

The Loss of Face for Everyone Concerned: EU Rule of Law in the Context of the 'Migration Crisis'

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Abstract

No winners emerge out of a consideration of the two key EU crises side-by-side: the ‘migration crisis’ – steady attempts by the EU and its Member States to switch off the effective enjoyment of the right to asylum already truncated by the Dublin system and national law – and the ‘rule of law crisis’, seeing Member States leave the club of functioning liberal democracies and pushing the Union in the direction of an association not based on particular values and harbouring autocracies with destroyed checks and balances. Hungary is deployed as a case-study next to the EU itself to assess how the two ‘crises’ feed and amplify each other and which lessons emerge from the connection between them for the EU’s future. The conclusion is that everyone is losing face, since EU law, just like Hungarian law, is unable to ensure the safeguarding of asylum seekers’ rights *by design*. Moreover, recent ‘improvements’, from the EU-Turkey deal to the Hungarian policy of populist hate, showcase the feebleness of values and rampant double standards in a landscape of wanting legal remedies and empty proclamations of rights and principles. While the failed neighbourhood policy and empty European values deliver thousands of dead in the Mediterranean, ‘illiberal’ Hungary and ‘value-based’ EU emerge as successful powerhouses of othering, hypocrisy and wanting legality, where double standards reign and scapegoating migration, especially ‘non-Western’ migration – up to the point of leaving thousands of people dead – brings steady political dividends.

Keywords

Rule of Law, migration crisis, Dublin system, Hungary, EU asylum law, CJEU, killing ‘non-Western’ people

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1. Introduction

The European Union, which is officially established as an entity based on the rule of law¹ according to its own Article 2 TEU,² currently faces a ‘rule of law crisis’ in several Member States, where the system of checks and balances is being gradually dismantled, judicial independence is undermined and systemic corruption is flourishing.³ Despite the availability of numerous instruments (e.g. Article 7 TEU, direct actions under Articles 258 and 259 TFEU, the financial repercussions of non-compliance under 260 TFEU, and many others)⁴ intended to deal with such existential threats – a Union *not* composed of rule of law-based democracies respecting human rights would be a misnomer – the political will to apply the available tools in practice is missing.⁵ The supranational side of the same coin has fared no better: while ‘rule of law’ emerged as the core rhetorical pretext for pushing for the unquestioned supremacy of EU law across the board,⁶ this created apparent conflicts with the Strasbourg human rights protection system and resulted in the Union’s failure to apply the same basic principles at the supranational level as it promotes at the national level, leading to the regrettable emergence of well-articulated double standards.⁷ The most clear-cut of these is the non-application of the core elements of the rule of law – the irremovability of judges and security of tenure⁸ – to the EU’s highest Court, as is clarified by the Vice-President of the institution.⁹ An embarrassing situation followed, calling into question the lawfulness of the composition of the Court.¹⁰ The illegally ousted Advocate General, whose term of office,

¹ Case 294/83, Judgment of the Court of 23 April 1986, *Parti écologiste ‘Les Verts’ v European Parliament*, para. 23.

² M. Klamert, D. Kochenov, Article 2, in M. Kellerbauer, M. Klamert, J. Tomkin, (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford: Oxford University Press), pp. 23-30.

³ Cf., eg, A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt (eds.), *Defending Checks and Balances in EU Member States. Taking Stock of Europe’s Actions*, Springer 2021; C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press 2016); A. Jakab, D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford: Oxford University Press 2017).

⁴ See, for an overview, K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, *Yearbook of European Law*, Volume 39, 2020, pp. 12-19 (and the literature cited therein).

⁵ JCMS Symposium 2016: *The Great Rule of Law Debate in the EU* edited by Dimitry Kochenov, Amichai Magen and Laurent Pech, *Journal of Common Market Studies* 2016 Volume 54, Issue 5, pp. 1045-1104.

⁶ D. Kochenov, ‘Rule of Law as a Tool to Claim Supremacy’, in Adam Bodnar and Jakub Urbanik (eds), *Περιμένοντας τους Βαρβάρους. Law in the days of Constitutional Crisis. Studies offered to Miroslaw Wyrzykowski* (Munich/Baden Baden: C.H. Beck/Nomos, 2021).

⁷ D. Kochenov, *De Facto Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times*, *XL Polish Yearbook of International Law* (2021) (Forthcoming).

⁸ K. Lenaerts, *Upholding the Rule of Law through Judicial Dialogue*, *Yearbook of European Law*, Volume 38, 2019, 3–17; P. Bogdanowicz, M. Taborowski, *How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience: ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v Republic of Poland*. *European Constitutional Law Review* 2020 16(2), 306-327.

⁹ Case C-423/20 P(R), Order of the Vice-president of the Court, *Council v Sharpston*, ECLI:EU:C:2020:700 (10 September 2020); Case C-424/20 P(R) Order of the Vice-president of the Court, *Représentants des Gouvernements des États membres v Sharpston*, ECLI:EU:C:2020:705 (10 September 2020).

¹⁰ D. Kochenov, G. Butler, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, Jean

which is established in Primary Law, has not yet expired, issued brilliant ‘shadow Opinions’ – also pertaining to core issues of EU migration law¹¹ – in parallel to those presented by the person purported to be an ‘Advocate General’ by the Member States and sworn in by the President of the Court in apparent violation of the Treaties.

On the other side of the same coin, the EU has been facing a ‘migration crisis’ in recent years, which is directly related to an absolute fiasco of its neighbourhood policy.¹² Barroso’s projected ‘ring of friends’ has effectively become (or at best remained) a renewed défilé of dictatorships or, in part, unstable warzone, finding the EU and its Member States utterly unprepared for this reality, including the migration pressures it could generate: so much for the ‘promotion of values’ abroad – including in EU’s own backyard.¹³ The ‘migration crisis’, which came as a testimony to unpreparedness and deep failure of foreign policy over the years and focused on dictator appeasement combined with ignoring powerful interests and *de facto* spheres of influence, presented a seemingly novel challenge: its mitigation needed to follow the Union’s values, such as solidarity and the rule of law. This proved extremely difficult to achieve, as politically and also legally, deep intolerance to the migrant other became the new normal in the EU, often targeting not only third-country nationals, but also EU citizens, as Sarah Ganty has demonstrated.¹⁴ This reality ranges from border walls to push-backs on land and at sea – sometimes with the full knowledge, if not the assistance, of FRONTEX¹⁵ – as well as broad acceptance of ‘culture’ and ‘integration’ tests.¹⁶ Europe today is without any doubt far removed from being a welcoming place, as thousands drown at sea from year to year and millions of hours are wasted by countless immigrants combined to

Monnet Working Paper 2/20: <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02-Dimitry-Kochenov-Graham-Butler.pdf>.

¹¹ Shadow Opinion of Advocate-General Eleanor Sharpston QC, Case C-194/19 HA, on the appeal rights of asylum seekers in the Dublin system: <http://eulawanalysis.blogspot.com/2021/02/case-c19419-h.html>.

¹² E. Basheska and D. Kochenov, ‘EuroMed, Migration and Frenemy-Ship: Pretending to Deepen Cooperation Across the Mediterranean’, in F. Ippolito and S. Trevisanut (eds), *Migration in the Mediterranean: Mechanisms of International Cooperation* (Cambridge, 2015), 41. For more on the ‘migration crisis’, the causes of which are beyond the scope of this chapter, see Agustín José Menéndez, *The Refugee Crisis: Between Human Tragedy and Symptom of the Structural Crisis of European Integration*, *European Law Journal*, Vol. 22, No. 4, July 2016, pp. 388–416; Rosemary Byrne, Gregor Noll, Jens Vedsted-Hansen, *Understanding the crisis of refugee law: Legal scholarship and the EU asylum system*, *Leiden Journal of International Law* (2020), 33, pp. 871–892.

