The Last Soldier Standing? Courts vs Politicians and the Rule of Law Crisis in the New Member States of the EU

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Abstract
The rule of law backsliding in Hungary and Poland revealed the EU's significant vulnerabilities in the face of the need to uphold the values that the whole system of EU integration presumes are in place. The lessons are revealing: respecting the *acquis* does not guarantee continuing adherence to Article 2 TEU values; economic success in the Union does not necessarily entrench democracy and the rule of law; the tools available to preserve the rule of law are largely inadequate, as they could go against the key assumptions of the internal market. Consequently, the lack of political will to deal with the values' crisis is not at all irrational, which makes it even more worrisome. What stands out from the grim picture is the revolutionary case law of the Court of Justice on judicial independence and mutual trust, which bridges the available infringement procedures with the outstanding problems and offers horizontal and vertical empowerment to the EU's decentralised judiciaries – now able to intervene – while also resolving the competences conundrum through a broad reading of the principle of judicial independence as a key element of the rule of law. However inspiring, recent case law developments are insufficient, we argue, to deal with the sociological legitimacy crisis in tackling illiberal democracies plaguing the EU: autocratic legalism cannot be fought with legalism alone. Designing a long-term systemic approach to a complex re-articulation of EU values is indispensable, as enforcement is not a panacea per se.

Keywords: EU law, rule of law, judicial independence, values enforcement, democracy, Poland, Hungary, judicial dialogue

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Introduction

The European Union (EU) and the Member States seem to be doing as little as they can to combat rule of law backsliding in some of the EU's constituent parts. Each of the EU institutions came up with their own plan on what to do, inventing ever more soft law of questionable quality. All that is being done appears to reveal one and only one point: there is a total disagreement among all the actors involved as to how to sort out the current impasse, revealing the soft underbelly of the EU in the face of the 'constitutional *coups*', deeply undermining both its day-to-day functioning and its grand promise.[1] This inaction unquestionably assists the powers of the backsliding Member States in consolidating their assault upon the EU's values even further. At least four key legal-political techniques are used to consolidate the undermining of the rule of law and democracy, as the present work shall demonstrate. All of them can be found in all the backsliding jurisdictions: a veritable template of assaulting the rule of law has emerged.[2] Step-by-step guides could be drawn on the basis of the Hungarian and Polish stories.[3]

There are also positive developments: the crisis allowed the judiciaries of the EU to shine, bringing the inter-court dialogue to a vital new level, upgrading its substance.[4] At the core of this dialogue are now also the fundamental principles of EU law, even those not confined in their entirety to the EU scope of powers,[5] in particular the independence of the judiciary – interpreted by the Court of Justice (ECJ) as an EU law principle and a vital element of the rule of law,[6] as opposed to merely the issues of validity and the interpretation of EU law *per se*, however broadly conceived.[7] Such interpretation – the spectacular innovation reshaping the constitutional system of the Union as we speak – gave voice to vertical concerns related to the independence of the judiciary,[8] as well as horizontal rule of law concerns, leading to a significant refinement of the principle of mutual recognition.[9] This allowed the Court to learn from its past mistakes in dealing with the assaults on the rule of law.[10] The presumption that the strict enforcement of the *acquis* is sufficient to guarantee adherence to the values is clearly no longer valid.[11] Together with the endowment of Article 19(1) TEU with the new significance, the ongoing crisis in the rule of law

[1] Scheppele 2017

[2] Pech and Scheppele 2017

[3] Cf. Krygier 2006, p 129, who anticipated the emergence of such templates long before the backsliding began

[4] CMLRev: editorial comment 2019; Dawson 2013, p 371

[5] On the shift of Article 2 TEU principles from 'principles' to 'values' without undermining the essence of the former, see Pech 2010

[6] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117; Pech and Platon 2018; Ciampi 2018; Krajewski 2018; Parodi 2018

[7] For the criticism of the classical inter-court dialogue before the most recent case law, see e.g. Kochenov and van Wolferen 2018

[8] This allowed the national courts under threat to deploy the preliminary ruling procedure in an innovative way in order to guarantee the preservation of own independence: Biernat and Kawczyńska 2018; Cf. Broberg 2017

[9] E.g. Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586; Rizcallah 2018. Cf. Lenaerts 2017

[10] Compare Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges) with Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 EU:C:2018:852 and Order of 17 Dec. 2018, EU:C:2018:1021

[11] On the difference, see Kochenov 2017a

helped open a new chapter of European constitutionalism: the very fact that the current concerns arose – rather than being strictly confined to the national legal orders – demonstrates the actual maturity of the level of supranational law and integration, or at least of its aspirations.[12]

As a crucial element of the ongoing fight for the rule of law, the principle of the independence of the judiciary is derived at EU level from Article 19(1) TEU, and is regarded as a vital part of the value of the rule of law.[13] Judicial independence thus emerged as a crucial connector between EU law and the enforcement of Article 2 TEU values outside the scope of the *acquis sensu stricto*,[14] which explains the relative silence on the Charter of Fundamental Rights among those who are busy trying to deal with the ongoing rule of law concerns in practice:[15] Article 51 CFR still stands, all the literature on the need to move on from this competence block notwithstanding.[16] After all, we are learning that 19(1) TEU is good enough.[17] A range of tools from pecuniary[18] to interim measures with backfiring force[19] can now be deployed to freeze at least some of the attempts of backsliding governments to undermine the independence of their judiciaries even further. This new, more thoughtful approach could definitely have a significant impact in other areas of EU law too.

Such fundamentally important developments notwithstanding, the fact remains that democratic and rule of law backsliding runs much deeper than the hijacking of the courts: Blokker has been absolutely correct in constantly reminding us of the need to deal with the deeper roots of soft totalitarianism and populist convulsions.[20] At issue is the phenomenon characterised by Scheppele as 'autocratic legalism', which has deep implications for the very fabric of the societies in question, potentially making the return to liberal democracy difficult.[21] Moreover, the problem of 'democratic decay', 'backsliding' and populism seems to be a global one,[22] rather than confined to some EU Member States *per se*. In the EU, just as elsewhere in the world – from Venezuela to Turkey – 'sociological legitimacy'[23] is crucially important and cannot be ignored. The core issue, ultimately, cannot consist in the perfecting of judicial cooperation in the hope of saving some courts in the EU's periphery.[24] It is much broader: how to ensure that the EU's own rule of law is

[12] Even though numerous international organisations around the world face similar crises and are designed to resolve these with a varying degree of success: Closa 2017

[13] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117, paras 36, 37 and 41

[14] Christophe Hillion predicted this development: Hillion 2016

[15] Pech and Platon 2018, pp 1833-1836

[16] Jakab 2016; Jakab 2017. Cf. von Bogdandy et al 2017

[17] The connection with the Charter is however obvious: Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 ECLI:EU:C:2018:852 and Order of 17 Dec. 2018 ECLI:EU:C:2018:1021

[18] Especially when the backsliding Member States attempt to openly defy the Court: Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255

[19] Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 ECLI:EU:C:2018:852 and Order of 17 Dec. 2018 ECLI:EU:C:2018:1021

[20] Blokker 2016; Blokker 2018

[21] Scheppele 2018

[22] Daly 2019; Anselmi 2018

[23] Blokker 2019

[24] Kukovec 2015

meticulously and consistently upheld, while crucially enjoying solid legitimacy? The issue of societal internalisation of the core principles of Article 2 TEU in the face of the populist wave is fundamental here.

We argue that the most mature answer to the problems at hand necessarily requires a long-term perspective and beyond reforming the existing enforcement mechanisms, also involves reform of the Union as such, as well as responding to Blokker's concerns: 'autocratic legalism' impacts societies to a great degree and cannot be fought with legalism alone. Supranational law should be made more aware of the values it is obliged by the Treaties to respect and protect, both at the national and supranational levels. EU law should embrace the rule of law as an institutional ideal,[25] which inter alia implies eventual substantive limitations on the *acquis* of the Union, as well as sincerely implementing EU values in the context of the day-to-day functioning of the Union, thus elevating them above the maladroit instrumentalism – and all its effectiveness leaving so much to be desired – marking them today. The outcome of such instrumentalism is crystal clear: a national economy can be distinctly successful in the internal market even when the core values of the Union are being undermined in the country in question. Poland provides a remarkable example of this, having become the first 'developed market' in Central and Eastern Europe[26] in a context where it is also soon to join Hungary – recently designated by Freedom House as the first 'partly free' regime in the history of the EU[27] – given recent developments. Economically successful EU membership is thus free of any 'natural' requirement that democracy and the rule of law should be sincerely felt,[28] which is a very worrisome reality, one which must be borne in mind at all times when dealing with the Union's remaining rule of law problems.

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What is the situation with the rule of law in the EU today? On the basis of the most dramatic examples, the number of the Member States where the rule of law is not safeguarded doubled as Poland[29] has now joined Hungary.[30] While more states could follow, the Union's position apparently continues to be very weak: new soft law of questionable quality has been produced by each institution.[31] The picture is grim, notwithstanding even the belated activation of the Article

[25] Cf. Roy 2015

[26] Day M (2018) Poland Becomes the First Country from Former Soviet Bloc to Be Ranked a 'Developed Market' www.telegraph.co.uk/business/2018/09/24/poland-becomes-first-country-former-soviet-bloc-ranked-developed/ Accessed 14 February 2019

[27] Simon Z (2019) Hungary Becomes First 'Partly Free' EU Nation in Democracy Gauge www.bloomberg.com/news/articles/2019-02-05/hungary-becomes-first-partly-free-eu-nation-in-democracy-gauge Accessed 14 February 2019

[28] Kochenov 2017b

[29] European Commission 2017a. Cf., most importantly: Sadurski 2018; Bodnar 2018; Koncewicz 2018a; Koncewicz 2016. See also The Venice Commission for Democracy through Law 2016

[30] European Parliament 2017. Cf., most importantly, Szente 2017; Scheppele 2015; Sólyom 2015; Bánkuti et al 2012

[31] Council of the European Union 2014a, pp 20-21; European Commission 2014; European Parliament 2016. Cf. on all these instruments, Waelbroeck and Oliver 2017; Kochenov et al 2016. Kochenov and Pech 2016; Oliver and Stefanelli 2016; but see, Hirsch Ballin 2016

7(1) Treaty on European Union (hereinafter: TEU) mechanism.[32] The particular instance of this activation is obviously somewhat misplaced, since Article 7(1) TEU is about 'threats' to values and the assault on the values in Poland and Hungary is well beyond the 'threat' point, thus begging the question of how appropriate the chosen legal basis actually is.[33] Indeed, the situation would seem to be evolving extremely fast and mainly – almost uniquely – in the direction of the deterioration of the rule of law and an increase in the abuse of the independent institutions by the executive.[34] It would appear that there is a total disagreement among essentially all the actors involved concerning what should be done, and the political will to sort out the current impasse is lacking at the Member State level as well.

