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Treaty changes for the better protection of EU values in the Member States

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Abstract

Safeguarding the rule of law, human rights and democratic legitimacy should indeed be non-negotiable. This being said, the entire discussion over the core Europe and a wider circle of Member States would be redundant if there existed a shared respect for the rule of law and other values delineated in Article 2 TEU. Consequently, we place an emphasis on the need to prioritise rule of law enforcement over a multi-speed Europe. We view the proposals we present from the EU's standpoint as instruments of robust rule of law enforcement and entrenchment, or tools of militant rule of law designed to safeguard the current functioning and long-term existence of the European project – notwithstanding the fact that the procedures and legal principles we advocate for can also function as an external check on national governments, thus contributing to the reinforcement of values at both levels of governance.

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1 | EU VALUES IN PERIL

1.1 | Substantive and procedural EU complicity in violating Article 2 TEU values

Erosion of values is currently a worldwide phenomenon, and in some parts of the European Union, it fundamentally endangers European integration, both for the EU as a community of values and as a community of laws.[1] Certain European countries, notably Bulgaria, Hungary, Poland, Romania and Slovakia, have experienced or are experiencing Rule of Law backsliding, even if Poland, following the legislative elections of October 2023, is no longer backsliding but is now seeking to undo the damage done by the previous ruling coalition since 2015.[2] Similar concerns are present at the supranational level too.

Here, the problems are twofold: substantive and procedural. On the one hand, we have cases of massive, direct, substantive EU values violations, for example in the field of migration. The most severe human rights violations by the EU (and the Member States), including mass deaths, widespread push-backs and torture, take place in the liminal spaces of EU's borders, where EU law not infrequently takes the side of the abusers, as Kochenov and Ganty have explained[3]: the EU's death machine, which cost racialised migrants almost 30,000 lives over the last eight years, is empowered by a handful of legal techniques, which, together, amount to a large-scale assault on the Rule of Law and human rights in their own right.[4]

Similarly, the overproceduralisation of the Rule of Law at the supranational level, which accompanied the rapid expansion of the Court's jurisdiction in this domain,[5] coupled with the unwillingness of the Council to act,[6] resulted in what Kochenov characterised as 'supremacy Rule of Law',[7] which could be a significant deviation from the essence of the principle. The direct outcome is both further politicisation and the voiding of the values supranationally, resulting in unaccountable mass human rights violations,[8] rocking of the institutional balance[9] and the failure of the supranational level to guarantee essential rights of Europeans.[10] For a productive analysis, it is absolutely vital to recognise that remedying deficiencies at the national level is directly related to addressing flaws in the supranational design and operation of the EU. Solving problems at one level can empower bad actors to exploit

[1]LD Spieker, *EU Values before the Court of Justice* (Oxford, 2023). Cf M Klamert and D Kochenov, 'Article 2 TEU', in M Kellerbauer et al. (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nf ed., Oxford, 2024); J Wouters, 'Revisiting Art. 2 TEU', 5 *European Papers* (2020) 255; KL Scheppele et al., 'EU Values Are Law, After All' 38 *Yearbook of European Law* (2021) 3; L Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' 14 *Hague Journal on the Rule of Law* (2022) 107; L Pech, 'The Rule of Law as a constitutional principle of the European Union', *Jean Monnet Working Papers* No. 04/09 (NYU, 2009).

[2]A Wójcik, Restoring the Rule of Law in Poland: An Assessment of the New Government's Progress, GMF Policy Brief, June 2014; Marek Safjan, 'The Crisis of the Rule of Law: A Lesson for Europe? Restoring the Rule of Law in Poland: A Particular or a Universal Challenge', in Wouters et al. (eds), *Upholding the Rule of Law in the EU* (Oxford: Oxford University Press (forthcoming)).

[3]S Ganty and D Kochenov, 'EU Lawlessness Law' 30(1) *Columbia Journal of European Law* (2024) 78-156.

[4]Ibid.; S Ganty and D Kochenov, 'How the EU Death Machine Works' (*VerfBlog*, February 2024); O Shatz, *EU Crimes against Humanity* (JSD Dissertation, Yale Law School, 2023).

[5]L Pech and D Kochenov, 'Respect for the Rule of Law in the Case-Law of the Court of Justice', SIEPS Report 2021:3 (Stockholm, 2021).

[6]P Oliver and J Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction', 54 *Journal of Common Market Studies* (2016) 1075.

[7]D Kochenov, 'EU Rule of Law Today: Limiting, Excusing, or Abusing Power?' in A Södersten and E Hercock (eds), *The Rule of Law in the EU: Crisis and Solutions*, SIEPS Report 2023:1op (Stockholm, 2023); D Kochenov, 'Restoring the Dialogical Rule of Law in the EU: Janus in the Mirror', 25 *Cambridge Yearbook of European Legal Studies*, 2024 (first view).

[8]Ganty and Kochenov, 'How the EU Death Machine Works'; D Kochenov and S Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in C Barnard et al (eds) *Pursuit of Legal Harmony in a Turbulent Europe* (Hart 2024); Shatz, *EU Crimes against Humanity*; S Ganty et al, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"', 16 *Hague Journal on the Rule of Law* (2024) 739; O Shatz and J Branco, 'Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to Article 15 of the Rome Statute on EU Migration Policies in the Central Mediterranean and Libya (2014–2019)' (2019). Available at https:// www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

[9]D Kochenov and G Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member State Power after the Sharpston Affair', 27 *European Law Journal* (2021) 262; E Basheska, 'EU Enlargement in Disregard of the Rule of Law' 14 *Hague Journal of the Rule Law* (2022) 221, P Bárd and D Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for EU's Constitutional Awakening', 27 *European Law Journal* (2021) 39.

[10]P Bárd and D Kochenov, 'What Article 7 is Not: The European Arrest Warrant and the *de Facto* Presumption of Guilt – Protecting EU Budget Better than Human Rights?', in A Łazowski and V Mitsilegas (eds) *The Arrest Warrant at Twenty* (Hart 2025); P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' 38 *Fordham International Law Journal* (2015) 955; B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Goreign Human Rights Court' 40(5) *European Law Review* (2015) 683.

the other level of law as a gateway to perpetuate violations, thus further abusing EU's 'lawlessness law'[11] to escape national-level Rule of Law guarantees.[12] This underscores the importance of a cohesive and well-integrated approach to governance within the EU to prevent the exploitation of legal gaps by those seeking to undermine democratic principles.[13]

On the other hand, the EU becomes complicit in value violations when not using available procedures to their fullest to enforce Article 2 TEU in the Member States. The EU was expected to serve as a bulwark against the potential decline of liberal democracy, a key motivation for some Member States to join the EU, as Sadurski rightly emphasised.[14] However, this expectation largely failed to materialise in practice, especially when tested against actual instances of democratic backsliding. Specifically, the EU's efforts have not led to significant improvements in Hungary or Poland, indicating that its actions have not been effective in countering the decline of liberal-democratic values in these countries.[15] This is true even though one must acknowledge that the few infringement actions and suspensions of funding by the EU had some delaying effects and significantly increased the costs of implementing the autocratic playbook. These measures, while not effective in reversing democratic backsliding, have at least impeded the progress of autocratic strategies and imposed financial burdens on those attempting to undermine democratic norms. However, on the overall scale, the impact of the supranational level of the law could be summarised as 'losing by winning'.[16] Thus, despite achieving some legal victories – and indeed the Commission did win a number of Rule of Law-related cases against Member States – the overall outcome has been a failure to secure the intended protection of democratic values. These cases failed to induce meaningful effects on the ground, even if they have been enforced. But worse, many have been entirely disregarded, showcasing the difficulties of Rule of Law enforcement in multi-level systems.[17]

In the following, we will focus on this latter procedural aspect, i.e. how the EU should be more active in enforcing values at the national level. At the same time, we should keep in mind that the supranational level is not without its own significant troubles.

