* during RoL backsliding, this paper makes two assumptions. First, overt practices are not only more transparent but by their nature more aggressive than covert ones. It is one thing to bribe a single judge in a district court, quite another to tip the balance of a Constitutional Court in one’s favour. Second, precisely because they *allow* themselves to be transparent and aggressive, overt practices signal a more entrenched RoL backsliding which implies covert practices are quite widespread already. Thus, overt practices are an ideal starting point to test the full capacity of RoL protection and promotion mechanisms at the EU level. Hence, when using the term ‘RoL backsliding’, I primarily refer to member states where overt instances of this phenomenon have been more common, i.e. Hungary and Poland.

This paper will not provide a detailed chronological account of RoL backsliding, as literature on the topic is abundant and exhaustive⁷⁷. Yet, some remarkable examples of its consequences appear necessary.

In a 2014 speech, Hungarian Prime Minister Viktor Orbán famously announced he was building an ‘illiberal state’⁷⁸ in Hungary, later making clear he thought possible ‘to construct a new state built on illiberal and national foundations within the European Union’⁷⁹. Orbán’s party, Fidesz⁸⁰, came to power in 2010. Since 2011, aided by a supermajority in Parliament, Fidesz has consistently pushed through major constitutional changes that allowed it to establish and consolidate ‘control over the country’s independent institutions’⁸¹. For a start, Fidesz annulled the constitutional requirement of a

⁷⁶ Avbelj M., Letnar Čerňič J., *The Impact of European Institutions on the Rule of Law and Democracy Slovenia and Beyond*, April 2020, Hart Publishing.

⁷⁷ For the Polish case, see Sadurski W., *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School, Legal Studies Research Paper, No. 18/01, January 2018.

⁷⁸ Prime Minister’s Office, Website of the Hungarian government, *Prime Minister Viktor Orbán’s speech at the 25th Bálványos Summer Free University and Student Camp*, July 30 2014, <<https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>> accessed 02/08/2020.

⁷⁹ Fish M. S., Gill G., Petrovic M., *A Quarter Century of Post-Communism Assessed*, Palgrave Macmillan, 2017, p.167.

⁸⁰ The full name of the party is *Fidesz – Hungarian Civic Alliance*. Fidesz is short for *Fiatal Demokraták Szövetsége* or “Alliance of Young Democrats”, the party’s founding name, see Wolfram, N., *Parties and Elections in Europe, “Hungary”*, (2018), <<http://parties-and-elections.eu/hungary.html>> accessed 02/08/2020.

⁸¹ Freedom House, *Country Report – Hungary*, 2019, <<https://freedomhouse.org/country/hungary>> accessed 02/08/2020.

four-fifths Parliamentary majority in order to adopt a new constitution⁸² – which imposed collaboration between government and opposition – without offering any constitutional or political justification⁸³. This led to the adoption of a new constitution in 2011, Hungary’s Fundamental Law, which was subsequently variously amended. In 2013, one of these amendments barred the Constitutional Court from referring to its rulings delivered prior to the entry into force of the Fundamental Law and limited the Court’s power to review the Fundamental Law itself. This was received as a controversial step of the executive to pursue political interests by curbing the judiciary’s power⁸⁴, evidenced by later rulings of the Constitutional Court which disproportionately favoured governmental interests⁸⁵. Another contentious measure via transitional provisions in the Fundamental law forced early retirement of judges of the court of last resort in the Hungarian system, the Supreme Court, some claim with the aim to replace them with ones loyal to the government⁸⁶. The CJEU found the measure incompatible with EU law⁸⁷ and the ECtHR held that there had been a violation of the right of access to court and of the freedom of expression of the Supreme Court’s former president as a result of the same measure⁸⁸. Moreover, the so-called “Enabling Act”, ratified as a “state of emergency” bill on 30 March 2020, gave the Hungarian government the right to pass special executive decrees in response to the COVID-19 outbreak and introduced prison terms of up to five years for people who spread “fake news” about coronavirus *or* measures against it⁸⁹. There is concern that the indefinite term of the state of emergency and the blanket authorisation of unconstrained executive powers may not only inappropriately restrict freedom of the press and freedom of expression, but

⁸² Article 24(5) of the 1989 Hungarian Constitution, introduced in 1995.

⁸³ Fleck Z., Gadó et al. in (eds) Arato A., Halmai G., Tudományegyetem L. E., Kis J., *Opinion on the Fundamental Law of Hungary*, 2011, New School for Social Research, New York, Central European University, Budapest, <https://www.diritticomparati.it/wp-content/uploads/2017/04/28022012_2_amicus-to-vc-english-final-1.pdf> accessed 02/08/2020.

As a side note, the possibility to change constitutional provisions by a simple two-third majority vote in Parliament, as well as an electoral law giving additional power to the winning parties in individual constituencies should be recognised as Hungary’s Achilles’ heel in constitutional design, insofar as these conditions *accelerated* constitutional change and allowed Fidesz to acquire a supermajority in Parliament. On this, see Lendvai P., *Orbán: Hungary's Strongman*, 2017, Oxford University Press, pp.129-130. However, the government-driven approach remains a principal explanation for the backsliding momentum.

⁸⁴ Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, *Report following her visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, Strasbourg, 21/05/2019, p.23.

⁸⁵ *Supra* note 81.

⁸⁶ Halmai G., ‘The Early Retirement Age of the Hungarian Judges’, in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, (eds.) Nicola F., Davis B., 2017, Cambridge University Press.

⁸⁷ Court of Justice of the European Union, *European Commission v. Hungary*, C-286/12, Judgment, 6 November 2012.

⁸⁸ ECtHR, Grand Chamber Judgment, no 20261/12, *Baka v. Hungary*, 23 June 2016.

⁸⁹ Wahl T., *Rule of Law Developments in Hungary*, Eucrim, 19 May 2020, <<https://eucrim.eu/news/rule-law-developments-hungary/>> accessed 02/08/2020.

further cement the erosion of the RoL in the country⁹⁰. RoL-dismantlement allowed the government to unleash an unending stream of legislative measures to stigmatise civil society foreign funding⁹¹, curb press freedom, endanger data protection⁹², take central control over public education⁹³ and perpetrate human rights violations, including passing laws which forced asylum seekers into detention camps, with some of them housed in converted shipping containers⁹⁴.

In Poland, Jarosław Kaczyński, leader of the PiS⁹⁵ party, already in 2011 declared his intent to emulate the Orbán model promising ‘Budapest in Warsaw’⁹⁶. PiS won a majority in the October 2015 elections and started a number of reforms with the effect of jeopardising the independence of the judiciary and thus compromising the RoL across the country. Lacking Fidesz’s supermajority, PiS undertook to disable the key institution that could rule its actions unconstitutional: the Polish Constitutional Court. The party refused to swear in some of the judges of the Constitutional Court elected by previous Parliaments, appointing other judges in their place and empowering them to adjudicate new cases. A judgment from the same Court declared the election of these judges unconstitutional⁹⁷, but the government refused to publish it in the official “Journal of Laws”⁹⁸. Later, the election of a new president of the Court ensured the ruling party’s appointees a majority in Court⁹⁹. This led to the Court losing its ability to independently control the constitutionality of legal provisions. As Koncewicz puts it, ‘[t]he Court no longer checks the political power, rather it legitimates and shields it against the unwanted challenges from the opposition.’¹⁰⁰ PiS is now able to use the Court as a method

⁹⁰ Uitz R., *Pandemic as Constitutional Moment*, Verfassungsblog, 24/03/2020, <<https://verfassungsblog.de/pandemic-as-constitutional-moment/>> accessed 02/08/2020.

⁹¹ Act LXXVI of 2017 on the transparency of foreign-funded organisations, <<https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>> accessed 02/07/2020.

⁹² Scheppele K. L., *Making Infringement Procedures More Effective: A Comment on Commission v. Hungary*, 30 April 2014, Verfassungsblog, <<https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/>> accessed 02/08/2020.

⁹³ Act XXV of 2017 on the Modifications of Act CCIV of 2011 on National Higher Education.

⁹⁴ Amnesty International, *Hungary: container camp bill is flagrant violation of international law*, 07/03/2017, <<https://www.amnesty.org/en/latest/news/2017/03/hungary-container-camp-bill-is-flagrant-violation-of-international-law/>> accessed 02/08/2020.

⁹⁵ Short for *Prawo i Sprawiedliwość*, or “Law and Justice”.

⁹⁶ Sadurski W., *Poland's Constitutional Breakdown*, 2019, Oxford University Press, p.3.

⁹⁷ Judgment of the Polish Constitutional Tribunal (sygn. K 47/15), <<http://citizensobservatory.pl/ustawa/judgment-of-the-constitutional-tribunal-sygn-k-4715/>> accessed 02/08/2020.

⁹⁸ Wyrzykowski M., *Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law, vol. 11, 2019, pp.417-422.

⁹⁹ *Ibid.*

¹⁰⁰ Koncewicz T. T., *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, Reconnect, March 13, 2019, <<https://reconnect-europe.eu/blog/koncewicz-polish-constitutional-court/>> accessed 02/08/2020.

to achieve political gains without engaging in democratic dialogue. By way of example, presently there are two laws subject to parliamentary works, one restricting, the other liberalising abortion¹⁰¹. Rather than risking hot political debate, PiS MPs submitted a motion to the Constitutional Tribunal so that their preferred policy achieves a legal effect similar to the parliamentary draft law¹⁰². Further, a 2017 reform of the National Council of the Judiciary (NCJ), a public body responsible for the recruitment and promotion of judges in Poland, provided that the majority of NCJ members, previously elected by their peers, are now elected by Parliament¹⁰³. Therefore, the judicial community in Poland *de facto* lost the power to delegate representatives to the NCJ, hence its influence on recruitment and promotion of judges. In early 2018, all NCJ members appointed under the old rules were replaced, which led to a far-reaching politicisation of the body¹⁰⁴. Later, two new chambers within the Polish Supreme Court were created, staffed with judges appointed by the new NCJ and entrusted with special powers – including the power to quash final judgments taken by the Supreme Court within the last 20 years by way of extraordinary review, or the power to decide whether judges are independent and impartial¹⁰⁵. A further amendment established that the President of the Republic (who heads the executive branch in Poland) can lawfully appoint judges¹⁰⁶, making Poland the only country in the EU where this is so¹⁰⁷. The so-called “muzzle law”, adopted on 23 February 2020, imposed sanctions on judges who question the legitimacy of the measures (such as the appointment of judges) and deliberate on ‘political matters’, making judicial oversight on the functioning of the justice system highly challenging¹⁰⁸. Some of these reforms were adopted as expedited procedures, meaning that the Parliament had less than 24 hours to discuss them¹⁰⁹. All these reforms were accompanied by a publicly funded campaign

¹⁰¹ Bodnar A., ‘Protection of Human Rights after the Constitutional Crisis in Poland’, in (ed.) Baer S., Lepsius O., Schönberger C., Waldhoff C., Walter C., *Das Öffentliche Recht Der Gegenwart, Jahrbuch Des Öffentlichen rechts Der Gegenwart*, Vol. 66, 2018, p.643.

¹⁰² *Ibid.*

¹⁰³ Venice Commission, *Poland, Joint Urgent Opinion*, Opinion No. 977/2019, CDL-PI(2020)002, Strasbourg, 16/01/2020, p.14.

¹⁰⁴ *Ibid.*, p.3.

¹⁰⁵ *Ibid.*

¹⁰⁶ Organization for Security and Co-operation in Europe (OSCE), *Urgent interim opinion on the bill amending the Act on the organization of common courts, the Act on the Supreme Court and certain other Acts of Poland (as of 20 December 2019)*, Opinion-Nr.:JUD-POL/365/2019 [AIC] Warsaw, 14/01/2020, p.12.

¹⁰⁷ See European Commission, *EU Justice Scoreboard 2019*, COM(2019)198/2, p.48.

¹⁰⁸ *Polish parliament approves judge ‘muzzle law’, Commission ‘very concerned’*, Euractiv, 24 January 2020, <<https://www.euractiv.com/section/justice-home-affairs/news/polish-parliament-approves-judge-muzzle-law-commission-very-concerned/>> accessed 02/08/2020.

¹⁰⁹ *Supra* note 103, p.6.

to discredit judges as well as disparaging statements made by high-ranking officials¹¹⁰. Just like in Hungary, judicial reforms precluded more wide-ranging changes. For instance, the government set up an organ in charge of appointing governing bodies of public radio and television companies circumventing the constitutional organ devised for the same purpose¹¹¹, transforming national media into ‘government propaganda mouthpieces’¹¹². Additionally, LGBTQI organisations headquarters were attacked and no effective investigations ensued¹¹³.

Such a scenario would have been unimaginable just a few years ago. Coming out from the 1989 Eastern European “velvet revolutions”, Hungary and Poland spearheaded regime transition from communism, including a thorough institutionalisation of the RoL. Hungary was the first ‘post-communist’ country to join the Council of Europe and access the ECHR in 1990. Poland gained CoE membership in 1991 and became party to the ECHR in 1993. And in 2004, Hungary, Poland and eight other countries became EU members as part of the biggest enlargement in the EU’s history¹¹⁴.

At the moment, in Poland ‘the executive and legislative powers (...) can interfere throughout the entire structure and output of the justice system’¹¹⁵, while Hungary is described as an ‘electoral authoritarian regime’¹¹⁶. In a scant 9 years, the two countries were transformed from success stories of transition from communism to democracy into prominent backsliding countries.

The political driving force behind RoL backsliding has been referred to as ‘populist constitutionalism’, i.e. a form of government which, by employing ‘core populist’ elements such as belief in the superiority of unlimited popular sovereignty and ultimate separation of society into two homogenous antagonistic groups – the pure people versus the corrupt elite – directly and openly

¹¹⁰ Applebaum A., *The Disturbing Campaign Against Poland’s Judges*, The Atlantic, January 28, 2020, <<https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>> accessed 02/08/2020.

¹¹¹ The relevant legislation is the Small Media Act, which set up the Council of National Media. The constitutional body is the National Broadcasting Council. Certain provisions of the act reviewed by the Constitutional Court were found unconstitutional, but the judgment remained unenforced. See Bodnar, *op. cit.*, p.645.

¹¹² Reporters without Borders, *2020 Report on Poland*, <<https://rsf.org/en/poland>> accessed 02/08/2020.

¹¹³ Helsinki Foundation for Human Rights, *The situation of civil society organizations in Poland*, 2016, <http://www.hfhr.pl/wp-content/uploads/2017/09/HFHR_situation_ngos_in_Poland_brief.pdf> accessed 02/08/2020.

¹¹⁴ Ott A., Inglis K. (eds), *Handbook on European Enlargement*, Asser Press, 2002.

¹¹⁵ European Commission, Staff Working Document, *Country Report Poland 2019*, Brussels, SWD (2019) 1020 final, 27/02/2019.

¹¹⁶ V-Dem Institute, *Democracy Report 2020*, <https://www.v-dem.net/media/filer_public/f0/5d/f05d46d8-626f-4b20-8e4e-53d4b134bfc6/democracy_report_2020_low.pdf> accessed 02/08/2020, p.14.

challenges EU values¹¹⁷. Indeed, its political proponents question the universality of the RoL model promoted by the EU in favour of sovereignist or particularist (e.g. historical, religious or ethnocentric) values, consider their decision-making powers legitimately derived from and for the benefit of ‘the people’, and on this basis justify bringing the judiciary under political tutelage¹¹⁸. Whether illiberal leaders actually believe their policies are beneficial for ‘the people’ or whether they merely pursue political benefits out of this narrative, the result is that they identify among the ‘enemies of the people’ the ‘cast’ of judges¹¹⁹, and offer justifications such as ‘repairing’ the constitutional court¹²⁰, enhancing ‘accountability’ of the judiciary¹²¹ or getting rid of ‘corrupted post-communist’ judges¹²² in order to achieve their political objectives, which triggers RoL backsliding. In other words, illiberal leaders *legitimise* RoL backsliding through a populist narrative. Parties such as Fidesz and PiS therefore do not just “perform” populism as a matter of political style, which would not be a novelty, but entirely reshape the constitutional setting of their countries in doing so. In this sense, populist constitutionalism directly opposes the RoL because it pursues political goals *at the expense of the RoL*. And while other countries usually try to hide illiberal attitudes behind a democratic façade¹²³, these parties openly embrace them.

Thus seen, RoL backsliding is a highly worrying phenomenon. Not only it produced in certain member states an unforeseen drastic reversal of democratisation via a constant erosion of the RoL, whose effects, as we have shown, radiate across the Union. It also marked a real danger of spill overs in other countries, as Poland’s emulation set the stage for the RoL crisis to spread beyond Hungary. Other countries, such as Slovakia, Malta and Romania have shown signs of being on the same route¹²⁴. As a result of these developments, three major European judicial networks established that the EU’s

¹¹⁷ Blokker P., *Populist Constitutionalism and Meaningful Popular Engagement*, The Foundation for Law, Justice and Society, Policy Brief, 2018; See also Mudde C., *The populist zeitgeist*, Government and Opposition, 2004 39(4):pp.541-563.

¹¹⁸ Muller J.W., *What is populism?*, University of Pennsylvania Press, 2016.

¹¹⁹ Bodnar, *op. cit.*, p.650.

¹²⁰ *Ibid.*

¹²¹ White Paper on the Reform of the Polish Judiciary, The chancellery of the Prime Minister, Warsaw, 07/03/2018, paras. 62 and 96.

¹²² Rettman A., *Polish judges under 'political control', watchdog warns*, euobserver, 16 December 2019, <<https://euobserver.com/justice/146941>> accessed 02/08/2020.

¹²³ Spijkers O., ‘Public participation in an illiberal democracy’, in (eds.) Muis A., van Troost L., *Will human rights survive illiberal democracy?*, Amnesty International Netherlands, March 2018, <<https://www.amnesty.nl/content/uploads/2015/10/illiberal-democracy-PDF-20mrt.pdf>> accessed 02/08/2020.

¹²⁴ European Union Agency for Fundamental Rights (henceforth: FRA), *Fundamental Rights Report 2020*, Luxembourg: Publications Office of the European Union.

common legal order is now ‘at risk’ due to the erosion of the independence of the judiciary¹²⁵. The situation sparked a debate on the credibility of “EU” values. Indeed, while on the one hand there is a legal framework establishing clear obligations for member states to respect the RoL, on the other hand there is open defiance of this obligation. It is somewhat odd that the EU is said to be ‘founded’ on values ‘common’ to member states, as Article 2 TEU states, while the counterfactual of RoL backsliding takes place so forcefully and in the open and respect for the RoL no longer defines some member states’ aspirational horizon.

In the face of a threat to its founding values, one would expect an effective and vigorous reaction from the EU. However, the EU addressed the situation often inadequately, casting doubts on its ability to promote the centrality of the RoL and on the credibility of the values which the EU is allegedly ‘founded on’. This is shown in the next chapter.

¹²⁵ Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; The president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019, <<https://www.encj.eu/node/535>> 02/08/2020.

3

ASSESSING THE EU'S APPROACH TO RULE OF LAW BACKSLIDING

'(...) there can be no compromise when it comes to respecting the Rule of Law.

There never will be.'

Ursula Von der Leyden, President of the European Commission¹²⁶

*'Each country in the Union holds the right to shape its own legal system, in
accordance with its own traditions.'*

Mateusz Morawiecki, Prime Minister of Poland¹²⁷

Having identified the main reasons and challenges in defending the RoL in the EU, this chapter assesses the EU's reaction to RoL backsliding since its onset in Hungary in 2011. The effectiveness of the EU's RoL protection mechanisms is evaluated, in addition to whether they can be improved and whether there are alternative ways for the EU to address RoL backsliding.

In summarising the complex reaction of the EU framework, a distinction is made between *political*, *legal* and *economic* mechanisms and between *soft* and *hard* mechanisms, where political mechanisms are either soft (monitoring- or dialogue-based) or hard (legally enforceable), while legal and economic mechanisms are exclusively hard.

In the first section, several challenges affecting the EU's initial response, which relied primarily on soft or political mechanisms, are presented. These challenges were a detrimental delay to react to

¹²⁶ European Commission, *Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission*, Press Release 16/07/19, <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230> accessed 02/08/2020.

¹²⁷ Brzozowski A., *We have the right to shape our own legal system, Polish PM tells EU*, Euractiv, 04/07/2018. <<https://www.euractiv.com/section/justice-home-affairs/news/we-have-the-right-to-shape-our-own-legal-system-polish-pm-tells-eu/>> accessed 02/08/2020.

the backsliding phenomenon, powerplay or burden shifting among EU institutions, an insistence on ultimately ineffectual soft mechanisms and flaws in the design of the mechanisms themselves. As a result, at first EU institutions were utterly unsuccessful at bringing member states back into line with the RoL.

In the second section, two underlying reasons for the challenges presented are scrutinised. On the one hand, the EU exhibited an optimism in the member states’ democratisation processes which did more harm than good when confronted with recalcitrant RoL backsliding governments. On the other hand, a lack of political incentives made it more difficult to punish illiberal governments. It is argued that calls from commentators to shift to a hard, enforcement-oriented approach through legal and economic mechanisms are *prima facie* justified.

In the third section, it is shown that the concrete threats posed by existing legal and proposed economic mechanisms yield better results with RoL backsliding. The EU’s growing preference for these hard mechanisms is confirmed by two trends identified in the EU’s response. It is however argued that an enforcement-based approach is unable to secure long-term protection of the RoL in the EU. This is primarily because “policing” EU values does not address the social dimension of RoL backsliding, i.e. the understanding and practice of the RoL in society, which actively shapes the phenomenon. This insight favours a different bottom-up, citizen-enhancing approach to RoL backsliding, which specifically promotes the *societal embedment* of the RoL.

3.1 THE EU’S INITIAL RESPONSE

3.1.1 Unreadiness leading to delay

When Hungary enacted its new constitution, the Fundamental Law, in April 2011, reports by international bodies were quickly released expressing concern as RoL backsliding in the country began to unfold¹²⁸. Since then, the EU has employed several mechanisms to address the situation. The principal actors of these mechanisms are the European Parliament, the European Commission, the

¹²⁸ See for instance Venice Commission, *Opinion on the new constitution of Hungary*, Adopted by the Venice Commission at its 87th Plenary Session, (Venice, 17-18 June 2011), <[www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf)> accessed 02/08/2020.

Council of the European Union¹²⁹, the European Council, the CJEU and of course, the member states. For analytical purposes, mechanisms are distinguished between *political*, *legal* and *economic* and between *soft* and *hard* mechanisms. Soft mechanisms comprise monitoring or dialogue-based procedures which are not legally binding¹³⁰. Hard mechanisms instead have enforcement as their primary aim and result in binding judgments, economic sanctions or fines¹³¹. Political mechanisms are both soft and hard, while legal and economic mechanisms are exclusively hard. Because such distinction is based on the mechanisms' ultimate consequences, when mechanisms are hybrid (e.g. Article 7 TEU), they are classified as *hard*. In what follows, the EU's initial reaction will be assessed.

As early as 2011, the European Parliament already started monitoring the development of political debates in Hungary, as they shifted from asylum and migration, to a focus on limiting civil society space and judicial independence¹³². The European Parliament responded to these developments by condemning worrisome Hungarian laws in several resolutions¹³³. The monitoring culminated in July 2013 with the adoption of the "Tavares report". In it, the Parliament noted that the content and frequency of amendments to Hungary's Fundamental Law were incompatible with the values contained in Article 2 TEU¹³⁴. The Parliament purposely drew attention to legal changes that had an impact on compliance with EU law encouraging the European Commission to 'identify instances of incompatibility with EU law' and the CJEU 'to adjudicate' such cases¹³⁵. This is a reasonable course of action. The Commission is primarily responsible for guaranteeing the correct application of EU law (and thus of the RoL *qua* EU value) as the 'guardian' of the Treaties¹³⁶ and together with the CJEU disposes of enforcement mechanisms, the former via infringement procedures, the latter via case adjudication, about which more later. In the report, the Parliament specifically called on the European

¹²⁹ Whenever I write 'Council', I refer to the Council of the European Union. This body should *not* be confused with the European Council.

¹³⁰ For a distinction between soft and hard mechanisms, see Hoffmann-Riem W., 'The Venice Commission of the Council of Europe – Standards and Impact', *European Journal of International Law*, Volume 25, Issue 2, May 2014, pp.579-597, in particular pp.580-581.

¹³¹ *Ibid.*

¹³² Pardavi M., Szuleka M., Gheorghe G., *New decade, old challenges, Civic space in Hungary, Poland and Romania*, Hungarian Helsinki Committee, Helsinki Foundation for Human Rights & APADOR-CH, March 2020.

¹³³ See for instance European Parliament Resolution, *On Recent Political Developments in Hungary*, P7TA(2012)0053, 16/02/2012.

¹³⁴ European Parliament Resolution, *On the situation of fundamental rights: standards and practices in Hungary*, 03/07/2013, (2012/2130(INI), para. 57.

¹³⁵ *Ibid.* para. 56.

¹³⁶ Article 17(1) TEU.

Commission to (1) ‘draw up a detailed proposal for a swift and independent monitoring mechanism’, (2) create a ‘Union values monitoring mechanism’, (3) ‘engage in a structured political dialogue’ with backsliding member states and (4) ‘start infringement proceedings’¹³⁷. Furthermore, it invited both the Commission and the Council to participate actively in monitoring the situation regarding the RoL in Hungary in the frame of an ‘Article 2 Trilogue’¹³⁸. These recommendations can be used as a yardstick to assess the critical inaction that followed the year after the report.