The Council is the firmest of all the institutions in terms of downplaying the problem, even going as far as to present the main actions taken by the other institutions to solve it as potentially illegal. The Council Legal Service has been negative – with no solid arguments for its position[35] – about the Commission's 'pre-Article 7 proposal'.[36] It similarly dismissed the attempts to cut the EU funding of the backsliding states.[37] Topping the list, however, are the flimsy reasons put forward by the Council Legal Service for its refusal to permit Judith Sargentini MEP to present her report, which triggered the request from the Parliament to start Article 7(1) procedure against Hungary, in Council: the Council does not want to hear Ms Sargentini in person based on legal advice which was only given 'orally' and with the arguments not disclosed, which does not shield the Council's position from criticism. The only more absurd avenue open to it was to support Hungary before the Court, where it now argues – not convincingly – that the Parliament managed to violate its own rules of procedure in adopting the Sargentini Report.[38]

The explanation behind the unwillingness to act could be obvious: since the Internal Market is an emanation of deep economic interpenetration aimed, precisely, at making outright hostilities between the Member States impossible – precisely the reason for choosing economic tools to achieve the goal of peace[39] – it is clear that the very logic of Article 7 TEU deeply contradicts the logic of the Internal Market and the rich Member States potentially stand to lose a great deal as a result of taking a principled, value-laden position on rule of law backsliding. This is why expecting too much of the Council – and by extension, of Article 7 TEU – would be naïve, unless something truly terrible happens in a backsliding Member State:[40] the Internal Market, after all, functions as designed.[41]

[32] European Parliament 2017; European Commission 2017a. Scheppele and Pech 2017
[33] Kochenov 2019a, p 88
[34] Sedelmeier 2014; Müller 2014; von Bogdandy and Sonnevend 2015; Closa and Kochenov 2016; Jakab and Kochenov 2017; Pech and Scheppele 2017
[35] Kochenov and Pech 2015
[36] Council of the European Union 2014b, esp. para 28
[37] Kelemen, Pech and Scheppele 2018
[38] Case C-650/18 *Hungary v European Parliament* (pending at time of writing). Cf. Kochenov 2019b, p 2082
[39] This is exactly why the objective of peace has proven to be unexportable: Williams 2010. Cf. Kochenov and Basheska 2016
[40] But see Hirsch Ballin 2016
[41] See, for a number of divergent perspectives, Amtenbrink et al 2019

When the Council is naturally disinclined and other EU institutions are profoundly ineffective, the ECJ, as in Andersen's tale, *de facto* plays the role of the last soldier standing. It stands by gradually learning from its own mistakes and the Commission's significant missteps: especially in the 'age-discrimination' cases, where the hijacking of the Hungarian judiciary went unnoticed,[42] while a radically more robust result was achieved in *Commission* v. *Poland* on virtually identical facts in the context of the attempted assault on the Supreme Court.[43]

The Court cannot solve these outstanding problems alone, even when helped by the national judiciaries. A much more concerted effort is required from all the actors involved to get the EU out of this impasse. While it remains the case, the supranational political party groups, instead of helping, seem to be aggravating the situation.[44] This inaction – or attempts to hinder positive change – on the part of the political institutions helps the powers of the backsliding Member States consolidate their assault upon the EU's values even further, undermining the truly heroic efforts of the Court of Justice and the national courts in Poland,[45] Ireland[46] and elsewhere in the Union. The ECJ's 'stone-by-stone' approach,[47] although unable to solve the outstanding problems by itself, nevertheless gives space for optimism and could amount to one of the key legacies of the Lenaerts court.

The inventiveness of the autocrats, populist voting and the weakness of the EU's track record and current position on values, are among a no doubt huge variety of other factors which have brought about a previously unimaginable situation, whereby the EU harbours Member States which – besides obviously not qualifying for Union membership were they to apply today, even given the EU's usual 'window dressing' of rule of law conditionality[48] – are working hard to undermine the key principles the EU was created to safeguard and promote: democracy, the rule of law and the protection of fundamental rights.[49] The underlying issue is the creation of a *modus vivendi* where the EU's own instrumentalist understanding of the rule of law, including principles such as mutual trust or the autonomy of EU law, reinforces, instead of jeopardising, the respect for values enshrined in Article 2 TEU.[50]

The paper starts out by defining the problem, focusing on the nature and gravity of the rule of law backsliding in Hungary and Poland, in order to outline four key techniques deployed by the autocratic regimes in order to consolidate the constitutional capture and massive assault on European values (Part 1). The techniques to achieve, legitimise and consolidate the destruction of the rule of law include: appeals to untamed national sovereignty emanating directly from 'the people'; fetishisation of 'constitutional identity' taken out of context; appeals to national security

[42] Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges); cf. Belavusau 2013

[43] Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 ECLI:EU:C:2018:852 and Order of 17 Dec. 2018, ECLI:EU:C:2018:1021; cf. CMLRev: editorial comment 2019

[44] Kelemen 2017; Kelemen and Pech 2018

[45] Biernat and Kawczyńska 2018

[46] See the whole saga surrounding Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586

[47] As explained by President Lenaerts in the context of the EU citizenship law field: Lenaerts 2015

[48] De Ridder and Kochenov 2011

[49] As well as other values expressed in Article 2 TEU; Pech 2010; Kochenov 2017; Magen and Pech 2018

[50] Klamert and Kochenov 2019

complete with the harassment of the media, NGOs and the independent educational institutions; and international disinformation campaigns. (Part 2) We proceed by discussing the role of institutions, with special regard to the room for manœuvre and the responsibility of the judiciary in upholding the rule of law, now taken seriously by the Court of Justice (Part 3). Next, the state of the art with regard to values in the EU legal system will be discussed (Part 4), followed by a normative assessment of how these values should preferably be approached (Part 5). Looking at supranational law, we argue that a failure to upgrade the role played by values – including the rule of law – sufficiently when the Union transformed from an ordinary treaty organisation into a constitutional system lies at the root of the problem (Part 6). The EU's powerlessness is among the root causes of letting Member States slide into authoritarianism and the courts alone will not be able to solve the puzzles currently outstanding (Part 7). We conclude that beyond praising the ECJ's immense forward-looking efforts, shifting the focus of the discussion from the enforcement of the rule of law to the reform of the Union as such is needed as a long-term solution (Part 8). There is time: illiberal regimes seem to be there to stay, and the options with regard to changing this reality, either supranationally or from a grass-roots level, are limited if not non-existent: we might need to wait two years, ten years – or thirty, for that matter – before Hungary and Poland are back on track. In the meantime, the EU institutions should arrive at a more subtle realisation of the EU's constitutional role and should not insist on the specificities of EU law trumping all other considerations, including respect for the values the EU and the Member States are supposed to share, but should instead acknowledge the possibility of potential limitations so as to let the foundations of the EU evolve, as provided for by the Lisbon Treaty. This could definitely be achieved in the context of a soft quarantine of Poland, Hungary and any other backsliding states, cutting the funding received by these countries from the EU, as well as designing and implementing more effective ways of combating fraud involving EU funds, while the ECJ's salient into control over the independence of the judiciary, as well as the dialogue between the courts in the EU, is extended.

1. European Values: From High Expectations to Jeopardy?

Whereas all Member States suffer from deficiencies in at least some elements of the rule of law, in light of the emerging pattern of constitutional capture we focus exclusively on rule of law backsliders and follow the definition proposed by Pech and Scheppele, according to which rule of law backsliding is a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party'.[51] In what follows we shall focus on the two Member States which currently satisfy these definitional elements: Hungary and Poland.

Even though countries acceding to the EU in 2004 had high hopes of joining the democratic world after decades of totalitarian rule, the enthusiasm for European values on the part of some

[51] Pech and Scheppele 2017, p 8

Central Eastern European Member States vanished on the way – a phenomenon which was all but unthinkable during the 1989 Eastern European 'velvet revolutions'.[52] During the democratic transition in all these countries, a separation of powers had been realised, where parliamentary law-making procedure required extensive consultation with both civil society and opposition parties and crucial issues of constitutional concern required a supermajority vote in Parliament. Independent self-governing judicial power ensured that the laws were applied fairly. Constitutional scrutiny played a special role in transitioning democracies. The Commission, having supervised the transition on behalf of the EU while focusing on all the core values,[53] has wrongly assured EU citizens and governments that the newcomers would not represent a danger of backsliding – precisely what we are witnessing today.[54]

After the regime change, Hungary was the first 'post-communist' country to join the Council of Europe and abide by the European Convention on Human Rights and Fundamental Freedoms (ECHR or Convention) in 1990. Poland gained membership in the Council of Europe in 1991 and became party to the ECHR in 1993. Hungary and Poland established official relations with the North Atlantic Treaty Organization (NATO) already in the early 1990s and became NATO members in 1999. They also signed EU Association Agreements in the early 1990s, which paved the way for accession negotiations and EU membership.[55] The Treaty of Accession to the European Union was signed in 2003. Hungary, Poland, six other Central and Eastern European countries and two Mediterranean islands became members of the European Union on 1 May 2004 as part of the biggest enlargement in the Union's history.[56] The European Union played an important role in the transformation of all the Eastern European states and in the context of their democratisation.[57] The principle of conditionality was used to achieve this, coupled with the presumption that any democratic or rule of law 'backsliding' would not be possible once the transformation was in place.[58] Alongside the Europe Agreements, the Union applied the Copenhagen criteria adopted by the 1993 Copenhagen European Council.[59] Clearly going beyond the scope of the Europe Agreements,[60] these criteria became the cornerstone of Hungary's and Poland's transformations throughout the first decade of this century, also reshaping the core of EU constitutionalism in the process.[61] The shocking rate at which the deconstruction of the rule of law occurs in Poland and Hungary today demonstrates the importance of a constitutional culture beyond black letter law, including constitutions, institutions and procedures.