1.2 | European Union responses to Rule of Law decline in the Member States

Despite the pressing importance of respect for values for the European project, the Union failed to step up against backsliding in the Member States in a persuasive manner. EU institutions did trigger the preventative arm of Article 7 TEU against Poland and then Hungary.[18] From a political perspective that shows the gravity of the situation, this could be taken for a positive development, yet, Article 7(1) is inefficient, as it lacks dissuasive force. In addition, even this very soft mechanism failed to be triggered for years vis-à-vis Hungary notwithstanding the European Parliament's most serious warnings and call for action in the so-called Tavares report of 2013.[19] Other procedures of Rule of Law enforcement have been repeatedly underused or misused. Infringement procedures have great potential, but as Kelemen and Pavone have shown, there has been a particularly significant decline in infringement procedures,

[11]Ganty and Kochenov, 'EU Lawlessness Law'.

[12]E Basheska and D Kochenov, 'Immigration and Citizenship in Europe – Does "Illiberalism" Matter?', *COMPAS Working Paper* No. 167 (Oxford University, 2024).

[13]B Grabowska-Moroz and J Grogan (eds) *Report. Rule of Law beyond the EU Member States* (Budapest, CEU Democracy Institute, 2024).

[14]W Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford, 2012).

[15]D Kochenov, '*De Facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times', XL *Polish Yearbook of International Law* (2021), 197.

[16]KL Scheppele et al., 'EU Values Are Law, After All'.

[17]G Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in the EU Two-Level System', in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge 2016); B Grabowska-Moroz, 'The Systemic Implications of the Supranational Legal Order for the Practice of the Rule of Law' 14 *Hague Journal on the Rule of Law* (2022) 331.

[18]European Commission, Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM/2017/0835 final - 2017/0360 (NLE); European Parliament resolution of 15 September 2022 on the proposal for a Council decision determining, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2018/0902R(NLE)).

[19]European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary, A7–0229/2013.

especially with regard to value-related cases.[20] The picture is grimmer still, once 'losing by winning' conceptualised by Scheppele et al. is factored in: the instances where the Commission entrenches and further legitimises national-level Rule of Law violations by winning cases, which are not properly designed – from Hungarian judicial retirement cases[21] to the chasing of the Central European University away from Hungary[22] – thus the complexity of the situation on the ground acquires a new light. Bárd goes as far as talking about the double nature of a Rule of Law problem in the EU:

> "EU institutions rather than making use of the tools they have available against Rule of Law backsliding, tend to look away, even though the phenomenon is a threat to their very own existence. Whereas time matters and response matters for the viability and integrity of EU law, European institutions engage in meaningless dialogues with governments that do not share the same language of constitutional democracy. This shows the double nature of the problem. (…) While in the national setting a power grab can be traced, in the EU an opposite phenomenon can be seen: a failure to act even against constitutional authorisation and obligation foreseen by the Treaties."[23]

The gravity of the problem of Commission passivity is demonstrated by the phenomenon of other actors stepping in, such as judges asking preliminary reference questions that should have been tackled by the Commission in the form of infringement procedures.[24] As Pech and Kochenov note: "as recalled by the Court itself, its preliminary ruling jurisdiction is much more limited than its jurisdiction in infringement cases, where the Court can directly find that a Member State has violated the principle of judicial independence."[25] Also, some Member States have toyed with the idea, and the Dutch parliament used to take the lead in this regard,[26] of suing other Member States over value violations.[27] Even though ultimately Article 259 TFEU has not been utilised, the mere fact that some Member States are contemplating making use of the provision shows that they see the gravity of the situation and are willing to even enter into direct diplomatic conflicts to fill the void left by the Commission.[28]

The power of the purse, i.e. connecting EU payments to respect for values seems to be a strong incentive, but we still have to see whether the backsliding Member States would be taking meaningful steps to restore the Rule of Law in order to get access to EU funds.[29] The track record thus far indicates that although there have been some advancements in formal legal rules seemingly aimed at enhancing the Rule of Law, the reality in everyday application reflects the contrary.[30] At the principled level, what we witness as a result of more than a decade of the fight for EU

[20]RD Kelemen and T Pavone, 'Where Have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union' 74 *World Politics* (2023); KL Scheppele, 'The Treaties without a Guardian', 29 *Columbia Journal of European Law* (2023) 93; M Grześkowiak, 'The "Guardian of the Treaties" Is No More?' 42 *Refugee Survey Quarterly* (2023) 81.

[21]*Commission v. Hungary* (judicial retirement).

[22]*Commission v. Hungary* (CEU).

[23]P Bárd, 'In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law' 27 *European Law Journal* (2021) 185, 188.

[24]D Hegedűs, 'Same, Same but Different?: The Pitfalls in Unfreezing EU Funds' (VerfBlog, 21 December 2023); E Farkas and A Kádár, 'Trick and Treat?: Hungary's Game of Non-Compliance' (VerfBlog, 12 December 2023); Á Kovács, 'Taking Revenge for Dissent: Hungary's Chief Justice to Fully Eliminate Judicial Autonomy' (VerfBlog, 13 December 2023). Case C-564/19 *IS* ECLI:EU:C:2021:949.

[25]Pech and Kochenov, 'Respect for the Rule of Law', 57.

[26]On 1 December 2020, the Dutch Parliament's Second Chamber adopted by 70% majority a motion to launch an Article 259 TEU procedure against Poland. The Parliament "calls on the government to investigate and to make necessary arrangements to bring Poland before the Court of Justice for failure to fulfil an obligation under the Treaties (Article 259 TFEU), preferably in cooperation with like-minded Member States, and to inform the Second Chamber of the Parliament by 1 February 2021 at the latest." As cited and translated by J Morijn, 'A Momentous Day for the Rule of Law: The ECJ Hearing about the Disciplinary Regime for the Polish Judiciary' (VerfBlog, 2 December 2020).

[27]D Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', 7 The Hague Journal of the Rule of Law (2015), 153–174; D Hegedűs, 'Exploring the Potential and Political Feasibility of "Biting Intergovernmentalism" in the EU', re:constitution Working Paper No. 15/2023; G Íñiguez, 'An Enemy within? Article 259 TFEU and the EU Rule of Law Crisis' 23 German Law Journal (2022) 1104.

[28]The environmental protection case of *Czech Republic v Poland (Turów Mine)*, Case C-121/21, albeit withdrawn, might be of indirect relevance for later value-related cases filed under Article 259 TFEU. Cf. E Basheska, 'Good European Neighbours' (VerfBlog, 20 May 2021).

[29]Scheppele, 'The Treaties without a Guardian'; Bárd and Kochenov, 'War as a Pretext'.

[30]Kovács, 'Taking Revenge'.

values, is the rise of 'supremacy Rule of Law',[31] which does not necessarily trigger any positive change on the ground in the Member States, while making the EU weaker, since supremacy of EU law – a purely procedural principle formulated by the Court of Justice several decades ago – ends up taking the place of the Rule of Law *sensu stricto*, thus offering an unusual and highly proceduralised vision of a monological supranational legality as a wholesale replacement of the Rule of Law in the EU.[32]

While asserting that the Union was lacking legal mechanisms, EU institutions engaged in the creation of a diverse set of Rule of Law tools over the last decade, the most important element of which was a steep broadening of the power of the CJEU to intervene.[33] Nevertheless, scholars contend that this pattern of increasing tools – many of which are centred around monitoring and dialogue – merely creates a deceptive impression that the EU is addressing the decline in values. Pech calls this the cycle of tool creation.[34] Kelemen goes as far as comparing the EU to "a home repair DIYer who constantly goes to the hardware store to buy new tools, rather than actually getting started on projects with the tools he has".[35] He sees this phenomenon not only as unnecessary but as a cheap excuse for inaction. Indeed, the EU seems to show disproportionately little willingness to associate impactful legal repercussions with the identification of systemic Rule of Law issues.

