Universitat Pompeu Fabra Barcelona

THESIS IN LAW 2021/2022

Departament de Dret

Problematising the Rule of Law as a Fundamental Value of the European Union

Sarah Cowie

Word Count: 14,749

Supervised by Professor Victor Ferreres Comella

Submitted in Partial Fulfilment of the Requirements of the LL.M in European and Global Law

Abstract

By ‘problematising’, I mean to state my intention to discover why the rule of law has become such a significant problem in the European Union over the past decade. In turn, I will analyse the concept of the constitutional ideal that is the rule of law, how it surfaces in the legal order of the European Union and what framework is in place for supranational engagement with it. I rely on the examples of recent constitutional reform in both Poland and Hungary to develop an understanding of how such a lacuna has arisen and the ways in which this founding value is vulnerable to exploitation. Furthermore, I explain how a chain of shortcomings by drafters and European institutions has permitted Member States to regress on their commitment to the Copenhagen criteria, thereby failing to prevent the consolidation of illiberalism before it became entrenched. Finally, I examine the recent evolution in the role of the Court of Justice through the most significant jurisprudence on the topic; and defend the expansion of its competences in order to adequately tackle the so-called ‘Rule of Law Crisis’.

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Introduction

Amongst the many substantial achievements and functions of the modern-day European Union, it is easy to forget that its greatest success was achieving peace on the continent. The EU is rooted in the idea of post war harmony, and in 2012 was awarded the Nobel Peace Prize for 'over six decades contributed to the advancement of peace and reconciliation, democracy and human rights in Europe.'[1] This legacy continues, and in his State of the Union address in 2017 then President of the European Commission Jean-Claude Junker stated that over any other function, the European Union had always been about values.[2] These values are enshrined in Article 2 of the Treaty on the European Union (TEU) where human dignity, freedom, democracy, equality, the rule of law and respect for human rights are all articulated as the founding values upon which the EU is based.[3]

Over the last decade the value which has been the subject of the most political and academic scrutiny has undoubtedly been the rule of law. Its meaning, scope, and the extent to which the European institutions may go to defend it remains centre stage when discussing the future of the European project. This has become of particular focus in light of the 'rule of law crisis' ongoing in Hungary and to a lesser degree, Poland.[4] These Member States have presented a significant cause for concern in recent years as we witness the development of what scholars have labelled 'abusive constitutionalism' and 'autocratic legalism' within the EU.[5] The actions and reforms conducted by Hungarian Prime Minister and leader of the controversial Fidesz party Viktor Orbán have become the ultimate test of Article 7 TEU, which contains sanctioning mechanisms for would-be rule of law violators. There appears to be a profound tension emerging between the EU's supposed commitment to the defence of these core democratic values and the aspiration of some Member States to defy those values while remaining members

[1] The Nobel Prize, 'The Nobel Peace Prize 2012' (*NobelPrize.org*, 2012) <https://www.nobelprize.org/prizes/peace/2012/summary/> Accessed on 18th January 2022.
[2] Jean-Claude Junker, former President of the European Commission, State of the Union Address (Speech 17/3165 in the European Parliament, 13th September 2017)
[3] Article 2, Consolidated version of the Treaty on European Union (2012) OJ C 326
[4] Patrick Lavelle, 'Europe's Rule of Law Crisis: An Assessment of the EU's Capacity to Address Systemic Breaches of Its Foundational Values in Member States' (2019) Trinity College Law Review 35
[5] Nicola Lacey, 'Populism and the Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds*), The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021), 466

of the union.[6] Hungary and Poland in particular have lapsed in their commitment to the liberal values outlined in the Copenhagen criteria. This failure to uphold the criteria required for accession to the European Union has become known as rule of law *backsliding*, and the emergence of this problem alongside the subsequent struggle to prevent it, the "Copenhagen dilemma." Having styled itself as a 'community based on the rule of law',[7] the challenge now facing the EU is to prevent its own evolution into an organisation harbouring illiberal democracies which would thereby see it deviate from its grand promise.[8] The aim of this thesis is to explore the varied case law and scholarship on the EU's rule of law crisis to draw together an overall understanding of how this problem has emerged, and to open the door to a potential solution.