[52] Vachudova 2005

[53] Kochenov 2004. This focus had a profound impact on EU constitutionalism, informing both the doctrine and the law on EU values: Sadurski 2012

[54] For an analysis of why there have always been strong reasons not to believe the Commission's assurances, see Kochenov 2008

[55] Inglis 2000

[56] Ott and Inglis 2002

[57] Cf. Vachudova 2005

[58] Kochenov 2008

[59] Hillion 2004

[60] Müller-Graff 1997, p 42; Maresceau 2001

[61] Sadurski 2012

The shift came rather abruptly when in April 2010, in a free and fair election, the centre-right political parties, Fidesz Hungarian Civic Union (Fidesz) and the Christian-Democratic People's Party (in Hungarian: Kereszténydemokrata Néppárt, KDNP)[62] got 53% of the votes, which translated into more than two-thirds of the seats in the unicameral Hungarian Parliament under the election law then in force.[63] The ruling party did not tolerate any internal dissent, and after forming the second Fidesz government[64] it eliminated – at least in the domestic setting – all sources of criticism by both voters and state institutions, effectively disposing of any effective checks and balances. Should a discontent electorate now wish to correct deficiencies, it would be difficult for it to do so due to the novel rules of the national ballot, which fundamentally bring into question the fairness of future elections. Judicial oversight and most importantly, the Hungarian Constitutional Court's power to correct the failures of a majoritarian government have been considerably impaired, along the powers of other *fora* designed to serve as checks on government powers. Distortions of the media and a lack of public information lead to the impossibility of a meaningful public debate and weaken the chances of restoring deliberative democracy. Support by the electorate is enhanced through emotionalism, revolutionary rhetoric, catchphrases such as 'law and order', 'family', 'tradition', 'nation', symbolic law-making, and identity politics in general. The friend/foe dichotomy is artificially created through punitive populism and scapegoating, partially by building on pre-existing prejudices, and partially by creating new enemies such as multinational companies or persons challenging Hungarian unorthodoxy on the international scene. Legally-speaking, the Hungarian 'reforms' are very well-designed, combining elements of different legal approaches present in different jurisdictions around the world in such a way that the outcome is a 'Frankenstate', an apt turn of phrase coined by Kim Scheppele.[65] As a result of the government in power's concerted effort to destroy the checks and balances which used to restrain it and capture the state, Hungary, the poster child of transition, emerges as the first 'partly free' political regime in the EU.

The changes can be traced back to the government's ideological roots, but unlike in Poland, government ideology is chosen by way of political convenience. Turning towards illiberalism was a necessity for a government wishing to retain political and economic power at all costs, and capture the state to this end. It could not reconcile its ideological stance with the concept of liberal democracy. So Fidesz had to search for other role models than the democratic world, and found its allies in countries such as Turkey and most importantly Russia. Even though illiberalism was relabelled as 'Christian democracy' after Fidesz was re-elected in April 2018, the same form of

[62] The cooperation between Fidesz and KDNP should not be regarded as a coalition, rather as a party alliance already in existence before the elections. According to their self-perception, their relationship is similar to the party alliance between CDU and CSU in the Federal Republic of Germany. KDNP is a tiny party which would probably not get into Parliament on its own. The insignificance of KDNP allows us to abbreviate for the sake of brevity: whenever the term 'Fidesz government' is used, the Fidesz-KDNP political alliance is meant.

[63] Act C of 1997 on the Election Procedure

[64] Fidesz first governed between 1998 and 2002

[65] Scheppele 2013. Cf. Uitz 2015

governance remains.[66] Representing radically opposing views within a short period never hurt Fidesz politicians, who are brilliant at explaining their reasons for a volte-face. The party, originally professing strong anti-Russian sentiments, became pro-Putin – and still managed to retain public support, while rebuilding the state machinery in such a way that alteration of power became if not impossible, then extremely difficult, thus effectively capturing the Hungarian state.

Poland followed the path of illiberalism when the Law and Justice party (Prawo i Sprawiedliwość, PiS) entered government in 2015.[67] The country experienced a very serious departure from liberal democratic principles and is going through the reversal of the rule of law in various fields.

The tools employed and the outcomes are very similar to those in Hungary, but certain elements of the Polish case also make it distinct, illustrating that there was no Central Eastern European or even Visegrád pattern. First, unlike Hungary, the Polish government does not have a constitution-making nor amending majority, therefore – for the time being – it engages in the dismatlement of the rule of law by way of curbing ordinary laws and directly ignoring the constitution. As Ewa Łętowska put it, the government has been 'trying to change the system through the back door'.[68] Second, Hungary is essentially a kleptocracy,[69] where the government may pick any ideology available on the political spectrum to acquire and retain economic and political power. By contrast, the Polish government and especially PiS leader Jarosław Kaczyński, the *de facto* ruler of Poland, are more likely to truly believe in what they are preaching in terms of national interests. When justifying its rule of law backsliding, a whole new worldview is developed, rewriting the democratic transition and the post-1989 Polish history as something fundamentally corrupted and shaped by foreign interests, in opposition to national ones.[70] For him, post-1989 Polish history, including the roundtable talks in 1989, is the result of an indecent compromise between the individuals and movements bringing about regime change and the outgoing Communist forces. Along these lines, he sees all democratic institutions as a 'sham'; for him, 'the Third Republic is not a real state but a phantom state built on the intellectual corruption of political elites, bribery, dysfunctional government caving in to Brussels and selling off Poland to strangers for peanuts'.[71] The war on history plays a key role in the project of constitutional

[66] After Fidesz won the April 2018 elections and secured a 2/3 majority in the Parliament for the party, PM Orbán declared the end of the era of liberal democracy and stated that it was replaced by Christian democracy. Dostal et al 2018, p 22. Instead of substantive changes, the new terminology can rather be explained by the recognition that that the term 'iIlliberal democracy' 'in English sounds like blood libel'. HVG, (2015) Orbán: Az illiberális demokrácia magyarul jól cseng www.hvg.hu/itthon/20150519_orban_fekete_barany Accessed 14 February 2019

[67] See, for the best analysis to date, Sadurski 2018

[68] Pacula 2017. Taking the President's announcement of a 2018 constitutional referendum into account, this might change in the future: Kelly L (2017) Polish President Wants Referendum on Constitution in Nov 2018 www.reuters.com/article/poland-politics-president-constitution-idUSL8N1IQ6P0 Accessed 14 February 2019. For an immediate analysis see Matczak 2017

[69] Cf. Magyar 2016

[70] Davies C (2016) The Conspiracy Theorists Who Have Taken over Poland www.theguardian.com/world/2016/feb/16/conspiracy-theorists-who-have-taken-over-poland Accessed 14 February 2019. Conelly and Koncewicz 2016

[71] Id.

capture.[72] For PiS 'repolonisation' means taking over power, banks, land and other property, and means reclaiming Poland from both foreigners and the corrupt political elites so as to bring about true regime change.[73] Any means are apparently allowed, and any checks or controls on power are seen as unnecessary burdens the state shall be freed from, so as to accomplish this purgative exercise.

2. The Four Elements of the Autocrats' Playbook

Illiberal governments are very well aware of the irreconcilability of their politics with European values. The states in question therefore lobby for exemptions and recognition of their Frankenstates in the EU context by relying mostly on four techniques which have proved to be effective and which include four key elements. Firstly, the backsliding states resort to the invocation of national sovereignty as their absolute right to 'reform' the state in a way which leads to the dismantlement of democratic and rule of law structures of checks and balances, so that placing the state at the service of a *de facto* one-party regime goes undisturbed. Secondly, backsliding states deploy the rhetoric of constitutional identity, claiming a measure of legal exceptionalism and specificity to shield the destruction of the rule of law from criticism. Thirdly, security concerns are showcased as a reason to diminish the level of checks on the government. Finally, backsliding states' governments capture the media and research institutions and conduct large-scale disinformation campaigns to undermine free speech, destroy the public debate and silence dissent. Let us look at some examples of the deployment of these four key strategies.

a. Invocation of national sovereignty to capture the judiciary, and beyond

The first technique is the invocation of national sovereignty through the promotion of a false opposition between 'democracy' and the legal structures in place to tame majoritarian government with a view to preserving, precisely, the alternation in power and the continuation of democratic government. For the populists, the division of powers and the system of checks and balances stand for the taming of 'democracy'. The Polish capture of the Constitutional Tribunal, the Supreme Court, the National Council of the Judiciary, and the ordinary courts happened under the pretext of 'reform' of the judiciary and was presented as a sovereign matter for the Member State, implying that the EU would be acting *ultra vires* if it interfered.[74] The worst nightmare is evolving before our eyes: the democratic Polish state, which was motivated to join the Union as Sadurski rightly explained, partly as a way to protect *itself* against the possible destruction of democracy and the rule of law,[75] is being dismantled by PiS in plain sight, with the EU doing virtually nothing to stop this.