The "EU's toolbox of measures to support and correct for Rule of Law rot is already sufficiently comprehensive and sophisticated in nature to, at the very least, contain Rule of Law backsliding if the full set of current instruments is used *promptly*, *forcefully* and in a *coordinated manner*."[36] This goes, among others, for infringement procedures and the various Rule of Law conditionality mechanisms. Once they have been triggered and legal consequences have been attached to Rule of Law backsliding, the Commission should show the utmost diligence in following up national responses. Winning cases is just one part of the story, as the judgments then need to be enforced. Fake compliance should not lead to the release of EU funds, as happened on numerous occasions in the past.

While we submit that the Rule of Law could be enforced more efficiently even under the current Treaty constellations, the Franco-German report on EU institutional reform, which dedicates the first section of the document to the Rule of Law and its enforcement,[37] gives momentum to brainstorming about changes that would make the Union more effective in this exercise. It also rightly observes the cardinal and transversal importance of the Rule of Law for the European project before upcoming enlargements.[38] Strengthening the protection of the Rule of Law and other fundamental values should indeed be non-negotiable, if and when introducing differentiated integration.[39] At the same time, one should acknowledge that much of the discussion about a core Europe and a wider circle of current Member States would probably be redundant if there existed a shared and meaningful respect for the Rule of Law and all the other values indicated in Article 2 TEU. Consequently, we place an emphasis on the enforcement of such values instead of a multi-speed Europe. We present here below instruments of robust Rule of Law enforcement, or tools of "militant Rule of Law"[40] designed to safeguard the survival of the European project, as a *part pro toto* for external checks on national governments to uphold the Union's other fundamental values.

[31]Kochenov, 'EU Rule of Law Today: Limiting, Excusing, or Abusing Power?'.

[32]Editorial Comments, 'EU Law between Common Values and Collective Feelings' (2018) 55 CMLRev. 1329, at 1334; Kochenov, 'Restoring the Dialogical Rule of Law in the EU: Janus in the Mirror'; D Kochenov and P Bárd, 'Kirchberg Salami Lost in Bosphorus', 60 *Journal of Common Market Studies* (2022) 150.

[33]L Pech and S Platon, 'Judicial Independence under Threat' 55 *Common Market Law Review* (2018) 1827; Pech and Kochenov, 'Respect for the Rule of Law'.

[34]L Pech, 'The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox', RECONNECT (Leuven) Working Paper No. 7 (2020); RD Kelemen, 'The European Union's Failure to Address the Autocracy Crisis: MacGyver, Rube Goldberg, and Europe's Unused Tools' 45 *Journal of European Integration* (2023) 223.

[35]D Kelemen, 'Curing the Virus of Autocracy in Europe: Q+A with Daniel Kelemen' (*UCL Europe Blog*, 7 December 2020).

[36]VZ Kazai and P Bárd (eds), 'Communication Strategy of the EU for Best Practice and Policy Recommendations' (2021) RECONNECT Deliverable 15.1 1–2 <https://reconnect-europe.eu/wp-content/uploads/2021/12/D15.1_web.pdf>.

[37]Report of the Franco-German working group on EU institutional reform. Sailing on High Seas: Reforming and Enlarging the EU for the 21st Century (Paris-Berlin, 18 September 2023).

[38]*Id*., at 12: 'there is a risk that its core values and the protection of democracy and the rule of law will erode further if states with weak institutions are allowed to join expeditiously.'

[39]*Id*. 15–16.

[40]A Sajó, 'Militant Rule of Law and Not-So-Bad Law', *CEU DI Working Paper* (2024) 1; J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' 21 *European Law Journal* (2015) 141.

While we maintain that the enforcement of the Rule of Law can be improved even within the current Treaty framework, in this article we propose a range of legal mechanisms for enforcing the Rule of Law at the European level, both with and without Treaty modifications. Drawing on our research findings from the Horizon 2020 RECONNECT project on "Reconciling Europe with its Citizens through Democracy and Rule of Law",[41] this discussion serves as a prelude to an upcoming edited collection focusing on the Rule of Law in the EU.[42]

2 | THE ENHANCEMENT OF MECHANISMS TO SAFEGUARD THE RULE OF LAW

2.1 | Systemic and comprehensive monitoring of EU values, preventive tools

Whereas we place the emphasis on enforcement mechanisms, we acknowledge that the sine qua non of such procedures is a thorough, methodologically correct, regular, qualitative and contextual assessment, based on equal treatment of the Member States.[43]

We also emphasise the importance of not prolonging cases *ad infinitum*, because time matters in the enforcement of EU values. Some cases that the Commission started have since become moot due to considerable delay, such as the case of the Central European University, which had to leave Hungary by the time the judgment on the violation of academic freedom had been rendered. In other instances, such as in asylum law, enormous harm to individual rights was done, due to non-enforcement.[44] In other cases, the government may use the "one step ahead, two steps backwards" approach, meaning that it will resolve some of the issues criticised by European institutions, but then commit novel mischiefs which must be tackled in novel procedures, otherwise, the illiberal government will rightfully contend that the European requirements are a moving target.[45] Having the efficiency aspect in mind, it is important to give sufficient time and space for governments to contest criticism, engage in dialogue with governments that are open to meaningful debate, and to follow a gradual approach of sanctions and legal consequences. Therefore, we shall discuss Rule of Law monitoring and preventive mechanisms first, before moving on to hard-core enforcement procedures in the second part of this chapter.

2.1.1 | The Commission's Annual Rule of Law Reports

The idea of establishing a comprehensive monitoring mechanism was floated in 2015 when the European Parliament invited the Commission to draft an internal strategy on the Rule of Law.[46] In 2016, the EP repeated its previous message and proposed the adoption of a Union Pact on Democracy, the Rule of Law and Fundamental Rights

[41]Horizon 2020 Research & Innovation programme under Grant Agreement no. 770142. See especially, VZ Kazai and P Bárd (eds.), 'Communication Strategy'; J Wouters et al. (eds.), Report addressed to the European Parliament and the Commission on policy recommendations and on Treaty changes and amendments to the EU Charter of Fundamental Rights, (2021) RECONNECT Deliverable 15.2 <https://reconnect-europe.eu/wp-content/uploads/2021/12/D15.2_web.pdf>; B Grabowska-Moroz, 'The Systemic Implications'; B Grabowska-Moroz, J Grogan et al, 'Special Issue Editorial: Reconciling the Theory and the Practice of the Rule of Law in the European Union', 14 *The Hague Journal on the Rule of Law* (2022) 101.

[42]J Wouters et al (eds.), *Upholding the Rule of Law in the EU* (Oxford, 2025, forthcoming).

[43]P Bárd, 'The Bumpy Road to Rule of Law Enforcement: The Commission's 2020 Annual Rule of Law Report', in J Urbanik and A Bodnar (eds.) *Περιμένοντας τους Βαρβάρους. Law in a time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski* (Warszawa: CH Beck Verlag, 2021) 59–68.

[44]In this regard, there is a welcome phenomenon: in June 2024, in Case C-123/22 *Commission v Hungary*, the Court imposed a record lump sum payment of €200,000,000 and a penalty of €1,000,000 per day of delay until compliance with an earlier 2020 Court judgment on asylum procedures.

[45]B Barnóczki and B Márton, 'Hungary to submit €3.9 billion loan request to European Commission – Navracsics', 31 August 2023, https://telex.hu/english/2023/08/31/hungary-to-submit-eur3-9-billion-loan-request-to-european-commission-navracsics.

[46]European Parliament resolution of 8 September 2015 on the situation of fundamental rights in the European Union (2013–2014) (2014/2254(INI)) 2015.