Primarily, I believe it is worthwhile to explain the nature of the rule of law. It is a principle I will argue is inherently susceptible to misuse and autocratic abuse. This vulnerability is exposed in a number of ways, and I suggest that the pluralist understanding of the rule of law combined with its intangible technical requirements make it by nature an extremely difficult value to uphold and enforce. These issues are amplified at the supranational level as Member States intent on pursing an illiberal agenda willingly exploit it, an occurrence I term the scaling-up problem. This ability for Member States to evade institutional oversight arises due to the unfortunate combination of the political difficulties and legal loopholes that have emerged while constructing as complex and integrated an organisation as the EU. Differences in national legal orders and EU treaty clauses once designed to facilitate the smooth cooperation of domestic and supranational courts have enabled the regimes of determined autocrats to manipulate the system in their favour. This unintended consequence arising from the scaling up of an ambiguous principle is wrought with further problems in the enforcement. The aforementioned mechanisms made available to the Commission in Article 7 TEU have a fundamental flaw: the veto pact between Poland and Hungary. Once referred to as the EU's 'nuclear option',[9] I submit that the requirement of a unanimous European Council vote to enforce sanctions leaves the mechanism thoroughly disarmed the instant more than one

[6] Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) Cambridge Yearbook of European Legal Studies 21, 63
[7] Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* ECLI:EU:C:1986:166 para. 23
[8] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19 Repubblika v Il-Prim Ministru' (2021) RECONNECT Working Paper Leuven 15, 5
[9] José Manuel Barroso, former President of the European Commission, State of the Union Address (Speech 13/684 in the European Parliament, 11th September 2013)

Member State faces the procedure concurrently. Aside from this unintentional issue in its drafting, I will demonstrate that the Commission itself has fallen short in the disciplining of rogue Member States, having made a series of poor political choices that have continued to exacerbate the rule of law crisis. Finally, I will discuss a selection of case law drawn from the Court of Justice of the European Union (CJEU). Following the progression of the jurisprudence on the rule of law, I explore the ongoing expansion of the Court's strategies and involvement in the enforcement of Article 2 TEU values. By scrutinising the success of the CJEU so far in this field, I hope to provide an insightful analysis on a potential new avenue to address post-accession value regression in the European Union that may have the potential to overcome the political and structural challenges posed by policing the rule of law so far.

The Exceptional Character of the Rule of Law

Chapter One

'There is considerable diversity of opinion as to the meaning of the rule of law and the consequences that do and should follow from breach of the concept.'[10]

1.1 THE NEBULOUS RULE OF LAW

The rule of law has long been perceived as a nebulous principle, and this 'fuzzy' quality is seemingly responsible for its appearance in a considerable variation of constitutional traditions.[11] Indeed, it has recently been described as the closest thing we have to a universal political ideal.[12] The unexpectedly wide embrace of the rule of law can perhaps be explained by its ability to appear, essentially, in the eye of the beholder. The flexibility and variability of its interpretations lends itself spectacularly to the rhetoric of government officials and academics across the political spectrum- although this the wide agreement ends with its incorporation into the system in question. The concept itself was famously described by scholar Jeremy Waldron as 'essentially contested'.[13] What then, can be said on the rule of law if saying anything is to contribute to this blur around its edges?

First, it is worthwhile to explore the range of interpretations and understandings put forth on the topic. The considerable 'diversity of opinion as to the meaning'[14] of the rule of law can be broadly explained as a spectrum that ranges from thinnest to the thickest conceptualisations scholars have defended. At one end the rule of law is illustrated as purely formalistic or procedural in nature, a view most famously promulgated by Joseph Raz. Here, the rule of law principle is analogised as the sharpener of the knife of the law, which subjects human conduct to a governance of rules.[15] The cluster of values Raz's conception centres around such as non-

[10] House of Lords Select Committee on the Constitution, Paul Craig, 'The Rule of Law' HL Paper 151(2006-2007), Appendix 5, 97
[11] Kim Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013), Governance 46(4), 559
[12] Jørgen Møller, and Svend-Erik Skaaning, 'Systematizing Thin and Thick Conceptions of the Rule of Law' (2012), The Justice System Journal 33(2), 136
[13] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)? (2002) Law and Philosophy 21(2), 137
[14] House of Lords Select Committee on the Constitution, 'The Rule of Law' (n10) 97
[15] Nicola Lacey, 'Populism and the Rule of Law' (n 5) 460