[72] Koncewicz 2018b. In Hungary the situation is similar: Könczöl 2018, p 246
[73] Freedom House 2017
[74] Grabowska-Moroz and Szuleka 2018
[75] Sadurski 2012

The Polish Constitutional Tribunal was the first institution to fall victim to state capture in late 2016.[76] Its powers have been considerably cut, changes were introduced to its structure and proceedings, its budget was cut, and three justices elected constitutionally by the seventh Sejm (the lower chamber of the Polish Parliament) were not permitted to take their oath, while three justices elected unconstitutionally by the eighth Sejm after PiS had won the elections were permitted to do so. Having rendered the Constitutional Tribunal irrelevant in upholding the rule of law, the government has done the same with the Supreme Court, the National Council for the Judiciary and the ordinary courts. The changes concerned the reorganisation of the Supreme Court to empower the executive to: prematurely end the tenure of judges, meaning forcefully retire them; determine the conditions and procedure for becoming a Supreme Court judge; control disciplinary procedures, amending the rules of procedure of the Supreme Court; change the total number of judges serving on the Supreme Court; reorganise the chambers in which Supreme Court justices serve; and restructure their case allocation.[77] Ordinary court capture was effected by subordinating all the Presidents and Directors of courts, i.e. the persons who decide on administrative and financial issues, to the Minister of Justice.[78] Even this short enumeration of government intrusions into the powers of the courts highlights only some of the milestones in judicial capture and shows, in the words of the Venice Commission – the most authoritative body in Europe on the issues of the rule of law and judicial independence – that 'the constitutionality of Polish laws can no longer be guaranteed'.[79]

In Hungary, we witnessed a similarly vicious attack against the judiciary, starting in 2011. The judicial retirement age of 70 was lowered to 62 with immediate effect, on the pretext of a labour law issue, where Hungary claimed sole power. This resulted in the removal and replacement of about 8% of all judges, 27% of Supreme Court judges and more than 50% of appeal court presidents. Towards the end of 2012, responding to pressure from various national and international fora,[80] the government agreed to rehire retired judges aged between 62 and 70, if they wished to continue to work. However, the judges' return was obstructed by two factors. First, court president positions and other functions had already been filled by new judges, meaning that the compulsorily retired judges who wished to return were offered lower court places with less prestige. Second, the judges who made to retire prematurely received considerable compensation for the period of their forced retirement, and a compensation equalling their previous year's salary, if they opted to remain in retirement. As a result, once the compensation scheme was introduced, most judges preferred it to returning to work. The matter became essentially moot. In theory,

[76] Koncewicz 2016

[77] In disregard of national and international criticism, on 8 December 2017, the laws on the Supreme Court and the Council were adopted by the Sejm, and on 15 December 2017 they were approved by the Senate

[78] Ustawa z dnia 23 marca 2017 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych [Law amending the act on the organization of common courts system], OJ 2017, item 803, www.dziennikustaw.gov.pl/DU/2017/803 (in Polish) Accessed 14 February 2019

[79] The Venice Commission for Democracy through Law 2016; European Commission 2017b, para 10

[80] HCC Decision 33/2012. (VII. 17.), CC Decision 45/2012. (XII. 29.), Venice Commission for Democracy through Law 2012

Hungary was condemned for its early retirement law by the ECJ, but in practice, the most experienced judges were removed from the judiciary: the Commission won a Pyrrhic victory.[81]

Another example in the same vein is the dispute related to the felling of trees in the Białowieża Forest, a UNESCO World Heritage Site. Pending the judgment in the main proceedings in *Białowieża*, the Court of Justice ordered Poland to stop the forest management operations under challenge.[82] The Polish response was intensified logging, and Poland even asked to remove the forest in question from the UNESCO World Heritage List.[83] Reference to national sovereignty was frequently made without any further justification. As the above controversy shows, by questioning the powers of the EU, the Polish government did not aim to initiate a legitimate discussion about the delineation between national and EU powers. It rather preferred 'to break free from the supranational machinery of control and enforcement. Following the trajectory from the "exit in values" to the "exit in legality" reveals an inescapable logic. All institutions, domestic and supranational, are seen to be standing in the way, and their rejection is part of the comprehensive constitutional doctrine – the politics of resentment'.[84]

b. Appeals to constitutional identity to undermine the institutions

The second and more sophisticated technique is the attempt to package departures from the rule of law in the name of constitutional identity.[85] Back in 2017, the Hungarian Parliament failed to acquire the necessary quorum to constitutionally entrench the concept of constitutional identity, but after Fidesz and its tiny coalition partner the Christian Democratic People's Party acquired a two-thirds i.e. constitution-amending majority, a modification to Article R) of the Fundamental Law referring to 'Hungarian cultural and Christian identity' has again been tabled. However, the amendment is somewhat redundant, since the already captured Hungarian Constitutional Court ('HCC') came to rescue the government, and developed its own theory of constitutional identity after the previous failed attempt to incorporate the concept into the Fundamental Law. When delivering its abstract constitutional interpretation in relation to European Council decision 2015/1601 of 22 September 2015 establishing provisional measures benefitting Italy and Greece, to support them in better coping with an emergency situation characterised by a sudden inflow of third country nationals in those Member States, the HCC invoked constitutional identity.[86] However tautological this may sound, according to the HCC 'constitutional identity equals the constitutional (self-)identity of Hungary'.[87] Its content is to be determined by the HCC on a case-by-case basis based on the interpretation of the Fundamental Law, its purposes, the National

[81] Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687

[82] Case C-441/17 R *Commission v Poland* Order of 20 Nov. 2017 ECLI:EU:C:2017:877

[83] In Case C-441/17 *Commission v Poland* [2018] ECLI:EU:C:2018:255 the Court ruled that by carrying on with the logging in the Białowieża Forest, Poland failed to fulfil its obligations under EU law. Cf. Coutron 2018; European Papers Editorial 2017

[84] Koncewicz 2018c

[85] Halmai 2018, pp 23-42; Kelemen and Pech 2018. For the best general treatment of the concept, see, Cloots 2015

[86] HCC decision 22/2016 (XII. 5.)

[87] Id.

Avowal contained therein, and the achievements of the Hungarian historical constitution. This definition is so vague that it can be considered as an attempt to grant a *carte blanche* type of derogation to the executive and the legislature from Hungary's obligations under EU law.[88] Once Fidesz acquired a two-thirds majority again in the 2018 parliamentary elections, it finally incorporated the constitutional identity into the Fundamental Law by way of the so-called seventh constitutional amendment.[89] Questioning claims of constitutional identity might well be criticised by those concerned as being ignorant or lacking respect, but European supervisory mechanisms should be able and confident enough to distinguish bluff from genuine claims of constitutional identity.[90]

c. Invocation of national security to undermine checks on the government

The third technique is reference to national security. Labelling virtually anyone still capable of formulating dissent as a foreign agent is a long used technique, but in Hungary it was taken to a whole new level in 2017 with the adoption of Lex CEU and Lex NGO,[91] targeting a private university and foreign-funded civil society organisations independent of government funds and thus able to express criticism of the government. The explanations of the laws attempting to force the CEU out of the country and to limit the public space for NGOs attempt to delegitimise these entities by claiming that they pose national security threats. The phenomenon of a shrinking space for civil society can be traced in both Hungary and Poland. The public narrative regarding NGOs has become very hostile. We are witnessing orchestrated smear campaigns against members of civil society who criticise the government or simply do not fit its ideological agenda.[92] In some cases, the smear campaigns are followed by investigations undertaken by law enforcement or tax authorities, which may create an even more hostile environment for NGOs.[93] Governments can deprive civil society of effective functioning by limiting their access to funding, including state but also foreign private funding, as the Hungarian law obliges NGOs to indicate that they are 'organisations receiving support from abroad', and to display this stigmatising label on all their published materials.[94] This verges closely on demonising dissenters as terrorists, and indeed the government claims that NGOs receiving foreign support – i.e. often the most professional ones –

[88] For English language analyses see Halmai 2017

[89] See inserted Article R) Fundamental Law. For the official government position see: Trócsányi 2018

[90] Kelemen 2018; Perju 2018; Halmai 2018

[91] Act XXV of 2017 on the Modifications of Act CCIV of 20011 on National Higher Education and Act LXXVI of 2017 on the transparency of foreign-funded organisations. According to the law on NGOs, any association or foundation receiving foreign support above the amount of 23.200 EUR per year will have to notify the courts about this fact. EU money is exempted, but only if distributed by the Hungarian state through a budgetary institution. The respective organisation will be labelled as a so-called 'organization supported from abroad', which will need to be indicated at the entity's website, press releases, publications, etc. The law is disturbing in many aspects: it mimics Russian worst practices, which have been condemned by international organisations as violations of freedom of association and free speech.

[92] Associated Press in Warsaw (2017) Police Raid Offices of Women's Groups in Poland After Protests www.theguardian.com/world/2017/oct/05/police-raid-offices-of-womens-groups-in-poland Accessed 14 February 2019

[93] The Hungarian Helsinki Committee et al 2017

[94] For more details see Szuleka 2018.

help asylum seekers, including terrorists, enter the country. A modification of the Hungarian Criminal Code ensures that criminal sanctions can be imposed on NGOs and individuals which provide legal or other types of aid to migrants arriving at Hungary's borders.[95] National security claims not only fit into the ruling party's nationalistic, exclusionary rhetoric and scapegoating, but can also serve (i.e. be abused) as the basis for lobbying for exemptions from European standards. As Uitz points out, reference to national security, which is the sole responsibility of the Member States according to Article 4(2) TEU 'can be a much stronger centrifugal force in Europe than cries of constitutional identity could ever be. □…□ Therefore, it is all the more important that European constitutional and political actors realize: The carefully crafted new Hungarian laws use the cloak of national security to stab the rule of law, as understood in Europe, in the heart'.[96]

d. Disinformation campaigns at the service of the backsliding regimes

The fourth technique the autocrats use to undermine the rule of law is disinformation or misinterpretation of the laws and policies of the government. Again Hungary took the lead in 2011 when they sent a wrong translation to Brussels of their controversial new constitution, the Fundamental Law, which made it appear to conform better with EU laws and values than the actual Hungarian original.[97] From a more substantive view, the Polish[98] and Hungarian[99] responses to the Commission's[100] and the European Parliament's[101] invitations for a Council Decision on the determination of a clear risk of a serious breach by Poland and Hungary of values enshrined in Article 2 TEU also contain factual mistakes and deliberate deceit.[102] Up-to-date information following the rapid legislative changes which sometimes happen literally overnight and solid legal research may deconstruct the fake information these texts contain and challenge the contention that these political forces engage in a dialogue, when all they do is produce documents or make some cosmetic changes to gain time and press on with their illiberal agendas.