The Commission resisted the Parliament’s calls for establishing an independent monitoring mechanism on the grounds that this would ‘raise serious questions of legality, institutional legitimacy and accountability’¹³⁹. Some argue the Commission did not want to see its institutional prerogatives reduced, hence the reason for its hesitancy¹⁴⁰.

Likewise, at this stage the Commission made little use of RoL-related infringement proceedings, and no such action was taken in respect of Hungary targeting specifically the RoL.

As for the creation of an in-house monitoring system, at the time of the ‘Tavares report’, the Commission had in place its Justice Scoreboard (since March 2013), a comparative information tool on the independence, quality and efficiency of member states’ justice systems¹⁴¹. The Scoreboard focuses on civil, commercial and administrative cases and aims to improve the effectiveness of national justice systems and promote RoL standards¹⁴². This instrument can affect the domestic standing of a governing majority as well as its reputation in European and international relations. Vitally, it can also inform policymaking. The Scoreboard was connected to the “European Semester”, the EU’s process of economic policy coordination, which draws from the Scoreboard to provide country-specific recommendations on structural reforms (including for example, judicial reforms)¹⁴³. The Scoreboard would seem a praiseworthy candidate for RoL monitoring. Indeed, the Commission lauded the Scoreboard’s utility ‘to develop country-knowledge’, indicating that it ‘could be further developed to

¹³⁷ *Supra* note 134, paras. 69-70.

¹³⁸ *Supra* note 134, para. 85.

¹³⁹ European Commission, *Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights*, SP(2017)16, 17/02/2017.

¹⁴⁰ Pech L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, Reconnect, Working Paper No. 7 (March 2020), p.30.

¹⁴¹ European Commission, Communication, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013)160final, 27/03/2013.

¹⁴² European Commission, *EU Justice Scoreboard 2019*, COM(2019)198/2, p.2.

¹⁴³ *Ibid.* p.3.

better address rule of law issues'¹⁴⁴. Yet the Scoreboard is, by itself, a rather limited mechanism. The Scoreboard's quantitative data relies on submissions by member states via CEPEJ¹⁴⁵, a CoE body contracted by the Commission. Since 2014, a number of member states, including Belgium, Germany and Ireland, have failed to provide some data, whether for political reasons or because their national authorities do not collect some of the information the Commission requests¹⁴⁶. It is easy to imagine that information provided by RoL backsliding governments could be false or even withdrawn in the future, so that the Scoreboard may fail to supply an accurate picture of the phenomenon. Secondly, the Scoreboard's parameters to measure the RoL are limited. The RoL is in danger not only when a government undermines judicial independence, but also, as we shall see, when it makes it impossible for CSOs to scrutinise its actions – issues which the Scoreboard ignores. Thirdly and crucially, the Scoreboard is not a complete protection mechanism and it needs to be complemented by a discussion forum or by an enforcement process. Accordingly, it is reasonable that in the Tavares report the Parliament lamented the absence of an *ad hoc* monitoring mechanism to address RoL backsliding despite the Scoreboard being in place.

If the Commission's initial response was, in light of the Parliament's recommendations, rather insufficient, the Council would not even bring itself to act. The Council simply stressed the importance of 'respecting the rule of law', shifting the burden on the Commission to put in place a 'systematic method' to tackle the issues¹⁴⁷. After these remarks, the Council stood by in a prolonged apathy which has been strongly criticised¹⁴⁸.

As no 'structured political dialogue' was set up by either the Commission or the Council, the totality of the European Parliament's specific requests to the Commission and the Council were largely ignored at first. Other than a loose monitoring of the situation from the European Parliament, therefore, no *ad hoc mechanisms* to address RoL backsliding were initially employed. A general unreadiness and

¹⁴⁴ European Commission, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, Brussels, 03/04/2019, COM(2019)163, p.9.

¹⁴⁵ In French 'Commission Européenne Pour l'Efficacité de la Justice'.

¹⁴⁶ Nielsen N., *EU justice scoreboard upsets some member states*, euobserver, 17 March 2014, <<https://euobserver.com/justice/123507>> accessed 02/08/2020.

¹⁴⁷ Council of the European Union, *Conclusions on fundamental rights and rule of law*, Luxembourg, 6 and 7 June 2013, <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf> accessed 02/08/2020, para. 9.

¹⁴⁸ Oliver P., Stefanelli J., 'Strengthening the Rule of Law in the EU: The Council's Inaction', (eds.) Kochenov D., Magen A., Pech L., *Journal of Common Market Studies: The Great Rule of Law Debate in the EU*, 21/07/2016.

inaction of both the Commission and the Council meant that EU bodies struggled to establish a consensus on the actual strategies to pursue for preserving RoL standards vis-à-vis the Hungarian government and engage promptly in concerted action. It took too long for the Commission and the Council to up their game in response to the Hungarian government’s undoing of the RoL. The upshot was that the EU could not keep up, let alone catch up with the rapidity and aggressiveness of RoL dismantlement. The delay which resulted in the EU’s initial response is significant, considering that already in 2011 Orbán’s government in Hungary moved rapidly to capture the judiciary and other independent institutions and that this inspired the Polish government to follow suit. Many RoL problems are time-sensitive and the longer they take to resolve, the greater the risk of entrenchment and of damage to the RoL. Thus, time is always on the side of those dismantling the RoL because problematic member states continue to make matters worse even as EU institutions struggle to forge a common front.

Consequently, the EU was, if in part, *responsible* for the aggravation of RoL backsliding. The RoL in Hungary further deteriorating, the Commission finally launched an *ad hoc* soft mechanism in 2014: the Rule of Law Framework.

3.1.2 *The Commission’s Framework and the Council’s Dialogue*

The Commission’s Rule of Law Framework was introduced to address the need ‘to find ad hoc solutions since EU mechanisms and procedures have not always been appropriate in ensuring an effective and timely response to threats to the rule of law’¹⁴⁹, but also to answer the reluctance of the EU to enter the *hard* solution of Article 7 TEU¹⁵⁰. The Framework is a multi-stage dialogue process, where the Commission assesses the state concerned and can produce opinions and monitor the state’s compliance or lack thereof to any recommendations it issues. If the recommendations’ requirements are unmet, the Commission can recommend the Council to trigger Article 7 TEU¹⁵¹. Given the nature of the Framework, it looked as if the Commission was finally building upon the Parliament’s proposal in the Tavares report to create a ‘structured political dialogue’. Unfortunately, far from being a

¹⁴⁹ European Commission, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11.3.2014, COM(2014)158 final, p.2.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* p.8.

resolatory mechanism, the Framework once again shed light on the unreadiness and on continuing interinstitutional skirmishes affecting EU institutions.

The Commission itself refused multiple times to activate the mechanism in respect of Hungary arguing that the matter could be ‘addressed by infringement procedures’ – which the Commission also hesitated to bring in respect of Hungary, as we shall see – and national ‘rule of law safeguards’¹⁵². To make matters worse, the Council’s Legal Service claimed that the Framework violated the principle of conferral¹⁵³. The principle of conferral states that competences not explicitly conferred upon the EU in EU Treaties remain with the member states¹⁵⁴. The Council’s interpretation was widely criticised for being restrictive¹⁵⁵, to which we could add ineffective, as in the end it only further slowed down the implementation of the Framework. It is interesting to note that while the Commission has never invoked the Framework with Hungary, ‘much farther along in the process of democratic deconsolidation than Poland’¹⁵⁶, it quickly sprang into action against Warsaw. The Commission employed the Framework for the first time in January 2016 to address Poland’s lack of compliance with the rulings of its Constitutional Court and the adoption of measures to undermine the Polish legislature¹⁵⁷. The procedure, which ended in December 2017, found a *systemic threat* to the RoL, i.e. a ‘widespread or recurrent practice or omission, or measure by public authorities which affects the rule of law’ at national level¹⁵⁸, and set out a list of proposed recommendations¹⁵⁹. The very purpose of the Framework was to prevent the emerging of a *systemic threat* to the RoL in a member state¹⁶⁰. All in all, therefore, the Framework did not satisfy the aim for which it was created. Almost two years of

¹⁵² The European Commissioner for Justice Věra Jourová declared this before the European Parliament in December 2015, <https://www.europarl.europa.eu/doceo/document/CRE-8-2015-12-02-ITM-017_EN.html?redirect> accessed 02/08/2020.

¹⁵³ Council of the European Union, Opinion of the Legal Service, *Commission’s Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties*, 10296/14, Brussels 27 May 2014, <<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>> accessed 02/08/2020.

¹⁵⁴ Spelled out in Articles 4 and 5 TEU.

¹⁵⁵ See Kochenov D. and Pech L., *From bad to worse? On the Commission and the Council’s rule of law initiatives*, Verfassungsblog, 20 January 2015, <<https://verfassungsblog.de/bad-worse-commission-councils-rule-lawinitiatives/>> accessed 02/08/2020.

¹⁵⁶ Scheppele K. L., Kelemen R. D., op. cit., p.421.

¹⁵⁷ European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71.

¹⁵⁸ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States*, Brussels, 02/05/2018, COM(2018) 324 final, Art(2)(b), p.8.

¹⁵⁹ European Commission, Recommendation 2017/146, 21/12/2016.

¹⁶⁰ European Commission, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11.3.2014, COM(2014)158 final, p.7.

dialogue by the Commission with the Polish government yielded no concrete solutions and the latter subsequently failed to cooperate with the recommendations, informing the Commission that it disagreed on all the points raised so that no agreement could be reached¹⁶¹. The Framework was not employed again with Hungary.

In the same year the Framework was established, the Council launched its own annual Rule of Law Dialogue in which member states would peer-review their progress in observing the RoL¹⁶². Laurent Pech has harshly criticised this mechanism, arguing that its creation only serves to imitate ‘some engagement by the Council in the field of the rule of law (...) and thus serves as an excuse for the Council’s lacking cooperation with the Commission’, also condemning the ‘total absence of *any* tangible results’ after several editions¹⁶³. Admittedly, in the last 2019 dialogue, the Council was unable to adopt conclusions due to opposition from, somewhat predictably, the Hungarian and Polish governments, which rejected the proposal of introducing reports from the Commission to support RoL discussions. Presidency conclusions were issued containing the draft text which was not agreed upon. This lapidary 2-page document faintly alludes to exchanging ‘best practices’ to prevent RoL problems, but fails to outline any concrete further steps to take¹⁶⁴. Both the Commission and the Parliament condemned the Council’s lack of progress in tackling the RoL in Hungary and Poland throughout the whole 2019¹⁶⁵.

The ‘Trilogue’ envisaged by the Tavares report never took place. And the fruitless dialogues with illiberal governments resulting from soft mechanisms invited EU bodies to proceed with Article 7 TEU.

¹⁶¹ O’Neal M., *The European Commission’s Enhanced Rule of Law Mechanism*, SWP Comment 2019/C 48, December 2019, <<https://www.swp-berlin.org/10.18449/2019C48/>> accessed 02/08/2020.

¹⁶² Council of the European Union, *Conclusions on ensuring respect for the rule of law*, Doc. No.17014/14, 16/12/2014.

¹⁶³ Pech L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, Reconnect, Working Paper No. 7 (March 2020), p.24.

¹⁶⁴ Council of the European Union, *Presidency conclusions: evaluation of the annual rule of law dialogue*, 14173/19, 19/11/2019.

¹⁶⁵ European Parliament, *Rule of law in Poland and Hungary: Debate with Council and Commission*, Press Release, 16 December 2019, <<https://www.europarl.europa.eu/news/en/press-room/20191216IPR69104/rule-of-law-in-poland-and-hungary-debate-with-council-and-commission>> accessed 02/08/2020.

3.1.3 Article 7 TEU

Article 7 TEU delineates a procedure to prevent or resolve a breach of EU values in a member state. According to the Commission, Article 7 is not intended to resolve individual cases, but to remedy a systemic breach of values by means of a ‘comprehensive political approach’¹⁶⁶. The CJEU cannot intervene, except to monitor the formal regularity of the procedure¹⁶⁷. As the EU’s *ad hoc* ‘political mechanism’ to defend its values¹⁶⁸, Article 7 involves a multi-stage process in which various stakeholders take part, among whom there are member states, the Fundamental Rights Agency (FRA), i.e. the EU’s agency for the promotion and protection ‘of human rights in the EU’¹⁶⁹, the Venice Commission and judicial networks¹⁷⁰). The full application of Article 7 envisages far-reaching sanctions, including suspension of voting rights in the Union institutions.

Article 7(1) is the Article’s preventing arm. Once triggered, it determines a ‘clear risk of a serious breach’ of Article 2 TEU values and allows the Council to issue recommendations. It was activated for the first time by the Commission against Poland on 20 December 2017¹⁷¹ and by the Parliament against Hungary on 12 September 2018¹⁷². Article 7(2) and 7(3) are instead the Article’s sanctioning arms. Article 7(2) determines the ‘existence of a serious and persistent breach’ of EU values. Its voting procedure requires a high threshold, namely *unanimity* at the European Council – excluding the member state concerned. This leads to Article 7(3), which enables the Council to suspend membership rights, including voting rights, by qualified majority voting¹⁷³.

¹⁶⁶ European Commission, Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003)606 final, 15/10/2003, <<http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-606-EN-F1-1.Pdf>> accessed 02/08/2020, p.7.

¹⁶⁷ On the basis of Article 269 TFEU.

¹⁶⁸ Opinion of Advocate General Tanchev delivered on 11 April 2019 in Case C-619/18, para. 50.

¹⁶⁹ See <<https://fra.europa.eu/en/about-fra>> accessed 02/08/2020.

¹⁷⁰ European Commission, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 02/08/2020, p.9.

¹⁷¹ European Commission, *Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law*, (COM(2017)835final, 20/12/2017.

¹⁷² European Parliament, *Resolution 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)), 12/09/2018.

¹⁷³ 72 per cent of member states (excluding the member state concerned), covering 65 per cent of EU population of member states participating in the vote, see <https://eur-lex.europa.eu/summary/glossary/qualified_majority.html> accessed 02/08/2020.

The mere fact that Article 7 has been described as a ‘nuclear option’¹⁷⁴ by a former Commissioner or as ‘an exceptional and “last resort” measure’¹⁷⁵ proves that EU institutions considered the possibility of using it highly unlikely until a few years ago. The EU’s has been constructed on the understanding that EU institutions would enforce the Union’s legal norms, instead of national governments enforcing them against one another¹⁷⁶. It was ‘built with many avenues for member states to check the power of the Union institutions’, rather than to robustly address the problem of member states retreating from their commitment to EU values¹⁷⁷. The very drafting of Article 7 shows that ‘member states [were] careful not to extend, in any way (...) the possible control by the Union of their own behaviour towards their own citizens’¹⁷⁸. Hence, a political solution to values violations was never really envisioned. This expectation was translated in Article 7’s implementation design, which is problematic. The core of the problem is Article 7(2)’s unanimity requirement at the European Council. First, it is by no way clear that all countries would vote in favour of triggering Article 7(2) resulting in punishment of one of their own, given the member states’ general unwillingness in policing each other¹⁷⁹. Second, it is likely that in present circumstances Hungary or Poland would back each other during the vote in the European Council. Accordingly, some posit that both countries could be excluded from the voting procedure¹⁸⁰. However, this would require a treaty change and, ironically, unanimity at the European Council once again¹⁸¹. Significant political leverage would have to be exerted into reform and it is difficult to imagine backsliding countries voting to punish themselves.

¹⁷⁴ Barroso J., President of the European Commission, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg, Speech/12/596, 12/10/2012.

¹⁷⁵ European Commission, *Rule of Law Framework*, <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en> accessed 02/08/2020.

¹⁷⁶ Phelan W., *In Place of Inter-State Retaliation: The European Union’s Rejection of WTO-style Trade Sanctions and Trade Remedies*, Oxford University Press, 2015.

¹⁷⁷ Scheppele K. L., Kelemen R. D., *op. cit.*, p.413.

¹⁷⁸ Sadurski W., *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider*, The University of Sydney Law School, Legal Studies Research Paper, No. 10/01, January 2010, p.10.

¹⁷⁹ European Parliament Resolution, *On the situation of fundamental rights: standards and practices in Hungary*, 03/07/2013, (2012/2130(INI), para. 5.

¹⁸⁰ Waelbroeck M. and Oliver P., ‘Enforcing the Rule of Law in the EU: What can be done about Hungary and Poland?’, in *Blog Droit Européen*, 09/02/18, <<https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/>> accessed 02/08/2020.

¹⁸¹ See European Parliament, *How EU Treaties are changed*, <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/640167/EPRS_ATAG\(2019\)640167_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/640167/EPRS_ATAG(2019)640167_EN.pdf)> accessed 02/08/2020.

In addition to its design making Article 7 currently unworkable, there are several instances where EU institutions repeatedly hampered its implementation process. When the Commission issued a recommendation to the Council to trigger Article 7 in respect of Hungary after having refused to do so for several years¹⁸², the Council refused to act on the recommendation, so this was eventually triggered by a majority in the European Parliament¹⁸³. During the stages of Article 7(1), the Council *also* did not allow the Parliament to present and defend its Article 7(1) reasoned proposal concerning Hungary as part of the established procedure, organising instead a breakfast informal dialogue with Rapporteur and member of the European Parliament Judith Sargentini to discuss her report¹⁸⁴.

Meetings in the General Affairs Council (GAC, a Council's configuration) against the background of Article 7 were especially problematic. During GAC hearings of the Polish Government, no country from Central or Eastern Europe took the floor, with questions coming mainly from France, Germany, Ireland, Spain, Portugal, the Benelux and Scandinavian countries, highlighting political divisions along a geographical divide for the procedure¹⁸⁵. Sometimes the Presidency of the Council simply showed a lack of interest to address the issues. During the Romanian presidency of the Council, for instance, the RoL was not discussed at the first GAC of 2019, unlike all the meetings in the same format in 2018¹⁸⁶. At times, GAC meetings even caused tensions among member states, such as when Hungarian officials sent offensive tweets complaining about the closed-door nature of meetings concerning the RoL in Hungary in December 2019¹⁸⁷. Even the European Parliament criticised GAC meetings noting that 'the hearings are not organised in a regular, structured and open manner' and that they 'have not yet resulted in any significant progress by the two Member States [i.e. Hungary and Poland] in question'¹⁸⁸.

On the whole, Article 7 TEU enlarges the EU's arsenal to maintain pressure on backsliding states. However, its design flaws and interinstitutional sluggishness in implementation make it an

¹⁸² Wiener A., *European Integration Theory*, June 2009, Oxford University Press, p.37.

¹⁸³ Hegedus D., *op. cit.*

¹⁸⁴ Michelot M., 'The "Article 7" proceedings against Poland and Hungary: What concrete effects?', in *Europe dans le monde*, 15/04/2019, <<https://institutdelors.eu/wp-content/uploads/2019/05/190415-EN-Etatdedroit-2.pdf>> accessed 02/08/2020.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Bond I., Gostyńska-Jakubowska, *op. cit.*

¹⁸⁸ European Parliament Resolution, *Ongoing hearings under article 7(1) of the TEU regarding Poland and Hungary*, (2020/2513(RSP)), 16/01/2020.

overall ineffective enforcement mechanism. Unsurprisingly, the situation in both Poland and Hungary has only deteriorated since the activation of Article 7(1), as the EU itself acknowledged¹⁸⁹.

In sum, at first EU institutions were utterly ineffective at bringing member states back into line with the RoL. This was the result of a detrimental delay to react to the backsliding phenomenon, powerplay or burden shifting among EU institutions, an insistence on ultimately ineffectual soft mechanisms and flaws in the design of the mechanisms themselves. In this complex multicausal scenario, the forest should not be lost for the trees. The challenges presented thus far describe the *effect of the EU’s reaction*, whose causes require a further layer of analysis. The following section therefore attempts to identify underlying reasons commonly identified in the literature for the challenges presented which made the EU’s initial response ineffective. These are first, an EU optimism in democratisation and second, a lack of political incentives to punish backsliding member states.

3.2 WHY DID SOFT AND POLITICAL MECHANISMS FAIL?

3.2.1 Optimism in democratisation

It has been argued that the EU was founded on a post-war optimism that ‘a Europe of united democracies could provide both peace and prosperity’¹⁹⁰. This belief dovetails with the RoL-related legal doctrine of “mutual trust” of respect for common values and can be detected in various official documents. The Preamble of the TEU for example affirms that states are ‘drawing inspiration from [Europe’s] inheritance (...) from which have developed the universal values of (...) the rule of law’ while stressing the ‘[member states] attachment to (...) the rule of law’. Such an optimism hinges on a factual presupposition, i.e. that the Union is based on values, as well as a long-term commitment, i.e. that its member states (will always) want to protect them. Indeed, member states were admitted to the EU with a *trust* in their unwavering devotion to EU values, such as the RoL¹⁹¹. This belief was undisputed and certainly reinforced for decades. For example, the development of the EU

¹⁸⁹ *Ibid.*

¹⁹⁰ Scheppele K. L., Kelemen R. D., ‘Defending Democracy in EU Member States, Beyond Article 7 TEU’, in (ed.) Bignami D., *EU Law in Populist Times*, December 2019, Cambridge University Press, p.413.

¹⁹¹ *Ibid.*

supranational legal order was possible precisely because member states were ready to accept the CJEU's supreme authority¹⁹². This optimistic outlook can partly account both for the EU's late reaction to face RoL backsliding and for its preference for soft mechanisms to the detriment of hard ones.

The idea of opting for soft mechanisms is not devoid of merit. Soft mechanisms are flexible, making them highly suited to serve as drivers of compromise, constant assessment and improvement¹⁹³. Without having to relinquish sovereignty, addressees can engage in soft recommendations whose requirements vary in intensity, proportionate to the gravity of the problem and resulting in a 'sliding scale of normativity'¹⁹⁴ allowing to separate and treat lower and higher threats accordingly.

As a result of its optimism in governmental collaboration for compliance, the EU preserved a 'naïve belief' in dialogue founded on the paradigm that a member state inadvertently steps into non-compliance and is thus willing to cooperate to get out of it¹⁹⁵. Such optimism is unable to capture the nature of present RoL backsliding, i.e. that governments deliberately pursue their policies at the expense of the RoL, as delineated in the previous chapter. Non-compliance is ideological and cannot be explained by reference to the lacking capacity, "plain" corruption, or outright sloppiness. The novelty of RoL backsliding may account for a certain difficulty in recognising the phenomenon, but in truth it only emphasised the EU's persistent blind optimism once the dynamics of backsliding became clear.

The very notion of "discussion" over, say, the publication of judgments of a constitutional court and their implementation (which does not leave much space for negotiation), conveys the idea that the RoL is negotiable and that it is possible to abolish the constitutional safeguards of checks and balances and simply discuss this with a member state. There may not be a universal specification for what is necessary for every time and place for the RoL to obtain, but there is a very widely accepted ideal, developed over centuries of legal and political tradition, as this paper has shown, whose core is hostility

¹⁹² Kelemen R. D., *The Court of Justice of the European Union in the Twenty-First Century*, 79 *Law and Contemporary Problems*, 2016, pp.117-140.

¹⁹³ Hoffmann-Riem W., *op. cit.*

¹⁹⁴ Goldmann M., 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', in von Bogdandy A., et al. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 2010, p.661.

¹⁹⁵ Pech L., Kochenov D., Grabowska-Moroz B. and Grogan J., *The Commission's Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, Verfassungsblog, <<https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/>> accessed 02/08/2020.

towards arbitrary power. The counterargument suggested by illiberal governments that ‘each country in the Union holds the right to shape its own legal system, in accordance with its own traditions’¹⁹⁶, that, in other words, there can be a Polish (or Hungarian, etc.) RoL, is simply absurd when the whole point is to undermine constraint on arbitrary power subverting the essence the RoL is to serve.

The experience with Hungary and Poland therefore showed that soft mechanisms do not yield positive results if states are unwilling to address RoL backsliding. As long as illiberal governments of backsliding countries suffer little or no consequences for their deliberate actions, a scenario which is *guaranteed* by the non-binding nature of soft mechanisms, they can blithely ignore them. What is worse, in the absence of concrete sanctions, illiberal governments can boast symbolic compliance and pass off as defenders of values *by way of* the room for window-dressing offered to them by dialogue-based mechanisms, where the RoL becomes little more than a bargaining chip in the hands of politicians. For instance, when recommendations were issued against Poland in the final stages of the Rule of Law Framework in December 2017, the appointment of the new Polish Prime Minister Mateusz Morawiecki was followed by the communication of certain possible concessions on judicial reforms¹⁹⁷. A partial rollback of the reforms did happen, affecting a discriminatory retirement regulation for judges¹⁹⁸. Even so, not only was the issue of the judges’ appointment by the Minister of Justice, one of the most blatant breaches of judicial independence, left untouched, but the situation was further complicated by entrusting the same function to the President of the Republic¹⁹⁹. Expressions like ‘two steps forward one step back’ or ‘peacock dance’ have entered the jargon to describe the reaction of backsliding member states to EU pressure, whereby illiberal leaders wrongfoot their critics with advances against liberal democracy, followed by half-retreats²⁰⁰.

All this confirms that soft mechanisms alone are unable to contain RoL backsliding and are unlikely to do so in the future. In particular, mechanisms based on governmental dialogue fail against a *deliberate* process of RoL dismantlement.