¹³ D. Kochenov and E. Basheska, ‘ENP’s Values Conditionality from Enlargements to Post-Crimea’, in S. Poli (ed.), *The EU and Its Values in the Neighbourhood* (Routledge, 2016), 145.

¹⁴ S. Ganty, *L’intégration des citoyens européens et des ressortissants de pays tiers en droit de l’UE. Critique d’une intégration choisie*, Larcier 2021.

¹⁵ Follow the work of EP FRONTEX Scrutiny Working Group (FSWG) was appointed by the Committee on Civil Liberties, Justice and Home Affairs, convened to deal with the alleged chronic violation of fundamental rights of asylum seekers by the agency. A recent audit report of the European Court of Auditors concluded that FRONTEX was ‘its own worst enemy’: N. Nielsen, *Euractiv*, 8 June 2021 <https://euobserver.com/migration/152070>.

¹⁶ S. Ganty, *Silence Is Not (Always) Golden: A Criticism of the ECJ’s Approach towards Integration Conditions for Family Reunification*, *European Journal of Migration and Law* 2021 (23) 2, 176–201.

learn the ‘the local customs and language’ in an *again* intolerant Europe.¹⁷ At a more global level, the EU, although officially created with lasting peace in mind, has been traditionally markedly ineffective in promoting peace in the European continent and around it.¹⁸ The emerging picture is a disheartening one. It is difficult to decide what about the newly-created post of the Commission Vice President for the ‘European Way of Life’ is a better illustration of just how bad this situation is: the fact that it exists, or the fact that it was thought to be a good idea.¹⁹

Against the above backdrop, this contribution focuses on the link between the rule of law and migration in the particularly poisonous context of democratic and rule of law backsliding in the EU.²⁰ Our analysis draws on the Hungarian case study,²¹ where overall institutional changes introduced since 2010 have led to the establishment of a regime described as ‘illiberal’ by some and as ‘authoritarian’ by others.²² We argue that Hungarian asylum policy is essentially designed with one key goal in mind: to deprive people of the right to seek asylum in breach of the international obligations of Hungary and of EU law. Introduced in response to the ‘migration crisis’ in 2015, it was a direct result of the broader process of rule of law backsliding. The Hungarian case study proves that the unresolved rule of law backsliding flourishing in some EU Member States affects both the practical implementation of EU basic values (e.g. solidarity) and the proper functioning of the EU policies (e.g. asylum policy).

Our hypothesis is that the rule of law is not secured sufficiently, either in the EU or by the EU, causing all concerned to lose face: EU values deserve better. Given how much the basic values of the EU, and especially the rule of law, are intertwined with the functioning of EU policies, we argue that reinforcement of the rule of law broadly conceived needs to be a part of the answer to the ‘migration crisis’ in the EU. Any substandard response in the field of the rule of law leads to deterioration of migrants’ rights and vice versa: anti-migration rhetoric and

¹⁷ A. Favell, A. Integration: twelve propositions after Schinkel. *JCMS* 7, 21 (2019); D. Kochenov, *Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice*, EUI Working Paper, EUI RSCAS, 2011/06.

¹⁸ A. Williams, *The Ethos of Europe* (Cambridge, 2009), ch. 1.

¹⁹ M. Peel, EU commission faces showdown over ‘European way of life’ job, *ft.com* 11 September 2019 <https://www.ft.com/content/1c3ab880-d492-11e9-a0bd-ab8ec6435630>; D. Herszenhorn, M. de La Baume, Outrage over ‘protecting our European way of life’ job title, *Politico* 11 September 2019, <https://www.politico.eu/article/outrage-over-protecting-our-european-way-of-life-job-title/>; S. in ‘t Veld, Threat to ‘European way of life’ is not migrants. It’s populists, *Politico* 12 September 2019, <https://www.politico.eu/article/populist-threat-to-european-way-of-life-sophie-int-veld-ursula-von-der-leyen/>.

²⁰ L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, *Cambridge Yearbook of European Legal Studies* (2017) 19, 3–47

²¹ Cf. B. Nagy, ‘Investment Migration and Corruption: The Case of Hungary’, in D. Kochenov and K. Surak (eds), *Selling Residence and Citizenship: The Redefinition of Belonging* (Cambridge, 2021 (forthcoming)).

²² ‘Ten million EU citizens now live under authoritarian rule’. K. Roth, *Stopping the authoritarian rot in Europe*, *EUObserver* 23 April 2020, <https://euobserver.com/opinion/148147>; K. Kovács, K.L. Scheppele, ‘The fragility of an independent judiciary: Lessons from Hungary and Poland and the European Union’, (2018) 51 *Communist and Post-Communist Studies* 3, 189–200; Z. Szente, *Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in A. Jakab, D. Kochenov (eds.) *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Cambridge: Cambridge University Press 2017); Gábor Halmai, *Illiberalism in East-Central Europe*, EUI Department of Law Research Paper No. 2019/05.

politics help entrench attacks on the rule of law in the backsliding Member States of the Union. Crucially, embracing a systemic connection between the responses to the two interrelated ‘crises’ should become a priority *both* at the EU and at the Member State level.

2. The status of values in the EU legal system

The amendments introduced into the Treaties in the 1990s strengthened the visibility, status and the role of values, such as democracy, fundamental rights and rule of law, building on their antecedents, lingering among the unwritten principles and informal resources of the *acquis*.²³ At least on paper and as inspirational ideals: full compliance with the *acquis* at that time still had little to do, strictly legally speaking, with compliance with ‘values’²⁴ – whence the need for the ‘Copenhagen political criteria’ in the context of recent enlargement preparations.²⁵ The aftermath of enlargement proved that their practical implementation faces numerous legal and political obstacles.

Despite the fact that the Rule of Law is closely linked with the development of the European Communities as confirmed on numerous occasions in the case law of the Court of Justice,²⁶ the Member States tend to question its status, justiciability, meaning and function.²⁷ This questioning is not always without merit, given the complexity of the multilevel system of European constitutionalism.²⁸ That said, Laurent Pech managed to demonstrate quite convincingly that even with the occasional differences in the articulation of its meaning notwithstanding,²⁹ the wholesome core of the rule of law is unquestionably sound.³⁰

²³ D. Kochenov, EU Enlargement Law: History and Recent Developments: Treaty - Custom Concubinage? European Integration online Papers (EIoP), Vol. 9, No. 6, 2005, pp. 1–23; M. Klamert, D. Kochenov, Article 2, in M. Kellerbauer, M. Klamert, J. Tomkin, (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford: Oxford University Press), pp. 23–30.

²⁴ D. Kochenov, The *Acquis* and Its Principles. The Enforcement of the ‘Law’ versus the Enforcement of ‘Values’ in the EU, in András Jakab and Dimitry Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States’ Compliance* (Oxford: Oxford University Press 2017), 9–27.

²⁵ C. Hilion, *EU Enlargement. A Legal Approach*, Hart Publishing 2004; D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law* (The Hague: Kluwer Law International 2008).

²⁶ T. von Danwitz, ‘The Rule of Law in the Recent Jurisprudence of the ECJ’ (2014) 14(5) *Fordham International Law Journal* 1340.

²⁷ J. Grogan, L. Pech et al., Unity and Diversity in National Understandings of the Rule of Law in the EU, RECONNECT Deliverable 7.1., April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>; Paul Blokker et al., The democracy and rule of law crises in the European Union and its Member States, RECONNECT Deliverable 14.1., April 2021, <https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf>.