[95] Article 353/ of Act C of 2012 on the Hungarian Criminal Code. For the official government position see: Website of the Hungarian Government (2018) Strong Action is Required Against the Organisers of Migration www.kormany.hu/en/news/strong-action-is-required-against-the-organisers-of-migration Accessed 14 February 2019. The Commission has recently started infringement proceedings against Hungary regarding this law

[96] Uitz 2017

[97] For a detailed enumeration of the discrepancies see The Hungarian Helsinki Committee et al 2011. This technique is also employed the other way around: when the Venice Commission delivered its highly critical opinion of the Fundamental Law, it was interpreted by the Government, as if the Hungarian constitution was being praised. See, The Hungarian Helsinki Committee 2011

[98] See: Chancellery of the Prime Minister 2018

[99] See, as made public by MEP Ujhelyi: Ujhelyi 2018

[100] European Commission 2017a

[101] Committee on Civil Liberties, Justice and Home Affairs 2017

[102] For an assessment of the Polish White Paper by the Polish Judges Association 'Iustitia', together with a team of experts, see Iustitia 2018. For an assessment of the Hungarian information sheet see the lengthy criticism by Labanino and Nagy 2018

3. The Role of the Judiciary and that of Political Institutions

The 'Anti-Member States' described above abuse their laws and constitutions to create autocracies, yet they take full part in governing the Union, benefiting from unprecedented direct financial support, and abusing the international prestige which is associated with membership of the EU,[103] while obviously undermining its image – an organisation obliged by its own law to actively *promote* values abroad which are not found at home.[104] In addition to prestige and to deriving tangible benefits from the integration of the national economy into the internal market, huge sums of money coming from the EU are direct transfers to the autocrats.[105] Poland will have received EUR 86 billion under the current budgetary framework by 2020 and Hungary 24 billion, which is an unprecedented transfer of resources from democracies to illiberal regimes after the end of the Cold War, and which unquestionably contributes to the entrenchment of the regimes in power. This is especially true in a context where the kleptocratic elites having captured the state and channel EU money through the networks of their clients and party associates in the direct interest of furthering harmful political agendas in direct contradiction with the values that the Union paying for them purports to stand for. Further research is needed to see how harmful exactly the Union's financial involvement in the backsliding Member States has been.

The international reactions to the current situation underline one thing: the Union is either content with the current situation or entirely powerless. The former is hardly convincing given both the size of direct economic transfers to Hungary and Poland as well as the dangers that these Member States bring into the Union, as fully expressed in the numerous public statements of the members of the College of Commissioners and heard during European Parliament debates. If a Member State breaches the EU's fundamental values, this is likely to undermine the very foundations of the Union and the trust between its Member States, regardless of the field in which the breach occurs.[106] Beyond harming the nationals of that Member State, other Union citizens residing in that state will also be detrimentally affected. Moreover, the lack of limitations on 'illiberal practices'[107] may encourage other Member State governments to follow suit and subject other countries' citizens to an abuse of their rights. In other words, violations of the rule of law may become contagious if there are no consequences.[108] Finally, all EU citizens will to some extent suffer due to the given state's participation in the EU's decision-making mechanisms. At the very least, the legitimacy of the Union's decision-making process will be jeopardised. Therefore, the latter explanation, i.e. the EU's powerlessness, seems to be the core of the matter. Such powerlessness is a consequence of a combination of the real difficulties, conceptual and practical,

[103] Closa 2016, p 13

[104] Pech 2013

[105] Consequently, the debates about how best to block the inflow of EU funds to the backsliding Member States has been very vivid over the last years. E.g. Halmai 2019

[106] European Commission 2003, p 5

[107] The term 'illiberal democracy' was coined long ago, but it gained practical relevance in the EU after Hungarian Prime Minister praised the concept in his speech given in Băile Tuşnad on 25 July 2014. Cf. Frans Timmermans' speech to the European Parliament: 'There is no such thing as an illiberal democracy' (Timmermans 2015a)

[108] s.a., Politico 2015, p 15

related to the enforcement of EU values,[109] but also, equally importantly, to the systematic misrepresentation of the Union's capacities through the unwillingness of its Member States and institutions to act, as a clear consensus on dealing with rule of law backsliding forcefully is apparently lacking. Lastly, the Monnet method underlying the Union, where economic interpenetration has always played a central role to achieving the goal of peace through shaping an environment where thoroughgoing political – and especially military – conflict becomes too costly to remain an option. This is exactly why a miracle is needed for the Council to treat Article 7 TEU seriously: the provision, at its core, goes against the very rationale of European integration as designed.

The claims that little to nothing can be done under the current legal framework – which are heard with remarkable regularity – are entirely baseless, as Hillion, Besselink and other scholars have consistently pointed out.[110] Now that the Article 7(1) TEU procedure has been triggered against Poland[111] and Hungary,[112] the opposite preoccupation comes to the fore, namely the inefficiency of the procedure,[113] which leads to the reinvention of other available tools. For instance, Articles 258 TFEU and 259 TFEU have been given a broader appeal in the backsliding context, as evidenced by the infringement proceedings pursued against Poland in relation to its destruction of its Supreme Court, which builds on the newly-found *effet utile* and EU law scope-shaping significance of Article 19(1) TEU (as well as Article 47 CFR, read in conjunction with the former),[114] in contrast to the Pyrrhic victories achieved in the otherwise similar Hungarian context.[115] Scholars anticipated this development,[116] which infuses Article 258 TFEU with clear new potential, all the necessary caution about interpreting it too broadly notwithstanding. Some necessary changes are technical and easily enforceable, such as treating all infringement cases with a rule of law element as rule of law cases, which the Commission has already done by requesting the reversal of attempted harmful 'reforms' through an accelerated procedure to prevent the packing of the Supreme Court of Poland with government stooges, which was being attempted following the Hungarian template precisely.[117] The Hungarian judicial capture case described above should be a warning for all future disputes: it was misconstrued as an age discrimination case, albeit the controversy was ultimately about judicial independence, and thus the rule of law.[118] The rule of law infringement was finalised during the 10 months the proceedings continued before

[109] Cf. Itzcovich 2017; Avbelj 2017

[110] Hillion 2016; Besselink 2017; Kochenov 2017c

[111] European Commission 2017a

[112] European Parliament 2018

[113] As a consequence, the institutions see the solution in the power of the purse to provide disincentives for rule of law violations. See European Commission 2018

[114] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117; Krajewski 2018; Pech and Platon 2018

[115] Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687

[116] Hillion 2016

[117] E.g. Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 EU:C:2018:852 and Order of 17 Dec. 2018, EU:C:2018:1021

[118] It is impossible to argue that the Court was not aware of what was going on on the ground: AG Kokott outlined the relevance of the on-going 'reform' for the Rule of Law quite clearly in her Opinion in the case, see paras 54-55

the EU institutions. Had the case not been misinterpreted as a discrimination case, the government could not have proposed individual compensation as a remedy. Both in terms of the remedies sought and the timing of the action, *Commission* v. *Poland* shows a spectacular learning curve on behalf of the Commission and the Court in terms of the increased effectiveness of the deployment of Article 258 TFEU in the context of rule of law backsliding. Kim Scheppele is absolutely right, asserting that systemic infringements require systemic compliance[119] – and Article 279 TFEU offers a lot of room here to prevent a situation from deteriorating by blocking any harmful 'reforms'. Crucially, a mere observance of the letter of the *acquis*, as was the case with the Hungarian judicial retirement age case, without however taking to heart its spirit and the essential promises of Article 2 TEU, coupled with an array of other provisions,[120] is not the right way forward, as is now abundantly clear.[121]

In addition to the substance for construing an infringement, the time element should also be considered: institutions including the ECJ should automatically take into account the gravity of the possible consequences of rule of law violations, the scale of their effects, and the fact that time is on the side of those violating the rule of law, to expedite or give priority to such cases. Often however, even an accelerated infringement procedure will not be prompt enough to prevent the irreparable harm that rule of law violations or backsliding can cause. Therefore, where an infringement procedure involving a rule of law element is pending, interim measures should be awarded, just as happened in the proceedings before the ECJ over the Polish judicial capture case. Other changes, such as a new approach by the Commission in bundling rule of law violations to show their systemic nature, or allocating more responsibility to democratic Member States in the enforcement of the rule of law, have long been proposed by scholars in the field.[122]

Some, like First Vice President Timmermans, compare the present situation to that of the Austrian crisis at the turn of the millennium and fear that triggering Article 7 TEU would similarly backfire.[123] The parallel drawn between the Austrian and the current situations is entirely misleading, however, for numerous reasons. The most obvious is that the institutions could not have made use of the then non-existent preventive limb of Article 7 – currently Article 7(1) TEU – at the time the *Freiheitliche Partei Österreichs* (FPÖ) entered government, and there was no reason to make use of the provision as it then stood, i.e. to invoke the sanctioning limb.[124] Given the lack of a legally predefined preventive procedure, a course of political action was opted for that need not – but very importantly *could* – be taken vis-à-vis Hungary or Poland in light of Article 7. The political quarantine of Austria started right after the formation of the government, before those in power could have eroded European values, and once the situation had been thoroughly

[119] Scheppele 2016

[120] On the variety of approaches open to the Commission and the Court of Justice, see the general overview in Hillion 2016. Cf. Closa et al 2014

[121] Kochenov 2017a

[122] Scheppele 2016; Kochenov 2015a

[123] Timmermans 2015b

[124] Lachmayer 2017

investigated, the Three Wise Men commissioned with this task did not find a violation of EU values and accordingly suggested lifting the political sanctions.[125] EU Member States' hostile intervention against Austria was backed neither by a proper legal basis nor political necessity: an illegal ad hoc action triggered by a democratic election result. In teaching us, ironically, that the EU *does not need any law* or a formal legal basis to take action in this domain, should the political will be available: so much for supranational rule of law – an issue we return to *infra*. The current Hungarian and Polish situations cannot be compared to the former Austrian one, since the former have already progressed far down the route towards constitutional capture, which is well documented both by European institutions and in the academic literature.

4. The Place of Values in the System of EU law: a Focus on Infringement Proceedings

Article 2 TEU, which makes reference to democracy, the rule of law and a series of other interrelated Union values, is somewhat different in nature from the rest of the *acquis*. The same unquestionably applies to the violations of values: Article 2 TEU violations are not the same as ordinary *acquis* violations. Such differences are particularly acute in the context of one specific type of chronically non-compliant state, where, as in Hungary, non-compliance is *ideological* and cannot be explained by reference to lacking capacity – 'simple' corruption and outright sloppiness[126] – characterisations one might deploy in the context of some South East European countries.[127] Where chronic non-compliance is ideological, Articles 260 TFEU, permitting striking at the non-compliant states financially, and 279 TFEU, authorising interim measures aimed at preventing the further deterioration of the situation on the ground,[128] become the *crux* of the whole story, as simple restatements of a breach under Article 258 TFEU (or Article 259 TFEU, for that matter)[129] will presumably not be enough,[130] even if the recent innovations mentioned in the previous sections would probably allow for some even in the context of the most cautious reading of these provisions' potential.[131] The question of the effectiveness of the ideological choice favouring non-compliance made by the relevant Member States will remain open for the years to come, as the Court in consort with other institutions is in search of more effective means to deploy the current instruments in the context of rule of law backsliding. Although the Court obviously offers room for optimism, as explained above, alone, it will not be able to solve all the outstanding problems: other institutions and the Member States will have to step in.