¹⁹⁶ Brzozowski A., *We have the right to shape our own legal system, Polish PM tells EU*, Euractiv, 04/07/2018. <<https://www.euractiv.com/section/justice-home-affairs/news/we-have-the-right-to-shape-our-own-legal-system-polish-pm-tells-eu/>> accessed 02/08/2020.

¹⁹⁷ Hegedus D., *op. cit.*, p.5.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Supra* note 103, p.4.

²⁰⁰ Hopkins V., *Viktor Orbán’s ‘peacock dance’ with EU may be step too far*, Financial Times, March 5 2019, <<https://www.ft.com/content/8a9b0b82-3e91-11e9-b896-fe36ec32aece>> accessed 02/08/2020.

Seen in this light, the setup of both the Commission's Framework and the Council's Dialogue exemplifies yet another flaw in the EU reaction: the multiplication of *additional* soft instruments in an uncoordinated manner. According to some, the proliferation of RoL measures would signal a broad consensus regarding the importance of the RoL and the threat its backsliding poses to the EU²⁰¹. One might also argue that the more instruments and institutions there are to protect the RoL, the better. This view ignores the real risk that the multiplication of standards and actors may lead to a "monitoring fatigue", where multiple instruments focusing on the same issue result in delivering a dispersed message.

The prolonged failure to control the phenomenon in fact testifies a lack of will to directly confront it by a permanent new instrument creation and a disagreement among all the actors on how to sort out the impasse. As Pech puts it, 'there seems to always be a persistent temptation to blame the instruments available to either justify their non-inactivation, or their timid use'²⁰². Though the introduction of the Framework, for example, has been depicted as a means to strengthen Article 7²⁰³, arguably it did more to weaken it, making the progress to trigger Article 7 lengthier and more onerous, so that some claimed it simply created an additional 'antechamber' to Article 7²⁰⁴.

3.2.2 Lack of political incentives

Another aspect which has been called attention to is the lack of political incentives at the EU-level to punish backsliding member states, which leads them to sacrifice EU values for political gains. For example, democratic leaders may rely on illiberal leaders to obtain votes or political weight at the EU level, which may actively discourage them from speaking out and voting against them²⁰⁵. Political incentives are helpful to explain additional challenges for RoL protection in the EU. In particular, they

²⁰¹ For a criticism of this argument, see Pech L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, Reconnect, Working Paper No. 7 (March 2020).

²⁰² Wójcik A., "A Bad Workman always Blames his Tools": an Interview with Laurent Pech, *Verfassungsblog*, 28 May 2018, <<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>> accessed 02/08/2020.

²⁰³ European Commission, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11.3.2014, COM(2014) 158 final.

²⁰⁴ Scheppele K. L., Kelemen R. D., *op. cit.*, p.420.

²⁰⁵ Kelemen R. D., 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union', in *Democracy without Solidarity: Political Dysfunction in Hard Times*, Volume 52, Special Issue 2, April 2017, pp.211-238.

show why the EU was always more lenient with Hungary, while it undertook a more aggressive stance against Poland.

Hungary’s ruling party, Fidesz, belongs at the EU level to the European People’s Party (EPP), traditionally the centre-right party in the European Parliament. The EPP brings together Germany’s *Christian Democrats*, France’s *The Republicans*, Italy’s *Forza Italia*, and others²⁰⁶. In the 2014 European elections, the EPP achieved a narrow lead over the EU’s second largest party, the Progressive Alliance of Socialists and Democrats (S&D). Fidesz won 11 seats in Parliament for the EPP, a critical gain considering the 30-seat difference between EPP and S&D (the former having won 221, the latter 191 seats)²⁰⁷. Cooperation between Fidesz and other EPP parties is clearly a win-win strategy, where the former gains political leverage while the latter win the elections. Inevitably then, the EPP has an interest in shielding Fidesz from attacks which might weaken it. There is ample confirmation of this behaviour. Until 2018, EPP leaders in Parliament consistently defended Orbán against EU intervention, even as he descended into xenophobia, anti-Semitism and autocracy²⁰⁸. For instance, in May 2017 the EPP voted against the proposal of initiating the Article 7 procedure in respect of Hungary and as a result the Parliament could not trigger it²⁰⁹. During the same plenary, the Parliament’s Civil Liberties Committee was instructed to prepare a report, named after its Rapporteur, Judith Sargentini, to assess whether the Parliament should trigger Article 7 TEU. Only 32 percent of EPP Members of the European Parliaments (MEPs) voted to refer the issue to the Committee²¹⁰.

However, a year later, when it came to endorsing the Sargentini report, EPP votes shifted, allowing to obtain the required two-thirds majority to trigger Article 7²¹¹. Far from this turnaround representing a change of heart, it has been argued that when the then-EPP chair, Manfred Weber, a long-standing supporter of Orbán, announced his candidacy for the position of Commission President, he realised that his consistent support for Orbán might lead many EPP members to oppose his candidacy²¹². This was so, especially since public awareness of the EPP’s support of Orbán would

²⁰⁶ See <<https://www.epp.eu/parties-and-partners/>> accessed 02/08/2020.

²⁰⁷ See <<https://www.europarl.europa.eu/elections2014-results/en/country-introduction-2014.html>> accessed 02/07/2020.

²⁰⁸ Scheppele K. L., Kelemen R. D., *op. cit.*, p.426.

²⁰⁹ Krekó P., *The Vote on the Sargentini Report: Good News for Europe, Bad News for Orbán, No News for Hungary*, Heinrich Böll Stiftung, 21/09/2018, <<https://eu.boell.org/en/2018/09/21/vote-sargentini-report-good-news-europe-bad-news-orban-no-news-hungary>> accesses 02/08/2020.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*

²¹² Scheppele K. L., Kelemen R. D., *op. cit.*

have been highly increased by a failure to endorse the Sargentini report. On 12th September 2018, Article 7 was officially triggered against Hungary in the European Parliament. A few months later, on 20 March 2019, the EPP suspended Fidesz's membership from the EPP group. What at first blush may seem a bold move reflecting a principled stance against illiberal governments, reveals again an additional layer of political calculus. A suspended party is excluded from all EPP party structures, including pre-Council summits, ministerial meetings, political assemblies, and its MEPs barred from any vice president position in the party²¹³. However, unlike expulsion, suspension means Fidesz MEPs can still attend Parliament meetings and, crucially, that they can *vote*. It would be naïve not to think this aspect might have influenced the EPP's decision to opt for a suspension. And so, in the last 2019 European elections, the EPP achieved again a narrow majority over S&D (182 vs. 154 seats) also thanks to Fidesz, which due to its stable advantage in Hungary against a dispersed domestic opposition posted a strong performance by winning nearly 53 percent of the votes and brought 12 seats to the European Parliament²¹⁴.

The lack of political incentives to curb backsliding is not limited to the European Parliament. Europarties also influence the Council, as heads of government often cooperate along party-political lines²¹⁵. Similarly, affiliations between the EPP and the Commission has made the latter rather selective when enforcing the RoL²¹⁶. As shown above, the Commission never launched the Framework against Hungary while it immediately used it against Poland. A plausible explanation is that PiS, Poland's ruling party, is a member of the nationalist, Eurosceptic "European Conservatives and Reformists" group in the European Parliament. The group is much weaker than the EPP and hence less able to protect PiS against EU action.

The potential conflict of interests for EU bodies is sometimes evident. According to the *Spitzenkandidat* process introduced in the 2014 elections, the party able to command a majority coalition in Parliament can name the European Commission President and have a direct impact on the policy direction of the EU's executive²¹⁷. In the 2019 elections two Spitzenkandidaten were discussed,

²¹³ Baume M. d.l., *Fidesz MEPs remain in the EPP group, for now*, Politico, 26/03/2019, <<https://www.politico.eu/article/fidesz-meps-remain-in-the-epp-group-for-now/>> accessed 02/08/2020.

²¹⁴ See <<https://www.europarl.europa.eu/election-results-2019/en>> accessed 02/08/2020.

²¹⁵ Johansson K. M., Raunio T., 'Political Parties in the European Union', *Oxford Research Encyclopedia of Politics*, Oxford University Press, Apr 2019, p.10.

²¹⁶ *Ibid.*

²¹⁷ Hurst L., *European elections 2019: What is a Spitzenkandidat?*, euronews, 24/05/2019, <<https://www.euronews.com/2019/04/24/european-elections-2019-what-is-a-spitzenkandidat>> accessed 02/08/2020.

but neither Manfred Weber, nor Frans Timmermans had a majority²¹⁸. Ursula von der Leyen was suggested as a compromise candidate. She was elected with 383 votes (374 were required for majority). Of these, 13 votes came from Fidesz²¹⁹ and 26 from PiS²²⁰.

In a nutshell, EU party politics easily overshadows EU values. Parties have incentives to shield illiberal leaders and pay no political price for supporting them, as they suffer no reputation damage and they are not punished by voters²²¹. Few voters even *know* about the existence of Europarties²²². National parties align with Europarties at the European level but on the ballot voters only see national parties. Research has shown that voters cannot locate their national parties accurately on the EU dimension²²³. Consequently, voters are less likely to hold their national parties accountable for what they do at the EU level. Accordingly, supporting Orbán imposed no political cost on national parties. As the Hungarian problem rose to the point where EPP obstinacy would be visible for all to see in the vote on the Sargentini Report, the EPP had to finally resort to a change of strategy.

3.2.3 The Commission’s ‘blueprint for action’

In 2019 the European Commission opened a wide debate and collected feedback on how to reinforce RoL mechanisms²²⁴. The result was the development of a ‘blueprint for action’²²⁵. The blueprint presented a new ‘Rule of Law Review Cycle’, consisting in an annual RoL report in all member states followed up by the European Parliament and the Council. Unlike previous soft

²¹⁸ Gray A., Barigazzi J., Baume M. d.l., *Who killed the Spitzenkandidat?*, Politico, 07/05/2019 <<https://www.politico.eu/article/who-killed-the-spitzenkandidat-european-parliament-election-2019-transition/>> accessed 02/08/2020.

²¹⁹ In alliance with another Hungarian party, the Christian Democratic People's Party (KDNP), see Prime Minister's Office, Website of the Hungarian government, *Majority of right-wing MEPs voted for Ursula von der Leyen, majority of left-wing MEPs rejected her*, 19/07/2019, <<https://www.kormany.hu/en/prime-minister-s-office/news/majority-of-right-wing-meps-voted-for-ursula-von-der-leyn-majority-of-left-wing-meps-rejected-her>> accessed 02/08/2020.

²²⁰ In alliance with another Polish party, United Poland (SP), see *European Commission head elected with Polish support*, poland in, <<https://polandin.com/43526145/european-commission-head-elected-with-polish-support>> accessed 02/08/2020.

²²¹ Kelemen R. D., Halmai G., *From Democratic Backsliding to Dictatorship in the Time of Corona?*, Reconnect Webinar, 8 April 2020.

²²² *Ibid.*

²²³ Kritzinger S., McElroy G., ‘Meaningful Choices? Voter perceptions of party positions in European Elections’, in (eds.) Banducci S., Franklin M., Giebler H., et al., *An Audit of Democracy in the EU*, 2012, European University Institute, pp.169-192.

²²⁴ European Commission, *Rule of Law: The Commission opens a debate to strengthen the rule of law in the EU*, Press Release, 03/04/2019, <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1912> accessed 02/08/2020.

²²⁵ European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, 17/07/2019, COM(2019)343final.

mechanisms, the Review Cycle has the advantage of bringing to the table all EU actors at the same time, which severely limits past problems of burden shifting or institutional power play. Monitoring will cover a wide range of issues, such as effective judicial protection, media pluralism and elections, which also constitutes an improvement upon existing monitoring mechanisms (such as the Justice Scoreboard). It will consist in a participatory process where member states are expected to engage ‘in a mutual exchange of information and a dialogue on RoL related topics’²²⁶.

While it is still early to evaluate the Review Cycle, its being another dialogue-based soft measure has attracted strong criticism²²⁷. In contrast, the blueprint’s brief mention to ‘a strategic approach to infringement proceedings related to the rule of law, requesting expedited proceedings and interim measures whenever necessary’²²⁸ has been praised.

3.2.4 Towards an enforcement-based approach

The reception of the blueprint sums up the current state of play of the RoL debate. The impression that addressing EU values violations, instead of being based on expert constitutional assessment, was hostage to reluctant illiberal governments or EU-level political calculus, in addition to the various challenges described above concerning soft or political mechanisms, has led many to argue that soft instruments have to be paired with a stick²²⁹, or more severely that ‘dialogue is not the way forward’²³⁰. Rather, it is posited that the way forward is to be found in a ‘rule of law enforcement cocktail’²³¹. It has consequently been claimed that EU values enforcement should not be entrusted only to the political mechanism of Article 7 TEU, but should also be enforceable in law²³². As has been

²²⁶ *Ibid.*, p.10.

²²⁷ Pech L., Kochenov D., Grabowska-Moroz B. and Grogan J., *The Commission’s Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, Verfassungsblog, <<https://verfassungsblog.de/the-commissions-rule-of-law-blueprint-for-action-a-missed-opportunity-to-fully-confront-legal-hooliganism/>> accessed 02/08/2020.

²²⁸ *Supra* note 225, p.14.

²²⁹ Uitz R., *EU Rule of Law Dialogues: Risks – In Context*, Verfassungsblog, 23 January 2020, <<https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/>> accessed 02/08/2020.

²³⁰ Pech L., *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, Reconnect, Policy Brief, June 2019, p.8.

²³¹ *Ibid.*

²³² See von Bogdandy A., et al., *Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States*, 49 Common Market Law Review 489, 2012; See also Scheppele K. L., *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions*, November 2013, <<https://verfassungsblog.de/wp-content/uploads/2013/11/scheppele-systemic-infringement-action-brussels-version.pdf>> accessed 02/08/2020.

analysed in this paper, the CJEU eventually endorsed this view in *Associação*. In so doing, it revived urgent calls from commentators to trigger timelier, enforcement-based measures to address RoL backsliding²³³. The EU itself authored studies which privileged this approach²³⁴. Seeing the failure of soft and political mechanisms, these considerations appear *prima facie* justified. The approach suggested is based on legal and economic (hard) mechanisms and sees the CJEU as the ‘last soldier standing’ in the RoL debate²³⁵. It contends to be an improvement upon previous responses as it sees its legal approach both rejecting the optimism grounding dialogue-based measures and being less vulnerable to the lack of political incentives to address value violations.

In the next section, therefore, hard mechanisms grounding this approach will be analysed.

3.3 HARD MECHANISMS: LEGAL AND ECONOMIC MEASURES

3.3.1 Preliminary rulings

Preliminary rulings are issued when a question of interpretation of EU law is considered necessary by a national court to give judgment in addition to its being new and of general interest for the uniform application of EU law throughout the Union²³⁶. As illustrated in the previous chapter, preliminary rulings have the potential to break new ground in matters of EU law. It is by way of a preliminary reference made in *Associação* from a Portuguese court to the CJEU that official enforceability of the RoL as an EU value was established. More than half of the CJEU’s work is made up of cases brought in this way²³⁷. Through litigation, actors express concerns which were not raised

²³³ Kochenov D. and Bard P., *op. cit.*

²³⁴ European Parliament, Study for the Committee on Constitutional Affairs (AFCE), *The EU framework for enforcing the respect of the rule of law and the Union’s fundamental principles and values*, January 2019, <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU\(2019\)608856](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU(2019)608856)> accessed 02/08/2020.

²³⁵ Kochenov D. and Bard P., *op. cit.*

²³⁶ CJEU, Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings, Official Journal of the European Union, 2019/C 380/01, 08/11/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001> accessed 02/08/2020.

²³⁷ CJEU, Directorate for Communication, *The year in review, Annual report 2019*, May 2020, p.54, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf> accessed 02/08/2020.

(or were side-lined) in the political process. Moreover, litigation offers an opportunity for correction, at a considerably lower cost than passing a legislative measure from scratch²³⁸.

Interestingly, judges who are the focus of governmental attempts to interfere with judicial independence can even spur the Commission into bringing infringement proceedings. For example, as negotiations wore on in the Commission's infringement action on the judicial retirement age and its effects on the Polish Supreme Court, the Supreme Court decided it could wait no longer and filed a reference for a preliminary ruling with the CJEU in August 2018²³⁹. The ruling eventually overlapped with the Commission's infringement proceeding. One might wonder what role Polish judges played in instigating the Commission, as the latter filed an infringement proceeding a month later the Supreme Court made a preliminary reference to the CJEU²⁴⁰. Seeing that preliminary references can prompt the Commission to act, Polish courts have increased the number of references in recent years and Hungarian judges have joined in²⁴¹.

However, preliminary rulings alone cannot ensure stable enforcement in backsliding countries, where national courts up to level of local ones are under substantial risk of being captured by political interests. Because national courts are not obliged to make a preliminary reference to the CJEU, politically dependent courts can deny the CJEU authority to review national measures by simply refusing to make a reference. Worse still, when a reference is made, captured courts may invalidate its outcome. This is exactly the course of action taken by the Polish Constitutional Tribunal recently²⁴², which ruled against a CJEU judgment from a preliminary ruling allowing Polish courts to disapply national law granting jurisdiction to the Polish Supreme Court (when including judges elected by the captured NCJ)²⁴³. Some have long encouraged a form of judicial activism to contrast politically-

²³⁸ Sajó A., Uitz R., *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017, ch. 8, p.323.

²³⁹ Case C-522/18, Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 9 August 2018, 2018 O.J.(C 427)8.

²⁴⁰ European Commission, *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court*, Press release, 24/09/2018, Brussels, <https://ec.europa.eu/commission/presscorner/detail/EN/IP_18_5830> accessed 02/08/2020.

²⁴¹ Biró M., *Hungarian Judge Requests European Court of Justice to Examine His Own Independence*, Index, July 17, 2019, <https://index.hu/english/2019/07/17/hungary_judicial_independence_european_court_of_justice_suspended_case/> accessed 02/08/2020.

²⁴² Sitnicka D., *Captured Constitutional Tribunal rules on the Supreme Court: Implementation of CJEU judgment inconsistent with EU law*, Rule of Law in Poland, 22/04/2020, <<https://ruleoflaw.pl/captured-constitutional-tribunal-rules-on-the-supreme-court-implementation-of-cjeu-judgment-inconsistent-with-eu-law/>> accessed 02/08/2020.

²⁴³ Judgment of the Court (Grand Chamber) of 19 November 2019. A. K. and Others v Sąd Najwyższy, Joined Cases C-585/18, C-624/18 and C-625/18.

dependent national courts²⁴⁴. It is doubtful however that many judges would follow this path given the chilling effect of disciplinary laws in place²⁴⁵.

3.3.2 *Infringement proceedings*

Infringement proceedings robustly strengthen preliminary rulings, as they make the Commission central in the process of enforcement. Following a dialogue with a member state, the Commission can bring infringement proceedings for failure to fulfil a specific piece of EU law by referring the matter to the CJEU²⁴⁶. A member state can also start proceedings to the CJEU against another country for the same purpose²⁴⁷. The proceedings can result in interim measures as well as substantial fines against a member state. Proceedings do away with the potentially thorny issue of leaving national courts with applying a CJEU’s preliminary ruling and be the judge of their own cause in cases of violation of judicial independence.

Regrettably, national governments tend to hide behind the Commission in place of launching their own actions²⁴⁸, therefore proceedings are typically brought solely by the Commission. In total, the Commission launched six “EU values” infringement proceedings against Hungary²⁴⁹ and four against Poland²⁵⁰. Thus far, infringement proceedings have been fairly successful. Through them, the EU was sometimes able to slow down the process of backsliding or even restore RoL compliance. For instance, in January 2012 the Commission launched infringement proceedings in regards of the 2011 Hungarian law forcing early retirement of almost 300 judges and public prosecutors within a very short transition period²⁵¹. Following a request from the Commission, the CJEU dealt with it in an expedited

²⁴⁴ Matczak M., *O rozbieżności pomiędzy sędziowskim i powszechnym rozumieniem sprawiedliwości oraz sposobach jej usuwania* [On discrepancy between judicial and common understanding of justice and on methods how to eliminate it], *Kwartalnik Krajowej Rady Sądownictwa* [Quarterly of the National Council of Judiciary], No. 4/2017, p.28.

²⁴⁵ Council of Europe, Monitoring Committee, *Report on the functioning of democratic institutions in Poland*, 06/01/2020, p.1.

²⁴⁶ Article 258 TFEU.

²⁴⁷ Article 259 TFEU.

²⁴⁸ Bárd P., Grogan J., Pech L., *Defending the Open Society against its Enemies*, *Verfassungsblog*, 22/06/2020, <<https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>> accessed 02/08/2020.

²⁴⁹ See <<https://www.asktheeu.org/en/request/6115/response/19716/attach/html/6/st14022.en18.pdf.html>> accessed 02/08/2020.

²⁵⁰ European Commission, Press Release, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, 29 April 2020, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772> accessed 02/08/2020.

²⁵¹ European Commission, News, *European Commission launches accelerated infringement proceedings against Hungary* <https://ec.europa.eu/economy_finance/articles/governance/2012-01-18-

procedure and condemned Hungary for age discrimination five months later. A new law adopted by the Hungarian government brought the retirement age in line with EU law and legal proceedings were closed²⁵².

In the Hungarian case, arbitrary lowering of judicial retirement was dealt with as an issue of age discrimination *rather than* independence of the judiciary. As shown in the previous chapter, this was because for a long time Article 2 TEU values' enforceability was uncertain and did not offer a sound legal basis for action. Since *Associação* established in February 2018 that national measures undermining judicial independence may be directly challenged in court, four infringement proceedings against Poland (the first one started in July 2017, the last one in April 2020) dealt with measures targeting the independence of the judiciary and two quoted *Associação* in finding a violation of judicial independence under Article 19(1) TEU²⁵³, causing Poland to repeal the Supreme Court law in January 2019²⁵⁴.

By zeroing in on independence of the judiciary, the Commission seemed to respond well to the recent developments of EU law. This change of tack was nonetheless restricted to the Polish case, confirming the Commission's selective approach in enforcement. The lack of any reaction by the Commission to the Hungarian administrative-court reform in 2018, introducing a very similar executive control over the judiciary²⁵⁵, is a case in point. Commission-President Ursula von der Leyen promised that when it comes to the RoL, 'there cannot be any compromise'²⁵⁶. However, Hungary has seen less than one Article-2-TEU-related infringement action per year on average since the 2013 Tavares report. To date, not a single one was launched by the current Commission. This shows that

[hungary_en.htm#:~:text=European%20Commission%20launches%20accelerated%20infringement%20proceedings%20against%20Hungary,-17.01.2012%20%2D%20European&text=Strasbourg%2C%2017%20January%202012%20%2D%20The,year%20under%20Hungary's%20new%20constitution.>](#) accessed 02/08/2020.

²⁵² European Commission, *European Commission closes infringement procedure on forced retirement of Hungarian judges*, Press Release, 20/12/2013, <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1112> accessed 02/08/2020.

²⁵³ Case C-192/18 Commission v Poland & C-619/18 Commission v Poland.

²⁵⁴ Mastracci M., *The Rule of Law and the Judicial Retirement Age in Poland: Is the ECJ Judgment the End of the Story?*, International Journal of Constitutional Law Blog, 19/07/2019, <<http://www.icconnectblog.com/2019/the-rule-of-law-and-the-judicial-retirement-age-in-poland-is-the-ecj-judgment-the-end-of-the-story/>> accessed 02/08/2020.

²⁵⁵ See Venice Commission, *Hungary, Opinion on the law on administrative courts*, Opinion no.943/2018, Strasbourg, 19/03/2019.

²⁵⁶ European Commission, *Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission*, Press Release 16/07/19, <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230> accessed 02/08/2020.

hard mechanisms, albeit less severely, are not immune from the lack of political incentives to defend EU values outlined above.

Nevertheless, the concrete impact of infringement proceedings is undeniable and could be felt even outside the EU’s sphere of action. The Venice Commission and the Hungarian government were engaged in an on-going dialogue over the Hungarian Fundamental Law²⁵⁷. It became clear that the Hungarian government was only willing to accept criticism and propose changes where the relevant issues were also the subject of talks with the European Commission regarding an infringement procedure, since the European Commission based its assessment on the analyses of the Venice Commission. The fact that the Hungarian government responded constructively to certain aspects of the Venice Commission’s criticism was therefore due more to the activities of the European Commission than to the “force of argument”²⁵⁸.

3.3.3 Rule of law conditionality for EU funding

A proposal which has gained popularity in recent years concerns linking respect for the RoL to EU funding. The EU has an investment budget, the European Structural and Investment Funds (ESI Funds), aiming to stimulate growth and jobs as well as territorial cooperation in the EU²⁵⁹. A current draft regulation set out by the Commission stipulates an *ex-ante* RoL conditionality for receipt of ESI Funds²⁶⁰, so that access to funding can be suspended or restricted where its use jeopardises the RoL. A systemic RoL deficiency would not comply with such conditionality, resulting in the application of the measure. ESI Funds regulations already provide that payments can be suspended if there is a ‘serious deficiency in the effective functioning of the management and control system’ of the Funds²⁶¹. Some have contended this implies that persons must have an effective remedy for complaints concerning the funds and therefore argue that the introduction of *ex ante* conditionalities is not just

²⁵⁷ Hoffmann-Riem W. *op. cit.*, p.594.

²⁵⁸ *Ibid.*

²⁵⁹ European Commission, *European Structural and Investment Funds 2014–2020: Official Texts and Commentaries*, (November 2015), p.45, <http://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blueguide_en.pdf> accessed 02/08/2020.