(EU Pact for DRF), providing for the definition, elaboration, monitoring and enforcement of those values and principles.[47] However, the Commission rejected the European Parliament's ideas[48] and a few years later elaborated its own Rule of Law monitoring mechanism instead: the Annual Rule of Law Report (ARoLR). The ARoLR was first published in 2020[49] and each year since.[50]

Pech and Bárd formulated a number of suggestions to improve the Commission's monitoring exercise, some of which have been taken up by the Commission.[51] The core deficiency – besides not assessing the EU's own compliance[52] – consists of failing to outline in full the particularly far-reaching nature of violations in a select group of Member States, where backsliding has known particular success. Underplaying this simple fact by treating all the Member States 'equally', the Commission departs from the starting tenet of the principle of equality: that like cases be treated alike and different cases be treated differently.[53] This vaguely corresponds to the 'spectrum of non-compliance', which Jakab and Kochenov offered: approaching the Member States where the failure to comply is an omission or a mistake in the same way as the Member States where non-compliance is a principled political choice taken in a calculated and well-designed manner is unquestionably a mistake.[54] Worse still: to expect the same tools designed to counter recalcitrance to be equally effective in these two instances clearly falls short of proper enforcement of the Rule of Law.[55]

In the long run, one could insert an explicit legal basis in the Treaties for a regular monitoring mechanism focusing on democracy, the Rule of Law and fundamental rights, with a special emphasis on systemic violations.[56] However, such a Treaty change would not be absolutely necessary for the establishment of such a process, nor for its reform. As for the reform, one could take the current ARoLR as a basis and introduce changes that make the mechanism more effective.

The first suggestion is not to oversell the ARoLR as an enforcement mechanism. It is a monitoring exercise with no legal consequences at the end of the process, roughly corresponding to the Commission's pre-accession monitoring in the same field, which does not have a direct connection to pre-accession progress offered to candidate countries, as opposed to the Commission's claims, leading to the 'failure of conditionality'[57] if not a breakdown of the Rule of Law in the pre-accession process.[58] As opposed to the first editions, the current versions of

[47]European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL)); See also Wouter van Ballegooij and Tatjana Evas, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights: European Added Value Assessment Accompanying the European Parliament's Legislative Own Initiative Report (Rapporteur: Michal Šimečka)*. (European Parliamentary Research Service Publications Office 2020) <https://data.europa.eu/doi/10.2861/376199>; P Bárd et al., 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' [2016] CEPS Paper 247.

[48]Commission, 'Follow up to the European Parliament resolution on with recommendations to the Commission on the establishment of an EU mechanism on democracy, the Rule of Law and fundamental rights, adopted by the Commission on 17 January 2017' SP(2017)16.

[49]Communication of 30 September 2020 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2020 Rule of Law Report: The rule of law situation in the European Union 2020. For some background, see B Grabowska-Moroz and D Kochenov, 'EU Rule of Law: The State of Play Following the Debate Surrounding the 2019 Commission's Communication', in G Amato and B Barbisan (eds), *Rule of Law vs Majoritarian Democracy* (Hart, 2021), 63. For criticism, see, eg, D Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law', 11 *Hague Journal on the Rule of Law* (2019) 423.

[50]For the differences between the European Parliament's proposal and the Commission's Annual Rule of Law Report, see W van Ballegooij, 'European Added Value of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' (European Parliamentary Research Service 2020) https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/642831/EPRS_BRI(2020)642831_EN.pdf. The European Parliament continues to push for the realisation of its original plans. European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)).

[51]L Pech and P Bárd 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' (2022) European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies PE 727.551.

[52]The situation is far from ideal at the supranational level: Ganty and Kochenov, 'EU Lawlessness Law'; Shatz, *EU Crimes against Humanity*; Bárd and Kochenov, 'What Article 7 is Not'. In 2024 CEU Democracy Institute Rule of Law Clinic compiled a shadow EU chapter encouraging EU institutions to draw inspirations from it for the official ARoLR. Grabowska-Moroz and Grogan (eds), *Rule of law beyond the EU Member States*.

[53]Kochenov, 'Elephants in the Room', 42.

[54]A Jakab and D Kochenov, 'Introductory Remarks', in A Jakab and D Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford 2017) 1.

[55]C Closa and D Kochenov, 'Introduction: How to Save the EU's Rule of Law and Should One Bother?', in C Closa and D Kochenov (eds.), *Reinforcing the Rule of Law Oversight in the European Union*, (Cambridge 2016), 1; C Closa et al., 'Reinforcing the Rule of Law Oversight in the European Union', EUI RSCAS Research Paper 2014/25.

[56]Scheppele et al, 'EU Values Are Law, After All'.

[57]D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008).

[58]Basheska, 'EU Enlargement in Disregard of the Rule of Law'.

the Report include country-specific recommendations, which is certainly a plus, even if the recommendations could better reflect some of the negative findings in the national reports themselves. Compliance with these recommendations should be followed up, but even if they will be, it should be acknowledged that the Commission's reports are not Rule of Law enforcement tools in the narrow sense; publishing reports cannot aspire to replace enforcement.

Second, the ARoLR should preferably be extended to cover all Article 2 TEU values, with an emphasis on democracy and fundamental rights, as such values have been shown to be interrelated.[59] It is difficult to talk about judicial independence, a classic Rule of Law issue, without discussing also the consequences of its decline for the individual in the form of not having access to judicial remedies or violations of fair trial rights. Courts belonging to a counter-majoritarian branch of government also ensure that democracy does not turn into the tyranny of the majority. Access to information and free speech as human rights and their enforcement by courts are also important for democracy, and especially deliberative democracy to function. The list of examples pointing to the interconnectedness of values goes on. The mutual dependency among values justifies the extension of the Report's scope.

Third, when assessing Member States' compliance with Article 2 TEU values an expert body should be involved. This external expert panel or network could be housed within the EU Agency for Fundamental Rights (EU FRA) or led by a university-based expert team. Notably, a previous EU network of independent experts on fundamental rights, established in 2002 and discontinued in 2007, played a crucial role in preparing annual reports and providing essential information on the situation of fundamental rights in the Member States.[60]

Fourth, a new EU-specific chapter should be added. Openly facing Rule of Law challenges or violations at the EU level, such as corruption within the institutions,[61] lending EU funds to illiberal regimes, allowing them to abuse policies and law to escape accountability under national or international law,[62] using the Union as a shield to whitewash questionable/criminal actions,[63] including the operation of the EU's death machine in the Mediterranean[64] and on the Eastern border of the Union,[65] or the continuing failure to accede to the European Convention on Human Rights[66] would improve the credibility and legitimacy of the ARoLR.

Fifth, in order to improve the effectiveness, the ARoLR could be channelled into Rule of Law tools and procedures, while not allowing such channelling to be derailed by the Union and national responses to on-going geopolitical challenges, as one could observe with the war in Ukraine.[67] The 2023 edition of the Report already makes references at more than a dozen instances to commitments made by the Member States in various EU procedures, such as in the area of the Resilience and Recovery Plan, Article 7 TEU procedures, conditionality or implementation of Court of Justice judgments. That exercise could be extended in a more systematic manner and vice versa, other Rule of Law tools should refer to the findings of the ARoLR. But in an ideal case, the ties should be much stronger, resulting *automatically* in Article 7(1), and in a worse case Article 7(2), infringement and conditionality procedures. At the very minimum, country-specific recommendations, which are present in the latest reports, should be followed up, so as to keep unresolved or recurring problems on the agenda and identify trends over time. A special chapter dedicated to the state of the Article 7 procedures would provide the same benefits. Similarly, the inclusion indicators on the implementation of relevant European Court of Human Rights judgments since 2022 are welcome, but this exercise could also be extended to the Rule of Law or in an ideal case all value-related judgments of the Court of

[59] L Spieker, *EU Values before the Court of Justice*; J Wouters, 'Revisiting Art. 2 TEU', 5 *European Papers* (2020) 255; M Klamert and D Kochenov, 'Article 2 TEU', in M Kellerbauer et al (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed., Vol 1., Oxford 2024).

[60] European Commission communication on Article 7 TEU, COM(2003) 606 final, 15 October 2003, 9.

[61] https://www.politico.eu/european-parliament-qatargate-corruption-scandal-updates/.

[62] Basheska and Kochenov, 'Immigration and Citizenship in Europe'.

[63] Ganty and Kochenov, 'EU Lawlessness Law'.