²⁸ 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: Cambridge University Press 2016), 36–58. We refer to multilevel constitutionalism as discussed and defined by I. Pernice (see, I. Pernice, Multilevel Constitutionalism and the Crisis of Democracy in Europe. *European Constitutional Law Review* 2015, 11(3), 541–562).

²⁹ E.g. L. Pech, Promoting the rule of law abroad: on the EU’s limited contribution to the shaping of an international understanding of the rule of law in D. Kochenov and F. Amtenbrink (Eds.), *The European Union’s Shaping of the International Legal Order* (Cambridge: Cambridge University Press 2014), 108–129.

It is thus not the ‘meaning game’ that we need to riddle, when the EU’s rule of law problems come to be illuminated. Rather, there seem to be two aspects of the rule of law crisis. The first is that some Member States deliberately undermine the existing system of checks and balances which allows the governments in power to amend and/or abuse the existing rules in order to remain in power, no matter what, through harnessing the apparatus of the state.³¹ The second aspect of the crisis consists in the fact that the European Union has been rather anæmic in its attempts to counteract rule of law backsliding in the Member States.³² Such an approach undermines the principle of the rule of law understood as a foundation of the EU and does not ensure that the Union is truly composed of rule of law abiding democracies respecting human rights. Despite being codified in primary EU law, fundamental rights have enjoyed limited scope of application,³³ since they are addressed to the Member States only when they are implementing Union law. Furthermore, the verification of their practical implementation by Member States is limited due to the principle of mutual trust between EU Member States and the principle of autonomy of EU law.³⁴ The Charter of Fundamental Rights guarantees the right to asylum in a scope provided for by the Geneva Convention and in accordance with the EU Treaties.³⁵ In this sense attempts to limit the right to asylum are not only about violations of EU law, but also, significantly, about undermining globally recognised human rights instruments. From this perspective, the ‘migration crisis’ (also described as a ‘refugee crisis’ or ‘asylum crisis’) can be considered as a crisis of fundamental rights protection in the EU. From the institutional perspective it is ‘a crisis of the CEAS’.³⁶

EU integration has been facing numerous challenges in the recent years, some of which have been described as ‘crises’, while others – as ‘deficits’.³⁷ Such crises-deficits result in a situation in which the law is both contested – for good or bad reasons – and disapplied – again, for good or bad reasons. The Dublin Regulation, which is famously flawed, does not work in

³⁰ L. Pech, The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09; L. Pech, J. Grogan et al., Unity and Diversity in National Understandings of the Rule of Law in the EU, RECONNECT Deliverable 7.1, April 2020, <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>.

³¹ L. Pech, K.L. Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies* (2017), 19, 3–47. For a detailed case study, see W. Sadurski, *Polish Constitutional Breakdown* (OUP: Oxford 2019).

³² For a detailed account and further literature, see e.g. K. L. Scheppele, D. Kochenov, B. Grabowska-Moroz, EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union, *Yearbook of European Law*, Volume 39, 2020, pp. 3–121.

³³ See Article 51 of the Charter.

³⁴ Opinion 2/13; mutual trust based on the presumption of general adherence to the values where only the trust, but not the actual adherence is enforced is highly problematic (D. Kochenov, EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?, 34 *Yearbook of European Law* 2015, 88)

³⁵ Lock, Article 18 of the Charter of Fundamental Rights, in M. Kellerbauer, M. Klamert, J. Tomkin (eds). *Commentary on the EU Treaties and the Charter of Fundamental Rights*, (OUP: Oxford, 2019), p. 2155.

³⁶ A. Niemann, N. Zaun, EU Refugee Policies and Politics in Times of Crisis: Theoretical and Empirical Perspectives, *JCMS* 2018 Volume 56. Number 1. pp. 3–22 (p. 3).

³⁷ E.g. D. Kochenov, G. de Búrca and A. Williams (eds), *Europe’s Justice Deficit?* (Hart Publishing, 2015).

practice, leaving the problems it purported to alleviate unresolved, while unquestionably remaining ‘law’. Article 7 TEU, similarly, fails to protect, not only against authoritarian turns – but also against the undermining of legal rules.³⁸ There is also an important ‘populist element’ present in both cases.³⁹ This concerns both anti-elitism – and this includes rallying against courts and judges in the name of ‘democracy’ pursuing the goal of undermining judicial independence; and anti-otherness, targeting today not only ‘illegal immigrants’ – but also EU citizens with immigrant background or family histories. How else does one protect ‘our European way of life’? The worse off here are the most vulnerable – the refugees. ‘Democratic’ fighting for ‘our way of life’ can thus build on the dismantlement of the rule of law with anti-refugee sentiments as the main driver deployed by the backsliding governments and gradually transferred to the European discourse and practice. Both the failure to tackle the problems of the dysfunctional Dublin system and the creation of the Commission Vice-Presidency focused on the ‘European way of life’ are thus parts of the same anti-rule of law populist drive, which saw Hungary and Poland in a free-fall in all the democracy and rule of law indexes. The ‘will of the people’, sometimes expressed via a referendum, is frequently one of the main instruments in the re-charting of law and politics along anti-rule of law and anti-immigrant lines. The two emerged in ‘our European way of life’ as two sides of the same coin, and both levels of government – supranational and national – are to blame. Furthermore, the populist critique of human rights also refers to the ‘people’, arguing that the ‘human rights project’ has given up on this mission and has started to serve particular groups and promote particular agendas.⁴⁰ Such rhetoric directly undermines pluralism, a foundational value in the EU project.⁴¹ Lastly, it goes without saying that the challenges described above erode the core fabric of which EU law is woven: the principle of mutual trust.⁴²

³⁸ B. Bugarič, ‘Protecting Democracy Inside the EU: On Article 7 and the Hungarian Turn to Authoritarianism’, in C. Closa and D. Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: Cambridge University Press, 2016) 82–102.

³⁹ Cf. D. Kochenov and B. Grabowska-Moroz, ‘Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined’, in A. Czarnota, M. Krygier and W. Sadurski (eds), *Populism and the Rule of Law* (Cambridge: Cambridge University Press, 2021).

⁴⁰ P. Blokker, ‘Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism’ (2019) 15 *European Constitutional Law Review* 518; D. Adamski, ‘The Social Contract of Democratic Backsliding in the “New EU” Countries’ (2019) 56 *CMLRev* 623; V. Bílková, Populism and Human Rights, in J. E. Nijman and W. G. Werner (eds.), *Netherlands Yearbook of International Law – Populism and Human Rights*. Asser Press 2018, The Hague, Netherlands, 161.

⁴¹ Ironically, anti-pluralism and nationalist preferences can actually produce pluralist results, as is illustrated by the regulation of citizenship in Europe: D. Kochenov and J. Lindeboom, Pluralism through Its Denial: The Success of EU Citizenship, in G. Davies and M. Avbelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

⁴² C. Rizcallah, *Le principe de confiance mutuelle en droit de l'Union européenne. Un principe essentiel à l'épreuve d'une crise de valeurs*, Larcier 2020.