[125] Ahtisaari et al 2001

[126] Uitz 2015

[127] E.g. Ioannidis 2017

[128] This provision has been deployed both against the logging in the Polish UNESCO-designated forest (Case C-441/17 R) and in the context of the attempted 'reform' of the Supreme Court in the country, aimed at depriving it of independence (Case C-619/18 R)

[129] See e.g., Kochenov 2015a

[130] On the main deficiencies of the system, see, most importantly, Jack 2013; Wennerås 2012; Wennerås 2017

[131] See, most importantly, Schmidt and Bogdanowicz 2018, p 1061; cf. Gormley 2017

While the literature has focused on restating the EU's presumed rule of law-based character,[132] as well as the issue of the enforcement of EU rule of law and other values in the defiant Member States,[133] it is crucial to realise that Europe's structural constitutional vulnerability stretches far beyond enforcement issues *per se*. Instead, it is rooted in the discrepancies between the EU's proclaimed constitutional structure as we find it in the Treaties and the reality marking the development of EU integration, as outlined above, which fosters doubt as to whether the Union is actually abiding by the rule of law.[134] In light of this structural deficiency, one can argue that the much-analysed systemic deficiency[135] in the area of values and especially the rule of law was bound to emerge sooner or later as the Union matured, whether in Hungary, Poland or elsewhere.[136] Dealing with it will necessarily require moving beyond a preoccupation with enforcement, which has engulfed all the recent literature on the subject – quite understandably, given the astonishing speed of the constitutional deterioration in both Hungary and Poland – towards reforming the integration project at its core,[137] ensuring that democracy and the rule of law are endowed with a more important role in the context of the supranational law of the Union.

In this general context, where the *acquis* and values are not synonymous, the application of the Copenhagen criteria in the context of the recent enlargement rounds teaches a particularly cautionary lesson: the Commission has emerged as an institution which, when given all responsibility regarding the preparedness of the new Member States for accession (values compliance outside the scope of the *acquis* included) failed the exercise.[138] Here, to the void of substance was added the lack of the capability to generate such a substance, the lack of virtually any limitations emerging from the scope of the law notwithstanding. Besides illustrating the EU's built-in limitations with regard to its ability to generate the substance of Article 2 TEU rules, the pre-accession context also sounds an alarm bell on institutional capacity: the Commission is probably not the best actor to entrust with the internal monitoring of Member States' compliance with Article 2 TEU.

5. How to Approach the Rule of Law in the Current Context?

The necessary question which emerges is how to outline the essence of the rule of law with the potential specificity of the supranational integration context in mind, while distinguishing this concept from democracy, fundamental rights and the other values of Article 2 TEU. Palombella's writing is extremely helpful in this regard, we suggest.[139] The essence of the rule of law – which

[132] Fernández Esteban 1999; Pech 2016

[133] E.g., the contributions in Closa and Kochenov 2016; Jakab and Kochenov 2017; von Bogdandy and Sonnevend 2015; Müller 2013

[134] Palombella 2009; Palombella 2016; Kochenov 2015b

[135] von Bogdandy and Ioannidis 2014

[136] See, for a broad discussion, Kochenov et al 2015

[137] For a much more critical restatement of this particular argument, see, Kochenov 2016; Weiler 2016

[138] Kochenov 2008

[139] Please consult Kochenov 2015b, on which this and the following sections are based, for the full picture

distinguishes it from legality, democracy and other wonderful things – is that the law is constantly in tension with and controlled by other law – how the EU falls short of this institutional ideal will be demonstrated. Palombella's rule of law, which is *dialogical* in essence since it presupposes and constantly relies on a constant taming of law with law, 'amounts to preventing one dominant source of law and its unconstrained whim, from absorbing all the available normativity'.[140] According to this account the rule of law implies that the law – *gubernaculum* – should always be controlled by other law – *jurisdictio* – lying outwith the sovereign's reach.[141] The tension is necessarily dialogical in nature since the absolute domination of either *gubernaculum* or *jurisdictio* necessarily destroys the core of the rule of law, which is the tension between the two. It goes without saying that making use of such a definition should necessarily be qualified by the Krygier's sage observation: 'whatever one might propose as the *echt* meaning of the rule of law is precisely that: a proposal'.[142] The rule of law is a classic example of an essentially contested concept:[143] the EU is seemingly as hopeless at defining what it means as its Member States and the broad academic doctrine.[144] The debate is constantly ongoing,[145] but the last available definition,[146] inspired by the Venice Commission's guidelines,[147] could provide a solid illustration of the current state of the definitional debate. Whether one agrees with the Commission's approach or not, it seems to be beyond any doubt what the rule of law is not. It is not democracy, the protection of human rights, nor similar delightful things, each of them definitely boasting its own sound claim to existence as a notion independent of the rule of law.[148] And it is not mere legality, which is adherence to the law.

Once the rule of law and legality are distinguished, the basic meaning of the rule of law comes down to the idea of the subordination of the law to another kind of law, which is not up to the sovereign to change at will.[149] This idea, traceable back to mediaeval England,[150] is described with recourse to two key notions to reflect the fundamental duality of the law's fabric, indispensable for the operation of the rule of law as a principle of law:[151] *jurisdictio* – the law untouchable for the day-to-day rules running the legal system and removed from the ambit of the purview of the sovereign – and *gubernaculum*, which is the use of the general rule-making

[140] Palombella, 2014, p 18. Similarly, see Georgiev 1993, p 4

[141] For an analysis of this perspective, see, id.; Palombella 2012; Palombella 2009, p 17. See also Palombella 2016

[142] Krygier 2014, p 78

[143] For a brilliant outline of the history of contestation, see, Waldron 2002

[144] For a multi-disciplinary overview see e.g. Hadfield and Weingast 2014; Cf. Levrat 2018, p 157; Pech 2009 and the literature cited therein. See also Pech 2013, on the 'holistic understanding' of the rule of law. For a special 'Eastern-European' perspective, which is particularly important in the context of the ongoing developments in the EU, see Přibáň 2009

[145] For key contributions, see, Schröder 2015; Morlino and Palombella 2010; Palombella and Walker 2009

[146] European Commission 2014

[147] The Venice Commission for Democracy through Law 2016b, as well as in the earlier version thereof: The Venice Commission for Democracy through Law 2011

[148] One should not forget the wise words of Joseph Raz: 'We have no need to be converted into the rule of law just in order to believe … that good should triumph': Raz 1979, p 21

[149] Palombella 2016

[150] Reid 2004

[151] Palombella 2012

power.[152] As Krygier put it in his commentary on Palombella's work, 'the king was subject to the law that he had not made, indeed that made him king. For the king – for anyone – to ignore or override that law was to violate the rule of law'.[153] Even in the contemporary age of popular sovereignty, this statement is obviously true, since democracy should not be capable of annihilating the law. Indeed, this is one of the key points made by the defenders of judicial review.[154]

Unlike despotic or totalitarian regimes, where the ruler is free to do anything he pleases; or problematic EU Member States such as Hungary, where the constitution is a political tool; or Poland, where the executive ignores the constitution to undermine the separation of powers; or pre-constitutional democracies, which equate the law with legislation,[155] the majority of constitutional democracies in the world today recognise the distinction between *jurisdictio* and *gubernaculum*, thus achieving a sound approximation of Palombella's rule of law as an institutional ideal, in terms of maintaining and fostering the constant tension between these two facets of the law. The authority should be itself bound by clear legal norms which are outside of its control. Indeed, this is the key feature of post-war constitutionalism. The *jurisdictio–gubernaculum* distinction, lying at the core of what the rule of law is about, can be policed either by courts or even by the structure of the constitution itself, through removing certain domains from *gubernaculum*'s scope.[156] The ideology of human rights is of huge significance in this context.[157] Furthermore, the existence of international law,[158] and of course supranational legal orders,[159] definitely contributes to the policing of the aforementioned duality.[160] The policing of the *jurisdictio–gubernaculum* divide is thus possible both through means internal and external to a given legal system.

6. Supranational Law and the Effective Instrumentalisation of Values

From Lord Mackenzie Stuart[161] to *Les Verts*, which characterises the Treaties as 'a constitutional charter based on the rule of law',[162] what we have been hearing about on the subject of the rule of

[152] For a detailed exposé, see Palombella 2016. See also Palombella 2009, p 30, emphasising that this duality should not be disturbed by democratic outcomes and ethical choices

[153] Krygier 2014, p 84

[154] Cf. Kumm 2010

[155] In a pre-constitutional state, the *Rechtsstaat* shapes a reality, in the words of Gianfranco Poggi, where 'there is a relation of near-identity between the state and its law': Poggi 1978, p 238 (as cited in Krygier 2014, p 84)

[156] Roznai 2017, pp 179-196

[157] Frankenberg 2013

[158] Dworkin 2013

[159] For an argument that numerous Central and Easters European states were actually motivated by the desire for external legal checks on their laws – a *jurisdictio* – when joining the Council of Europe, see Sadurski, 2012

[160] Palombella 2012, ch 2

[161] Mackenzie Stuart 1977. See also Bebr 1965. Cf. Levrat 2018

[162] Case 294/83 *Partie Ecologiste 'Les Verts' v Parliament* [1986] ECLI:EU:C:1986:166, para 23. See also Opinion 1/91 *EEA Agreement* [1991] ECLI:EU:C:1991:490

law in the EU actually amounts to internal legal compliance.[163] This is an established understanding of legality.[164] Legality is not enough to ensure that the EU behaves like – and is – a true rule of law-based constitutional system. If we were to argue that equating the rule of law and legality is legitimate, then, as Palombella correctly notes, our thinking 'shifts the issue from the rule of law to the […] respect for the laws of a legal system'.[165] Yet 'the rule of law cannot mean just the self-referentiality of a legal order',[166] which is the reason why contemporary constitutionalism is usually understood as implying, among other things, additional restraints through law:[167] restraints which are crucially not simply democratic or political.[168]