²⁶⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the member states*, COM/2018/324final.

²⁶¹ European Parliament and Council Regulation (EU)1303/2013, Article 142(a).

desirable, but mandatory under current legal requirements²⁶². The justification would be to protect successful implementation of the Funds, the effect to protect the RoL.

This is a reasonable course of action because unchecked EU funds transfer huge sums of money in the hands of autocrats with few strings attached. For instance, the way Orbán's government is backed by EU funds has been described as a 'political resource curse'²⁶³. Just as autocrats can use resource revenues (such as money coming from oil) to prop up their regimes, so illiberal leaders in the EU can use ESI Funds to perpetuate their rule, such as Orbán's patronage network²⁶⁴. Mismanagement of EU funds is obviously not limited to illiberal governments²⁶⁵. Still, insofar as it concerns illiberal governments in backsliding states, it aggravates RoL backsliding.

The potentially successful impact of conditioning EU funding can be gleamed by the basic fact that both Hungary and Poland heavily depend on EU funds. In the 2014-2020 funding period, Poland has been the largest net recipient of EU funds²⁶⁶ while Hungary one of the major per capita recipients²⁶⁷, with as many as 95 percent of all public investments in the country co-financed by the EU²⁶⁸. Even voting sanctions then (cf. Article 7 TEU) may eventually matter little as long as EU money keeps flowing. On the contrary, if the economic condition in their countries deteriorated due to the decrease of EU funds, Fidesz and PiS might forfeit much of their popularity. Thus, they might be willing to accept serious democratic commitments in exchange for maintaining current levels of EU funds. Economic pressure then, would seem a strong card in the hands of the Union to influence the policies of Fidesz and PiS. It would reinforce the message that the benefits of autocracies are simply incompatible with the benefits of EU membership.

The draft regulation has nonetheless been criticised on several points. The Council's Legal Service claimed that it fails to make a solid connection between the objective of protecting the EU's

²⁶² Butler I., *Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework*, Civil Liberties Union for Europe, 03/2018, <www.liberties.eu/en/news/european-values-fund-two-proposals-mff/14471> accessed 02/08/2020.

²⁶³ Kelemen R. D., Halmai G., *From Democratic Backsliding to Dictatorship in the Time of Corona?*, Reconnect Webinar, 8 April 2020.

²⁶⁴ Magyar B., *Post-Communist Mafia State: The Case of Hungary*, 29/02/2016, Central European University Press.

²⁶⁵ See *Brussels warns Bulgaria over EU funds mismanagement*, Euractiv, 13/05/08, <<https://www.euractiv.com/section/future-eu/news/brussels-warns-bulgaria-over-eu-funds-mismanagement/>> accessed 02/08/2020.

²⁶⁶ Kovacevic T., *EU budget: Who pays most in and who gets most back?*, BBC, 28 MAY 2019, <<https://www.bbc.com/news/uk-politics-48256318>> accessed 02/08/2020.

²⁶⁷ *Supra* note 259.

²⁶⁸ Keszthely C., *Hungary's Economy Heavily Depends on EU Funds, Study Finds*, Budapest Business Journal, 30/03/2017, <https://bbj.hu/economy/hungarys-economyheavily-depends-on-eu-funds-study-finds_130880> accessed 02/08/2020.

financial interests and RoL deficiencies in a member state²⁶⁹. In truth, no evidence has hitherto shown that the Polish government’s judicial reforms have led to mismanagement of EU funds. Despite the politicisation of its judiciary, Poland is 41st in Transparency International’s Corruption Perception Index, far above Bulgaria (74th), Hungary (70th), Greece (67th) and Italy (51st)²⁷⁰.

Furthermore, economic sanctioning measures could have an indiscriminate impact on the population and create a toxic dichotomy between rich and poorer “new” member states which are net beneficiaries of EU funds. The Commission’s proposal stipulates that if the flow of EU funds to a country is suspended, the government of that member state would still have a legal obligation to fulfil their obligations to the Funds beneficiaries – transferring the duty to make payments from the EU budget to the national budget²⁷¹. The Commission needs to ensure that only those responsible for RoL violations are deprived of funding, and not worthy recipients in deprived regions of the EU. Thus, it is crucial that this provision is maintained in the final draft of the regulation. Whether the draft will eventually make it to law will crucially depend on the Commission’s political will. If this will be bent by political loyalties, the proposal might not materialise.

3.4 THE SHORTCOMINGS OF A HARD RESPONSE

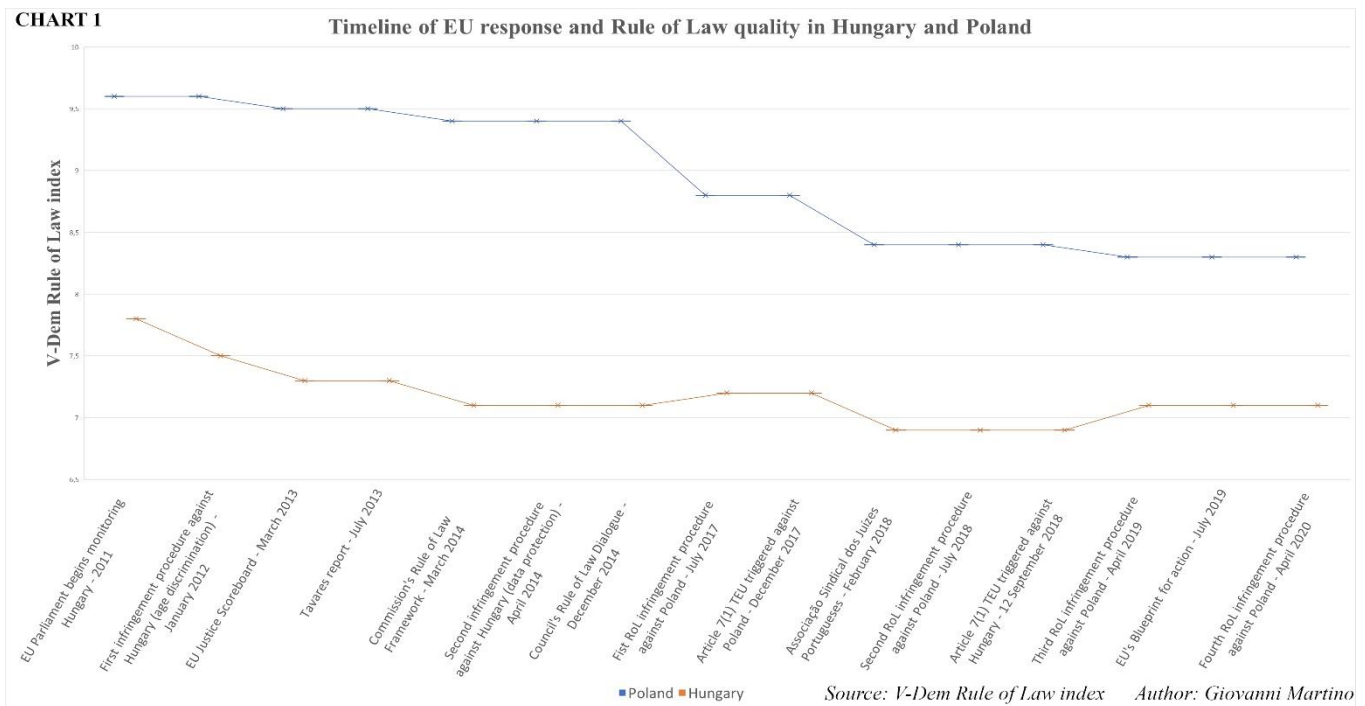
From our survey of EU RoL instruments, it appears that hard mechanisms, and in particular legal mechanisms and economic measures are the only ones capable of effectively contrasting the backsliding of the RoL. Indeed, recent experience with infringement proceedings buttresses the assumption behind this approach that concrete threats such as fining improve compliance and raises high hopes for a future RoL-conditionality of EU funding. From this would follow, that if the EU raises the backsliding states’ economic interests at stake, these will eventually restore a RoL-compliant scenario by following the imposed measures. Hard mechanisms are hence an indispensable tool for the EU to police its core values. If these mechanisms are reinforced by the however minimal peer pressure originating from political mechanisms and international scrutiny, the EU might have found an

²⁶⁹ *Council lawyers raise concerns over plan to link EU funds to rule of law*, Politico, 29 October 2018, <<https://www.politico.eu/pro/council-lawyers-raise-concerns-over-planto-link-eu-funds-to-rule-of-law-hungary-poland/>> accessed 02/08/2020.

²⁷⁰ Transparency International, *Corruption Perception Index 2019*, <<https://www.transparency.org/en/cpi/2019/results>> accessed 02/08/2020.

²⁷¹ *Supra* note 260, Article 4(2).

ultimately winning, if imperfect, strategy to contrast RoL backsliding. Preoccupation with enforcement is understandable given the astonishing speed of constitutional deterioration in both Hungary and Poland and it is often related to the argument that ‘the problem could be very easily and quickly resolved by withdrawing the reforms related to courts, according to the recommendations of the European Commission’²⁷². The current hard response then, offering quick, unambiguous, and visibly effective punitive measures through a stable top-down approach has undoubtedly its appeal, especially if its robust performance is compared with the EU’s trepidation of just a few years ago. Two trends noted in this research in the EU’s response to RoL backsliding confirm the EU’s preference for this approach (see Chart 1, p. 56): (1) while the EU’s initial response relied primarily on existing soft or political mechanisms and in devising additional soft mechanisms, (2) as RoL backsliding worsened, legal or economic mechanisms were increasingly employed, answering insistent calls to privilege a hard over soft response.



²⁷² Peers S., *Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual?*, EU Law Analysis, 15/08/2018, <<http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html>> accessed 02/08/2020.

This paper however argues that insofar as the EU’s preferred path to address RoL backsliding is enforcement, the appeal for this approach is illusory. An enforcement-focused response is purchased at the expense of a simplification of issues. Therein lies a legalistic tendency to assume that ‘political problems can be resolved by taking them out of the political sphere and turning them into legal matters’²⁷³. The EU risks ultimately reducing a complex, multi-dimensional issue such as RoL backsliding to a legal engineering problem, where deeply political issues are treated as legally verifiable facts resolvable entirely through the legal process. In this way, a fundamental dimension goes entirely unaddressed, i.e. *the understanding and practice of the RoL in a society*.

Democratisation theories have widely studied the importance of value endorsement in society. Rustow describes the last phase of democratic transition as the ‘habituation phase’, where to simple adoption of democratic rules follows actual belief in the rules²⁷⁴. By the mid-1990s it was maintained (1) that democracy consolidated in a polity when actors decided to play by its rules thereby making it ‘the only game in town’ and (2) that once democracy consolidated it was entrenched by *popular consensus* and so highly unlikely to revert to authoritarianism²⁷⁵. Entrenchment in popular consensus thus plays an essential part in democratic consolidation. Similarly, it has been argued that solid legal institutions are necessary for a RoL to obtain, but they are not sufficient, because they need ‘*supporting circumstances*’²⁷⁶. These include parameters such as the consideration of the law as legitimate, the level of compliance with the law, the level of impersonal trust and the extent to which the law counts among people who have power²⁷⁷. In order for the law to *rule*, in other words, it has to *matter* in a given society²⁷⁸. The law has to matter both as a resource and as a protection, both in the exercise of power and as a social guidance, both for institutional actors *and* for citizens²⁷⁹. In a similar fashion, Blokker speaks of the *societal embeddedness* of a set of constitutional values, ‘indicating the take-for-

²⁷³ Blokker P., *Systemic infringement action: an effective solution or rather part of the problem?*, Verfassungsblog, 05/12/2013, <<https://verfassungsblog.de/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem/>> accessed 02/08/2020.

²⁷⁴ Rustow D., ‘Transitions to democracy: Toward a dynamic model’, *Comparative Politics*, April 1970, pp.337-363.

²⁷⁵ Schedler A., ‘Measuring Democratic Consolidation’, *Studies in Comparative International Development*, volume 36, 2001, Springer, pp.66-92.

²⁷⁶ Krygier M., ‘Transitional Questions about the Rule of Law: Why, What, and How?’, *East Central Europe, Eine wissenschaftliche Zeitschrift* 28(1), 2001, pp.1–34.

²⁷⁷ *Ibid.*

²⁷⁸ Blokker P., ‘EU Democratic Oversight and Domestic Deviation from the Rule of Law - Sociological Reflections’ in Closa C. and Kochenov D. (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016.

²⁷⁹ Nelken D., ‘Using the Concept of Legal Culture’, *Australian Journal of Legal Philosophy*, 29, 2004.

granted nature of a successful constitutional order among various political and societal actors.’²⁸⁰ Blokker argues that values gradually become part of the socio-political expectations and understandings of society at large²⁸¹. Far from being an automatic process, this depends on the *involvement* of citizens in the employment of values, e.g. in advocacy, policymaking, constitution-making, etc²⁸². If this is true, the frequency and intensity of RoL-promoting activities starting from or addressed to citizens which we may refer to as, borrowing the term from Blokker, the degree of *RoL societal embedment*, may explain and even predict the resilience of the RoL in a country. The more citizens are informed, active and involved in promoting the RoL, the higher the protection of society from RoL backsliding. Conversely, there is breeding ground for backsliding developments when the majority of citizens, civil society groups and political actors are not involved in RoL-promoting activities.

This insight brings us back to the governmental-driven nature of RoL backsliding where populist elements are used to oppose EU values, i.e. “populist constitutionalism”. It follows that *at least* one of the reasons illiberal governments were able to dismantle the RoL and initiate a process of backsliding is that liberal-constitutional values were not *sufficiently embedded* in society in the first place. A recent joint report of UNESCO and UNODC similarly indicates that where expectations that the RoL will be observed are widespread, politicians are forced to give effect to it²⁸³. This explains how it was possible for certain countries to backslide so quickly *despite* the RoL being formally institutionalised when backsliding took hold. The system could be dismantled not only because those in the position to make decisions were willing to change the law, but crucially, because those in the position to check them, allowed them to do so. As we will see in the next chapter, this can be confirmed in both Hungary and Poland.

At the basis of the EU’s response then is a very limited understanding of the role EU citizens play in promoting (or dismantling) EU values. This is witnessed by the fact that the measures suggested to address backsliding at the EU level are quite ineffective in fostering identification with EU values

²⁸⁰ Blokker P., *Populist Constitutionalism and Meaningful Popular Engagement*, The Foundation for Law, Justice and Society, Policy Brief, 2018.

²⁸¹ *Ibid.* p.6

²⁸² *Ibid.*

²⁸³ UNESCO and UNODC, *Strengthening the rule of law through education – A guide for policymakers*, 2019.

and spurring vigorous citizen engagement. As a result, even if hard mechanisms whip a country into shape, the problems of a fragile democratic system ingrained in wider society are left untouched.

The consequences are not hard to guess. First, there might be only temporary compliance with the RoL, with backsliding taking a different form in the future. Continuing instances of “peacock dance” compliance, *despite* infringement proceedings, seem to prove this point²⁸⁴. In this sense, hard-based measures offer a short-term solution, because they can “reset” backsliding advances but are unable to stop them. A counter-argument is that *timely* enforcement is instead able to circumscribe instances of RoL backsliding, nipping the issue in the bud before it becomes systemic. Seemingly, with a clear legal mandate and established violations (as identified in the previous chapter), all that is left to be done is looking at how the enforcement machinery can be strengthened. This reply fails to grasp the people-centred, *populist* logic of RoL backsliding. Illiberal governments do not exist in isolation. They require a support group which confers legitimacy to their position, i.e. voters²⁸⁵. While EU enforcement is concerned with procedural violations and remedies (e.g. harmonising laws to a RoL-standard or provide legal relief by way of compensation or legal reform), illiberal leaders’ play on a different, non-legal ground. They exploit their voters’ existing prejudices to create identifiable enemies²⁸⁶, which allows them to *legitimise* and pursue RoL dismantlement without significant opposition. Liberal-democratic institutions are fragile *because* illiberal governments can trade off values for political interests, not the contrary. And illiberal governments can trade off values for political interests *precisely* thanks to popular support. This paper then argues that at least *part* of the reason why such popular support is possible is due to the lack of societal embedment of the RoL in the society where backsliding takes place. And, as we shall see, that the limited care for this aspect is a major flaw in the EU’s enforcement-based response.

In a way, a preference for top-down, technocratic, legalist solutions was designed into the EU from its inception, ‘inscribed onto the genome of a project that was all about immunizing Europe against the sort of totalitarian abuses of political power that had ravaged the continent in the first half of the Twentieth Century’²⁸⁷. Even so, relegating values protection to EU institutional oversight glosses over issues that ought to play out in contested public grounds. This can be profoundly

²⁸⁴ Steinbeis M., *Watching the Peacock Dance*, Verfassungsblog, 22/05/2020, <<https://verfassungsblog.de/watching-the-peacock-dance/>> accessed 02/08/2020.

²⁸⁵ de Mesquita B. B., Smith A., *The Dictator's Handbook*, PublicAffairs, 2011.

²⁸⁶ Rosenfeld M., *op. cit.*.

²⁸⁷ Morlino L., Piana D., Sandulli A., Corkin J., *op. cit.*, p.8.

disenchanting for those who draw their identities from their attachment to the local, the particular, and the traditional and are without the tools to engage the EU's legal, secularising *modus operandi*²⁸⁸.

In this sense, mastering the “values” without the people themselves is as misleading as claiming to be the supreme interpreter of an identified “popular will”. In doing the former, the EU exacerbates a sense of powerlessness, where EU citizens experience EU values as something done to them, rather than as something they do²⁸⁹. It leads many Europeans to conclude that the EU does not work for them, and so triggers backlashes against its “values”. It has been argued that EU citizens have recently ‘become more cynical about the value of democracy as a political system, less hopeful that anything they do might influence public policy, and more willing to express support for authoritarian alternatives’²⁹⁰. FRA surveys also show that struggling households (making ends meet with difficulty, including people whose main income is unemployment benefits) are more likely to doubt judges’ ability to work free from government influence than household who make ends meet easily²⁹¹. In formerly agrarian societies such as Hungary and Poland, struggling households are also likely to emphasise religion, national pride, and respect for authority²⁹². These groups are extensively targeted by Fidesz and PiS, which were able to make a good diagnosis of existing problems in their societies, and could sometimes provide a good ‘recipe as to how [they could] be cured’²⁹³. In Poland for example, the PiS government set up generous benefit schemes for families with children which contributed to the increase of wages in the countryside²⁹⁴, lowered the retirement age²⁹⁵, raised the minimum wage²⁹⁶ and launched a plan to ‘re-Polonize’ the banking sector²⁹⁷. This social policy ‘gave a sense of dignity and respect to large segments of the society’²⁹⁸.

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ Foa S. R., Mounk Y., ‘The Danger of Deconsolidation’, in *Journal of Democracy*, July 2016, Vol. 27, No. 3.

²⁹¹ FRA, *What do Fundamental Rights Mean for People in the EU?*, Luxembourg, Publications Office of the EU, 2020, p.43.

²⁹² Inglehart R., Welzel C., *Changing Mass Priorities: The Link between Modernization and Democracy*, Perspectives on Politics, Vol. 8 no. 2, 2010, pp.551-567

²⁹³ Bodnar, *op. cit.*, p.651.

²⁹⁴ *Poland's Andrzej Duda rides wave of 'sacred tradition'*, BBC, 13/07/2020, <<https://www.bbc.com/news/world-europe-53389096>>, accessed 02/08/2020.

²⁹⁵ Fomina J., and Kucharczyk J., *Populism and Protest in Poland*, *Journal of Democracy* 27(4):58-68, October 2016, p.61.

²⁹⁶ Perlman H., *Poland to increase minimum wage for 2020, 2021*, Bloomberg tax, 16/09/2019, <<https://news.bloombergtax.com/payroll/poland-to-increase-minimum-wage-for-2020-2021>> accessed 02/08/2020.

²⁹⁷ *Polish president signs bill on suspending retail tax*, Radio Poland, 21/12/2016. <<http://www.thenews.pl/1/12/Artykul/285678,Polish-president-signs-bill-on-suspending-retail-tax>> accessed 02/08/2020.

²⁹⁸ Bodnar, *op. cit.*, p.651.

Illiberal leaders can thus easily exploit the wedge between top-down legalistic EU oversight of values and popular disenchantment. They can reframe an enforcement-based response as undertaken by “remote” Eurocrats and European judges, telling “us” what to do, sometimes contributing to a misguided perception that RoL violations are a ‘Central European problem’²⁹⁹. Therefore, even an *effective* timely enforcement would do a lasting damage to EU institutions, not only in backsliding member states but in any corner of the Union where Euroscepticism boasts a smidgeon of political voice.

Furthermore, effective enforcement would have to involve substantial fines. This is because the costs of compliance for backsliding member states are radically different than fining a country which has had technical obstacles or sloppy implementation³⁰⁰. When the cost of compliance is nothing short of a regime change (i.e. embracing accountability mechanisms, judicial independence and the possibility of losing elections), the country will be paying ever growing amounts. Despite pro-EU attitudes being still high in Poland and Hungary, sanctions could alienate member state populations targeted (a phenomenon already observed in 2000 during the Austrian crisis³⁰¹) and the punishment of what were originally democratically elected parties would certainly not entice popular opinion. Suspending funds would then risk driving poorer member states slowly out of the EU and into the arms of other powers with little interests in democracy, human rights or the RoL, like China³⁰². Eventually enforcement of EU values would triumph at the price of the EU itself, following what Carl Schmitt described as the ‘tyranny of values’ where, in order to assert themselves, values annihilate everything around them³⁰³.

However (and worse still), as economic forecasts for Hungary and Poland remain positive and labour relatively cheap compared to neighbouring countries (e.g. Orbán has secured Hungary’s position in Europe as a low-cost production site for major companies such as Daimler and Audi³⁰⁴), member states stand to lose a great deal as a result of taking a value-laden position, which makes it

²⁹⁹ Bond I., Gostyńska-Jakubowska, *op. cit.*

³⁰⁰ Kochenov, D., *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, Polish Yearbook of International Law, Vol. 33 (2013), pp.145-170, p.168.

³⁰¹ Dani M., *Opening the Enforcement of EU Fundamental Values to European Citizens*, Verfassungsblog, 07/04/13, <<https://verfassungsblog.de/opening-the-enforcement-of-eu-fundamental-values-to-european-citizens/>> accessed 02/08/2020.

³⁰² Benner T., and Weidenfeld J., *Europe, Don’t Let China Divide and Conquer: Cutting Funds to Countries that Disregard EU Values will Push Them into China’s Arms*, Politico Europe, 20/04/18, <www.politico.eu/article/europe-china-divide-and-conquer/> accessed 02/08/2020.

³⁰³ Schmitt C. [1979], *The Tyranny of Values*, Plutarch Press, 1996.

³⁰⁴ Rech W., *op. cit.*, p.337.

easier for them to turn a blind eye to RoL backsliding. While RoL backsliding undoubtedly damages the EU economy, allowing or forcing backsliding states to leave the EU would damage it even more. Fidesz and PiS thus can act fearlessly on the European stage. Referring to EU Commissioner Frans Timmermans' work on the RoL in Poland, Polish former Foreign Minister Waszczykowski said that 'this activity of Mr. Timmermans is not taken seriously by the ratings agencies, by investors or by business people'³⁰⁵. Thus, a future lack of enforcement by levying insurmountable fines would be barely surprising. It would then not be amiss to say that, even if governed less by a lack of political incentives, an enforcement-based response is prone to a lack of *economic* incentives to protect the RoL against illiberal governments.

The change from 'principles', as in previous versions of Treaties, to 'values' in Article 2 TEU would reflect the awareness that, at this point, the Union clearly has ends which are no more merely economic³⁰⁶. The EU however essentially started as an economic integration project and "values" were simply 'not part of the DNA' of the Union for a long time³⁰⁷. The European Communities of 1951 did not have a catalogue of fundamental rights and did not seek democratic input comparable to the national level³⁰⁸. The idea was that economic interdependence would trump all interstate contentions. Yet this inevitably made interstate contentions beyond those flowing from economic self-interest hardly possible. One must only recall that until recently the legal status of the RoL *qua* EU value was legally uncertain. EU law has simply not been *founded* on EU values. There is a whole different set of principles that actually matter: supremacy, direct effect, and autonomy of EU law³⁰⁹. Operating together, they can set aside human rights law³¹⁰, UN constraints³¹¹ as well as member states' constitutional provisions³¹². This impression is aggravated by the fact that it has been shown that the

³⁰⁵ Karnitschnig M., *Poland has a Problem – With Frans Timmermans*, Politico, 29/05/2016, <<http://www.politico.eu/article/poland-has-a-problem-with-eu-brussels-first-vice-president-frans-timmermans/>> accessed 02/08/2020.

³⁰⁶ For a detailed argument on this, see Cassese S., *The "Constitutional traditions common to the member states" of the European Union*, Rivista trimestrale di Diritto Pubblico, LXVII, 4-2017.

³⁰⁷ Weiler J., *In the face of the crisis: input legitimacy, output legitimacy and the political messianism of European integration*, Journal of European Integration Vol. 34, 2012, p.837.

³⁰⁸ *Ibid.*

³⁰⁹ Craig P., de Búrca G., *EU Law: Text, Cases, and Materials*, Seventh Edition, Oxford University Press, July 2020, particularly chs. 10 and 11.

³¹⁰ Judgment of the Court (Grand Chamber) of 3 September 2008. Yassin Abdullah Kadi and Al Barakat International Foundation v Council of the European Union and Commission of the European Communities.