3. When rule of law backsliding meets ‘migration crisis’ – Hungarian asylum law before the Court of Justice.

Commissioner Viviane Reding, when discussing the ‘rule of law crisis’ in 2013, referred to three examples: ‘the Roma crisis in France in summer 2010; the Hungarian crisis that started at the end of 2011; and the Romanian rule of law crisis in the summer of 2012’.⁴³ After ten years the Hungarian crisis has led to the establishment of the first autocracy in the European Union – a ‘Partly Free’ EU Member State.⁴⁴ Institutional arrangements undertaken by the government in Hungary since 2010 have strengthened the executive against any independent entity. Such an institutional, procedural and political shift allowed the government to introduce numerous policies directly affecting fundamental rights and freedoms – freedom of association, academic freedom, and right to asylum.⁴⁵

There are no effective checks and balances which would control and supervise whether a policy is reasonable, effective or acceptable in the light of Constitution, international law or the moral values of a given society. Using the ‘migration crisis’ to ramp-up populist sentiments, the Hungarian government introduced an asylum policy which *de facto* limited the right to asylum to a degree where there could be no such right in practice. The populist othering game went as far as the criminalisation of those ‘assisting’ ‘migrants’ and large-scale PR campaigns against the figures criticising the government, from George Soros, the founder of the CEU, to key figures at the European Commission.⁴⁶ ‘Othering’ is popular and can become a banner under which the rule of law is destroyed.

A barbed-wire fence was erected along the country’s southern border; crossing the border fence became a criminal act; two transit zones were established, where people were kept

⁴³ Viviane Reding, Speech: The EU and the Rule of Law – What next?, 4 September 2013, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677.

⁴⁴ Freedom in the World 2019. Democracy in Retreat, Freedom House - <https://freedomhouse.org/report/freedom-world/2019/democracy-retreat>.

⁴⁵ 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)).

⁴⁶ ‘Stop Soros’ started with coordinated media campaign (see Judith Mischke, George Soros accuses Hungary of ‘anti-Semitic’ attack campaign, Politico 20 November 2017), followed by the publication of a draft law on NGOs providing support to asylum seekers (see K. Than, Hungary submits anti-immigration ‘Stop Soros’ bill to parliament, Reuters 14 February 2018, <https://www.reuters.com/article/us-hungary-soros-law/hungary-submits-anti-immigration-stop-soros-bill-to-parliament-idUSKCN1FY1JE>) and a new law on higher education, which primarily targeted the status of the Central European University, established and financed by G. Soros. Finally, ‘Stop Soros’ campaign covered also President of the European Commission, Jean-Claude Juncker (see L. Bayer, Hungary launches campaign targeting Jean-Claude Juncker, Politico 18 February 2019, <https://www.politico.eu/article/hungary-launches-campaign-targeting-jean-claude-juncker-george-soros/>). Legislation adopted as a part of ‘Stop Soros’ resulted in infringement actions: C-78/18 (Lex NGO), C-821/19 and C-66/18 (Lex CEU).

without any ‘detention order’; the courts’ competences were limited;⁴⁷ a ‘push-back’ policy was implemented; since 2018 all asylum applications were automatically declared inadmissible if the applicant had transited Serbia;⁴⁸ and finally, as mentioned above, providing assistance to asylum-seekers also became a criminal act. In 2016 alone, the Hungarian government spent approximately 28 million euros on its large-scale xenophobic anti-immigrant campaign.⁴⁹ In October 2018 a referendum was held in Hungary in which the Hungarians were asked ‘Do you want the European Union to prescribe the mandatory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly?’ Despite the low turnout, Viktor Orbán announced that ‘Hungarians decided that only we Hungarians can decide with whom we want to live’.⁵⁰

The very idea of migration, especially ‘non-Western’ migration, came to be immensely politicised. The politicisation of migration⁵¹ diagnosed in numerous Member States, was a result of the polarisation of attitudes towards EU migration policy,⁵² and without any doubt also a reaction to the very essence of what the EU has stood for from its inception: a Union in which the internal market is the main objective and the core element of achieving it is open internal borders and the strict enforcement of the principle of non-discrimination on the basis of nationality. Unthinkable elsewhere in the world, given the nationality’s main function, which is exclusion – it would be absurd to claim that any of the Member States enjoys any control over its borders or its population.⁵³ No nationalist would like this, of course, and Orbán has been very skilful in riding the wave of hate he fuelled in full knowledge of the outright nihilistic, at least legally speaking, nature of his referendum, combined with all the PR activity: by joining the EU, Hungary had surrendered the right, precisely, to determine essentially who will inhabit its territory.⁵⁴ The law was thus not on the ‘othering’ populists’ side.

⁴⁷ Judgment of the Court (Grand Chamber) of 29 July 2019, *Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2019:626.

⁴⁸ V. Hopkins, J. Shotter, M. Peel, ECJ ruling deals blow to Hungary’s asylum process, *Financial Times* 17 December 2020 - <https://www.ft.com/content/a5c13b76-a53e-4b02-8247-8959ec02d363>.

⁴⁹ E. M. Goździak, Using Fear of the “Other,” Orbán Reshapes Migration Policy in a Hungary Built on Cultural Diversity, October 10, 2019 <https://www.migrationpolicy.org/article/orb%C3%A1n-reshapes-migration-policy-hungary>.

⁵⁰ K. Than, G. Szakacs, Hungary's Orban to seek EU of strong nations after landslide re-election, *Reuters* 10 April 2018, <https://www.reuters.com/article/cnews-us-hungary-election-orban-idCAKBN1HH12A-OCATP>.

⁵¹ Felipe González Morales, Hungary: Government’s declared migrant ‘crisis’ does not correspond to reality and leads to human rights violations, says UN expert, BUDAPEST (17 July 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E>.

⁵² F. Pasetti, B. Garcés-Masareñas, Who is responsible, for what and to whom? Patterns of politicisation on refugees and the European solidarity crisis, *Ceaseval Research on the Common European Asylum System* (2018) No. 16, Chemnitz, p. 7.

⁵³ D. Kochenov and J. Lindeboom, Pluralism through Its Denial: The Success of EU Citizenship, in G. Davies and M. Avbelj (eds.), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018).

⁵⁴ D. Kochenov, Rounding up the Circle: The Mutation of Member States’ Nationalities under Pressure from EU Citizenship, *EUI RSCAS Working Paper* 2010/23.

Would it be surprising, then, that the officially endorsed and madly serialised narrative offered by the Hungarian government rests heavily on creating a link between ‘rule of law’ and ‘migration’ – suggesting that criticism based on ‘rule of law’ aims at forcing Hungary to ‘let illegal migrants in’,⁵⁵ and as a result the procedure initiated under Article 7 TEU, constitutes a ‘revenge campaign of the pro-migration elite’.⁵⁶ Insofar as the EU is bound to ensure that its law’s claim to supremacy succeeds⁵⁷ and that an effective right of asylum is indeed provided in the EU – however flawed its problematic legal framework may be on the subject⁵⁸ – Orbán’s propaganda has thus got several key points about the nature of the EU right. Indeed, Hungary cannot in the majority of cases decide who will live in Hungary and yes, it is against the law to try to do so without taking EU legal instruments fully into account.

The second point that the Orbán propaganda machine got across relates to the criticism of ‘migration’ *per se*, which is presented as a threat to Hungary,⁵⁹ resulting in the ‘securitisation’ of migration⁶⁰ and the humiliation of migrants. Hungary is not alone here – take the UK⁶¹ or Denmark⁶² as other examples – but Hungary is notorious for bringing this basic point to an extreme. For Fidesz, the crux of the matter is not even ‘Britishness’ or ‘the knowledge of the Danish language and culture’: any act of migration by ‘non-Western’ ‘others’ is presented in the official narrative as a direct threat to ‘Christian values’ – never mind the religion of the

⁵⁵ F. Kaszás, Hungarian Gov’t Has Few Allies in Fight Against Rule of Law Criteria, 2020.11.19, <https://hungarytoday.hu/orban-hungary-argument-rule-of-law-allies/>. The Prime Minister said that ‘those who protect their borders and their countries from migration are no longer considered by Brussels to be rule-governed states’.