By and large, the re-articulation of the Union from an ordinary treaty organisation into a constitutional system was not accompanied by a sufficient upgrade of the role played by the core values it is said to build upon.[169] These values do not inform the day-to-day functioning of EU law, neither internally[170] nor externally.[171] Let us not forget that the promotion of its values, including the rule of law, is an obligation lying on the Union in accordance with the Treaties.[172] Indeed, unless we take the Commission's scribbles for granted, the EU's steering of countless issues directly related to the values at hand is more problematic than not. The EU is not about the values Article 2 TEU preaches, which any student of EU law and politics will readily confirm.[173] The EU's very self-definition is not about human rights, the rule of law or democracy.[174] EU law functions differently: there is a whole other set of principles which actually matter and which are held dear: supremacy, direct effect and autonomy are the key trio which spring to mind.[175] Operating together, they can set aside both national constitutional[176] and international human

[163] Fernandez Esteban 1999; also, Everling 2010, p 701; Zuleeg 2010, pp 772-779. EU institutions' own accounts of what is meant by the rule of law beyond the tautology of 'being bound by law' present a most diverse account, which found an expression in the EU's external action: Pech 2013, p 108; Burlyuk 2015, p 509

[164] E.g. the contributions in Besselink et al 2010

[165] Palombella 2015

[166] Id. Compare with M. Krygier: 'To try to capture this elusive phenomenon by focusing on characteristics of laws and legal institutions is, I believe, to start in the wrong place and move in the wrong direction': Krygier 2006. See also Tamanaha 2006

[167] For a clear discussion of the relationship between constitutionalism and the rule of law see, Krygier 2017

[168] Naturally, this is not to say that we should do away with the political restraints. Indeed, the virtually complete depoliticisation of the law has been one of the key criticisms of the EU legal order: Přibáň 2015, p 193 and Wilkinson 2015

[169] Williams 2009

[170] Weiler 2009, p 51; Williams 2010

[171] For critical engagements, see Cremona 2011, p 275; Leino and Petrov 2009

[172] Article 3(5) TEU

[173] The crucial argument in this vein has been made, most powerfully, by Andrew Williams: Williams 2009. See, also, Weiler 2010

[174] See most recently, Opinion 2/13 *ECHR Accession II* [2014] ECLI:EU:C:2014:2454, para 170, which states that the fundamental right in the EU are 'interpret[ed] [...] within the framework of the structure and objectives of the EU'

[175] Procedural principles cannot possibly replace the lack of substantive attention to the core values encompassed by Article 2 TEU, including the rule of law, threatening to cause justice deficit of the Union: Kochenov et al 2015. Cf. Halberstam 2015 and Eeckhout 2015; Kochenov 2010

[176] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107

rights,[177] as well as UN law constraints.[178] In the current crisis-rich environment,[179] the Union frequently stars as part of the problem, rather than part of the solution. The problem is, it behaves like a constitutional system endowed with authority relying on the ECJ to police this claim – a natural expectation of any legal order[180] – while failing at the same time to boast the necessary ABC of constitutionalism: when push comes to shove, its values play a foundational role in outlining neither the scope nor the substance of the law.[181]

Bringing the values back in is indispensable to infusing the EU's constitutional claims with credibility. In practice, this would mean a return to the promise of EU integration made in the days of the Union's inception.[182] A *fédération européenne* (the one mentioned in the Schuman Declaration) to be brought about through the creation of the internal market, stood for a line of developments significantly more far-reaching than the idea of economic integration as such. The former is values-based – while the latter is probably not (at least, not based on the values of Article 2), as Andrew Williams explained in his seminal work.[183]

Not the whole story was negative, however. Although the Union's ambition has gradually been scaled down to the market – call it a hijacking of the ends by the means[184] – the Union started *de facto* to play the role of the promoter of liberal and tolerant nationhood, as rightly characterised by Kymlicka, mostly through negative integration and advancing a very clear idea of constitutionalism based on proportionality, tolerance and the taming of nationalism.[185] Furthermore, at the core of the Union there lay basic mutual respect among the Member States: the Union would become impossible if they began to obstruct the principle of mutual recognition.[186] This came down to frowning upon the ideology of 'thick' national identities, however glorified in some schoolbooks. The ultimate result is that the EU, subconsciously as it were, emerged as a promoter of *one* particular type of constitutionalism,[187] which is based on the rule of law understood through national democracy and the culture of justification which implies human rights protection and strong judicial review. To be a Member State of the EU in the context of these developments came to signify one thing: to stick to this particular type of

[177] Opinion 2/13 *ECHR Accession II* [2014] ECLI:EU:C:2014:2454; Kochenov 2015b

[178] On the *Kadi* saga, see, de Búrca 2010, p 1. See also, of course, Case C-584/10 *Kadi II* [2013] ECLI:EU:C:2013:518

[179] Three equally important facets of the current crisis can be outlined: values; justice; and economic and monetary. On the crisis of values, see e.g., Williams 2009 and Weiler 2010. On the crisis of justice: Kochenov et al 2015. On the economic side of the crisis, see e.g., Menéndez 2013; Adams et al 2014

[180] Lindeboom 2018

[181] Peebles 1998; Kochenov 2017d

[182] On the key aspects of dynamics of EU's legal history see, Davies and Rasmussen 2012

[183] Williams 2010

[184] Kochenov 2013

[185] Kymlicka 2006, p 134. See also Davies 2010

[186] Poiares Maduro 2007. For a very sophisticated analysis of the Union's effects on the Member States see Somek 2010a and Somek 2010b

[187] Perju 2012b

constitutionalism, which is now reflected in Article 2 TEU and which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Article 49 TEU.[188]

The EU thus emerged as a vehicle of the negative market-based approach to the 'values' question. Clearly, creating a market and questioning the state is not sufficient as a basis for a mature constitutional system, potentially creating a system of justice rendered nugatory at the supranational level[189] and perpetuating the Union's inability to help the Member States labouring to inflict a justice void on themselves, either through an outright embrace of Putin-style 'illiberal democracy' – proclaimed as an ideal to strive for by the Hungarian Prime Minister Orbán[190] – an attack on the judiciary and the media – as in contemporary Poland[191] – or through failing to build a well-ordered and functioning modern state – as it the case in Greece[192] and Romania,[193] for instance. Outright defiance is thus not required to fall out of adherence to Article 2 TEU aspirations.

7. Mutual-Recognition-Supranationalism: Powerless, but the Court ?

The Union is thus generally powerless concerning the *enforcement* of values and more importantly, is also indecisive as to their *content*. The very fact that we are now concerned with enforcing them seriously amounts to nothing else but a concession that the presumption that there is a level playing field among all Member States in terms of the rule of law etc. – i.e. the fact that all of them actually adhere to the specific type of constitutionalism the EU set out to promote – does not hold (any more). This is something the European Court of Human Rights has already clearly hinted at in *M.S.S. v. Belgium and Greece*.[194] Acknowledging this alongside the EU's obvious powerlessness as far as values are concerned is a potentially explosive combination in a Union built on Member State equality and the principle of mutual recognition. In a situation where the core values are not respected by Hungary, for instance, we are not dealing with a Member State that is revolting for one reason or another against a binding norm of European law. At the level of values, we are dealing with a *principally different Member State*, with the Belarusisation of the EU from the inside.[195]

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[188] See e.g. Kochenov 2008, ch 2

[189] Douglas-Scott 2015

[190] For the full text of the speech, see, Tóth C (2014) Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014 www.budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592 Accessed 14 February 2019. In 2018 it has been renamed as 'Christian democracy', but there is no substantive change behind the shift in terminology (see Part 1)

[191] Cf. Venice Commission 2016

[192] Ioannidis 2017

[193] Perju 2012a, p 246

[194] *MSS v Belgium and Greece* [2011] App no 30696/09 (ECtHR, 21 January 2011) But see also the Bosphorus presumption of equivalent protection *Bosphorus v Ireland*, App no 45036/98 (ECtHR, 20 June 2005) and *Michaud v France*, App No. 12323/11, (ECtHR, 6 December 2012), which survived even after Opinion 2/13 had been rendered: *Avotiņš v Latvia*, App no 17502/07, (ECtHR, 23 May 2016)

[195] Belavusau 2013, p 1145

Once the values of Article 2 TEU are not observed, the essential presumptions behind the core of the Union no longer hold, undermining the very essence of the integration exercise: mutual recognition becomes an untenable fiction, which the Member States are nevertheless bound by EU law to adhere to. This is the core of what the autonomy of EU law stands for, as confirmed by the Court in its infamous Opinion 2/13 which vetoed the EU's accession to the ECHR.[196] In this Opinion on the draft accession agreement of the EU to ECHR, the Court of Justice highlighted the principle of mutual trust between Member States, which forms the cornerstone of the area of freedom, security and justice. In the Court of Justice's interpretation, this means that a Member State must presume all other Member States to be in compliance with EU law, including their respect for fundamental rights. To be fair, it should be mentioned that the Court also referred to 'exceptional circumstances', which would warrant departure from the mutual trust principle,[197] but the exact nature of these exceptional circumstances was left open. In *Aranyosi* and *Căldăraru*[198] and in a later case discussed *infra*,[199] the Court made clear that it will not accept a clear risk of a serious breach of EU values (Article 7(1) TEU) as a benchmark for suspending mutual trust in general. Rather, it holds that the application of mutual recognition based instruments – or at least the European Arrest Warrant[200] at issue in the case – may only be suspended if the sanctioning prong of Article 7 TEU (current Article 7(2)–(3) TEU) is invoked and the Council determines a breach of EU values.[201] Absent the completion of an Article 7(2)-(3) procedure, only individual surrenders may be suspended on a case-by-case basis, provided a two-prong test is followed.[202] The Court clarified that the executing judicial authority must assess whether there are fundamental rights deficiencies in general. Once a risk of a rights violation is established, as a second step, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant will be exposed to a real risk of human rights violations, in the event of his surrender to that Member State. If the risk of a human rights infringement in general and in the specific case are established, the execution of the warrant must be postponed.[203]

The Court left a number of issues unclear, two of which deserve greater attention as they might have detrimental consequences for the rule of law as it shall be understood in the EU, and might contribute to the proliferation of rule of law backsliding across borders. First, *Aranyosi* placed too much of an emphasis on external *fora* in determining the state of values in the Member

[196] This point has been forcefully restated in the ECJ's Opinion 2/13 *ECHR Accession II* [2014] ECLI:EU:C:2014:2454. See e.g. para 192

[197] Id.