³¹¹ Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

³¹² Judgment of the Court (Grand Chamber), 26 February 2013, Stefano Melloni v Ministerio Fiscal.

progress of accession countries’ in meeting the standards for entering the EU was measured by detailed assessments of economic readiness for the single market, while the analysis of whether democracy, human rights, and the RoL were firmly in place was left to rather impressionistic reports³¹³. We may then wonder whether arguing that in the face of RoL backsliding the EU ‘may be unable to function at all’³¹⁴, that ‘the whole European project (...) will eventually break’³¹⁵ or that ‘Europe itself is destined to vanish’³¹⁶ are convincing arguments after all. Surely a failure to defend its values would contradict the EU’s self-understanding as a liberal-democratic peace project³¹⁷. But if the EU is unable or unwilling to protect itself as a value community, it probably *will not* cease to exist as an economic community.

We may therefore conclude that an enforcement-based response, *in the best-case scenario*, is likely to leave the situation at standstill, that is, leave backsliding member states on the path to authoritarianism. This should remind EU institutions that protection of EU values requires more than offering economic prosperity or threatening economic sanctions by punishing infringements of specific legal norms.

By and large, the EU’s response to RoL backsliding has been swinging between the two extremes of *laissez-faire* blind optimism in democratic consolidation and enforcement-based value compliance. Just as blind optimism reflects an inability to accept RoL backsliding, so enforcement-based responses signal an incapacity to deal with it appropriately.

This paper argues for a third way. In light of what has been said, punitive actions taken by EU institutions matter greatly as they can set and enforce limits to what backsliding member states can do, but they are unable by themselves to promote societal embedment of EU values, and in particular of the RoL. If the battle against backsliding is framed entirely within this field of action, then the CJEU inevitably figures as the “last soldier standing”. The enforcement-based EU response has mostly revolved around what legal process the EU had at its disposal, rather than working upward from where

³¹³ Kochenov D., *EU Enlargement and the Failure of Conditionality: Pre-accession*, Kluwer Law International, 2008.

³¹⁴ Scheppele K. L., Kelemen R. D., *op. cit.*, p.415

³¹⁵ *Ibid.*

³¹⁶ *The future of European Union in Frans Timmermans vision*, Il Trentino, 02/06/2018, <<https://www.ufficiostampa.provincia.tn.it/Comunicati/The-future-of-European-Union-in-Frans-Timmermans-vision>> accessed 02/08/2020.

³¹⁷ von Bogdandy A., *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, 2019, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-14, p.8.

and how locally driven momentum accumulates. In this way, protection of the RoL has not been translated into a citizen-enhancing principle and the EU has reduced itself to a “policeman” of values in the sphere of legal enforcement. Its response can only be long-term effective to the extent that it latches onto the primary agency of domestic forces. Value embedment requires a deeper, context-dependent engagement with local realities. This approach brings us away from clear cut solutions, but this is exactly what a long-term EU-promotion of values requires.

This approach is discussed in the next chapter.

4

FROM POLICING TO PROMOTING THE RULE OF LAW

‘It should not be forgotten that the effective realisation of values such as democracy and the rule of law depends on the critical mass of institutional actors, women and men enforcing them at national level with their own integrity.’³¹⁸

Having considered the shortcomings of an EU enforcement-based, top-down response to RoL backsliding, the goal of this chapter is to show that civil society organisations (CSOs) are *key* to the EU’s strategy to contrast RoL backsliding. The chapter is divided into two parts.

In the first section, out of the civil society sphere, the chapter singles out CSOs which have a unique role in promoting RoL societal embedment. Following 1989, absence of civic engagement in politics and policy-making and the transition from communist rule made liberal-democratic institutions hardly embedded in Hungarian and Polish societies, creating breeding ground for illiberal leaders to dismantle the RoL. Consequences of this can be noticed today, as CSOs face shrinking civic spaces driven by illiberal governments, and a lack of awareness of their work in the public sphere.

With these issues in mind, in the second part it is argued that EU efforts to address RoL backsliding have been inadequate in fostering CSOs. Recommendations for further EU action in this direction are therefore laid out.

4.1 CIVIL SOCIETY ORGANISATIONS AS CENTRAL ACTORS

Civil society is a broad term defined as a set of organizational or individual activities that (1) are private (i.e. constitute individual or collective action outside the sphere and control of government), (2) pursue a public purpose (i.e. serve the broader community and are not meant primarily to generate

³¹⁸ Polakiewicz J., Sandvig J., *Council of Europe and the Rule of Law*, Journal of Civil and Legal Sciences, 2015, p.6.

profit or create something of value to the persons undertaking the activities) and (3) are free (i.e. are pursued without compulsion)³¹⁹.

There are several reasons why a bottom-up approach to address RoL backsliding needs to involve civil society. A strong and diverse civil society is internationally acknowledged to be an indispensable component of any democracy³²⁰. Civil society can hold institutions to account and promote transparency, raise awareness of societal issues, bring expert knowledge to shape policymaking and encourage citizen engagement³²¹. The role of civil society is all the more enhanced where RoL backsliding takes place. The systemic nature of RoL backsliding entails that, in addition to illiberal governments openly opposing the RoL, governmental control extends over a variety of actors who normally keep the government in check. These include local institutions³²², media outlets³²³ and of course, the (no more independent) judiciary³²⁴. Civil society is therefore in the unique position to support RoL societal embedment without being under direct governmental interference.

All civil society actors can well play a part in ensuring a place for the RoL in the public debate. For reasons of space, the scope of this chapter is limited to CSOs. Nevertheless, this paper *also* calls for further research on the role other civil society actors play in promoting the RoL, such as informal communities of volunteers, the academic world, religious and faith communities, trade unions and businesses, to name a few³²⁵.

³¹⁹ Salamon M. L., Sokolowski W., *The Size and Scope of the European Third Sector*, TSI Working Paper No. 12, Seventh Framework Programme, European Union. Brussels: Third Sector Impact, 2016, pp.2-3.

³²⁰ UN, Office of the High Commissioner for Human Rights, *Civil society space and the United Nations Human Rights System*, 2014.

³²¹ Schwab K., *The Future Role of Civil Society*, World Economic Forum, 2013, <http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf> accessed 02/08/2020.

³²² Havlíček P., *The EU's Lessons for Supporting Civil Society in Member States*, The German Marshall Fund of the United States, No. 8, June 2020.

³²³ Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, *Report following her visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, Strasbourg, 21 May 2019, p.15.

³²⁴ European Parliament, Press Release, *Rule of law in Poland and Hungary has worsened*, 16/01/2020.

³²⁵ Jezard A., *Who and what is it civil society?*, World Economic Forum, 23/04/2018, <<https://www.weforum.org/agenda/2018/04/what-is-civil-society/>> accessed 02/08/2020.

4.1.1 Promoting rule of law societal embedment

The European Economic and Social Committee, an EU body with the purpose of acting as a ‘a bridge between Europe and organised civil society’³²⁶, defines CSOs as ‘the sum of all organisational structures whose members have objectives and responsibilities that are of general interest and who can act as mediators between public authorities and the public’³²⁷. From this definition it can be inferred that, ideally, governments turn to CSOs to discuss issues with the public, which in turns helps the public turning to the government to influence public policy. Thus, CSOs can serve as a “transmission belt” for the demands of citizens and the political apparatus³²⁸. Particularly in backsliding countries, where the bridge between voters’ interests and the people in power ‘is either seriously threatened or broken’³²⁹, CSOs essentially keep civic engagement and civic participation in policymaking alive. CSOs are uniquely equipped to connect to society thanks to networks established with local communities and insights developed into their problems over time³³⁰. Thus, they can go beyond the RoL as it is “in the books” and survey how it is experienced locally³³¹. For example, CSOs have demonstrated that informal distribution of power in backsliding states – such as outsourcing state functions to other institutions – remain extremely influential for the stability of illiberal governments since they are vital to reduce accountability and strengthen patronage networks³³². These informal networks are much more difficult for international observers to identify, who consequently tend to underestimate their prevalence³³³. Thus, CSOs have a unique expertise that combines both analysing systemic changes in legal systems and assessing how such changes weaken RoL protection at the local level.

³²⁶ European Economic and Social Committee (EESC), A bridge between Europe and organised civil society, 2009, <<https://www.eesc.europa.eu/resources/docs/eesc-2009-01-en.pdf>> accessed 02/08/2020.

³²⁷ EESC, *The future evolution of civil society in the European Union by 2030*, December 2017, CES/CSS/01/2017, p.3.

³²⁸ Zimmer A., Hoemke P., *Riders on the Storm. TSOs and the European Level of Governance - Contested Terrain for TSOs!*, TSI Working Paper No. 11, Seventh Framework Programme, European Union, 2016, p.10.

³²⁹ Kochenov D. and Bard P. *op. cit.*, p.168.

³³⁰ Alemanno A., Ananicz S., *Uncivil cut: the EU budget and civil society*, Social Europe, 16/07/2020, <<https://www.socialeurope.eu/uncivil-cut-the-eu-budget-and-civil-society>> accessed 02/08/2020.

³³¹ On the idea that locals have a concrete knowledge of local problems, see de Feyter K., ‘Globalisation and human rights’ in (eds.) Gómez Isa F., de Feyter K., *International Human Rights Law in a Global Context*, 2009, pp.51-96.

³³² Pardavi M., *Civil society protecting the rule of law: The View from Hungarian Helsinki Committee*, Reconnect Webinar, 05/02/2020.

³³³ *Ibid.*

CSOs can oppose RoL backsliding in a variety of ways. CSOs can engage in monitoring of political behaviour, public protest and occupation of the public space³³⁴. They can also promote civic engagement and inform citizens about rights abuse and RoL issues (through training, campaigns and events)³³⁵. Together, all these elements may put significant constraints on illiberal governments' dismantlement of the RoL both by prompting forms of immediate resistance and, crucially, by fostering RoL societal embedment in society. This paper has identified the second element to be essential to counteract the erosion of the RoL in the EU, as it allows to turn backsliding around from the ground and for the long-term. Hence CSOs action is *key* to the EU's strategy to address RoL backsliding.

A broad concept like the RoL almost inherently lends itself to political instrumentalisation and to its own abuse³³⁶. Unsurprisingly, a recent Eurobarometer survey indicates that 56 percent of EU citizens are underinformed about the RoL³³⁷. Commentators have argued that the independence of the judiciary 'may seem less important' to people than other issues such as 'taxes, schools, retirement pensions or healthcare'³³⁸. People may have no personal experience regarding the work of courts or may think that it is 'about murderers and thieves'³³⁹ and thus may see no risks of them losing independence.

Marcin Matczak has brilliantly compared popular-based scepticism which lends support to populist RoL backsliding to the anti-vax movement³⁴⁰. Just as vaccination has potentially dangerous side-effects, so does the RoL, e.g. an independent judiciary could lead to unlimited discretionary powers and ostensibly apolitical judges may in fact be politically partisan³⁴¹. If vaccination and the RoL work, nothing spectacular happens – people are healthy and live in peace, there are 'no tanks on the streets', to the point that 'life can even seem a little boring'³⁴². Only an attentive cost-benefit

³³⁴ Blokker P., *Populist Constitutionalism and Meaningful Popular Engagement*, The Foundation for Law, Justice and Society, Policy Brief, 2018.

³³⁵ *Ibid.*

³³⁶ Palombella G., *The abuse of the rule of law*, Sant'Anna School of Advanced Studies, 03/03/2020, p.1

³³⁷ European Commission, Press Release, *Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement*, 17/07/2019, Brussels.

³³⁸ Bodnar A., *Commissioner for Human Rights Adam Bodnar: On the Anatomy of the Crime Against the Polish Judiciary*, Rule of Law in Poland, 20/02/2020, <<https://ruleoflaw.pl/commissioner-for-human-rights-adam-bodnar-on-the-anatomy-of-the-crime-against-the-polish-judiciary/>> accessed 02/08/2020.

³³⁹ Walker S., *Standing up for the 'real' Poland: how Duda exploited rural-urban divide to win re-election*, The Guardian, 18/07/2020. <<https://www.theguardian.com/world/2020/jul/18/andrzej-duda-poland-rural-urban-re-election>> accessed 02/08/2020.

³⁴⁰ Matczak M., *Poland's Rule of Law Crisis: Some Thoughts*, Hague Journal on the Rule of Law, (2019) 11, pp.407-410.

³⁴¹ *Ibid.*

³⁴² *Ibid.*, p.409.

analysis reveals that the consequences of giving up vaccination and the RoL would be far worse than any side effects. If people are told that information about side effects has been hidden from them by doctors or judges, they may think they have finally “discovered the truth” and develop an insecurity, a distrust, a determination to take control over their future³⁴³. And if side effects are highlighted often enough, the benefits being inconspicuous, people can conclude that neither vaccination, nor the RoL are indispensable. Perhaps, their reasoning goes, ‘if we stop vaccinating ourselves (and abandon the RoL), nothing bad will happen, as nothing bad is happening now, and we will not have to worry about any side-effects. The problem with this reasoning is obvious: nothing bad is happening now precisely *because* both vaccination and the RoL are working as intended’³⁴⁴.

It is therefore a great challenge to speak about the dangers of RoL backsliding, inasmuch as a significant part of it requires activating the citizens’ imagination and moral compass. By bringing the discussion of the RoL away from “high-level” institutional settings, by moving from a legal discourse to storytelling of people’s experiences communicated through traditional or social media³⁴⁵, by raising awareness of RoL backsliding using everyday facts, CSOs are well-suited to undertake the task of informing citizens about their rights and value abuse taking place and ultimately hammer home that it is in their interest to protect the RoL. Additionally, they may encourage members of the public to join CSOs and carry out voluntary work with them. CSOs can thus enable local communities to influence local and regional decision-makers and take the matter in their own hands. They are and can form what are referred to in the literature as ‘change agents’: actors who are strongly committed to causing and steering processes of change³⁴⁶.

4.1.2 *The lack of civic engagement in backsliding countries*

If a lack of societal embedment of EU values is crucial to the development of RoL backsliding, and if CSOs are vital to promote such embedment, then we should expect CSOs to have a hard time in backsliding countries. This hypothesis is corroborated by historical as well as contemporary data.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*, p.409.

³⁴⁵ Setniewska D., *Raising the profile of independent civil society through social media, a coalition-building experience*, European Civic Forum (ed.), *Activizanship*, Third edition, pp.16-17, Virtual copy in possession of author.

³⁴⁶ Magen A., Morlino L., ‘Methods of Influence, Layers of Impact, Cycles of Change: A Framework for Analysis’, (eds.) Magen A., Morlino L., *International Actors, Democratization and the Rule of Law. Anchoring Democracy*, London: Routledge, pp.27-52.

Both Hungary and Poland, after moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it between the XIX and the XX century³⁴⁷, experienced a long takeover from communist parties (roughly from 1945 till 1989) followed by an onset of democratisation³⁴⁸. Commentators have illustrated how these democratisation processes (such as constitutional formation) were characterised by first, an elitist approach and second, a lack of widespread support for liberal-democratic tenets³⁴⁹, where preference was given to the satisfaction of the basic needs of the populace and general economic effectiveness over mass civic and political engagement³⁵⁰.

In Poland, initial grass-rooted local civic initiatives grew out of the anti-communist opposition. This was the case for the “Solidarity”³⁵¹ mass movement of the early 1980s, often presented as igniter for the events that culminated in the socio-political transformation that began in 1989³⁵². However, the experience of “Solidarity” was not taken as the basis for changes introduced in Poland in the 1990s. As a result, it did not build any models of action. The so-called “Civic Committees”, a continuation of the “Solidarity” movement, could have constituted good background for being reshaped into local version of CSOs, but often these groups fell apart at the beginning of the 1990s³⁵³. After 1989, Poland closely followed international bodies recommendations as part of its transition from communism. However, the implementation of recommendations was not ‘subject of a deep discussion in society, beyond interested groups such as lawyers or judicial associations’³⁵⁴. There was no significant public debate concerning the importance of democratic standards for the daily life of citizens and consequently the majority of international instruments the country was implementing were unknown to opinion-makers and ordinary citizens³⁵⁵.

Likewise, in post-communist Hungary, there was an almost ‘total absence of popular participation in the constitution-making process’ and subsequent constitutional amendments consisted

³⁴⁷ Halmai G., *Second-Grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope with Illiberal Member States*, Quaderni costituzionali, n.2, June 2018.

³⁴⁸ *Ibid.*

³⁴⁹ Kelemen R. D., Halmai G., *From Democratic Backsliding to Dictatorship in the Time of Corona?*, Reconnect Webinar, 8 April 2020.

³⁵⁰ Preuss U., *Constitutional Revolution. The Link between Constitutionalism and Progress*, Humanities Press, 1995, p.3.

³⁵¹ In Polish, *Solidarność*.

³⁵² Pazderski F., *Understanding civil society’s structural challenges in the Visegrád region to build trust, the Polish case*, European Civic Forum (ed.), *Activizanship*, Third edition, pp.10-15, Virtual copy in possession of author.

³⁵³ *Ibid.*

³⁵⁴ Bodnar, *op. cit.*, p.660.

³⁵⁵ *Ibid.*

of agreements between a few political parties rather than being grounded in consensual politics involving the entire political spectrum and political debate³⁵⁶.

As a consequence, not only for decades, under communist regimes, people lived in non-transparent societies, governed by centralised powers with little accountability or responsiveness from public institutions. Even during democratisation processes, the rise of democratic institutions was hardly *embedded* in wider society. Some have pointed to a resulting ‘social vacuum’: a strong identification with primary groups (like family and close friends) and the nation, with low or no identification with intermediary bodies³⁵⁷.

Additionally, the emergence from communism has remained to this day a lasting bone of contention³⁵⁸. Despite the steep rise of living standards since 1989, in both countries the transition from communism to liberal democracy did not benefit everyone³⁵⁹. Unequal access to public services and infrastructure with a divide between rich cities and rural areas remains a problem³⁶⁰. Those who benefited least felt cheated both by the new distribution mechanisms and by the uneventfulness of the transition to democracy, testified by a lack of criminal investigations of communist officials which carries historical legacies on the behaviour of legal personnel up to this day³⁶¹. This should stress that an apparently “legal” issue such as RoL backsliding encroaches onto a highly divisive, politicised and emotionally charged area.

In what were countries with a strong emphasis on a liberal constitution grounded in EU values such as Hungary in 2010 or Poland in 2015, the emergence of Fidesz’s and PiS’s illiberalism reflects deeper problems that have to do with an absence of opportunities for identification with and participation in politics and policymaking and the transition of these countries from the communist rule. Against this background, the institutions of liberal democracy were insufficient to protect

³⁵⁶ Arato A., Miklósi Z., ‘Constitution Making and Transition Politics in Hungary’, in (eds.) Miller L. E., Aucoin L., *Framing the State in Times of Transition, Case Studies in Constitution Making*, April 2010, ch.13, p.352.

³⁵⁷ Frentzel-Zagorska J., ‘Civil Society in Poland and Hungary’, *Soviet Studies*, Vol. 42, No. 4 (Oct., 1990), pp.759-777.

³⁵⁸ Blokker P., *Democracy, rule of law and authoritarian populism: a postcard from Europe*, Diritti Comparati Webinar, 10/06/2020.

³⁵⁹ Matczak M., *op. cit.*, p.408.

³⁶⁰ Walker S., ‘*This is the golden age: eastern Europe’s extraordinary 30-year revival*’, The Guardian, 26/10/2019, <<https://www.theguardian.com/world/2019/oct/26/this-is-the-golden-age-eastern-europes-extraordinary-30-year-revival>> accessed 02/08/2020.

³⁶¹ *Supra*, note 358.

themselves once a critical mass of people was willing to dispense with them and populist leaders could translate their emotions into political movements.

In Hungary, Fidesz mobilised populist sentiments, drawing support predominantly from the rural, socially conservative, religiously oriented, nationalist and anti-communist parts of Hungarian society³⁶². Liberalism and the RoL were identified as Western imports, foreign interests and “elite” upper-class ideas³⁶³. It was possible to channel popular discontent ‘into discontent with a constitution that seemed to legitimate this dreadful state of affairs [of a malfunctioning democracy and economy]’³⁶⁴. Fidesz could then engage in constitution-making through a hasty and largely non-participatory drafting of the new Fundamental Law in 2011, rushing the constitution through Parliament without significant citizenship participation³⁶⁵.

Similarly, in Poland, ‘the government was (...) taking advantage of a low level of civil (...) awareness’ of its reforms which eventually led to centralisation of power and political subordination of the judiciary³⁶⁶. Apart from judges, neither key political players nor the wider public took the constitution for granted, nor were they willing to strongly defend such institutions in cases of counter-constitutional action by populists³⁶⁷.

4.1.3 Weak CSO sector in backsliding countries

The absence of civil engagement left an imprint on the level of civic activism and inevitably on the state of CSOs in backsliding countries. Here, comparative research shows that CSOs are weakly rooted in local communities and that they are facing difficulties ‘because the sector is limited by a lack of public awareness and a lack of trust in its professionalism and the quality of its services.’³⁶⁸ In Poland and Hungary, CSOs depend heavily on donors or public funding and there is little philanthropic

³⁶² Tóka G., and Popa S., ‘Hungary’, in Berglund S., et al. (eds.), *The Handbook of Political Change in Eastern Europe*, Edgar Elgar, 2013.

³⁶³ Bozóki A., *op. cit.*, pp.649-663.

³⁶⁴ Scheppele K. L., ‘The social lives of constitutions’, in (eds.) Blokker P., and Thornhill C., *Sociological Constitutionalism*, Cambridge University Press, 2017, p.60.

³⁶⁵ László R., *Dismantling direct democracy: Referenda in Hungary*, Friedrich Ebert Stiftung, 19/01/2017, <<https://www.fesconnect.org/reading-picks/dismantling-direct-democracy-in-hungary/>> accessed 02/08/2020.

³⁶⁶ Bodnar, *op. cit.*, p.650.

³⁶⁷ Zimmer A., Pahl, B., *Learning from Europe: Report on third sector enabling and disabling factors*, TSI Comparative Report No.1, Seventh Framework Programme, European Union, 2016, p.15.

³⁶⁸ *Ibid.*

culture³⁶⁹. CSOs should have active people behind them ready to participate in their work either with their time, with their voice or with their money, whereas often they are operated by small groups of professionals or committed persons³⁷⁰. This invites a comparison with countries with higher citizen participation in policy-making, a stronger CSOs presence and a stronger RoL in place³⁷¹.

In addition to being fragmented and lacking deep roots in local communities, CSOs in backsliding countries have witnessed in recent years the attempt of illiberal governments to narrow down their space for action, referred to as ‘shrinking civic space’³⁷². Given the role of CSOs in promoting accountability of the executive, hostility from illiberal governments is almost inevitable. Decreased public consultation with CSOs, restrictive legislation limiting CSO functioning, undue state interference in CSOs internal matters, smear campaigns to sow distrust for CSOs in the public discourse and failure of the state to provide protection from interference by third parties are particularly acute problems in backsliding countries³⁷³. Hungarian law for instance prescribes that any CSOs receiving foreign support above the amount of 23.200 EUR per year must notify national courts³⁷⁴. The respective organisation is labelled as an ‘organization supported from abroad’, which has to be indicated at the entity’s website, press releases and publications. EU funding is exempted, but only if distributed by a governmental budgetary institution. The Polish government has recently announced a very similar provision³⁷⁵. Even when unenforced, these laws create an atmosphere of intimidation and insecurity among CSOs. Unfortunately, the low public awareness of CSOs contributes to making them vulnerable to such pressure.

³⁶⁹ United States Agency for International Development, *2018 Civil society organization sustainability index Central and Eastern Europe and Eurasia*, September 2019, pp.102-111&168-177.

³⁷⁰ Hungarian Environmental Partnership Foundation (Ökotárs), *On the way to community organizing*, <https://www.okotars.hu/sites/default/files/okotars_alapitvany_on_the_way_to_community_organizing.pdf> accessed 02/08/2020.

³⁷¹ For example, see a study on Swedish civil society in Wijkström F., *The Role of Civil Society. The Case of Sweden in International Comparison*, paper presented at the 1st International Korean Studies Workshop on ‘Civil Society & Consolidating Democracy in Comparative Perspective’, June 2004. Sweden usually scores very high in RoL performance, see <<https://worldjusticeproject.org/rule-of-law-index/country/2020/Sweden/>>.

³⁷² Negri G., *How European civil society is pushing back against democratic erosion*, Carnegie Europe, 12/03/2020, <<https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254>> accessed 02/08/2020.

³⁷³ *Ibid.*

³⁷⁴ Act LXXVI of 2017 on the transparency of foreign-funded organisations, <<https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>> accessed 02/07/2020.

³⁷⁵ *Polish government considers law forcing NGOs to declare foreign funding*, Reuters, 11/05/2020, <<https://www.reuters.com/article/poland-ngos/polish-government-considers-law-forcing-ngos-to-declare-foreign-funding-idUSL8N2CT53C>> accessed 02/08/2020.

Does this signal that the “will of the people”, to say it with the populist, has turned against CSOs? Evidence reveals this is not the case. A recent study concerning the attitudes of Hungarians towards CSOs shows that seven out of ten Hungarians would support CSOs³⁷⁶. Two-thirds of the respondents argue that CSOs should call attention to the errors made by the government³⁷⁷. Considering the ambiguous relationship between the current government and CSOs, this view is surprisingly shared by 60 per cent of pro-government voters. The study also shows that the concept of “CSO” is rather vague in the mind of respondents, as only every third respondent was able to name a national CSO and even fewer a local one³⁷⁸. This resonates with the finding that the majority of Hungarians who do not help CSOs justify it with little knowledge about CSOs and their respective work³⁷⁹.