[64] Shatz, *EU Crimes against Humanity*; Ganty and D Kochenov, 'How the EU Death Machine Works'.

[65] Ganty et al., 'EU Lawlessness Law at the EU-Belarusian Border'.

[66] Eeckhout, 'Opinion 2/13'; B de Witte and Š Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' 40(5) *ELRev* (2015) 683; D Kochenov 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' 34 *Yearbook of European Law* (2015) 74.

[67] Bárd and Kochenov, 'War as a Pretext'.

Justice, not least because their implementation is rather poor.[68] A special compensation mechanism is indispensable to make up for the non-applicability of Article 7 TEU to the Union itself, even when the Union triggers mass values violations, as Kochenov proposed.[69]

Sixth, the ARoLR should feed not only into sanction mechanisms but also legal consequences of a non-punitive nature. For example, the principle of mutual recognition should be suspended in case of a finding of systemic value violations. The principle was developed originally in relation to the free movement of goods, but it is equally applied in other areas, such as asylum or judicial cooperation in criminal matters and has far-reaching values implications.[70] Indeed, in the Area of Freedom, Security and Justice, the rebuttable presumption of 'mutual trust'[71] is the cornerstone of the whole system, which is based on the fundamental premiss that all Member States share the common values enshrined in Article 2 TEU.[72] However, systemic infringement of the Rule of Law, including the principle of judicial independence, and fundamental rights undermines this mutual trust and thus potentially renders the complete Area of Freedom, Security and Justice dysfunctional[73]: the outcome is a de facto introduction of the presumption of guilt in the EU's legal sphere, ruining even the most notional adherence to the national and ECHR standards of human rights protection.[74] This is why we suggest the replacement of the concept of mutual trust and the automatic mutual recognition of judgments with a system based on 'earned trust'.[75] This would require the introduction of an objective and impartial evaluation of the implementation of Union policies in the Area of Freedom, Security and Justice on the basis of Article 70 TFEU, in order to facilitate the full application of the principle of mutual recognition. This mechanism could serve as the basis for determining when mutual trust-based laws are to be suspended. In case a later edition of the ARoLR shows improvements, the respective laws could be reinstated. Such a mechanism would exempt the courts from the burden of determining on a case-by-case basis when to comply with mutual recognition-based law. As suggested by Mitsilegas, Carrera and Eisele, the proposed mechanism could be inspired by the Schengen evaluation system adopted in October 2013, making use of another, an Article 70 TFEU-based monitoring mechanism, for the first time.[76]

2.1.2 | Other monitoring mechanisms

With regard to the many other mechanisms, one should first screen out those that have been counterproductive and abandon them. As a second step, with regard to the remaining procedures, their relation should be clarified and possible overlaps that might potentially lead to different outcomes avoided. Regarding the first step, the prime monitoring mechanism that proved to be unsuccessful in the past is the Rule of Law Framework, introduced in

[68]P Bárd, 'Systemic Problems, Systemic Infringements: The Case of Hungary' (2022) A Study Commissioned by the Rights and Democracy Cluster – The Greens/EFA in the European Parliament, 104 <http://extranet.greens-efa.eu/public/media/file/1/7947>.

[69]D Kochenov, 'Article 7 TEU' in M Kellerbauer et al. (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed., Vol 1, Oxford 2024).

[70]D Kochenov, 'The EU and the Rule of Law: Naïveté or Grand Design?', in M Adams et al (eds.), *EU Rule of Law between Idealism and Realism* (Cambridge 2017) 419.

[71]Case C-411/10 *NS v Secretary of State for Home Department* ECLI:EU:C:2011:865 and Case C-493/10 *ME v Refugee Applications Commissioner* ECLI:EU:C:2011:865.

[72]Opinion 2/13. Cf. Eeckhout, 'Opinion 2/13'; de Witte and Imamović, 'Opinion 2/13'.

[73]P Bárd, 'Saving EU Criminal Justice Proposal for EU-Wide Supervision of the Rule of Law and Fundamental Rights' (2018) no 2018–1 CEPS https://www.ceps.eu/ceps-publications/saving-eu-criminal-justice-proposal-euwide-supervision-rule-law-and-fundamental-rights/. See also, recent judgments of the CJEU concerning asylum law, Case C-821/19 *Commission v. Hungary* ECLI:EU:C:2021:930 and Case C-808/18, *Commission v. Hungary* ECLI:EU:C:2020:1029.

[74]Bárd and Kochenov, 'What Article 7 is Not'.

[75]V Mitsilegas, 'Mutual Recognition and Fundamental Rights in EU Criminal Law' in S Iglesias Sánchez and M González Pascual (eds), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge 2021).

[76]V Mitsilegas et al, 'The End of the Transitional Period for Police and Criminal Justice Measures Adopted before the Lisbon Treaty: Who monitors trust in the European Criminal Justice area?' 74 *CEPS Paper in Liberty and Security in Europe* (2014) 3 and 34 <https://www.ceps.eu/cepspublications/end-transitional-period-police-and-criminal-justice-measures-adopted-lisbon-treaty-who/>.

2014.[77] The Rule of Law Framework procedure was initially applied to Poland in response to attempts to capture the Constitutional Tribunal. Although Article 7(1) TEU, and later even Article 7(2) TEU, could have been invoked, a distinct procedure was created, seemingly as a preliminary step before triggering Article 7(1) TEU. However, applying this procedure selectively to Poland and not Hungary, where worrisome constitutional issues arose much earlier, raised concerns about objectivity, impartiality and equal treatment of Member States.[78] Beyond these concerns, the procedure also raised effectiveness issues. Upholding European values may involve a 'sunshine policy' based on dialoguing, but success ultimately depends on recreating the recipient's commitment to liberal democracy, the Rule of Law and other Article 2 TEU values. The procedure with Poland, instead of fostering discourse, turned into a 'dialogue of the deaf,'[79] with repeated deadline extensions leading to the loss of the independence of the Polish Constitutional Tribunal.

The Council's Annual Rule of Law Dialogue is another exercise introduced in 2014 to uphold the Rule of Law, which was also identified as an unhelpful procedure in Rule of Law scrutiny.[80] The Council's dialogues covered diverse topics such as the digital era's impact on the Rule of Law, migrants' integration, media pluralism and trust in public institutions. Its evaluation during the Finnish Presidency faced opposition from Hungary and Poland. Notwithstanding the lack of unanimity, a new "peer review" format was introduced in 2020, featuring horizontal discussions on pan-European Rule of Law issues and country-specific discussions for selected Member States. This "reform" has not led to any meaningful improvements with the Council's Annual Rule of Law Dialogue amounting in practice to nothing more than a "*confidential* discussion of about *one hour every year* on the overall rule of law situation in the EU, with the country-specific dialogue amounting in practice to another *confidential* discussion of the situation in each Member State of the EU *every 3 years for about 30 minutes*, with no transparency regarding the information provided to the Council, the nature of the discussion within the Council and any eventual follow up (or lack thereof)."[81] Almost ten years since its launch, the added value of the Council's dialogue tool "is yet to be demonstrated", and "if one was to rank the different Rule of Law tools based on their effectiveness considering their advertised objectives, the Council's Rule of Law dialogue would easily come last".[82]As a second step, other mechanisms, such as the EU Justice Scoreboard established in 2013, which is a monitoring tool focusing on judicial independence, or the European Semester, an annual cycle of economic and fiscal policy coordination introduced in 2010 and incorporating Article 2 TEU issues since 2018, may also be channelled into the Commission's monitoring exercise in the framework of the ARoLR. The Democracy, Rule of Law and Fundamental Rights Monitoring Group (DRFMG) of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE)[83] could complement the monitoring work. The relationship between the various monitoring mechanisms should be clarified in the future, ensuring they all converge into procedures that attach consequences to negative findings. This means that monitoring mechanisms along with Article 7 procedures, infringement actions, funding suspensions and other measures should be part of a cohesive strategy that consistently and effectively addresses violations of democratic norms, thereby enhancing the EU's ability to uphold liberal democracy within its Member States.