⁵⁶ E. Zalan, Hungary claims EU ‘witch-hunt’ over rule of law hearing, EUObserver Brussels, 17 September 2019. Minister Varga said that ‘the pro-migration liberal elite continued to repeat the same baseless, untruthful, unfounded accusations that are echoed in the liberal, mostly western European media’. See also, Z. Kovács, This is how ‘rule of law’ became a weapon against countries that oppose migration, Nov 20, 2020, <http://abouthungary.hu/blog/this-is-how-rule-of-law-became-a-weapon-against-countries-that-oppose-migration/>.

⁵⁷ J. Lindeboom, ‘Why EU Law Claims Supremacy’, Oxford Journal of Legal Studies 2018 (38) 2, 328–356.

⁵⁸ E. Brouwer, Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof. (2013) *Utrecht Law Review* 9(1), 135–147; S. Peers, Reconciling the Dublin system with European fundamental rights and the Charter. *ERA Forum* 15, 485–494 (2014).

⁵⁹ Lili Bayer, Hungary’s ‘zero refugee’ strategy, Politico 20 September 2016 <https://www.politico.eu/article/hungary-zero-refugee-strategy-viktor-orban-europe-migration-crisis/>. Hungary: Government’s declared migrant ‘crisis’ does not correspond to reality and leads to human rights violations, says UN expert, BUDAPEST (17 July 2019) - <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E>.

⁶⁰ P. Maldini, M. Takahashi, Refugee Crisis and the European Union: Do the Failed Migration and Asylum Policies Indicate a Political and Structural Crisis of European Integration? *COMMUNICATION MANAGEMENT REVIEW*, 2 (2017), p. 67; Hungary: Government’s declared migrant ‘crisis’ does not correspond to reality and leads to human rights violations, says UN expert, BUDAPEST (17 July 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24831&LangID=E>.

⁶¹ C. O’Brien, ‘Between the Devil and the Deep Blue Sea: Vulnerable EU Citizens Cast Adrift in the UK Post-Brexit’, *Common Market Law Review* (2021) Vol. 58, pp. 431–470; D. Kochenov, EU citizenship and withdrawals from the Union. How inevitable is the radical downgrading of rights? in C. Closa (ed). *Secession from a Member State and Withdrawal from the European Union. Troubled Membership* (Cambridge: Cambridge University Press 2017).

⁶² S. Ganty, Silence Is Not (Always) Golden: A Criticism of the ECJ’s Approach towards Integration Conditions for Family Reunification, *European Journal of Migration and Law* 2021 (23) 2, 176–201.

migrants – thus justifying the rhetorical need of protecting these values.⁶³ The only value enjoying protection here is boring old racism – not an atypical stance in the contemporary ‘West’ of the passport apartheid,⁶⁴ but probably somewhat more clearly articulated in Hungary than, say, Denmark, and thus a little bit more obnoxious. Orbán even employs the term ‘Christian democracy’ to describe a regime which he used to name ‘illiberal democracy’.⁶⁵ This description of course advanced despite the fact that the functioning of Hungarian ‘transit zones’ can hardly be linked to any ‘Christian standard’,⁶⁶ not to mention the fact that Hungarian ‘democracy’, to quote András Sajó’s brilliant recent account, is ‘Ruling by Cheating’.⁶⁷

The anti-migration policy adopted by the Hungarian government since 2015 became the subject of numerous infringement actions initiated by the European Commission. The first concerned the opposition to fulfil the relocation plan adopted in 2015 as a part of the ‘European Agenda on Migration’.⁶⁸ The aim of the relocation programme was to support Greece and Italy and relocate almost 1,600,000 refugees to other Member States. The programme operated on the basis of two Council decisions⁶⁹ which were challenged by the Czech Republic and Hungary⁷⁰ before the Court of Justice.⁷¹ One reason for the reluctant response to EU initiatives, such as the relocation scheme in many EU countries, has been the rise of nationalistic populist parties in national elections in several EU Member States.⁷² In the proceedings before the Court, the Polish government argued, for example, that the relocation

⁶³ M. Karnitschnig, ‘Orbán Says Migrants Threaten “Christian” Europe’, Politico Europe, 3 September 2015, <https://www.politico.eu/article/orban-migrants-threaten-christian-europeidentity-refugees-asylum-crisis/>.

⁶⁴ D. Kochenov, ‘Ending the Passport Apartheid: The Alternative to Citizenship Is No Citizenship’ (2020) 18(4) *International Journal of Constitutional Law*, 1525–1530.

⁶⁵ S. Walker, Orbán deploys Christianity with a twist to tighten grip in Hungary, guardian.com 14 July 2019 <https://www.theguardian.com/world/2019/jul/14/viktor-orban-budapest-hungary-christianity-with-a-twist>; Viktor Orbán’s full speech for the beginning of his fourth mandate, Visegrad Post May 12, 2018 <https://visegradpost.com/en/2018/05/12/viktor-orbans-full-speech-for-the-beginning-of-his-fourth-mandate/>

⁶⁶ Gabor Ivanyi, There’s nothing Christian about Orban’s democratic values, Euronews 30 December 2019, <https://www.euronews.com/2018/09/05/there-s-nothing-christian-about-orban-s-democratic-values-view>; Rejection, starvation, creating bureaucratic and legal hurdles, and spreading false news about asylum seekers is particularly un-Christian behaviour.

⁶⁷ A. Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (Cambridge: Cambridge University Press, 2021).

⁶⁸ European Commission, *Communication to the European Parliament, the European Council and the Council. Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration*, Brussels, 23.9.2015, COM(2015) 490 final. The European Agenda for Migration mentioned numerous actions, such as hotspot system (filtering people and categorising them as asylum seekers or ‘economic migrants’), a relocation mechanism, and external deals (e.g. with Turkey and Libya).

⁶⁹ Council Decision (EU) 2015/1523 and Council Decision (EU) 2015/1601).

⁷⁰ K. Groenendijk, B. Nagy, Hungary’s appeal against relocation to the CJEU: upfront attack or rear guard battle? 16 December 2015, <http://eumigrationlawblog.eu/hungarys-appeal-against-relocation-to-the-cjeu-upfront-attack-or-rear-guard-battle/>.

⁷¹ A challenge to the legality of Decision 2015/1601 was unsuccessful - Judgment of 6 September 2017, *Slovak Republic and Hungary v Council*, C-643/15 and C-647/15, EU:C:2017:631.

⁷² I.P. Karolewski, R. Benedikter, Europe’s migration predicament: The European Union’s refugees’ relocation scheme versus the defiant Central Eastern European Visegrad Group. *Journal of Inter-Regional Studies: Regional and Global Perspective* (2018), 1:40-53; K. Gadd, V. Engström, B. Grabowska-Moroz, Democratic Legitimacy in EU Migration Policies, RECONNECT Deliverable 13.2, p. 31.

scheme was disproportionate with respect to states which are ‘virtually ethnically homogeneous, like Poland’ and ‘whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory’.⁷³ The Court’s ruling, which dismissed this reasoning, was seen as a milestone since solidarity and burden-sharing were framed for the first time as obligations, rather than as discretionary.⁷⁴

Following the unsuccessful challenge of legality of the relocation scheme, Hungary (alongside Poland and the Czech Republic) faced proceedings regarding their failure to fulfil obligations under the relocation decisions.⁷⁵ Hungary, Poland and the Czech Republic argued that their actions – refusal to accept refugees under the relocation scheme – were justified due to the ineffectiveness of the scheme and the need to safeguard internal security. The governments argued that such ‘withdrawal’ from the realm of legal obligations directly binding on them was acceptable in the light of Article 72 TFEU, which specifies that ‘This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’. The Court disagreed with this argument and underlined that Article 72 TFEU must be interpreted strictly⁷⁶ and ‘cannot be read in such a way as to confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities’.⁷⁷ It further underlined that Member States cannot rely on their ‘unilateral assessment’ to avoid their obligations.⁷⁸ This was in particular due to the binding nature of the Decisions and from the perspective of their *aim* – solidarity, finding that ‘in a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness’.⁷⁹ AG Sharpston was as simple on this matter as she was clear: ‘respect for the rule of law implies compliance with one’s legal obligations’.⁸⁰ She added that ‘solidarity is the lifeblood of the European project’, which ‘requires one to shoulder collective responsibilities and (yes) burdens to further the common good’.⁸¹

⁷³ Judgment of the Court (Grand Chamber) of 6 September 2017, Joined Cases C-643/15 and C-647/15, para. 302.