Equally, in Poland, while almost 60 per cent of Polish citizens declare trusting CSOs³⁸⁰, it has been shown that people often do not understand what is meant by terms such as “CSO”, “NGO”, or “non-profit” and it was found that the sector is associated with helping children or working on health issues, but not necessarily with democracy³⁸¹.

While these findings may indicate a high level of polarisation in these societies (so that, when CSOs are attacked by the ruling party, the part of the society opposing the government stands firm behind independent civil society), they also signal, rather than a principled distrust towards CSOs, a lack of awareness and knowledge in society of what they do. In other words, citizens are generally more positive than negative towards CSOs, but they know little about it.

When civic awareness *is* awakened, examples of successful action to counter illiberal governments and specifically RoL backsliding in both countries are copious. In Hungary, the coalition *Civilizáció* emerged in early 2017 specifically to oppose government plans to stifle foreign funding for CSOs³⁸². About thirty large civic organizations started to meet to build common responses, with an unprecedented level of cooperation in the country among different parts of civil society. Indeed, the

³⁷⁶ *Civilizáció & Political Capital, Civil Szervezetek, Társadalmi Megírélése, Kutatási Jelentés*, February 2020, [in Hungarian] https://politicalcapital.hu/pc-admin/source/documents/civil_szervezetek_tarsadalmi_megitelese_kutatasi_jelentes_20200220.pdf?fbclid=IwAR2UYn0TeP-8q1WedY4zRDpXEtKhG2oD1dV9i01xOoQfVVSqy5bB7QcwQyA accessed 02/08/2020.

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

³⁸⁰ Pazderski F., *op. cit.*

³⁸¹ Setniewska D., *op. cit.*

³⁸² See <https://icscentre.org/wp-content/uploads/2020/04/20-04-09-Civilisation-Hungary.pdf> accessed 02/08/2020.

aim was not only to deepen coalitions among various CSOs but also to broaden connections among CSOs, citizens and smaller community groups outside urban centres³⁸³. The coalition organized several major actions, such as street demonstrations drawing thousands of people in Budapest and submitted a joint petition to the Hungarian Constitutional Court to challenge the government’s measures³⁸⁴.

In Poland, massive protests in November 2017 caused the President to veto two legislative provisions concerning the judiciary³⁸⁵. A PiS-sponsored smear campaign against civil society prompted a host of organizations to form a coalition to protect the civic sector. In 2018, the coalition launched a campaign (named “To działa” or “It works”) to win over citizens as allies against increasingly repressive state authorities³⁸⁶. The campaign shows the role and the impact CSOs have on people’s lives, creating focus groups in different villages and cities across Poland.

These are meaningful examples of attempts by CSOs to address the issue of RoL backsliding by consolidating the value of the RoL within (and crucially *with*) Polish and Hungarian societies. To promote the RoL as a *value* allows to entrench stalwart opposition, if not against illiberal governments *per se*, at least against backsliding on EU values, preventing that a lack of popular awareness triggers the populist strategy of channelling popular discontent against the RoL. The contrast between this approach and the EU’s top-down enforcement-based response to RoL backsliding should have been by now made clear. Accordingly, in shifting its approach *from protection to promotion* of the RoL, the EU can have a paramount role in fostering CSOs’ action. This will be shown in the next section.

4.2 THE EU’S SHORTFALLS IN PROMOTING CSOS AND RECOMMENDATIONS

Despite civil society policy being primarily a member state competence, i.e., national governments are free to design and implement their own approaches vis-à-vis civil society in their countries³⁸⁷, Article 11 TEU gives the EU a legal mandate to support CSOs. It states that EU bodies ‘shall, by appropriate means, give citizens and representative associations the opportunity to make

³⁸³ *Ibid.*

³⁸⁴ Hürriyet Daily News, Hungarians march against crackdown on universities, NGOs, 22/05/2017, <<https://www.hurriyetdailynews.com/hungarians-march-against-crackdown-on-universities-ngos--113398>> accessed 02/08/2020.

³⁸⁵ *Fresh Poland protests over judiciary reform*, BBC, 24/11/2017, <<https://www.bbc.com/news/world-europe-42116064>> accessed 02/08/2020.

³⁸⁶ See the campaign’s website, [in Polish] <<http://www.todziala.org/>> accessed 02/08/2020.

³⁸⁷ Mora V., *Important Allies - Why Does the EU Need to Do More for Civil Society?*, Visegrad Insight, <<https://visegradinsight.eu/important-allies-civil-society-central-europe/>> accessed 02/08/2020.

known and publicly exchange their views in all areas of Union action'³⁸⁸, while prescribing 'an open, transparent and regular dialogue with representative associations and civil society'³⁸⁹.

As argued in the previous chapter, in order to stimulate a long-term, effective response to RoL backsliding, it is crucial to bring about societal embedment of the RoL. As argued in the previous section, civil society and in particular CSOs play a pivotal role in this. CSOs address a lack of awareness in society and harness popular dialogue with an outreach and an effectiveness unattainable by the EU's RoL protection mechanisms. It is crucial that the EU recognises this. Regrettably, this paper found that the role of the EU in fostering civil society, and in particular CSOs, as a principal ally in addressing RoL backsliding has received relatively little space compared to "punitive" measures against backsliding countries, both in the relevant literature and in the EU's plans for future action.

In truth, the role of CSOs for the enhancement of the RoL has been recognised both at the international³⁹⁰ and at the EU level³⁹¹. In its "blueprint", the Commission *did* acknowledge the challenge 'to foster a rule of law culture in the general public', asking the question of how the 'EU [can] best encourage key networks and civil society' and 'develop grassroots discussions on rule of law issues'³⁹². In the same document, the Commission additionally pledged to 'make full use of funding possibilities for civil society (...) supporting the strengthening of a rule of law culture'³⁹³. The creation of a 'rule of law culture' was even one of the three 'pillars' of the blueprint³⁹⁴. Notwithstanding this, translating these questions and commitments into practice has been, at best, a slipshod attempt revealing a discrepancy between what is aimed for and the practice, so that it appears that the EU is headed in a different direction.

In the following the EU's shortfalls in this regard will be outlined, together with recommendations as to the way forward. Three aspects will be considered: EU funding to CSOs, EU platforms for CSOs and CSOs' business models.

³⁸⁸ Article 11(1) TEU.

³⁸⁹ Article 11(2) TEU.

³⁹⁰ UN, Human Rights Council, Nineteenth session Agenda item 3, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, A/HRC/RES/19/36, p.4.

³⁹¹ European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, 17 July 2019, COM(2019) 343 final.

³⁹² *Ibid.* p.6.

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

4.2.1 EU funding to CSOs

Generally, external funding is crucial for CSOs’ functioning because CSOs do not make any profit or their revenues are insufficient³⁹⁵. Particularly in backsliding countries, as shown above, as illiberal governments’ aim at “shrinking civic space”, national funds are curtailed or hardly accessible and alternative financial sources are missing to compensate for the tense situation of the public purse. Therefore, international sources such as EU funds become the main monetary contribution to the growth of the sector on a sustainable basis. Unsurprisingly, CSOs in Hungary and Poland are increasingly turning to EU funds³⁹⁶. Most EU funding for CSOs is mediated through national governments³⁹⁷. When granting public funds to CSOs, illiberal governments often carry out procedural irregularities, privileging organisations with no previous track record of civic work over applicants with extensive relevant experience³⁹⁸. New government-supported CSOs are emerging to take advantage of this (government-organised non-governmental organisations, or GONGOs), which undercut CSOs’ legitimacy and sully their reputation³⁹⁹. Far from providing an argument against CSO funding, this point further underlines that the EU and CSOs need to cooperate, so that while infringement proceedings against mismanagement of funds could enforce a friendlier atmosphere for CSOs to survive, the survival of CSOs would concretely instil a ‘rule of law culture’.

The EU’s new budget package for 2021-2027, known as the Multiannual Financial Framework (MFF) has recently been approved⁴⁰⁰. This is the most important source of EU funding for CSOs⁴⁰¹. The bulk of the budget devoted to civil society is delineated in the MFF’s Rights and Values

³⁹⁵ EESC, *The future evolution of civil society in the European Union by 2030*, December 2017, CES/CSS/01/2017, pp.29-35.

³⁹⁶ *Ibid.*, p.30.

³⁹⁷ European Commission, *Funding opportunities for NGOs*, <[³⁹⁸ Pazderski F., *op. cit.*](https://ec.europa.eu/info/funding-tenders/how-eu-funding-works/who-eligible-funding/funding-opportunities-ngos_en#:~:text=NGOs%20working%20in%20these%20fields,an%20EU%20region%20or%20country.&text=The%20Creative%20Europe%20programme%20supports,audiovisual%2C%20cultural%20and%20creative%20sector.> accessed 02/08/2020.</p></div><div data-bbox=)

³⁹⁹ Youngs R., *New Directions for EU Civil Society Support: Lessons From Turkey, the Western Balkans, and Eastern Europe*, Carnegie Europe, 18/02/2020, p.15, <<https://carnegieeurope.eu/2020/02/18/new-directions-for-eu-civil-society-support-pub-81092>> accessed 02/08/2020.

⁴⁰⁰ European Council, *Conclusions on the recovery plan and multiannual financial framework for 2021-2027*, Brussels, 21/07/2020, <<https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>> accessed 02/08/2020, p.39.

⁴⁰¹ Pornschlegel S., *Countering shrinking spaces: Recommendations to support EU civil society*, European Policy Centre, Discussion paper, 11/06/2020, p.9.

Programme. The MFF budget approval involved a proposal from the European Commission, which had to be jointly discussed and agreed by the European Parliament and the Council⁴⁰². While the Parliament's proposal for the Rights and Values Programme in January 2019 was of €1.832 billion, the approved revised proposal cut it by more than half, to €841 million⁴⁰³. The severe economic fallout of the COVID-19 crisis arguably played a major role in this cut. However, "crisis" talk gave handy leeway for illiberal governments to push for money to be diverted to 'other priorities'⁴⁰⁴. Most alarmingly, the proposal seems to speak the mind of Hungarian President Orbán, who claimed '[l]et's resolve the economic problems, restart our economies, start creating jobs, then we can continue the rule of law debates'⁴⁰⁵. In light of what this paper has argued, cutting budget for CSOs is a glaring mistake. Rather than looking for savings in civil society promotion, the EU should boost its support for CSOs. As said earlier, when it comes to RoL backsliding, time is on the side of illiberal governments.

The MFF proposal also does not match what the EU spends on democracy promotion outside the EU. Its external policy counterpart, the European Instrument for Democracy and Human Rights, which provides funding for CSOs in neighbourhood countries, has a budget of €1.3 billion⁴⁰⁶. Once again, a certain optimistic belief emerges that value compliance inevitably consolidates with EU membership. The EU should remember that the RoL is 'realised through successive levels achieved in a progressive manner', so that 'full achievement of the Rule of Law remains an on-going task'⁴⁰⁷ and has to be considered a never-ending aim of the European integration rather than an acquired precondition for admitting new members. The EU's external policy, pledging to promote externally the same values it cherishes internally⁴⁰⁸, is simply unconvincing when the EU is unable or unwilling to protect the very same values within itself. A first recommendation to EU bodies then is to increase funding for CSOs. Should the MFF remain in its present condition, the EU should urgently seek

⁴⁰² Fact Sheets on the European Union, *The budgetary procedure*, <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.5.pdf> accessed 02/08/2020.

⁴⁰³ *Supra* note 400, p.39.

⁴⁰⁴ Youngs R., *op. cit.*, p.3.

⁴⁰⁵ Bayer L., *No EU budget if rule of law discussed, Orbán says*, Politico, 10/07/2020, <<https://www.politico.eu/article/no-budget-if-rule-of-law-discussed-orban-says/>> accessed 02/08/2020.

⁴⁰⁶ Pornschlegel S., *op. cit.*

⁴⁰⁷ Venice Commission, *Rule of Law Checklist*, Strasbourg, 18/03/2016, Study No. 711/2013, Council of Europe (CDL-AD(2016)007), p.8.

⁴⁰⁸ In consonance to Article 21 TEU.

alternative ways to fund CSOs, for instance through emergency funding or *ad hoc* funding programmes.

Along with increasing funds, the Union could do more to improve them. For example, it could set a minimum percentage for the amount of sectoral aid that should be channelled through civil society, rather than having it bargained in the run-up to the MFF’s final budget proposal. This would send a clear message that the Union is genuine in its belief that civil society is an indispensable partner in EU values promotion. Furthermore, CSOs funding programmes cover particular subjects (such as the rights of vulnerable groups or hate crime), but none of them are specifically focused to directly support CSOs for the promotion and protection of EU values⁴⁰⁹. In addition, criteria often demand CSOs to work transnationally, which means that any activities focusing on promotion at national level do not meet EU funding requirements. While outcome-oriented funding and Europeanisation of CSOs is to be welcomed, these features severely narrow down the criteria for receiving funding. Many CSOs do not have the capacity to meet the criteria and therefore to apply for EU funding. The EU should make sure that access to funding is easier and avoid that CSOs which genuinely promote the RoL are prevented from applying.

In sum, a first recommendation is to *increase, improve and simplify EU funding to CSOs*.

4.2.2 EU platforms for CSOs

In addition to participating to international RoL monitoring procedures with their shadow reports⁴¹⁰, CSOs play a role in the EU’s RoL protection mechanisms. However, little CSOs involvement in these mechanisms and obstacles in accessing EU stakeholders in the process of RoL monitoring have been bemoaned⁴¹¹. For instance, when listing actors for consultation in the Rule of Law Framework, while explicitly referring to the ‘FRA’ or various ‘judicial networks’, the

⁴⁰⁹ Butler I., *Using the EU’s Budget to Protect Democracy, the Rule of Law and Fundamental Rights*, Civil Liberties Union for Europe, 2018, <<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>> accessed 02/08/2020.

⁴¹⁰ See for instance Poland’s Universal Periodic Review stakeholders’ contribution, UN, Human Rights Council, Working Group on the Universal Periodic Review, Twenty-seventh session, 1–12 May 2017, A/HRC/WG.6/27/POL/3. See also Hungary’s, UN, Human Rights Council, Working Group on the Universal Periodic Review, Twenty-fifth session, 2–13 May 2016, A/HRC/WG.6/25/HUN/3.

⁴¹¹ Helsinki Foundation for Human Rights and Hungarian Helsinki Committee, *Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning “Further strengthening the Rule of Law within the Union. State of play and possible next steps”*, Budapest and Warsaw, 04/06/2019.

Commission does not mention civil society (as well as media and academia)⁴¹². Additionally, because the Commission's exchanges with the member state prior to the recommendations issued in the Rule of Law Framework are kept confidential 'to facilitate quickly reaching a solution'⁴¹³, Polish CSOs were virtually excluded from the Framework's initial hearings⁴¹⁴. The requirement for confidentiality is difficult to combine with the public and fundamental nature of the issues being discussed such as the independence of judiciary, the separation of powers or the transparency of the legislative process. Confidentiality is also at odds with one of the Framework's main goals, which is to ensure an 'objective and thorough assessment' of the situation at stake⁴¹⁵. In order to do this, access to different sources of information at all stages of the procedure should be required. It is difficult to see how a 'quick solution' can be reached without this. Within the Article 7 procedure, while interactions of Hungarian CSOs with the European Parliament afforded a relatively accessible platform for contributions from civil society and the public (with hearings live-streamed on the Internet and covered by national media), GAC hearings in the Council were closed-doors, thus they fully lacked transparency or accessibility to civil society or the wider public⁴¹⁶. In general, broader inclusion of EU citizens and particularly CSOs should be ensured.

Additionally, when addressing civil society as part of the response to RoL backsliding, the EU confined the role of CSOs to information providers of RoL mechanisms (like Article 7 TEU), feeding into high-level institutional dialogues or top-down legal enforcement of EU values. Nothing has changed with the upcoming Rule of Law Review Cycle, in which civil society provides feedback but it is not covered by the Cycle itself (which, for instance, does not monitor civic space). In so doing, the huge potential for CSOs' independent action to foster RoL societal embedment is lost and support they require from the EU overlooked.

In order to tackle shrinking civic space, the state of civil society should be included in the forthcoming Review Cycle. Inspiration could be taken from existing indexes, such as the United States

⁴¹² European Commission, *A new EU Framework to strengthen the Rule of Law*, Brussels, 11.3.2014, COM(2014) 158 final, p.9.

⁴¹³ *Ibid.*, p.8.

⁴¹⁴ *Supra* note 411.

⁴¹⁵ European Commission, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 02/08/2020, p.7.

⁴¹⁶ *Ibid.*

Agency for International Development’s civil society stability index⁴¹⁷. Additionally, the EU should systematically collect data on the ability of CSOs to operate free from government influence. The FRA should carry out on-ground assessment to help create a safe environment for CSOs and release regular reports on civic space (so far, it released only one in 2018⁴¹⁸). This would be part of the FRA’s mandate (so it would not require a treaty change)⁴¹⁹, thus could be immediately set in motion. In so doing, the FRA could team up with CSOs to improve dissemination of knowledge about RoL issues, which would boost both the EU and CSOs’ effectiveness in promoting RoL societal embedment. EU bodies could draw from this data to set clear guidelines on member state CSO legislation. An example would be having national budget approval subject to a process of open and inclusive civic participation in line with guidelines already established by the CoE⁴²⁰. Finally, an EU coordinator on the RoL and civic space in the European Commission or Parliament could be established. This would both ensure effective monitoring of civic space and allow CSOs to navigate EU institutions more easily⁴²¹.

As for what concerns *ad hoc* platforms for CSOs at the EU level, the FRA’s Fundamental Rights Platform and the European Economic and Social Committee (EESC) are two examples worthy of comparison.

The FRA’s Platform is a network for cooperation with civil society from across the EU, consulting every year civil society participants (mostly CSOs) about the challenges they face in their day-to-day work, bringing together hundreds of organisations⁴²². Interviews conducted within this research with representatives of major CSOs in Poland and Hungary revealed that the Platform is in fact not much engaged in and it is not considered a meaningful instrument for CSOs action in the field of the RoL, as it is constrained by the FRA’s limited mandate and resources⁴²³.

⁴¹⁷ United States Agency for International Development, *2018 Civil society organization sustainability index Central and Eastern Europe and Eurasia*, September 2019.

⁴¹⁸ FRA, *Challenges facing civil society organisations working on human rights in the EU*, Luxembourg: Publications Office of the European Union, 2017 (available on the FRA’s website since January 2018).

⁴¹⁹ See Council Regulation (EC) No 168/2007, Article 4.

⁴²⁰ Council of Europe, Recommendation CM/Rec(2018)4 of the Committee of Ministers to member States on the participation of citizens in local public life, 21/03/2018.

⁴²¹ This was suggested by Marta Pardavi in Pardavi M., *Civil society protecting the rule of law: The View from Hungarian Helsinki Committee*, Reconnect Webinar, 05/02/2020.

⁴²² FRA, *What do Fundamental Rights Mean for People in the EU?*, Luxembourg, Publications Office of the EU, 2020, p.41.

⁴²³ Skype interview with Marta Pardavi, co-chair of the Hungarian Helsinki Committee, 06/07/2020; Skype interview with Szymon Ananicz, senior expert and advocacy officer at the Stefan Batory Foundation, 20/06/2020. This impression is not limited to CSOs in Hungary and Poland, as gathered in a Skype interview with Pepijn Gerrits, executive director of the Netherlands Helsinki Committee, 24/06/2020.

A positive element is instead represented by European Economic and Social Committee (EESC), a key instrument of direct communication between EU bodies, representatives of civil society and authorities, for whom it organises regular RoL conferences⁴²⁴. These events are useful insofar as they make it possible to highlight the views of civil society and to clarify the position of the authorities on RoL topics in the same space. Such a forum could be associated with a permanent structured dialogue to develop the civil society component of the Rule of Law Review Cycle. However, the chief drawback of this option would be the constraint of the EESC's mandate, limited to advising the European Commission, Parliament and Council while making sure that the voice of civil society is heard in Brussels.

To harness the potential of CSOs to foster RoL societal embedment, a system of open, inclusive, regular and structured dialogue between the Commission, the Parliament and the Council and organised European civil society should be developed alongside the provisions of Article 11 TEU. EU-level discussion platforms would stimulate CSOs' *independent* action, supporting transnational, cross-sectoral knowledge building and sharing and allowing CSOs' action to resonate with a stronger voice with both national governments and wider society. These dialogue-based fora would not be confronted with unwilling participating actors (as is the case with soft RoL mechanisms vis-à-vis illiberal governments), but with enthusiast RoL supporters from the civil society sphere. Having EU institutions at the centre of the RoL debate providing a platform for relevant players would open as yet untapped potential for the EU to have increased influence in promoting EU values as an integrated forum for civil society, strengthening the legitimacy of EU bodies when addressing RoL deficiencies.

In essence, a second recommendation is to *improve accessibility of RoL protection mechanisms for CSOs and devise or strengthen existing EU platforms for CSOs*.

4.2.3 CSOs' business models

Lastly, the EU could address CSOs' long-standing structural budgetary weaknesses by providing appropriate communicative and cognitive resources. For example, the EU could oversee a fresh network of private donors designed to promote greater self-sufficiency and alternative income streams for CSOs. The EU could also develop initiatives focused on helping CSOs to provide a range

⁴²⁴ EESC, *Fundamental rights and the rule of law, National developments from a civil society perspective*, 2018-2019, June 2020.

of services to the local population to generate their own resources (such as economic activity, membership fees, and new forms of fundraising) and workshops on integrating advocacy and volunteering with managerial business strategies such as cost and activity accounting and performance measurement. Where international funding becomes harder to access, any diversification of income sources increases an organisation’s stability and autonomy because it makes it not entirely bound to a single source of income. Beyond increased stability and autonomy, local income generation has the added value of strengthening an organisation’s outreach among its constituents⁴²⁵. By donating money or buying a product or service offered, members of the community not only provide financial support but also express their solidarity with, and ideological investment in, an organisation’s work⁴²⁶, supporting the advancement of societal embedment in RoL issues.

In short, a third and final recommendation is to *help CSOs strengthening their business models*.

⁴²⁵ Youngs R., *op. cit.*, p.18.

⁴²⁶ *Ibid.*

5

CONCLUSION

This paper aimed at answering two questions: *(1) To what extent does the EU effectively defend the RoL internally?*, and *(2) How can the EU improve defence of the RoL internally?* It further addressed the following sub-question: *How can the EU prevent, curb, or turn around RoL backsliding?* To answer these questions, this work explored the main reasons and challenges in defending the RoL in the EU, assessed the EU's reaction to RoL backsliding and illustrated how CSOs are *key* to the EU's strategy to contrast the phenomenon.

Chapter 2 identified the main reasons and challenges in defending the RoL in the EU. In particular, the chapter showed that the RoL acts as a bulwark against arbitrary power and that it is interrelated with democracy and human rights. It then illustrated how recent developments of EU law made compliance with the RoL a legally binding standard for the organization of member state judiciaries, reflecting the instrumental importance of the RoL for the functioning of the EU. Finally, it presented RoL backsliding and its government-driven, deliberate nature, explaining how it fundamentally threatens the credibility of a Union “founded” on values.

Having identified RoL backsliding as a challenge for defending the RoL internally, the EU's response to RoL backsliding since its onset in Hungary in 2011 was assessed in chapter 3. Specifically, the chapter evaluated the effectiveness of the EU's RoL protection mechanisms, whether they can be improved, and whether there are alternative ways for the EU to address RoL backsliding. Several challenges affecting the EU's initial response, which relied primarily on soft or political mechanisms, were found, making them ineffective against government-driven, deliberate RoL dismantlement. These challenges could be ultimately traced back to an EU's optimism in democratisation and a lack of political incentives to punish illiberal governments. The chapter evidenced that enforcing compliance with the RoL through legal and economic mechanisms, as it has been done through infringement proceedings and envisaged through RoL-conditionality measures for the EU budget, is currently the EU's preferred approach, in harmony with suggestions from most commentators in the RoL debate. This paper argued that despite its being more effective than soft or political mechanisms, an enforcement-based approach is unable to secure long-term promotion of the RoL in the EU. This is primarily because “policing” EU values does not address the social dimension of RoL backsliding, i.e.

the understanding and practice of the RoL in society, which actively shapes the phenomenon. In the best-case scenario, this approach is likely to leave the situation as it is, with the result that backsliding will not be deterred. It was contended that long-term promotion of the RoL is achieved by promoting its *societal embedment*. This insight favours a different bottom-up, citizen-enhancing approach to RoL backsliding.

In illustrating this approach, chapter 4 attempted to show that CSOs are *key* to the EU’s strategy to contrast RoL backsliding. Precisely, the chapter investigated the contribution of CSOs to promote RoL societal embedment and how the EU can support CSOs in this regard. As civic engagement in politics and policy-making was largely absent in post-communist democratisation processes of backsliding countries, it was shown that CSOs face shrinking civic spaces driven by illiberal governments, and a lack of awareness of their work in society. With these issues in mind, it was found that the EU’s efforts to foster CSOs have been inadequate. Recommendations for further EU action in this direction were therefore laid out. These were to:

1. *Increase, improve and simplify EU funding to CSOs.*
2. *Improve accessibility of RoL protection mechanisms for CSOs and devise or strengthen existing EU platforms for CSOs.*
3. *Help CSOs strengthening their business models.*

At first sight, these recommendations might seem extraneous to the RoL debate. This thesis hopes to have shown that this is far from correct. Instead, they should be considered essential to stimulate a long-term response to RoL backsliding and to effectively defend the RoL within the EU.