[77]'European Commission presents a framework to safeguard the rule of law in the European Union' (11 March 2014) Press release <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237>. D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality', 11 *European Constitutional Law Review* (2015) 512.

[78]D Kochenov, 'The Commission vs. Poland: The Sovereign State Is Winning 1–0' (VerfBlog, 25 January 2016); G Gotev, 'Tavares: Discussing rule of law in Poland separately from Hungary will lead 'nowhere'' (13 January 2016) *Euractiv* <http://www.euractiv.com/sections/justice-home-affairs/tavares-discussing-rule-law-poland-separately-hungary-will-lead>.

[79]KL Scheppele and L Pech, 'Poland and the European Commission, Part I: A Dialogue of the Deaf?' (VerfBlog 3 January 2017).

[80]'Evaluation of the annual rule of law dialogue – Presidency conclusions' (19 November 2019), Press release <https://www.consilium.europa.eu/en/press/press-releases/2019/11/19/evaluation-of-the-annual-rule-of-law-dialogue-presidency-conclusions/>.

[81]Pech and Bárd 'The Commission's Rule of Law Report', 35.

[82]B Lobina, 'Beating a dead horse: Is there any value in the Council's annual rule of law dialogue' (VerfBlog, 7 December 2023) .

[83]European Parliament, 'Working Document on Democracy, Rule of Law and Fundamental Rights Monitoring Group' (10 July 2020) (LIBE/9/02808) Report: <https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2020/07-13/1204406EN.pdf>.

2.1.3 | The preventive prong of Article 7 TEU: Article 7(1)

Article 7 TEU is specifically designed to tackle systemic violations of EU values enshrined in Article 2, including democracy, the Rule of Law and human rights. However, the shortcomings of the application of this mechanism in the cases of Hungary and Poland[84] cast serious doubts on its effectiveness. The gravity of the negative tendencies in these two Member States that are thoroughly documented stands in stark contrast with the lack of progress in the proceedings. We believe that the efficiency problems are mainly due to political reasons,[85] more precisely the lack of willingness of the actors involved in the process to start the procedures in time or to move forward in a timely manner. Nevertheless, in the course of our research, we have also identified certain flaws in the relevant Treaty provisions that could be corrected to render the Article 7 procedure more efficient and thus more adequate to quickly and dissuasively react to the systemic infringement of EU values in the Member States.

Firstly, we recommend clarifying the conditions and the scope of application of the Article 7 procedures. In its current form, Article 7 TEU consists of two prongs: a preventive one (Article 7(1): determining a clear risk of a serious breach) which serves as a platform for dialogue and early warning, and a corrective one (Article 7(2): determining a serious and persistent breach), with Article 7(3) devoted to sanctions to follow up on Article 7(2). It is true that the conditions for triggering Article 7(1) had already been interpreted by the Commission[86] long before the dismantling of constitutional democracy started in Hungary in 2010 and in Poland in 2015. But it can be argued that the unreasonably belated response of the EU actors was, at least partially, due to the ambiguity of the provisions allowing political actors to exercise a great degree of discretion as to the activation of Article 7 and the choice between Article 7(1) and Article 7(2).[87]

Therefore, we recommend clarifying the terms 'clear risk of a serious breach' and 'a serious and persistence breach' in the Treaty itself or, alternatively, in a Protocol or a Declaration attached to the TEU. We would also find it useful to consider the mandatory or automatic initiation of Article 7 proceedings in case a serious and persistent breach of EU values or the risk of it is detected either in the already existing ARoLR or the DRF mechanism proposed by the EP.[88] In addition, we suggest making it unequivocal that the activation of Article 7(1) does not depend on any kind of "pre-Article 7" proceedings informal or otherwise,[89] and similarly that the Article 7(1) procedure is not necessarily the antechamber of triggering Article 7(2). It should be clear that EU institutions must move directly to the application of that latter provision when justified.

Secondly, we find it deeply problematic that the EP has been excluded from participating in the Council's Article 7(1) hearings, even when it is the activating authority. The different treatment of the Commission and the EP is based on the Council's procedural rules, not on a Treaty provision, and it arguably goes against the principle of

[84]European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)); European Commission, 2017, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final.

[85]For example, it could be argued that the ambiguous consequences of the so-called 'Haider affair', i.e. the adoption of coordinated bilateral sanctions against Austria as a reaction to the far-right Freedom Party's joining the Austrian governing coalition after the 1999 elections, constituted a negative experience which had an impact on the attitude of EU officials and the Member States. See KL Scheppele and L Pech, 'Didn't the EU Learn That These Rule-of-Law Interventions Don't Work?', (VerfBlog, 9 March 2018).

[86]Commission, 'Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based' (Communication from the Commission to the Council and the European Parliament) COM(2003) 0606 final.

[87]D Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision' in A von Bogdandy et al (eds.) *Defending Checks and Balances in EU member states* (Springer 2021); C Closa, 'Institutional Logics and the EU's Limited Sanctioning Capacity under Article 7 TEU', *International Political Science Review* (2020) 1–15.

[88]Otherwise, we endorse the opinion of the EP on the complementarity of the DRF mechanism, the ARoLR and the Article 7 proceedings. See European Parliament resolution of 24 June 2021 on the Commission's 2020 Rule of Law Report (2021/2025(INI)), especially para. 54–55. See also Pech and Bárd, 'The Commission's Rule of Law Report'.

[89]For example, on the Commission's Rule of Law Framework, which was triggered in the case of Poland in January 2016. See European Commission, Commission adopts Rule of Law Opinion on the situation in Poland, Press release, Brussels, 1 June 2016, and subsequent recommendations the Polish government failed to comply with. L Pech et al, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' 13 *Hague Journal on the Rule of Law* (2021) 1.

institutional balance.[90] This is why we recommend inserting a basic procedural principle in Article 7 prescribing the involvement of the activating authority in Council discussions and formal hearings, or more generally, the involvement of the EP in such hearings as a default rule.[91]

2.2 | Revision of enforcement mechanisms

2.2.1 | The revision of the Article 7(2)–(3) procedure

The EU has a plethora of enforcement tools, and it is far from being a paper tiger when it comes to sanctions against violations of its own values.[92] One of the "hard laws" foreseen for enforcement with a treaty basis is Article 7(2)–(3) TEU, designed for determining a serious and persistent breach of values enshrined in Article 2 TEU and consequential sanctions. Articles 258–260 TFEU provide for infringement procedures. The EU also possesses laws that play on the power of the purse vis-à-vis rulers that engage in violations of Article 2 TEU values.[93]

There are some in-built drawbacks of these mechanisms: they only indirectly, by deterrence, serve prevention, or in other words, these mechanisms and procedures are triggered *ex post facto*, when the harm had already been done.[94] But reality shows that they are often not used even when the harm is done; they fail to reflect the reality of systemic state capture; and the sanctions are not sufficiently followed up. Therefore, some suggestions for Treaty changes likely to contribute to the effectiveness of some of the major enforcement procedures will be highlighted. Let us start with Article 7(2)–(3) TEU.