⁷⁴ B. de Witte, E. Tsourdi, Confrontation on relocation – The Court of Justice endorses the emergency scheme for compulsory relocation of asylum seekers within the European Union: *Slovak Republic and Hungary v. Council*. Joined Cases C-643/15 & C-647/15, *Slovak Republic and Hungary v. Council of the European Union*, Judgment of the Court (Grand Chamber) of 6 September 2017, EU:C:2017:631, (2017) *Common Market Law Review*, 55(5), p. 1493.

⁷⁵ Joined Cases C-715/17, C-718/17 and C-719/17.

⁷⁶ Para. 143.

⁷⁷ Para. 145.

⁷⁸ Para. 180.

⁷⁹ Para. 139.

⁸⁰ Opinion of Advocate General Sharpston delivered on 31 October 2019 Case C-715/17 *European Commission v Republic of Poland*; Case C-718/17 *European Commission v Republic of Hungary*; Case C-719/17 *European Commission v Czech Republic*, para. 241.

⁸¹ Para. 253.

There is also an important ‘political aspect’ to the relocation story – that ‘consensus in the EU has to be formed on the political level’,⁸² to forestall legal challenges of its crucial elements. The media informed that outside the legal proceedings, it was being suggested that the relocation decisions themselves, rather than the lawless behaviour of the recalcitrant Member States, were the ‘original sin’ that broke trust between the Commission and Eastern and Central European governments.⁸³ The lack of an actual will to cooperate and genuinely act in solidarity with other EU Member States is seen as one of the reasons why the relocation system failed.⁸⁴ This legal fight reinforced the position of the ‘anti-immigrant’ leaders at home: connecting the destruction of the rule of law with anti-immigration policies has seemingly paid off.⁸⁵

The main elements of the new asylum policy were subject of the second infringement procedure against Hungary, initiated already in 2015, which did not reach the Court until 2018.⁸⁶ The case covered the most disturbing elements of the ‘asylum procedures’ applied in two ‘transit zones’. Access to the asylum procedure was ‘systematically and drastically’ limited,⁸⁷ which was found to be incompatible with Article 6(1) of Directive 2013/32. The obligation to remain in the transit zones (surrounded by a high fence and barbed wire) was recognised as ‘detention’,⁸⁸ which had not been ordered on a case-by-case basis⁸⁹ and was thus contrary to numerous provisions of Directive 2013/32.⁹⁰ The Court also found that the so called ‘push-back’ policies violated EU law. However, according to the Hungarian Helsinki Committee, the policy is still in use.⁹¹ As a result FRONTEX – an EU agency currently under EP investigation for, precisely, push-backs elsewhere – decided to suspend operations in Hungary.⁹² This is a puzzling decision, given the growing evidence of FRONTEX’s own involvement in push-backs and harassment, in attempts to prevent the effective protection of rights.

⁸² N. Kirst, Protecting the Formal Rule of Law in the EU’s Asylum Policy: The CJEU’s Judgment on the Asylum Relocation Mechanism, EU Law Analysis Blog 20 June 2020 - <http://eulawanalysis.blogspot.com/2020/06/protecting-formal-rule-of-law-in-eus.html>.

⁸³ E. Zalan, Court: Three countries broke EU law on migrant relocation, EU Observer 2 April 2020 - <https://euobserver-com.proxy-ub.rug.nl/migration/147971>.

⁸⁴ S. Progin-Theuerkauf, V. Zufferey, Aucune justification du refus de participer au mécanisme temporaire de relocalisation de demandeurs d’une protection internationale, European Papers, Vol. 5, 2020, No 1, European Forum, Insight of 20 May 2020, pp. 587-595.

⁸⁵ For a very nuanced approach contextualizing the stance of the Central and Eastern European Countries, see, Paul Blokker (et al.), The democracy and rule of law crises in the European Union and its Member States, RECONNECT Deliverable 14.1., April 2021, <https://reconnect-europe.eu/wp-content/uploads/2021/04/D14.1.pdf>.

⁸⁶ Judgment of 17 December 2020, *Commission v Hungary*, Case C-808/18, para. 60 and 67.

⁸⁷ Id. para. 118.

⁸⁸ Id, para. 160 and 166.

⁸⁹ Id, para. 176.

⁹⁰ Id, para. 186.

⁹¹ N. Nielsen, Hungary ‘ignoring EU court ruling on asylum’, EU Observer 11. January 2021.

⁹² N. Nielsen, Frontex suspends operations in Hungary, EU Observer 27 January 2021, <https://euobserver.com/migration/150744>.

The third infringement action deals with the legislation which criminalises organising activities with a view to ‘enabling asylum proceedings to be brought in Hungary by a person who is not persecuted in his or her country of nationality, country of habitual residence or any other country via which he or she arrived [...] or who does not have a well-founded fear of direct persecution’. The Commission argued that such legislation violates EU law and in 2019 brought the infringement case to the Court.⁹³ The Opinion in this case was delivered by Mr Rantos sitting as ‘AG’.⁹⁴ He found that the Hungarian government had breached EU law⁹⁵ by criminalising activities designed to enable asylum proceedings to be brought by persons who do not meet the criteria for the granting international protection established by national law.⁹⁶ The Hungarian authorities argued that the challenged provision of domestic law must be interpreted in light of the clarification provided by the Hungarian Constitutional Court, which had ruled that the provision ‘does not penalise negligent conduct, but exclusively acts which are committed deliberately’.⁹⁷ It is however up to the authorities to decide whether the action meets the criteria of being ‘deliberate’. Writing as ‘AG’ Mr Rantos found that ‘in any event, criminalising assistance provided to applicants for international protection could have a particularly significant deterrent effect on all persons or organisations who, knowingly, try to promote a change in legislation or a more flexible interpretation of national law, or even claim that the relevant national law is incompatible with EU law’.⁹⁸ As a result, the challenged provision ‘de facto prevents or, at the very least, significantly restricts any activity providing assistance to applicants for international protection carried out by persons or organisations.’⁹⁹ The above finding seems to be even more evident if the analysis is concentrated on the asylum seeker directly. As illegally ousted AG Sharpston underlined in her Shadow Opinion in the case of *H.A.*,¹⁰⁰ dealing with the Dublin system, ‘[a]n applicant for international protection is not a statistic. He or she is a human being, who has the right to be

⁹³ Action brought on 8 November 2019, *European Commission v Hungary*, Case C-821/19.