As a founding value of the EU, along with respect for human dignity, freedom, democracy, equality and human rights, the RoL should answer the question of what ultimately holds Europe together, in line with the Union’s motto ‘united in diversity’⁴²⁷. This paper has shown that the answer to that question is sometimes different: political and economic incentives are often strong enough to trump RoL protection. Future research would do well to explore to what extent the EU requires value homogeneity as a gravity centre for its existence. To the extent that it *does*, this paper has argued that simply “policing” EU values is not a real answer when they are under threat, as is the case with RoL

⁴²⁷ See <https://europa.eu/european-union/about-eu/symbols/motto_en> accessed 02/08/2020.

backsliding. The EU should veer its focus from institutional dialogue-based or enforcement-oriented responses to a bottom-up, citizen-enhancing approach. In showing that one way to do this is by fostering the activity of CSOs in backsliding countries, this thesis could only scratch the surface of possible responses. Nonetheless such examination generates vital insights for the way forward and illustrates that it is somewhat different from the one currently undertaken by the EU. The EU's approach should urgently be revised in light of a re-examination of the nexus between civil society and the RoL, where civil society is concretely involved as *key* for defending the RoL. If not, the Union 'will be able to do little else but stand and watch as backsliding intensifies across member states and tips over into a downward spiral towards authoritarianism'⁴²⁸.

RoL backsliding is a complex problem and this thesis did not set for providing a straightforward answer. There is reason to suppose that a lack of political or economic incentives at the EU level might also frustrate the approach suggested. This paper has however highlighted that a shift from protection to promotion of the RoL is necessary for long-term outcomes as the EU is powerless to defend its values without its citizens. Accordingly, defending the RoL must be integrated in a process not restricted to law but also covering civic engagement and societal transformation. Ultimately, this is the only way the RoL can be defended as a *value*.

⁴²⁸ Pornschlegel S., *op. cit.*, p.12.

BIBLIOGRAPHY⁴²⁹

ARTICLES AND BOOKS

- Arato A., Miklósi Z., ‘Constitution Making and Transition Politics in Hungary’, in (eds.) Miller L. E., Aucoin L., *Framing the State in Times of Transition, Case Studies in Constitution Making*, April 2010
- Avbelj M., Letnar Čerňič J., *The Impact of European Institutions on the Rule of Law and Democracy Slovenia and Beyond*, April 2020, Hart Publishing
- Bingham T., *The Rule of Law*, 2010, Penguin Books
- Blokker P., ‘EU Democratic Oversight and Domestic Deviation from the Rule of Law - Sociological Reflections’ in Closa C. and Kochenov D. (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016
- — *Populist Constitutionalism and Meaningful Popular Engagement*, The Foundation for Law, Justice and Society, Policy Brief, 2018
- Bodnar A., ‘Protection of Human Rights after the Constitutional Crisis in Poland’, in (ed.) Baer, S., Lepsius, O., Schönberger, C., Waldhoff, C., Walter, C., *Das Öffentliche Recht Der Gegenwart, Jahrbuch Des Öffentlichen rechts Der Gegenwart*, Vol. 66, 2018
- von Bogdandy A., *Principles and Challenges of a European Doctrine of Systemic Deficiencies*, 2019, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-14
- Bond I., Gostyńska-Jakubowska A., *Democracy and The Rule of Law: Failing Partnership?*, Centre for European Reform, Policy brief, 20/01/2020
- Bozóki A., ‘Occupy the State: The Orbán Regime in Hungary’, in *Debatte*, vol. 19, Number 3 (3 December 2011), Routledge, pp. 649-663

⁴²⁹ Date formatting is dd/mm/yyyy.

- Butler I., *Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework*, Civil Liberties Union for Europe, 03/2018, <www.liberties.eu/en/news/european-values-fund-two-proposals-mff/14471> accessed 02/08/2020
- Carrera S., Guild E., Hernanz N. (2013), *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism*, Centre for European Policy Studies
- Carugati F., *Democratic Stability: A Long View*, *Annual Review of Political Science*, 2020, 23:pp.59-75
- Cassese S., *The “Constitutional traditions common to the member states” of the European Union*, *Rivista trimestrale di Diritto Pubblico*, LXVII
- Craig P., de Búrca G., *EU Law: Text, Cases, and Materials*, Seventh Edition, Oxford University Press, July 2020
- Diamond L. (2005), "The State of Democratization at the Beginning of the 21st Century" *The Whitehead Journal of Diplomacy and International Relations*, 6, pp. 13-18.
- Efrat A., Hirsch-Hoefler S., Magen. A. (2019), *Working Paper on Global Democracy & Rule of Law Conditions and Trajectories*, Reconnect, 2019.
- de Feyter K., 'Globalisation and human rights' in (eds.) Gómez Isa F., de Feyter K., *International Human Rights Law in a Global Context*, 2009, pp.51-96
- Fish M. S., Gill G., Petrovic M., *A Quarter Century of Post-Communism Assessed*, Palgrave Macmillan, 2017
- Fleck Z., Gadó et al., in (eds) Arato A., Halmai G., Tudományegyetem L. E., Kis j., *Opinion on the Fundamental Law of Hungary*, 2011, New School for Social Research, New York, Central European University, Budapest, <https://www.diritticomparati.it/wp-content/uploads/2017/04/28022012_2_amicus-to-vc-english-final-1.pdf> accessed 02/08/2020
- Foa S. R., Mounk Y., 'The Danger of Deconsolidation', in *Journal of Democracy*, July 2016, Vol. 27
- Fomina J., and Kucharczyk J., *Populism and Protest in Poland*, *Journal of Democracy* 27(4):58-68, October 2016
- Frentzel-Zagorska J., 'Civil Society in Poland and Hungary', *Soviet Studies*, Vol. 42, No. 4 (Oct., 1990), pp.759-777

- Goldmann M., ‘Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority’, in A. von Bogdandy et al. (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, 2010
- Halmai G., ‘The Early Retirement Age of the Hungarian Judges’, *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, (eds.) Nicola F., Davis B., 2017
- — *Second-Grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope with Illiberal Member States*, Quaderni costituzionali, n.2, June 2018
- Havlíček P., *The EU’s Lessons for Supporting Civil Society in Member States*, The German Marshall Fund of the United States, No. 8, June 2020
- Hegedus D., *What Role for EU institutions in confronting Europe’s democracy and rule of law crisis?*, The German Marshall Fund of the United States, Policy Paper, March 2019
- Hoffmann-Riem W., ‘The Venice Commission of the Council of Europe – Standards and Impact’, *European Journal of International Law*, Volume 25, Issue 2, May 2014, pp.579-597
- Huntington S. P., ‘Democracy’s Third Wave’, in *The Journal of Democracy*, 2(2), 1991.
- Inglehart R., Welzel C., *Changing Mass Priorities: The Link between Modernization and Democracy*, Perspectives on Politics, Vol. 8 no. 2, 2010
- Jacobson F. G., *The Sovereignty of the Law: The European Way*, 2007, Cambridge University Press
- Jezard A., *Who and what is it civil society?*, World Economic Forum, 23/04/2018, <<https://www.weforum.org/agenda/2018/04/what-is-civil-society/>> accessed 02/08/2020
- Kelemen, R. D., ‘Europe’s Other Democratic Deficit: National Authoritarianism in Europe’s Democratic Union’, in *Democracy without Solidarity: Political Dysfunction in Hard Times*, Volume 52, Special Issue 2, April 2017, pp.211-238
- — *The Court of Justice of the European Union in the Twenty-First Century*, 79 Law and Contemporary Problems, 2016, pp.117-140
- Kochenov D., *EU Enlargement and the Failure of Conditionality: Pre-accession*, Kluwer Law International, 2008
- — *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, Polish Yearbook of International Law, Vol. 33 (2013), pp.145-170.

- Kochenov, D. and Bard, P., *The last soldier standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, 2019, University of Groningen Faculty of Law Research Paper Series No. 5/2019
- Kochenov D., Magen A., Pech L., *Journal of Common Market Studies: The Great Rule of Law Debate in the EU*, 21 July 2016
- Konieczny T. T., *From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court*, Reconnect, March 13, 2019, <<https://reconnect-europe.eu/blog/konieczny-polish-constitutional-court/>> accessed 02/08/2020
- Konstadinides T., *The Rule of Law in the European Union. The Internal Dimension*, Hart Publishing, 2017
- Krajewski M., *Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena's Dilemma*, European Papers, Vol. 3, 2018, No 1, pp.395-407
- Kritzing S. and McElroy G., 'Meaningful Choices? Voter perceptions of party positions in European Elections', in Banducci S., Franklin M., Giebler H., et al. (eds) *An Audit of Democracy in the EU*, 2012, European University Institute, pp.169-192
- Lachmayer, K., 'Questioning the Basic Values – Austria and Jörg Haider' in Jakab, A., Kochenov D. (eds), *The Enforcement of EU Law and Values, Ensuring Member States' Compliance*, 2017, Oxford University Press, pp.436-455.
- László, R. (2017), 'Dismantling direct democracy: Referenda in Hungary', Friedrich Ebert Stiftung, 19 January 2017, <https://www.fesconnect.org/reading-picks/dismantling-direct-democracy-in-hungary/>.
- Lendvai P., *Orbán: Hungary's Strongman*, 2017, Oxford University Press
- Mader O., 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', in *Hague Journal on the Rule of Law*, 11:2019
- Magen A. (2016). "Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU", *Journal of Common Market Studies*, 54(5), pp. 1050-1061.
- Magen A., Morlino L., 'Methods of Influence, Layers of Impact, Cycles of Change: A Framework for Analysis', (eds.) Magen A., Morlino L., *International Actors, Democratization and the Rule of Law. Anchoring Democracy*, London: Routledge, 2008, pp.27-52

- Magyar B., *Post-Communist Mafia State: The Case of Hungary*, 29/02/2016, Central European University Press
- Matczak M., *O rozbieżności pomiędzy sędziowskim i powszechnym rozumieniem sprawiedliwości oraz sposobach jej usuwania* [On discrepancy between judicial and common understanding of justice and on methods how to eliminate it], *Kwartalnik Krajowej Rady Sądownictwa* [Quarterly of the National Council of Judiciary], No. 4/2017, pp.22–28
- – *Poland’s Rule of Law Crisis: Some Thoughts*, *Hague Journal on the Rule of Law*, (2019) 11, pp.407-410
- de Mesquita B. B., Smith A., *The Dictator's Handbook*, PublicAffairs, 2011
- Michelot M., ‘The “Article 7” proceedings against Poland and Hungary: What concrete effects?’, in *Europe dans le monde*, 15/04/2019, <<https://institutdelors.eu/wp-content/uploads/2019/05/190415-EN-Etatdedroit-2.pdf>> accessed 02/08/2020
- Morlino L., Piana D., Sandulli A., Corkin J., *Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice*, Reconnect, 31/10/2019
- Mudde C., *The populist zeitgeist*, *Government and Opposition*, 2004 39(4):pp.541-563
- Muller J.W., *What is populism?*, University of Pennsylvania Press, 2016
- Nelken D., ‘Using the Concept of Legal Culture’, *Australian Journal of Legal Philosophy*, 29, 2004
- Oliver P., Stefanelli J., ‘Strengthening the Rule of Law in the EU: The Council's Inaction’, in (ed. Ott A., Inglis K. (eds), *Handbook on European Enlargement*, Asser Press, 2002
- Palombella G., *The abuse of the rule of law*, Sant’Anna School of Advanced Studies, 03/03/2020
- Pech, L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, Reconnect, Working Paper No. 7 (March 2020)
- Pech L. and Kim L. S., ‘Illiberalism Within: Rule of Law Backsliding in the EU’, in *Cambridge Yearbook of European Legal Studies*, 2017, p.19
- Pech L., Kochenov D., Grabowska-Moroz B. and Grogan J., *The Commission’s Rule of Law Blueprint for Action: A Missed Opportunity to Fully Confront Legal Hooliganism*, University of Groningen, September 2019
- Polakiewicz J., Sandvig J., *Council of Europe and the Rule of Law*, *Journal of Civil and Legal Sciences*, 2015
- Porschlegel S., *Countering shrinking spaces: Recommendations to support EU civil society*, European Policy Centre, Discussion paper, 11/06/2020

- Preuss U., *Constitutional Revolution. The Link between Constitutionalism and Progress*, Humanities Press, 1995
- Raz J., *The rule of law and its virtue*, 1979, Oxford University Press, pp.210–229
- Reid J. P., *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and the Eighteenth Centuries*, DeKald: Northern Illinois University Press, 2004
- Rosenfeld, M., ‘Constitutional Identity’, in (eds.) Rosenfeld M., Sajó A. *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012
- Rustow, D., (1970), ‘Transitions to democracy: Toward a dynamic model’, *Comparative Politics*, 2 (April), pp. 337-363
- Sadurski W., *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School, Legal Studies Research Paper, No. 18/01, January 2018
- – *Poland's Constitutional Breakdown*, 2019, Oxford University Press
- Sajó A., Uitz R., *The Constitution of Freedom: An Introduction to Legal Constitutionalism*, Oxford University Press, 2017, ch. 8
- Salamon M. L., Sokolowski W., *The Size and Scope of the European Third Sector*, TSI Working Paper No. 12, Seventh Framework Programme, European Union. Brussels: Third Sector Impact, 2016
- Schedler A., ‘Conceptualizing Accountability’, in (eds.) Schedler A., Diamond L., Plattner M. F., *The Self-Restraining State: Power and Accountability in New Democracies*, 1999, Lynne Rienner Publishers, pp.13-28
- – (2001), ‘Measuring Democratic Consolidation’, *Studies in Comparative International Development*, volume 36, Springer, pp. 66–92
- Scheppele, K. L., ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures’, in Closa C. and Kochenov D. (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016
- – ‘The social lives of constitutions’, in P. Blokker and C. Thornhill (eds), *Sociological Constitutionalism*, Cambridge: Cambridge University Press, 2017
- Scheppele K. L., Kelemen R. D., ‘Defending Democracy in EU Member States, Beyond Article 7 TEU’, in (ed.) Bignami D., *EU Law in Populist Times*, December 2019, Cambridge University Press
- Schmitt C. [1979], *The Tyranny of Values*, Plutarch Press, 1996

- Schwab K., *The Future Role of Civil Society*, World Economic Forum, 2013, <http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf> accessed 02/08/2020
- Spijkers O., ‘Public participation in an illiberal democracy’, in (eds.) Muis A., van Troost L., *Will human rights survive illiberal democracy?*, Amnesty International Netherlands, March 2018, <<https://www.amnesty.nl/content/uploads/2015/10/illiberal-democracy-PDF-20mrt.pdf>> accessed 02/08/2020
- Tamanaha B. Z., *On the Rule of Law: History, Politics, Theory*, 2004, Cambridge: Cambridge University Press, p.15
- ‘A Concise Guide to the Rule of Law’, in (eds.) Palombella G., and Walker N., *Relocating the Rule of Law*, 2009, Hart Publishing, pp.4-8
- Tóka G., and Popa S., ‘Hungary’, in Berglund S., et al. (eds.), *The Handbook of Political Change in Eastern Europe*, Edgar Elgar, 2013
- Unger R. M., *Law in Modern Societies. Towards a Criticism of Social Theory*, 1976, New York: The Free Press
- Waelbroeck M., Oliver P., ‘Enforcing the Rule of Law in the EU: What can be done about Hungary and Poland?’, in *Blog Droit Européen*, 09/02/18, <<https://blogdroiteuropeen.com/2018/02/09/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-part-ii-michel-waelbroeck-and-peter-oliver/>> accessed 02/08/2020
- Walder D., Lust, E., ‘Unwelcome Change: Coming to Terms with Democratic Backsliding’, *Annual Review of Political Science*, 2018, 21 (1):93–113
- Weiler J., *In the face of the crisis: input legitimacy, output legitimacy and the political messianism of European integration*, *Journal of European Integration* Vol. 34, 2012
- Wendel M., *Afraid of Their Own Courage? Some Preliminary Reflections on LM*, *Verfassungsblog*, 26 Jul 2018, <https://verfassungsblog.de/afraid-of-their-own-courage-some-preliminary-reflections-on-lm/>.
- Wennerström, E. O., ‘Can the EU Protect Its Fundamental Values?’, in (eds.) Bakardjieva Engelbrekt A., Bremberg N., Michalski A., Oxelheim L., *The European Union in a Changing World Order*, 2020, Palgrave Macmillan, pp. 245-272.
- Wiener, A., *European Integration Theory*, June 2009, Oxford University Press

- Wijkström F., *The Role of Civil Society. The Case of Sweden in International Comparison*, paper presented at the 1st International Korean Studies Workshop on ‘Civil Society & Consolidating Democracy in Comparative Perspective’, June 2004. Sweden usually scores very high in RoL performance, see <<https://worldjusticeproject.org/rule-of-law-index/country/2020/Sweden/>>
- Wójcik A., “*A Bad Workman always Blames his Tools*”: an Interview with Laurent Pech, Verfassungsblog, 28 May 2018, <<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>> accessed 02/08/2020
- Wyrzykowski M., *Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland*, Hague Journal on the Rule of Law, vol. 11, 2019
- Zimmer A., Hoemke P., *Riders on the Storm. TSOs and the European Level of Governance - Contested Terrain for TSOs!*, TSI Working Paper No. 11, Seventh Framework Programme, European Union, 2016
- Zimmer A., Pahl, B., *Learning from Europe: Report on third sector enabling and disabling factors*, TSI Comparative Report No.1, Seventh Framework Programme, European Union, 2016

OFFICIAL DOCUMENTS

European Union

- Council of the European Union, Statement by the Portuguese Presidency of the EU on behalf of XIV Member States, 31/01/2000,
<https://www.cvce.eu/en/obj/statement_by_the_portuguese_presidency_of_the_eu_on_behalf_of_14_member_states_31_january_2000-en-8a5857af-cf29-4f2d-93c9-8bfd90e40c1.html>
accessed 02/08/2020
- Council of the European Union, *Conclusions on fundamental rights and rule of law*, Luxembourg, 6 and 7 June 2013,
<https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137404.pdf>
accessed 02/08/2020
- Council of the European Union, Opinion of the Legal Service, *Commission’s Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties*, 10296/14,

Brussels 27 May 2014, <<http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>> accessed 02/08/2020

Council of the European Union, *Conclusions on ensuring respect for the rule of law*, Doc. No. 17014/14, 16 December 2014

Council of the European Union, *Presidency conclusions: evaluation of the annual rule of law dialogue*, 14173/19, 19/11/2019

Court of Justice of the European Union, *Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings*, Official Journal of the European Union, 2019/C 380/01, 08/11/2019, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOC_2019_380_R_0001> accessed 02/08/2020

Council Regulation (EC) No 168/2007, Article 4

Declaration on European Identity (Copenhagen, 14 December 1973), Bulletin of the European Communities, December 1973, No 12. Luxembourg: Office for official publications of the European Communities

European Council, Framework Decision of 13 June 2002 on the European Arrest Warrant (2002/584/JHA)

European Council, Presidency Conclusions, Copenhagen, 21-22 June 1993, <https://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf> accessed 02/08/2020

European Council, *Conclusions on the recovery plan and multiannual financial framework for 2021-2027*, Brussels, 21/07/2020, <<https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf>> accessed 02/08/2020

European Commission, *Annual Growth Survey 2019*, Brussels, 21 November 2018, COM(2018)770final

European Commission, Staff Working Document, *Country Report Poland 2019*, Brussels, SWD (2019) 1020 final, 27/02/2019

European Commission Communication, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, COM(2013)160 final.

European Commission, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 02/08/2020

- European Commission Communication, *Respect for and promotion of the values on which the Union is based*, COM(2003)606 final, 15/10/2003
- European Commission Communication, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, Brussels, 19.10.2010 COM(2010)573final
- European Commission Communication, *Strengthening the rule of law within the Union. A blueprint for action*, Brussels, 17 July 2019, COM(2019) 343 final
- European Commission Communication, *Further strengthening the Rule of Law within the Union. State of play and possible next steps*, COM (2019) 163 final, 03/04/2019
- European Commission, Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights, SP(2017)16, 17/02/2017
- European Commission, Press Release, *Opening Statement in the European Parliament Plenary Session by Ursula von der Leyen, Candidate for President of the European Commission*, 16/07/19, <https://ec.europa.eu/commission/presscorner/detail/it/speech_19_4230> accessed 02/08/2020
- European Commission, Press Release, *European Commission closes infringement procedure on forced retirement of Hungarian judges*, 20/12/2013, <https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1112> accessed 02/08/2020
- European Commission, Press Release, *Rule of Law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court*, Press release, 24/09/2018, Brussels, <https://ec.europa.eu/commission/presscorner/detail/EN/IP_18_5830> accessed 02/08/2020
- European Commission, Press Release, *Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland*, 29 April 2020, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772> accessed 02/08/2020
- European Commission, Press Release, *Strengthening the rule of law through increased awareness, an annual monitoring cycle and more effective enforcement*, 17/07/2019, Brussels, <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4169> accessed 02/08/2020
- European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017) 835 final, 20

European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the member states, COM/2018/324final

European Commission, *Recommendation 2018/103 regarding the rule of law in Poland*, OJ L17/50, 20/12/2017.

European Commission, Recommendation 2017/146, 21/12/2016

European Commission, *EU Justice Scoreboard 2019*, COM(2019)198/2

European Commission, *Rule of Law Framework*, <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-framework_en> accessed 02/08/2020

European Parliament, Press Release, *Rule of law in Poland and Hungary: Debate with Council and Commission*, 16/12/2019, <<https://www.europarl.europa.eu/news/en/press-room/20191216IPR69104/rule-of-law-in-poland-and-hungary-debate-with-council-and-commission>> accessed 02/08/2020.

European Parliament, Press Release, *Rule of law in Poland and Hungary has worsened*, 16/01/2020

European Parliament, Resolution, *On Recent Political Developments in Hungary*, P7TA(2012)0053, 16/02/12

European Parliament, Resolution, *On the situation of fundamental rights: standards and practices in Hungary*, 03/07/2013, (2012/2130(INI))

European Parliament, Resolution, *On the establishment of an EU mechanism on democracy, the rule of law and fundamental rights* (2015/2254(INL)), 25/10/2016.

European Parliament, Resolution 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)), 12/09/2018

European Parliament, Resolution, *Ongoing hearings under article 7(1) of the TEU regarding Poland and Hungary*, (2020/2513(RSP)), 16/01/2020

European Parliament and Council Regulation (EU)1303/2013, Article 142(a)

European Economic and Social Committee, *A bridge between Europe and organised civil society*, 2009, <<https://www.eesc.europa.eu/resources/docs/eesc-2009-01-en.pdf>> accessed 02/08/2020

European Economic and Social Committee, *The future evolution of civil society in the European Union by 2030*, December 2017, CES/CSS/01/2017

European Economic and Social Committee, *Fundamental rights and the rule of law, National developments from a civil society perspective*, 2018-2019, June 2020

European Union Agency for Fundamental Rights, *Challenges facing civil society organisations working on human rights in the EU*, Luxembourg: Publications Office of the European Union, 2017

European Union Agency for Fundamental Rights, *Fundamental Rights Report 2020*, Luxembourg: Publications Office of the European Union, 2020

European Union Agency for Fundamental Rights, *What do Fundamental Rights Mean for People in the EU?*, Luxembourg: Publications Office of the EU, 2020

Council of Europe

Recommendation CM/Rec(2018)4 of the Committee of Ministers to member States on the participation of citizens in local public life, 21/03/2018

Statute of the Council of Europe, 1949

International

European Commission for Democracy through Law, *Opinion on the new constitution of Hungary*, Adopted by the Venice Commission at its 87th Plenary Session, (Venice, 17-18 June 2011), <[www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf)> accessed 02/08/2020

European Commission for Democracy through Law, *Poland, Joint Urgent Opinion*, Opinion No. 977 / 2019, CDL-PI(2020)002, Strasbourg, 16 January 2020

European Commission for Democracy through Law (Venice Commission), *Hungary, Opinion on the law on administrative courts*, Opinion no.943/2018, Strasbourg, 19/03/2019

European Commission for Democracy through Law, *Report on the Rule of Law*, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (CDL-AD(2011)003rev)

European Commission for Democracy through Law, Resolution (1990) (90)6, On a Partial Agreement Establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers.