[198] Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198

[199] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586

[200] Council of the European Union 2002

[201] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586, para 70

[202] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586, para 73

[203] In *Aranyosi and Căldăraru*, the Court of Justice had an opportunity to clarify what those exceptional circumstances might be and it made an attempt to do so, but ultimately opened more questions than it answered: see Joined Cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198. For an analysis see van Ballegooij, and Bárd 2016

States. The judgment in *Aranyosi* heavily depended on a pilot judgment issued by the European Court of Human Rights (ECtHR),[204] holding that prison conditions in Hungary violated Article 4 EU Charter (Article 3 ECHR). But after the judgment in *Aranyosi* had been rendered, Hungary adopted a new law,[205] which provided a combination of preventive and compensatory remedies, guaranteeing in theory genuine redress for human rights violations originating from cramped prisons and other unsuitable detention conditions. In light of this new law, in *Domján v. Hungary*[206] the ECtHR declared another Hungarian detainee's application – and all others' in his position – complaining about prison conditions premature and therefore inadmissible, saying that Mr. Domján should make use of the remedies introduced by the new Hungarian law before turning to the Strasbourg court. The ECtHR's decision in *Domján* led the AG believe in the *ML* case that surrender cannot be postponed any longer on the grounds of poor prison conditions in Hungary.[207] The ECJ adopted a more refined approach:[208] it realised that procedures enabling authorities to grant redress for fundamental rights violations cannot rule out the existence of a real risk of a violation, and that the *Domján* case law should not automatically make Member States' courts dismiss claims from persons requested. Nevertheless, it implied that 'in the absence of minimum standards under EU law regarding detention conditions'[209] the ultimate bar for determining the potentiality of human rights violations remains to be determined by the Strasbourg court. It means that the Court is not yet ready to develop higher standards or review the values' situation on the ground in a Member State, but continues to 'contract it out' to the Council of Europe, at least where human rights are at stake.

Second, the Court left it unclear whether and to what extent the *Aranyosi* case law would be applicable where a case did not exclusively concern a human rights violation, but also included an element of the rule of law being threatened in the issuing state. In the case of *LM*, the ECJ got a chance to answer the question.[210] The issue was whether a suspect of a crime should be surrendered from Ireland to Poland when the executing judicial authority had serious doubts as to whether the suspect would receive a fair trial in the issuing state, due to the lack of independence of the judiciary resulting from changes to the Polish judicial system.[211] The ECJ could have gone – and scholars have previously argued[212] for doing so – beyond its case law and framed the case primarily as a rule of law problem. The ECJ however constructed the case as a possible violation

[204] *Varga and others, op. cit.*

[205] Act No. CX of 2016 amending Act No. CCXL of 2013 on the enforcement of punishments, measures, certain coercive measures and confinement for regulatory offences

[206] *Domján v Hungary* App no 5433/17 (ECtHR, 14 November 2017)

[207] Case C-220/18 PPU, *ML* [2018] ECLI:EU:C:2018:547, Opinion of AG Campos Sánchez-Bordona, paras 51-54

[208] Case C-220/18 PPU, *ML* [2018] ECLI:EU:C:2018:589, para 117

[209] Id. at para 90. Cf. van Ballegooij 2017

[210] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586; Cf. Dorociak and Lewandowski 2017

[211] High Court of Ireland decision of 12 March 2018, *Minister for Justice and Equality v Celmer* [2018] IEHC 119. For the final version of the preliminary reference see High Court of Ireland decision of 23 March 2018, *Minister for Justice and Equality v Celmer* [2018] IEHC 119

[212] Bárd and van Ballegooij 2018a; Bárd and van Ballegooij 2018b; Bárd and van Ballegooij 2018c; van Ballegooij and Bárd 2018

of a fundamental right, namely the right to a fair trial as protected by Article 47 EU Charter, which presupposes that tribunals are independent and impartial.[213] The ECJ ruled that the two-step test in *Aranyosi* needs to be followed by the executing judicial authority when making decisions on surrenders. The second prong however makes the suspension of surrender almost impossible. It seems to be a disproportionate burden on the individual to show how a systemic breach if the rule of law effects his or her case individually. Elsewhere we have argued that once the first step of the test was satisfied, the burden should shift to the stronger party, *i.e.* the issuing state.[214] The Court's insistence that the issuing and executing authorities engage in a 'dialogue' about the latter's independence,[215] presupposes the unlikely scenario that a captured court will admit that it was captured.

Applying the test in *LM*, both the High Court of England and Wales[216] and the Irish High Court surrendered suspects to Poland. Both cases illustrate how difficult it is for the defence to prove that the wanted person will be individually affected by the current threats to the independence of the Polish judiciary to the extent that this would pose a real risk of a breach of their fair trial rights, and more specifically their rights to an independent tribunal.

Summing up the relevant case law on mutual recognition, the Court insisted that autonomy considerations in the context of EU law will usually tend to prevail over human rights and other values – including the rule of law – cherished on the one hand in the national constitutional systems of the Member States, and on the other by Article 6 TEU, the Charter of Fundamental Rights and also Article 67(1) TFEU, according to which fundamental rights are supposed to be the cornerstones of the area of freedom, security and justice. Indeed, it would probably not be incorrect to argue that this would be the shortest possible summary of Opinion 2/13, which itself summarised EU law as it stands. The consequences for the rule of law are drastic: all the principles invoked by the ECJ to justify giving EU law the upper hand in Opinion 2/13 are procedural, while the problems that the reliance on the ECHR is there to solve are substantive. Curing substantive deficiencies of the EU legal order with the remedies confined to autonomy and direct effect is a logical flaw plaguing the EU legal system, which puzzles the most renowned commentators.[217] One cannot quarrel about the roses when the forests are burning. To agree with Eleanor Sharpston and Daniel Sarmiento, 'in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided with the latter. The losers under Opinion 2/13 are not the Member State of the signatory States of the Council of Europe, but the individual citizens of the European Union'.[218] This is so, we must add, not only because of the potential reduction of the level of human rights protection. Rather, it is due to the fact that the EU, as Opinion 2/13 made clear, boasts the

[213] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586, paras 47-48
[214] van Ballegooij and Bárd 2016, based on Bárd et al 2016
[215] Case C-216/18 PPU, *Minister for Justice and Equality v LM* [2018] ECLI:EU:C:2018:586, paras 76-77
[216] *Pawel Lis et al*, EWHC 2848(Admin) 31 October
[217] E.g. P. Eeckhout 2015; Halberstam 2015
[218] Sarmiento and Sharpston 2017

overwhelming potential to undermine the rule of law at the national level and this potential impact is not an empty threat.[219]

In the light of the above it appears that the ensuring of mutual trust – an topic much discussed in the context of the safeguarding of the rule of law in the EU – takes the back seat in the context where infringement proceedings initiated by the Commission created a veritable boost in the creative reading of the values in cumulation with Article 19(1) TEU and the Charter in the recent *Commission v. Poland* cases, as analysed in the very beginning of this contribution. While both horizontal 'questioning mutual trust' route and the vertical infringement proceedings / preliminary references route are obviously deployable against democratic and rule of law backsliding, the latter emerges as the preferred option in the light of the most recent case law pertaining to both routes discussed. The ECJ's role has been both significant and tricky and so far it has played ideally, without offering room for any possible reproach. Which route – the vertical, or the horizontal – will appear most usable is not as important, in the end, compared with the very masterful articulation of both options, which are bound to be the core legacies of the Lenaerts Court.

8. Enforcement through Subtle Gradualism ? As a Conclusion

The rule of law backsliding in Hungary and Poland revealed the EU's significant vulnerabilities in the face of the need to uphold the values the whole system of EU integration presumes to have in place. The lessons are revealing: respecting the *acquis* does not guarantee continuing adherence to Article 2 TEU values; economic success in the Union does not necessarily entrench democracy and the rule of law; the tools available to preserve the rule of law are largely inadequate, as they could go against the key assumptions of the internal market. Consequently, the lack of political will to deal with the values' crisis is not at all irrational, which makes it even more worrisome. What stands out from this grim picture is the revolutionary case law of the Court of Justice on judicial independence and mutual trust, which bridges the available infringement procedures with the outstanding problems and offers horizontal and vertical empowerment to the EU's decentralised judiciaries – now able to intervene – while also resolving the competences conundrum through a broad reading of the principle of judicial independence as a key element of the rule of law. However inspiring, recent case law developments are insufficient, we argue, to deal with the sociological legitimacy crisis in tackling illiberal democracies plaguing the EU: autocratic legalism cannot be fought with legalism alone. Designing a long-term systemic approach leading to a complex re-articulation of EU values is indispensable, as enforcement per se is not a panacea.

The core question which emerges in the light of the above discussion, is how to ensure that the EU's own approach to the rule of law does not undermine, if not destroy, adherence to the principle of the rule of law in the Member States, which are, in fact, compliant with the values listed in Article 2 TEU. We submit that such an understanding of the rule of law cannot possibly

[219] See, further, Kochenov 2016

lead to the much-needed solution of the outstanding problems. Instead, the most mature answer to the problems should necessarily involve not only the reform of the enforcement mechanisms, but *the reform of the Union as such*, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, to aspire to protect at both the national and supranational levels. Instead of hiding behind the veil of the procedural purity banners of autonomy, supremacy and the like, EU law should embrace the rule of law as an institutional ideal.[220] This implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating the values above the instrumentalism marking them today. The result would be the emergence of a supranational constitutional system at the EU level, which would be truer to the glorious 'constitutional' label, and which would play a significantly more productive role in solving the backsliding challenges in Hungary, Poland, and any other Member States following suit, where the war against all what we believe in is currently ongoing.

[220] Cf. Palombella 2012

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