⁹⁴ Mr Rantos was appointed to the position of AG by the Member States notwithstanding the lack of a vacancy and as a result, as per the decision of the Vice President of the Court of Justice, that such an action of the Member States as masters of the Treaties was not reviewable by the Court of Justice. The tenure of AG Sharpston was consequently terminated in direct breach of the Treaties and the Statute of the Court as well as of the Court’s newly-minted case law on the importance of judicial irremovability and independence. For a detailed analysis of the case and judicial challenges of this decision, see D. Kochenov, G. Butler, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, Jean Monnet Working Paper 2/2020 at: <https://jeanmonnetprogram.org/wp-content/uploads/JMWP-02-Dimitry-Kochenov-Graham-Butler.pdf>. By supporting the attack of the Member States on its own independence the Court has seemingly opened a Pandora’s box, since ECtHR case law on the matter is unequivocal, especially following the seminal decision in *Xero Flor*: a body containing usurpers appointed to the bench in the absence of a vacancy is not a court or tribunal established by law.

⁹⁵ E.g. provisions of Directive 2013/32 on common procedures for granting and withdrawing international protection and Directive 2013/33/EU on standards for the reception of applicants for international protection.

⁹⁶ Opinion of 25 February 2021, *Commission v Hungary*, Case C-821/19.

⁹⁷ *Id.*, para. 33.

⁹⁸ *Id.*, para. 36.

⁹⁹ *Id.*, para. 44.

¹⁰⁰ Case C-194/19.

treated fairly and with dignity’.¹⁰¹ Limiting access to legal assistance renders meaningless the right to be treated fairly.

All the hard work of the Court of Justice, including the infringement actions and preliminary rulings in response to the requests from the Hungarian courts quite expectedly failed to produce any major policy shifts on the ground: Hungary remains closed to refugees. As a result of preliminary references, however, the Court acquired a chance to rule on the main elements of the Hungarian asylum law before the infringement actions confirmed those findings.¹⁰² Consider transit zones – the Court in *FMS* had already found in May 2020 that placement in transit zones amounted to unlawful detention.¹⁰³ The Government criticised the ruling as ‘dangerous’, arguing that it ‘poses a security risk to all of Europe’,¹⁰⁴ but also decided to close the transit zones in May 2020.¹⁰⁵ It shows, first and foremost, how important the time factor is in the decision-making process of the European Commission – the guardian of the Treaties – regarding initiating infringement actions against Member States. Second, the role of the independent domestic courts, indispensable actors in guaranteeing rule of law standards, cannot be overstated, especially in the context of asylum cases.

4. Why solving the ‘migration crisis’ requires EU rule of law resilience

It is well known that the existing EU asylum legal framework does not constitute an effective tool to ensuring that the fundamental rights of all those concerned are safeguarded. Indeed, it has been abundantly confirmed that the Dublin Regulation does not produce such results,¹⁰⁶ which constitutes a huge challenge for the rule of law. It is a result of two constitutional problems with the rule of law in the European Union. The first is a ‘design problem’ which amounts to the fact that the rule of law is not really an EU institutional

¹⁰¹ Shadow Opinion of Eleanor Sharpston QC – Case C-194/19 HA, on appeal rights of asylum seekers in the Dublin system published at EU Law Analysis Blog, 12 February 2021, <http://eulawanalysis.blogspot.com/2021/02/case-c19419-h.html>

¹⁰² A. Léderer, M. Pardavi, Still Waters Run Deep: The CJEU finds pushbacks in Hungary illegal, *VerfBlog*, 2020/12/21, <https://verfassungsblog.de/still-waters-run-deep/>

¹⁰³ Judgment of the Court (Grand Chamber) 14 May 2020, Joined Cases C-924/19 PPU and C-925/19 PPU, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*.

¹⁰⁴ Gergely Gulyás on the European Court of Justice’s new ruling on immigration: It’s dangerous for all of Europe, 21 May 2020, <http://abouthungary.hu/blog/gergely-gulyas-on-the-european-court-of-justices-new-ruling-on-immigration-its-dangerous-for-all-of-europe/>.

¹⁰⁵ R. Uitz, Don’t be fooled by its sudden compliance. Hungary is helping to unravel the EU’s legal order, *Euronews* 28 May 2020, <https://www.euronews.com/2020/05/28/don-t-be-fooled-by-its-sudden-compliance-hungary-is-helping-to-unravel-the-eu-s-legal-orde>.

¹⁰⁶ A. Dernbach, Germany suspends Dublin agreement for Syrian refugees, *Euractiv* 26 August 2015, <https://www.euractiv.com/section/economy-jobs/news/germany-suspends-dublin-agreement-for-syrian-refugees/>

ideal.¹⁰⁷ Later claims notwithstanding, it was not a foundational value and its understanding is often limited to the requirement of legality. The *jurisdictio–gubernaculum* divide is missing in the EU legal system.¹⁰⁸ This all led to a situation where Article 2 TEU tends not to be regarded – mistakenly in our view – as part of the ordinary EU *acquis*.¹⁰⁹ The second issue is a ‘functionality problem’ – the inability to enforce EU values effectively, neither politically nor legally.¹¹⁰ This is notwithstanding the overwhelming progress made over recent years in the area of the rule of law, especially by the Court of Justice.¹¹¹ The existing tools have been ineffective in the face of all the deliberate attempts to undermine checks and balances in some EU Member States. Interestingly enough, similar design and enforcement shortcomings have also been highlighted with regard to the ‘migration crisis.’¹¹² In short, on top of the Hungarian mockery of the law described above, it is fundamental to realise that the rule of law and migration contexts are also intertwined because the EU law in question is absolutely inadequate and – which could be even worse for our purposes – its rigorous enforcement could be presented as as much of a threat to the rule of law and the protection of fundamental rights as breaking it.

The EU actions, including infringement actions and Article 7 TEU procedure, did not solve the rule of law backsliding in Hungary. Dismantlement of the checks and balances gave the public authorities a broad discretion regarding public policies, including protection of fundamental rights and the right to asylum. As a result, the Commission had to initiate numerous infringements regarding violations of EU asylum law, dealing with such basic issues as access to asylum procedure or access to legal assistance. In our opinion such basic violations of the right to asylum would not have been introduced if the rule of law backsliding was tackled effectively in Hungary. Despite the Commission’s small juridical victories, the infringement actions did not change the essence of the Hungarian asylum policy, which makes seeking asylum in Hungary highly challenging, especially for the Mediterranean route migrants. In other words, we are dealing with yet another instance of what we have characterised

¹⁰⁷ G. Palombella, ‘The Rule of Law as an Institutional Ideal’, in L Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010) 3.

¹⁰⁸ D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 *Yearbook of European Law* 2015. Cf G. Palombella, ‘The Rule of law and its core’, in G. Palombella, N. Walker (eds.) *Relocating the Rule of Law* (Hart Publishing 2009).

¹⁰⁹ M. Klamert, D. Kochenov, Article 2, in M. Kellerbauer, M. Klamert, J. Tomkin, (eds.) *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford: Oxford University Press), pp. 23–30; K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, *Yearbook of European Law*, Volume 39, 2020, 12–19.

¹¹⁰ D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34 *Yearbook of European Law* 2015, p. 89.

¹¹¹ For a detailed analysis, see, L. Pech and D. Kochenov, *Respect for the Rule of Law in the Case-Law of the Court of Justice: A Casebook Overview of the Key Judgments since the Portuguese Judges Case* (Stockholm: SIEPS, 2021).

¹¹² D. Thym, *The ‘refugee crisis’ as a challenge of legal design and institutional legitimacy*, *Common Market Law Review* 2016 (Vol. 53, Issue 6), pp. 1549–1550.

elsewhere as ‘losing by winning’, writing with Kim Scheppele.¹¹³ The Commission’s Court victories change absolutely nothing at the systemic level. Worse still, given the shortcomings of the Dublin system, ideal compliance with EU law would be prone to producing chronic violations of the right to seek asylum – we will turn to this point below. Such a ‘vicious circle’ shows that solving ‘migration crisis’ is directly linked with the need to handle the rule of law backsliding in EU Member States, as well as addressing the justice deficit and other flaws plaguing EU law at the supranational level.