First, the current rules on voting in the Council, especially the unanimity requirement of Article 7(2) for determining the existence of a serious and persistent breach of EU fundamental values, carry the risk of depriving the whole mechanism of its dissuasive and retribute effect. This very high threshold may not only discourage the Commission or the Member States from initiating the Article 7(2) procedure for its extremely low likelihood of success,[95] but may also render the successful application of this provision, and thus the imposition of any sanctions on a Member State impossible due to the potential exercise of a veto by any member of the Council.[96] This latter scenario is most likely, or even inevitable, if a serious and persistent breach of EU fundamental values occurs in more than one Member State simultaneously, who may join forces to protect each other from the negative consequences, as happened with Poland and Hungary.[97] This is why we recommend reforming the voting rules as follows. It would be useful to replace the unanimity criterion of Article 7(2) with a supermajority of four-fifths to make Article 7 easier to use in practice.[98] It should also be regulated unequivocally that if Article 7(1) or 7(2)(3) proceedings are initiated

[90]L Pech et al 'The European Parliament Sidelined. On the Council's distorted reading of Article 7(1) TEU' (VerfBlog, 8 December 2019).
[91]L Pech and D Kochenov 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid', (2019) 7: <https://reconnect-europe.eu/wpcontent/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf>.
[92]For previous attempts of taking stock of enforcement tools, see A. Jakab and D. Kochenov (eds), *The Enforcement of EU Law and Values* (Oxford 2016); L Pech and D Kochenov, 'Strengthening the Rule of Law Within the European Union'.
[93]Regulation (EU) No 1303/2013 (Common Provisions Regulation), Regulation 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.
[94]L Pech, 'Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas', (2021) *RECONNECT Policy Brief*, 8–11, https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf.
[95]C Closa 'The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance' 26(5) *Journal of European Public Policy* (2019) 696–716.
[96]KL Scheppele 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' (VerfBlog 24 October 2016).
[97]A Rettman, 'Poland to Veto EU Sanctions on Hungary' (*EUobserver*, 13 September 2018) <https://euobserver.com/justice/142825>.
[98]B Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge 2016). For the calculation of the qualified majority requirement, see Kochenov, 'Article 7: A Commentary on a Much Talked-About 'Dead' Provision', 143.

against multiple Member States simultaneously, the Member State already subjected to any type of Article 7 procedure (including Article 7(1))[99] should automatically lose its right to vote in another Article 7 procedure involving a different Member State.[100]

Second, we are of the view that the Treaty provision on the applicable sanctions should also be revised. In its current form, Article 7(3) TEU provides the following: where a determination under Article 7(2) has been made about the existence of a serious and persistent breach, the Council 'may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question'. Only the suspension of the voting rights of the representative of the government of that Member State in the Council is mentioned in that paragraph as an example. The lack of any further indication of the possible sanctions is problematic because it gives almost unlimited discretionary power to the Council which implies a certain level of legal uncertainty. The absence of any safeguard clause, which would require a proportionality assessment of the sanctions in light of the possible negative impact on the citizens is also problematic in the light of the broad nature of the political discretion the Article implies – particularly given how sweeping the effect of even the most 'targeted' sanctions is on society.[101] This is why we find it desirable to insert a more detailed list of possible sanctions in the Treaty, such as the suspension of additional rights specifically named, and some guiding rules on the application of the legal consequences based on the gravity of the breach detected.

In light of the seriousness of the systemic breach of EU values in some Member States, the sanctions imposed on the basis of Article 7(3) may not be suitable for preventing the proliferation of the consequences of value decline when Member States cooperate under EU law. Therefore, we recommend creating an explicit legal basis in the Treaties for the application of legal consequences aimed not primarily at the sanctioning of the Member State concerned, but at the preservation of the good functioning of the EU, which may be disrupted as a result of the legal and political measures put in place by the said Member State.[102] An example would be the suspension of the principle of mutual trust-based laws, including the automatic mutual recognition of judgments.[103]

Should neither the retributive sanctions nor the protective measures mentioned above prove sufficient to consolidate the problems in a Member State, and protect the integrity of the EU's legal order, we suggest reflecting on the possible introduction of a new procedure for the purpose of expelling a Member State from the EU as a mechanism of last resort.[104]

2.2.2 | The revision of the infringement proceedings

Even though, originally, the mechanism of infringement procedures as laid down in Articles 258–260 TFEU was not meant to serve specifically the protection of the Rule of Law, it turned into an important tool to defend the Union's fundamental values. Infringement procedures have yielded much more positive results in practice than other rule of

[99]Article 354 TFEU clearly states that the purpose of Article 7 TEU is that the Member State in question shall not be counted in the calculation of the necessary majority. Cf D Kochenov, 'Article 354 TFEU', in M Kellerbauer et al (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed., Vol 2, Oxford, 2024).

[100]KL Scheppele 'Can Poland be Sanctioned by the EU?'. Another solution would be the initiation of Article 7 proceedings against these Member States in one bundle, so that both or all of them are excluded from voting. But see D Kochenov, 'Article 7 TEU' in in M Kellerbauer et al (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2nd ed., Vol 1, Oxford, 2024).

[101]A Hofer, 'The EU's "Massive and Targeted" Sanctions in Response to Russian Aggression, a Contradiction in Terms', 25 *Cambridge Yearbook of European Legal Studies* (2024).

[102]For example, for the sake of preserving the integrity of the Union's legal order, the application of the principle of mutual recognition based on mutual trust should be suspended with regard to the Member State in which a clear risk of a serious breach, or an actual serious and persistent breach, of EU fundamental values is detected in the ARoLR or the DRF mechanism.

[103]P Bárd, 'Canaries in a Coal Mine: Rule of Law Deficiencies and Mutual Trust' 13 *Pravni Zapisi* (2021) 371–395.

[104]This solution has already been suggested by several scholars. See J-W Müller, 'Safeguarding Democracy Inside the EU: Brussels and the Future of Liberal Order', *Transatlantic Academy Paper Series* No. 3 (2013); C Closa and D Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in W Schröder (ed.) *Strengthening the Rule of Law in Europe: From Common Concept to Mechanisms of Implementation* (Hart 2016); B Bugarič, 'Protecting Democracy inside the EU'; C Closa, 'Paradoxes and Dilemmas in Compliance and Enforcement' (VerfBlog, 26 December 2020); T Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7'28 *Res Publica* (2022) 693, T Theuns, *Protecting Democracy in Europe: Pluralism, Autocracy and the Future of the EU* (Hurst, 2024).

law mechanisms, such as the Article 7 procedure. Still, the use of this tool could be used much more efficiently, and for that, no Treaty changes are needed, albeit our suggestions could be entrenched in primary sources of EU law to emphasise the urgent need of implementing them.[105]

The first problem to be addressed is to call a spade a spade and tackle Rule of Law violations as such. In the past, the Commission often failed to do so and instead focused in its infringement cases on the violation of specific EU legislation and fundamental rights provisions.[106] It thereby not only missed the chance to send a clear warning to those governments who violate the Rule of Law; it also made it very difficult to find an adequate remedy to the problem. A notorious example of such a misframing was the forced premature retirement of judges by the Hungarian government. The Commission attacked the measure of lowering the retirement age as age-based workplace discrimination, allowing the ruling party to get rid of the most senior, experienced and independent judges despite the judgement of the CJEU finding a breach of EU law.[107] The case law by now makes clear that Rule of Law violations can be litigated on the combined basis of Articles 2, 4(3) and 19(1) TEU, even without any additional infringement of EU secondary law or fundamental rights provisions.[108] Furthermore, the Commission most recently started procedures solely on the basis of Article 2 TEU.[109] Therefore, it is not absolutely crucial for the Commission to press on with value-related cases only when there are legal bases other than Article 2 TEU, but would have an added value to have this unequivocally reflected in the Treaties.

Second, the procedural dimension of Rule of Law infringement procedures should be clarified to prevent Member States dismantling the Rule of Law from capitalising on the slowness of infringement procedures and complete judicial capture before the delivery of the CJEU judgment.[110] This is why accelerated infringement actions should be the default rule when a Member State violates the Union's fundamental values. This means, among others, that both the Commission and the CJEU should be bound to respect reasonably tight deadlines. In addition, applications for interim measures should be systematically considered by the Commission.[111] The procedure could be further improved by bundling the Rule of Law infringement cases as a 'package' to make it clear to the CJEU that fundamental values are persistently and seriously violated in a particular Member State.[112] If the CJEU finds a violation, the Commission should closely scrutinise and carefully assess whether the Member State in question took the necessary measures to comply with the jjudgment, and if not, it should bring the matter again before the CJEU, specifying the amount of the lump sum or penalty payment to be paid by the Member State. Rule of Law infringement cases should enjoy preferential treatment, also in terms of scrutinising the follow-up of earlier judgments.