European Commission for Democracy through Law, *Rule of Law Checklist*, Strasbourg, 18/03/2016, Study No. 711/2013, Council of Europe (CDL-AD(2016)007)

Organization for Security and Co-operation in Europe (OSCE), *Urgent interim opinion on the bill amending the Act on the organization of common courts, the Act on the Supreme Court and certain other Acts of Poland (as of 20 December 2019)*, Opinion-Nr.:JUD-POL/365/2019 [AIC] Warsaw, 14/01/2020

Resolution (1990) (90)6 On a Partial Agreement Establishing the European Commission for Democracy through Law, adopted by the Committee of Ministers

United Nations, Declaration of the High-level Meeting of the 67th Session of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 30 November 2012

United Nations Educational, Scientific and Cultural Organisation (UNESCO) and United Nations Office on Drugs and Crime (UNODC), *Strengthening the rule of law through education – A guide for policymakers*, 2019

United Nations, General Assembly, Resolution 60/1, *2005 World Summit Outcome*, A/RES/60/1

United Nations, General Assembly, *Resolution on transforming our world: The 2030 Agenda for Sustainable Development*, A/RES/70/1, 25 September 2015

United Nations Human Rights Council, Nineteenth session, Agenda item 3, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, A/HRC/RES/19/36, 19/04/2012

United Nations, Human Rights Council, Nineteenth session Agenda item 3, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, A/HRC/RES/19/36

United Nations, Human Rights Council, Working Group on the Universal Periodic Review, Twenty-fifth session, 2-13 May 2016, A/HRC/WG.6/25/HUN/3

United Nations, Human Rights Council, Working Group on the Universal Periodic Review, Twenty-seventh session, 1–12 May 2017, A/HRC/WG.6/27/POL/3

United Nations, Office of the High Commissioner for Human Rights, *Civil society space and the United Nations Human Rights System*, 2014

United Nations Development Programme (UNDP), *Working with civil society in foreign aid: possibilities for south-south cooperation?*, September 2013, Annex 1, p.123, <https://www.undp.org/content/dam/undp/documents/partners/civil_society/publications/2013_UNDP-CH-Working-With-Civil-Society-in-Foreign-Aid_EN.pdf> accessed 02/08/2020

White Paper on the Reform of the Polish Judiciary, The chancellery of the Prime Minister, Warsaw, 07/03/2018

LEGISLATIVE INSTRUMENTS

European Union

Charter of Fundamental Rights of the European Union

Convention for the Protection of Human Rights and Fundamental Freedoms

Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5; 24 December 2002

Treaty on the European Union

Treaty on the Functioning of European Union

Hungary

1989 Hungarian Constitution, Article 24(5)

Act XXV of 2017 on the Modifications of Act CCIV of 2011 on National Higher Education

Act LXXVI of 2017 on the transparency of foreign-funded organisations, <<https://www.helsinki.hu/wp-content/uploads/LexNGO-adopted-text-unofficial-ENG-14June2017.pdf>> accessed 02/08/2020

Poland

Small Media Act

International

United Nations, General Assembly. (1948), Universal declaration of human rights

CASE LAW AND OTHER JUDICIAL ACTS

European Court of Human Rights, Grand Chamber Judgment, no 20261/12, Baka v. Hungary, 23 June 2016

Court of Justice of the European Union, Case 294/83 Les Verts v. Parliament, ECLI:EU:C:1986:166.

Court of Justice of the European Union, Case C-192/18 Commission v Poland

Court of Justice of the European Union, Case C-522/18, Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 9 August 2018, 2018 O.J. (C 427) 8

Court of Justice of the European Union, C-619/18 Commission v Poland

Court of Justice of the European Union, Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 3 September 2008, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities

Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 5 April 2016, Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen, Joined Cases C-404/15 and C-659/15 PPU

Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 27 February 2018, Associação Sindical dos Juizes Portugueses v Tribunal de Contas, Case C-64/16

Court of Justice of the European Union, Judgment of the Court (Grand Chamber), 26 February 2013, Stefano Melloni v Ministerio Fiscal

Court of Justice of the European Union, Judgment of the Court (Grand Chamber) of 25 July 2018, LM, Case C-216/18 PPU

Court of Justice of the European Union, European Commission v. Hungary, C-286/12, Judgment, 6 November 2012

Opinion of Advocate General Cruz Villalón in CJEU, Case C-62/14 Gauweiler and Others, ECLI:EU:C:2015:7

Opinion of Advocate General Tanchev delivered on 11 April 2019 in Case C-619/18

Judgment of the Polish Constitutional Tribunal (sygn. K 47/15), at <http://citizensobservatory.pl/ustawa/judgment-of-the-constitutional-tribunal-sygn-k-4715/>

REPORTS

Civilizáció & Political Capital, *Civil Szervezetek, Társadalmi Megírélése, Kutatási Jelentés*, February 2020, [in Hungarian] <https://politicalcapital.hu/pc-admin/source/documents/civil_szervezetek_tarsadalmi_megitelese_kutatasi_jelentes_20200220.pdf?fbclid=IwAR2UYn0TeP-8q1WedY4zRDpXEtKhG2oD1dV9i01xOoQfVVSqv5bB7QcwQyA> accessed 02/08/2020

Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, *Report following her visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, Strasbourg, 21/05/2019

Council of Europe, Monitoring Committee, *Report on the functioning of democratic institutions in Poland*, 06/01/2020

Court of Justice of the European Union, Directorate for Communication, *The year in review, Annual report 2019*, May 2020, p.54, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/ra_pan_2019_interieur_en_final.pdf> accessed 02/08/2020

Freedom House, *Country Report – Hungary*, 2019, <<https://freedomhouse.org/country/hungary>> accessed 02/08/2020.

Report by the Secretary General of the Council of Europe Thorbjørn Jagland, *State of democracy, human rights and the rule of law*, 128th Session of the Committee of Ministers Elsinore, 18/05/2018

Reporters without Borders, *2020 Report on Poland*, <<https://rsf.org/en/poland>> accessed 02/08/2020

Transparency International, *Corruption Perception Index 2019*, <<https://www.transparency.org/en/cpi/2019/results>> accessed 02/08/2020

United States Agency for International Development, *2018 Civil society organization sustainability index Central and Eastern Europe and Eurasia*, September 2019, pp.102-111&168-177

DOCUMENTS FROM CIVIL SOCIETY ORGANISATIONS

- Amnesty International, *Hungary: container camp bill is flagrant violation of international law*, 07/03/2017, <<https://www.amnesty.org/en/latest/news/2017/03/hungary-container-camp-bill-is-flagrant-violation-of-international-law/>> accessed 02/08/2020.
- Helsinki Foundation for Human Rights, *The situation of civil society organizations in Poland*, 2016, <http://www.hfhr.pl/wp-content/uploads/2017/09/HFHR_situation_ngos_in_Poland_brief.pdf> accessed 02/08/2020.
- Pardavi M., Szuleka M., Gheorghe G., *New decade, old challenges, Civic space in Hungary, Poland and Romania*, Hungarian Helsinki Committee, Helsinki Foundation for Human Rights & APADOR-CH, March 2020
- V-Dem Institute, Democracy Report 2020, <https://www.v-dem.net/media/filer_public/f0/5d/f05d46d8-626f-4b20-8e4e-53d4b134bfcb/democracy_report_2020_low.pdf> accessed 02/08/2020

NEWSPAPER ARTICLES

- Applebaum A., *The Disturbing Campaign Against Poland’s Judges*, The Atlantic, January 28, 2020, <<https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/>> accessed 02/08/2020
- Baume, M. d.l., *Fidesz MEPs remain in the EPP group, for now*, Politico, 26 March 2019, <<https://www.politico.eu/article/fidesz-meps-remain-in-the-epp-group-for-now/>> accessed 02/08/2020
- Bayer L., *No EU budget if rule of law discussed, Orbán says*, Politico, 10/07/2020, <<https://www.politico.eu/article/no-budget-if-rule-of-law-discussed-orban-says/>> accessed 02/08/2020
- Benner T., and Weidenfeld J., *Europe, Don’t Let China Divide and Conquer: Cutting Funds to Countries that Disregard EU Values will Push Them into China’s Arms*, Politico Europe, 20/04/18, <www.politico.eu/article/europe-china-divide-and-conquer/> accessed 02/08/2020

- Biró M., *Hungarian Judge Requests European Court of Justice to Examine His Own Independence*, Index, 17/07/2019, <https://index.hu/english/2019/07/17/hungary_judicial_independence_european_court_of_justice_suspended_case/> accessed 02/08/2020
- Black, I., Europe rallies against Haider coalition, The Guardian, 04/02/2000, <<http://www.theguardian.com/world/2000/feb/04/austria.ianblack>> accessed 02/08/2020
- Brussels warns Bulgaria over EU funds mismanagement, Euractiv, 13/05/08, <<https://www.euractiv.com/section/future-eu/news/brussels-warns-bulgaria-over-eu-funds-mismanagement/>> accessed 02/08/2020
- de Búrca G., Morijn J., *Strengthening EU rule of law protection: start with freedom of expression*, Euractiv, 20/05/2019, <<https://www.euractiv.com/section/justice-home-affairs/opinion/strengthening-eu-rule-of-law-protection-start-with-freedom-of-expression/>> accessed 02/08/2020
- Council lawyers raise concerns over plan to link EU funds to rule of law, Politico, 29 October 2018, <<https://www.politico.eu/pro/council-lawyers-raise-concerns-over-planto-link-eu-funds-to-rule-of-law-hungary-poland/>> accessed 02/08/2020
- European Commission head elected with Polish support, poland in, <<https://polandin.com/43526145/european-commission-head-elected-with-polish-support>> accessed 02/08/2020
- Fresh Poland protests over judiciary reform, BBC, 24/11/2017, <<https://www.bbc.com/news/world-europe-42116064>> accessed 02/08/2020
- Hopkins V., Viktor Orbán's 'peacock dance' with EU may be step too far, Financial Times, March 5 2019, <<https://www.ft.com/content/8a9b0b82-3e91-11e9-b896-fe36ec32aece>> accessed 02/08/2020
- Hürriyet Daily News, Hungarians march against crackdown on universities, NGOs, 22/05/2017, <<https://www.hurriyetdailynews.com/hungarians-march-against-crackdown-on-universities-ngos--113398>> accessed 02/08/2020
- Hurst, L., *European elections 2019: What is a spitzenkandidat?*, euronews, 24 May 2019, <<https://www.euronews.com/2019/04/24/european-elections-2019-what-is-a-spitzenkandidat>> accessed 02/08/2020

- Karnitschnig M., *Poland has a Problem – With Frans Timmermans*, Politico, 29/05/2016, <<http://www.politico.eu/article/poland-has-a-problem-with-eu-brussels-first-vice-president-frans-timmermans/>> accessed 02/08/2020
- Keszthely, C., *Hungary’s Economy Heavily Depends on EU Funds, Study Finds*, Budapest Business Journal, 30/03/2017, <https://bbj.hu/economy/hungarys-economyheavily-depends-on-eu-funds-study-finds_130880> accessed 02/08/2020
- Kovacevic T., *EU budget: Who pays most in and who gets most back?*, BBC, 28 MAY 2019, <<https://www.bbc.com/news/uk-politics-48256318>> accessed 02/08/2020
- Krekó P., *The Vote on the Sargentini Report: Good News for Europe, Bad News for Orbán, No News for Hungary*, Heinrich Böll Stiftung, 21/09/2018, <<https://eu.boell.org/en/2018/09/21/vote-sargentini-report-good-news-europe-bad-news-orban-no-news-hungary>> accesses 02/08/2020
- Morawiecki M., *Poland’s vision for Europe*, Politico, 30/04/19, <<https://www.politico.eu/article/poland-vision-for-europe-mateusz-morawiecki/>> accessed 02/08/2020
- Nielsen N., *EU justice scoreboard upsets some member states*, euobserver, 17 March 2014, <<https://euobserver.com/justice/123507>> accessed 02/08/2020
- Poland's Andrzej Duda rides wave of 'sacred tradition'*, BBC, 13/07/2020, <<https://www.bbc.com/news/world-europe-53389096>>, accessed 02/08/2020
- Polish government considers law forcing NGOs to declare foreign funding*, Reuters, 11/05/2020, <<https://www.reuters.com/article/poland-ngos/polish-government-considers-law-forcing-ngos-to-declare-foreign-funding-idUSL8N2CT53C>> accessed 02/08/2020
- Polish parliament approves judge ‘muzzle law’, Commission ‘very concerned’*, Euractiv, 24 January 2020, <<https://www.euractiv.com/section/justice-home-affairs/news/polish-parliament-approves-judge-muzzle-law-commission-very-concerned/>> accessed 02/08/2020
- Rettman A., *Polish judges under 'political control', watchdog warns*, euobserver, 16 December 2019, <<https://euobserver.com/justice/146941>> accessed 02/08/2020
- Sitnicka D., *Captured Constitutional Tribunal rules on the Supreme Court: Implementation of CJEU judgment inconsistent with EU law*, Rule of Law in Poland, 22/04/2020, <<https://ruleoflaw.pl/captured-constitutional-tribunal-rules-on-the-supreme-court-implementation-of-cjeu-judgment-inconsistent-with-eu-law/>> accessed 02/08/2020

Walker S., *'This is the golden age': eastern Europe's extraordinary 30-year revival*, The Guardian, 26/10/2019, <<https://www.theguardian.com/world/2019/oct/26/this-is-the-golden-age-eastern-europes-extraordinary-30-year-revival>> accessed 02/08/2020

– – *Standing up for the 'real' Poland: how Duda exploited rural-urban divide to win re-election*, The Guardian, 18/07/2020. <<https://www.theguardian.com/world/2020/jul/18/andrzej-duda-poland-rural-urban-re-election>> accessed 02/08/2020

INTERNET SOURCES

Alemanno A., Ananicz S., *Uncivil cut: the EU budget and civil society*, Social Europe, 16/07/2020, <<https://www.socialeurope.eu/uncivil-cut-the-eu-budget-and-civil-society>> accessed 02/08/2020

Alemanno A., Pech, L., 'Holding European Political Parties Accountable: Testing the Horizontal EU Values Compliance Mechanism', *Verfassungsblog*, 15 May 2019: <https://verfassungsblog.de/holding-european-political-parties-accountable-testing-the-horizontal-eu-valuescompliance-mechanism/>

AskTheEU, <<https://www.asktheeu.org/en/request/6115/response/19716/attach/html/6/st14022.en18.pdf.html>> accessed 02/08/2020

Bárd P., Grogan J., Pech L., *Defending the Open Society against its Enemies*, *Verfassungsblog*, 22/06/2020, <<https://verfassungsblog.de/defending-the-open-society-against-its-enemies/>> accessed 02/08/2020

Blokker, P., *Systemic infringement action: an effective solution or rather part of the problem?*, *Verfassungsblog*, 5 December 2013, <<https://verfassungsblog.de/systemic-infringement-action-an-effective-solution-or-rather-part-of-the-problem/>> accessed 02/08/2020

Bodnar A., *Commissioner for Human Rights Adam Bodnar: On the Anatomy of the Crime Against the Polish Judiciary*, *Rule of Law in Poland*, 20/02/2020, <<https://ruleoflaw.pl/commissioner-for-human-rights-adam-bodnar-on-the-anatomy-of-the-crime-against-the-polish-judiciary/>> accessed 02/08/2020

Butler I., *Using the EU's Budget to Protect Democracy, the Rule of Law and Fundamental Rights*, Civil Liberties Union for Europe, 2018,

<<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>> accessed 02/08/2020.

Dani M., *Opening the Enforcement of EU Fundamental Values to European Citizens*, Verfassungsblog, 07/04/13, <<https://verfassungsblog.de/opening-the-enforcement-of-eu-fundamental-values-to-european-citizens/>> accessed 02/08/2020

EUR-Lex, Glossary of summaries, *Qualified majority*, <https://eur-lex.europa.eu/summary/glossary/qualified_majority.html> accessed 02/08/2020

European Commission, *European Structural and Investment Funds 2014–2020: Official Texts and Commentaries* (November 2015), <http://ec.europa.eu/regional_policy/sources/docgener/guides/blue_book/blueguide_en.pdf> accessed 02/08/2020

European Commission, *Funding opportunities for NGOs*, <https://ec.europa.eu/info/funding-tenders/how-eu-funding-works/who-eligible-funding/funding-opportunities-ngos_en#:~:text=NGOs%20working%20in%20these%20fields,an%20EU%20region%20or%20country.&text=The%20Creative%20Europe%20programme%20supports,audiovisual%2C%20cultural%20and%20creative%20sector.> accessed 02/08/2020

European Commission, *The EU values*, <<https://ec.europa.eu/component-library/eu/about/eu-values/>> accessed 02/08/2020

European Parliament, Debates, 02/12/2015, Brussels, <https://www.europarl.europa.eu/doceo/document/CRE-8-2015-12-02-ITM-017_EN.html?redirect> accessed 02/08/2020

European Parliament, Results of the 2014 European elections, <<https://www.europarl.europa.eu/elections2014-results/en/country-introduction-2014.html>> accessed 02/07/2020

European Parliament, Results of the 2019 European elections, <<https://www.europarl.europa.eu/election-results-2019/en>> accessed 02/08/2020

European People’s Party, Website, Parties & Partners, <<https://www.epp.eu/parties-and-partners/>> accessed 02/08/2020

European Union, Website, *The EU motto*, <https://europa.eu/european-union/about-eu/symbols/motto_en> accessed 02/08/2020

- Kochenov D., Pech L., *From bad to worse? On the Commission and the Council's rule of law initiatives*, Verfassungsblog, 20 January 2015, <<https://verfassungsblog.de/bad-worse-commission-councils-rule-lawinitiatives/>> accessed 02/08/2020
- Mastracci M., *The Rule of Law and the Judicial Retirement Age in Poland: Is the ECJ Judgment the End of the Story?*, International Journal of Constitutional Law Blog, 19/07/2019, <<http://www.iconnectblog.com/2019/the-rule-of-law-and-the-judicial-retirement-age-in-poland-is-the-ecj-judgment-the-end-of-the-story/>> accessed 02/08/2020
- Millennium Challenge Corporation, *Rule of Law indicator*, <<https://www.mcc.gov/who-we-fund/indicator/rule-of-law-indicator>> accessed 02/08/2020
- Mora V., *Important Allies - Why Does the EU Need to Do More for Civil Society?*, Visegrad Insight, <<https://visegradinsight.eu/important-allies-civil-society-central-europe/>> accessed 02/08/2020
- Negri G., *How European civil society is pushing back against democratic erosion*, Carnegie Europe, 12/03/2020, <<https://carnegieeurope.eu/2020/03/12/how-european-civil-society-is-pushing-back-against-democratic-erosion-pub-81254>> accessed 02/08/2020
- O'Neal M., *The European Commission's Enhanced Rule of Law Mechanism*, SWP Comment 2019/C 48, December 2019, <<https://www.swp-berlin.org/10.18449/2019C48/>> accessed 02/08/2020
- Peers S., *Mutual trust and independence of the judiciary after the CJEU judgment in LM – new era or business as usual?*, EU Law Analysis, 15/08/2018, <<http://eulawanalysis.blogspot.com/2018/08/mutual-trust-and-independence-of.html>> accessed 02/08/2020
- Perlman H., *Poland to increase minimum wage for 2020, 2021*, Bloomberg tax, 16/09/2019, <<https://news.bloombergtax.com/payroll/poland-to-increase-minimum-wage-for-2020-2021>> accessed 02/08/2020
- Polish president signs bill on suspending retail tax*, Radio Poland, 21/12/2016. <<http://www.thenews.pl/1/12/Artykul/285678,Polish-president-signs-bill-on-suspending-retail-tax>> accessed 02/08/2020
- Rech W., *Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary*, *Journal of Contemporary European Studies*, 26/07/2018, pp.334-345
- Scheppele K. L., *What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systematic Infringement Actions*, November

- 2013, <<https://verfassungsblog.de/wp-content/uploads/2013/11/scheppele-systemic-infringement-action-brussels-version.pdf>> accessed 02/08/2020
- – *Making Infringement Procedures More Effective: A Comment on Commission v. Hungary*, 30 April 2014, Verfassungsblog, <<https://verfassungsblog.de/making-infringement-procedures-more-effective-a-comment-on-commission-v-hungary/>> accessed 02/08/2020
- Scheppele K. L., Pech, L. ‘Why Poland and not Hungary’, Verfassungsblog, 08/03/2018, <<https://verfassungsblog.de/why-poland-and-not-hungary/>> accessed 02/08/2020
- The future of European Union in Frans Timmermans vision*, Il Trentino, 02/06/2018, <<https://www.ufficiostampa.provincia.tn.it/Comunicati/The-future-of-European-Union-in-Frans-Timmermans-vision>> accessed 02/08/2020.
- Steinbeis M., *Watching the Peacock Dance*, Verfassungsblog, 22/05/2020, <<https://verfassungsblog.de/watching-the-peacock-dance/>> accessed 02/08/2020
- To działa, Website, [in Polish] <<http://www.todziala.org/>> accessed 02/08/2020
- Uitz R., *Pandemic as Constitutional Moment*, Verfassungsblog, 24/03/2020, <<https://verfassungsblog.de/pandemic-as-constitutional-moment/>> accessed 02/08/2020
- – EU Rule of Law Dialogues: Risks – In Context, Verfassungsblog, 23/01/2020, <<https://verfassungsblog.de/eu-rule-of-law-dialogues-risks-in-context/>>
- Wahl, T., *Rule of Law Developments in Hungary*, Eucrim, 19 May 2020, <<https://eucrim.eu/news/rule-law-developments-hungary/>> accessed 02/08/2020.
- Wolfram, N., *Parties and Elections in Europe*, “Hungary”, (2018), <<http://parties-and-elections.eu/hungary.html>> accessed 02/08/2020

OTHER

- Barroso J., President of the European Commission, State of the Union 2012 Address, Plenary session of the European Parliament, Strasbourg, Speech/12/596, 12/09/2012
- European Commission, News, European Commission launches accelerated infringement proceedings against Hungary <https://ec.europa.eu/economy_finance/articles/governance/2012-01-18-hungary_en.htm#:~:text=European%20Commission%20launches%20accelerated%20infringement%20proceedings%20against%20Hungary,->

[17.01.2012%20%2D%20European&text=Strasbourg%2C%2017%20January%202012%20%2D%20The,year%20under%20Hungary's%20new%20constitution.>](#) accessed 02/08/2020

European Commission, The EU's Rule of Law toolbox, at https://ec.europa.eu/info/sites/info/files/rule_of_law_factsheet_1.pdf

European Parliament, *How EU Treaties are changed*, <[https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/640167/EPRS_ATA\(2019\)640167_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/640167/EPRS_ATA(2019)640167_EN.pdf)> accessed 02/08/2020

European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71

Fact Sheets on the European Union, *The budgetary procedure*, <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.5.pdf> accessed 02/08/2020

Helsinki Foundation for Human Rights and Hungarian Helsinki Committee, *Opinion on the Communication from the Commission to the European Parliament, the European Council and the Council concerning "Further strengthening the Rule of Law within the Union. State of play and possible next steps"*, Budapest and Warsaw, 04/06/2019

Hungarian Environmental Partnership Foundation (Ökotárs), *On the way to community organizing*, <https://www.okotars.hu/sites/default/files/okotars_alapitvany_on_the_way_to_community_organizing.pdf> accessed 02/08/2020

Letter to the President-Elect of the European Commission from the president of the Network of Presidents of the Supreme Courts of the EU; The president of the European Association of Judges; and the president of the European Network of Councils for the Judiciary, Brussels, 20 September 2019, <<https://www.encj.eu/node/535>> 02/08/2020

Pazderski F., *Understanding civil society's structural challenges in the Visegrád region to build trust, the Polish case*, European Civic Forum (ed.), *Activizenship*, Third edition, pp.10-15, Virtual copy in possession of author

Prime Minister's Office, Website of the Hungarian government, *Prime Minister Viktor Orbán's speech at the 25th Bálványos Summer Free University and Student Camp*, July 30 2014, <<https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp>> accessed 02/08/2020

- Prime Minister’s Office, Website of the Hungarian government, *Majority of right-wing MEPs voted for Ursula von der Leyen, majority of left-wing MEPs rejected her*, 19/07/2019, <<https://www.kormany.hu/en/prime-minister-s-office/news/majority-of-right-wing-meps-voted-for-ursula-von-der-leyen-majority-of-left-wing-meps-rejected-her>> accessed 02/08/2020
- Reding V., *The EU and the Rule of Law – What next?*, European Commission Speech/13/677, 04/09/2013
- Setniewska D., *Raising the profile of independent civil society through social media, a coalition-building experience*, European Civic Forum (ed.), *Activizenship*, Third edition, pp.16-17, Virtual copy in possession of author
- Youngs R., *New Directions for EU Civil Society Support: Lessons From Turkey, the Western Balkans, and Eastern Europe*, Carnegie Europe, 18/02/2020, <<https://carnegieeurope.eu/2020/02/18/new-directions-for-eu-civil-society-support-pub-81092>> accessed 02/08/2020

CONFERENCES AND WEBINARS

- Blokker P., *Democracy, rule of law and authoritarian populism: a postcard from Europe*, Diritti Comparati Webinar, 10/06/2020
- Kelemen R. D., Halmai G., *From Democratic Backsliding to Dictatorship in the Time of Corona?*, Reconnect Webinar, 8 April 2020
- Lenaerts K., *Upholding the Rule of Law within the EU*, in 2nd Reconnect Conference (5 July 2019) report, p.20, <<https://reconnect-europe.eu/wp-content/uploads/2019/08/RECONNECT-GA-report-web.pdf>> accessed 02/08/2020
- Pardavi M., *Civil society protecting the rule of law: The View from Hungarian Helsinki Committee*, Reconnect Webinar, 05/02/2020

INTERVIEWS

Skype interview with Szymon Ananicz, senior expert and advocacy officer at the Stefan Batory Foundation, 20/06/2020

Skype interview with Pepijn Gerrits, executive director of the Netherlands Helsinki Committee, 24/06/2020

Skype interview with Marta Pardavi, co-chair of the Hungarian Helsinki Committee, 06/07/2020