It goes without saying that the inability of the EU to address rule of law backsliding is only one side of the coin. The second, once again, is that EU law *per se* does not offer the basic rule of law standards required to guarantee asylum rights. The so-called ‘EU–Turkey deal’, one of the main tools aimed at dealing with the ‘migration crisis’, provides an interesting example of such EU rule of law shortcomings. The deal was reached in 2016 and aimed at limiting the number of people seeking asylum who reached the EU Member States from the Mediterranean area.¹¹⁴ It was a part of the EU Migration Agenda.¹¹⁵ According to the agreement all new irregular migrants crossing from Turkey into the Greek islands from 20 March 2016 would be returned to Turkey.¹¹⁶ In return the EU distributed 3 billion euros to the Facility for Refugees in Turkey. The focus of criticism of the deal was the danger of human rights abuses in Turkey.¹¹⁷ In 2017 an annulment action was brought to the General Court by three persons who had travelled from Turkey to Greece, where they submitted applications for asylum. Under the EU–Turkey deal they could be returned to Turkey if their applications for asylum were rejected. They argued that the EU–Turkey deal is an international agreement that the European Council, as an institution acting in the name of the EU, concluded with the Republic of Turkey. The obvious unstated objective of such agreement is to annihilate the right to seek asylum in the EU. The General Court, however, ruled that it lacks jurisdiction to hear and determine these actions under Article 263 TFEU, reaching the conclusion that it was not the EU but its Member States which conducted negotiations with Turkey and the Court did not have jurisdiction to rule on the lawfulness of an international agreement concluded by

¹¹³ K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union, *Yearbook of European Law*, Volume 39, 2020, pp. 3–121.

¹¹⁴ EU–Turkey Statement of 18 March 2016, <https://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/>.

¹¹⁵ Communication to the European Parliament, the European Council, the Council, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration, Brussels, 23.9.2015, COM(2015) 490 final.

¹¹⁶ The other points of the deal were: migrants arriving in the Greek islands would be duly registered and any application for asylum would be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive; migrants not applying for asylum or whose application for asylum had been found to be unfounded or inadmissible would be returned to Turkey; for every Syrian being returned to Turkey from the Greek islands, another Syrian would be resettled from Turkey to the European Union.

¹¹⁷ A. Geddes, *The Politics of European Union Migration Governance*, *JCMS 2018 Volume 56. Annual Review* pp. 120–130 (p. 123); J. Monar, *Justice and Home Affairs*, *JCMS 2017 Volume 55. Annual Review* pp. 102–117, p. 102-103.

the Member States.¹¹⁸ The Court of Justice dismissed¹¹⁹ the appeals after finding them ‘incoherent’,¹²⁰ ‘worded in a vague and ambiguous manner’,¹²¹ ‘lacking any coherent structure’.¹²² Switching off the fundamental rights guaranteed in EU and international law in direct breach of what both these legal orders purport to guarantee is thus absolutely fine in the EU system of the rule of law, freeing the Member States to demonise asylum seekers, view them as a threat and are unwilling to adhere to the really quite low standard of protection guaranteed by EU and international law. The desire of the Member States not to honour clear obligations *is* the law, as the world has learned from the Court’s engagement with the EU–Turkey deal.

The apparent supranational rule of law problems were further exacerbated by the positions adopted by the institutions in the context of this litigation. The EU institutions denied before the General Court that they participated in signing the agreement with Turkey despite the wording of the press release, which referred to the ‘EU–Turkey Statement’. The EU has done all it could to hide a mass assault on the rights of asylum seekers that it had orchestrated behind truly ingenious and flimsy excuses, amplifying serious concerns about the accountability of the European Union institutions and the Union as a whole.¹²³ Approached from this vantage point, Orbán’s government in Hungary is a model pupil in the EU’s school of values with the only difference being that it does not claim that ‘it was not Hungary’ that built a barbed-wire fence and engaged in the systematic abuse of asylum seekers to void their rights of any content. The EU is seeking the same results, but under the juvenile banner that ‘it was not me’. An international agreement reached outside the legal framework required by the Treaties, affecting fundamental rights and freedoms to the point of *de facto* threatening to eliminate them, and remaining outside the jurisdiction of the Court, constitutes a huge challenge to the idea that the rule of law is a foundational value of the EU: just another example of how mythical the fable of the completeness of the system of legal remedies in the EU is. It is thus beyond any doubt that the problematic tandem of waning rule of law and migrants’ rights deterioration is not merely acute in the context of the analysis of the situation in the backsliding EU Member States, but it should also be taken seriously when considering the supranational level.

¹¹⁸ Orders of 28 February 2017 in Cases T-192/16 *NF v European Council*, T-193/16 *NG v European Council*, and T-257/16 *NM v European Council*.

¹¹⁹ Order of the Court (First Chamber) 12 September 2018, Joined Cases C-208/17 P to C-210/17 P, ECLI:EU:C:2018:705.

¹²⁰ *Id*, para. 16.

¹²¹ *Id*, para. 13

¹²² *Id*, para. 14

¹²³ S. Carrera, L. den Hertog and M. Stefan, *It wasn’t me! The Luxembourg Court Orders on the EU–Turkey Refugee Deal*, CEPS Policy Insights No 2017-15/April 2017, p. 2 – By rejecting ownership of and responsibility for the Statement before the Court – while still being complicit in its origins and implementation – the European Council, the Council and the Commission failed to play the roles attributed to them by the Lisbon Treaty.

The image of the EU emerging in this context was directly opposite to the ‘Union based on the rule of law’, let alone a Union giving full respect to the rights of asylum seekers and compliance with EU law. The supranational level flaws affecting the rule of law picture and adding to its complexity, thus further came to light. The rationale behind the double standards in how the Court of Justice treats Union institutions as opposed to the individual Member States embarking on exactly the same exercise of robbing the most needy of all their rights and sometimes of their lives, will need to be explained by the Court in its future case law.

5. To conclude

The rule of law is purported to be one of the core values on which the EU is founded. The same applies to respect for human rights, especially those set out in the Charter of Fundamental Rights and entering the EU legal system from the ECHR. Those most basic aspects of European law are currently facing the biggest political and legal challenges, frequently described as ‘crises’: a rule of law ‘crisis’ and a migration ‘crisis’.¹²⁴ Crises can be perceived as an important stage of development or progress, emerging as true turning points. Political will both at the supranational and at the national level emerges, however, as an indispensable factor to turn the ‘rule of law’ into a truly foundational and constitutional value of the EU and make it work *for* rather than *against* safeguarding the rights of all those entangled in the ‘migration crisis’. As our analysis has shown, both the national – as illustrated by Hungary – and the EU regulatory levels have demonstrated eagerness to annihilate fundamental rights, undermining the basics of the rule of law and obfuscating the levels of legal and political responsibility for ‘crisis’-inspired actions aimed at harming rights. The recurrent connection between migration and the rule of law has thus been feeding a dangerous vicious circle, lowering the level of rights protection and eroding rule of law guarantees, as well as undoubtedly the legitimacy of the Union as a whole. Should this trend not be reversed, all Europeans – just like the foreigners at our shores – are going to be markedly worse off as a result, while our ideals are being progressively turned into empty proclamations by the European Union and its Hungaries alike.

¹²⁴ ‘crisis, n.’ *OED Online*. Oxford University Press, December 2020. Web.

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