Not only the Commission, but also Member States can stand up for the enforcement of the respect of the Union's fundamental values. They can do so either by intervening in Rule of Law infringement procedures on the side of the Commission or by taking action themselves on the basis of Article 259 TFEU when the Commission does not commence an infringement case.[113] However, it should be considered as a last resort, as such litigation may

[105]For a detailed analysis of the current problems and their solution without any legislative amendments see L Pech, 'Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas' (2022) RECONNECT Policy Brief <Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf (reconnect-europe.eu)>.

[106]P Bárd and A Śledzińska-Simon, 'On the principle of irremovability of judges beyond age discrimination: *Commission v. Poland*' 57 *Common Market Law Review* (2020) 1555–1584.

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

[108]Cf. Pech and Kochenov, 'Strengthening the Rule of Law Within the European Union'.

[109]See the infringement actions, where the Commission invoked Article 2 TEU as a stand-alone provision, without invoking Article 19 TEU or secondary legislation (but invoking Article 10 TEU). See first, the action started against Hungary violating LGBT+ rights, Case C-769/22 *Commission v Hungary*. For an analysis, see M Bonelli and M Claes, 'Crossing the Rubicon? The Commission's Use of Article 2 TEU in the Infringement Action on LGBTIQ+ Rights in Hungary' 30 *Maastricht Journal of European and Comparative Law*, (2023) 3. See also the infringement case launched against Poland due to the adoption of Lex Tusk, i.e. by the Polish law on the State Committee for Russian influence on the internal security of Poland between 2007 and 2022, formal notice, INFR(2023)2088 of 8 June 2023.

[110]P Bárd and A Śledzińska-Simon, 'Rule of Law Infringement Procedures – A Proposal to Extend the EU's Rule of Law Toolbox', CEPS Papers in Liberty and Security in Europe (2019) 1–25.

[111]Guidance for this can be taken from the position in case *Commission* v *Poland (Białowieża Forest)*, Case C-441/17, EU:C:2018:255.

[112]KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge 2016), pp. 105–132; KL Scheppele et al, 'EU Values Are Law, After All'.

[113]Kochenov, 'Biting Intergovernmentalism'; Íñiguez, 'Enemy within?'.

compromise the relations between the Member States, and as safeguarding the respect of the Treaties, including their fundamental values, is primarily the responsibility of the Commission as the Union's watchdog. Therefore, in these cases, it would be desirable to specify in the notice the Commission's commitment to take over the case from the Member State(s) initiating an Article 259 TFEU procedure. Finally, Rule of Law-related infringement procedures are often not followed up, therefore a heavier emphasis should be placed on following up enforcement, and if needed impose lump sum or penalty payments, if needed.[114]

2.2.3 | The revision of conditionality procedures

Regarding the most recent enforcement tool, the Conditionality Regulation, i.e. Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, the results of its efficiency are not clear yet. While the Conditionality Regulation has been triggered for the first time against Hungary, the suspension of funds "have not been in place long enough to exercise their full effect, and so far Viktor Orbán has shown no sign of turning away from his autocratisation of Hungary. Quite to the contrary, he is hardening his rule and escalating his use of extortion tactics to pressure the EU to release his funds."[115]

We do not advocate for a revision of the Conditionality Regulation; instead, we recommend interpreting it in line with the current text. So far, the Commission has adopted a *contra legem* interpretation, as evidenced by its decision not to trigger the mechanism against Poland after having sent a request for information to Polish authorities on 17 November 2021 pursuant to Article 6(4) Conditionality Regulation.[116]

Also, as the Court of Auditors noted, for countries other than Hungary, auditors could not always verify the reasons for using one conditionality tool over another, concluding that the European Commission cannot transparently demonstrate the protection of the EU's financial interests across all Member States.[117]

The Court of Auditors identified several risks undermining the long-term effectiveness of the suspension of certain funds. Rule of Law issues may impact other parts of the budget beyond the measures taken, as seen with Hungary, where only 55% of at-risk programmes were addressed. The remaining 45% and other EU funds could face similar problems. Additionally, the Conditionality Regulation may result in superficial compliance without real improvements, such as Hungary merely announcing the creation of an Integrity Authority without ensuring effective anti-corruption measures. There is also a risk of remedial actions being reversed once budgetary measures are lifted.[118]

Additionally, in December 2023 the Commission decided to unfreeze funds to Hungary despite serious Rule of Law concerns related to unmet milestones, and simultaneously with voting on the Ukrainian accession talks to which Hungary had earlier objected. In a historic move, the European Parliament decided to take the Commission to court over the unfreezing of funds.

Instead of a Treaty change, we recommend sticking to the text of the Conditionality Regulation, ensuring compliance with the milestones, and not give in to political bargaining or blackmailing when unfreezing funds. The opposite of further politicisation of the deployment of the Rule of Law toolbox and the Conditionality Regulation is thus sorely needed, as the clearly identifiable politicisation has a clear capacity to further undermine the value of the Rule of Law in the European legal space.[119]

[114]For an analysis, see G Barrett, 'Rule of Law Chickens Coming Home to Roost: The Ruling in Case C-123/22 European Commission v Hungary' (VerfBlog 21 June 2024).
[115]RD Kelemen, 'Will the European Union Escape Its Autocracy Trap?' *Journal of European Public Policy* (2024), 1, 17.
[116]L Pech et al, 'The Case for Activating the Rule of Law Conditionality Regulation in Respect of Poland (2023), https://www.greens-efa.eu/files/assets/docs/rule_of_law_v2.1.pdf.
[117]European Court of Auditors, The rule of law in the EU. An improved framework to protect the EU's financial interests, but risks remain, 2024/03, https://www.eca.europa.eu/ECAPublications/SR-2024-03/SR-2024-03_EN.pdf, 46.
[118]Ibid.
[119]Grabowska-Moroz and Grogan (eds) 'Rule of Law beyond the EU Member States'.

3 | CONCLUSION: THE PROSPECTS OF A TREATY REFORM PROCESS

The Franco-German Report on EU institutional reform offered a unique opportunity to explore transformative changes that could significantly enhance the EU's efficiency in upholding its core values. The Report advocates for differentiated integration, allowing varying levels of cooperation among Member States. Yet, it firmly asserts that adherence to common values, such as the Rule of Law, must remain undivided and inviolable. We advise reversing things: our focus shifts towards robust Rule of Law enforcement rather than a multi-speed Europe. We believe that the entire debate on a core Europe versus a wider circle of Member States is absolutely moot if absent the universal respect for the Rule of Law and the values set out in Article 2 TEU. The contrary is equally true: a multi-speed Europe will not solve the pandemic of values decline, and possibly it will not even achieve the minimum result of a proliferation of Rule of Law issues affecting the core Europe. This is particularly the case, given the growing concerns related to EU's own adherence to the Rule of Law and other Article 2 TEU values.

From the EU's perspective, the proposals we put forth serve as powerful instruments for enforcing and entrenching the Rule of Law – what we call "militant Rule of Law"– designed to ensure the survival of the European project. While it is beneficial to consider Treaty changes in anticipation of future opportunities for amendments, these are certainly not essential in the short or medium term to more efficiently enforce Article 2 TEU.

Our main message is clear: instead of inventing new procedures and tools for value enforcement, we need a more active, forceful and coordinated approach to enforcing the Rule of Law. Regular follow-up is crucial, with a special emphasis on the judgments of the CJEU and the ECtHR. Additionally, rigorous enforcement of the requirements laid down in conditionality procedures is needed to ensure that they are not subject to daily political bargains and blackmail.

In essence, the call is not for a revolution in procedure but for a renaissance in commitment. The Rule of Law must not be a mere slogan but embody a steadfast practice. By emphasising consistent enforcement and follow-through, we fortify the bedrock of our Union. It's not about speeding ahead on separate tracks; it's about ensuring that every Member State, every institution and every citizen remains on the same path of justice and integrity. After all, a united Europe stands strongest when its foundation—the Rule of Law—is unshakeable.

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