retroactivity and clarity are the most formalistic; nothing is said about who makes the law, making it autocracy or democracy compatible and thereby forming the thinnest interpretation. Hayek, too, favours a purely instrumentalist vision of the rule of law, protecting a maximum of personal liberty and enforcing a negative conception of justice. This "isonomic" conception is linked by Hayek to an unfettered discretion to live as is pleased,[16] the rule of law encompassing little more than the provision of clear and certain rules to enable this. Moving across the spectrum from here, Fuller's understanding of the rule of law as promoting an "inner morality of law" is built upon by Waldron, who understands such procedural commitments as implying a certain interpersonal attitude- such as equality before the law requiring something akin to the provision of a right to a fair trial.[17] Finally, the thickest or most substantive conceptualisation of the rule of law layers substantive provisions strongly associated with liberal democracy on top of the formalistic and procedural requirements imagined by others. An amalgam of democracy, formal legality and individual rights,[18] this particular iteration of the rule of law encompasses judicial review, justice, separation of powers and often human rights guarantees.[19] This final version of the rule of law best fits the vision adopted by the European Commission, with the recent 2020 rule of law report indicative of this thick, substantive and ambitious approach to the principle.[20]

1.2 PROBLEMS INHERENT TO THE RULE OF LAW

i. The pluralist nature of the rule of law

The incorporation of a fundamentally abstract ideal into a constitutional system can naturally be expected to produce problems. I identify three key issues inherent to the principle of the rule of law, which when drawn together create a climate of illegitimacy and constitutional uncertainty. The first of these is *plurality*, simply because the rule of law itself is inherently pluralist. Who's rule of law are we dissecting? What is the central notion? How thick must we imagine it to be? Which norms does it encompass? The rule of law is undoubtedly marked by

[16] Frederic Hayek, *The Constitution of Liberty* (University of Chicago Press 1960)
[17] Nicola Lacey, 'Populism and the Rule of Law' (n 5) 461
[18] Vaselios Adamis, 'Democracy, populism, and the rule of law: A reconsideration of their interconnectedness' (2020), Politics 1(14), 8
[19] Nicola Lacey, 'Populism and the Rule of Law' (n 5) 461
[20] Vaselios Adamis, 'Democracy, populism, and the rule of law' (n18) 8

a ‘somewhat unfocussed essence’,[21] which I previously characterised as its nebulous quality- conceptual differences exist at every conceivable level. This rapidly becomes a constitutional problem however, as once the door to the cacophony of voices has been opened, it becomes impossible to ignore that any static belief once held as to its nature is but one of many competing ideals. Judgements, constitutional amendments, legislation all pursued in the name of the rule of law are entirely challengeable based on which of the many conceptions is subscribed to by both the enunciator and the challenger. The recent attempt by the British Government to erode the separation of powers through legislation such as the Judicial Review and Courts Bill is a strong example. The resulting legal criticism of the proposed legislation as contra the rule of law caused government ministers to brand lawyers “woke”, activist and left wing.[22] This undermining of one of the concepts thought to form part of the ‘invisible bedrock’[23] supporting stable nations and healthy democracy is largely unchallengeable- the rule of law is apparently whatever the executive pleases. No check or balance is capable of compelling adherence to some minimum standard for rule of law compliance. The rule of law has been described as a multidimensional living organism,[24] but this lack of enforcement ability stemming from its ever-shifting character is exactly what becomes exploitable.

This is particularly problematic when elevated to the level of the European Union. Problems that constitute political squabbles at the domestic level morph into something much more threatening when incorporated into a supranational organisation hosting a legal system brimming with unique constitutional traditions. The abstract nature of the rule of law in combination with the at times improvised, ad-hoc nature of the EU has given rise to a multitude of problems. Although there was a commendable effort by the European Commission to give a working definition to the rule of law that some found ‘compelling’,[25] it was unfortunately accompanied by the understanding ‘that the precise content of the principles and standards stemming from the rule of law may [still] vary at national level’.[26] The theory of constitutional

[21] Dimitry Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion' (2009) Erasmus Law Review 5, 20
[22] I. Stephanie Boyce, ‘Respect for the Rule of Law is in Jeopardy in the UK’ *Financial Times* (London, September 1st 2021)
[23] *Ibid*
[24] Peer Zumbansen, ‘The Rule of Law, Legal Pluralism, and Challenges to a Western-Centric View: Some Very Preliminary Observations’ (2017), King's College London Law School Research Paper 05, 6
[25] Laurent Pech and Kim Scheppele, ‘Is the Rule of Law Too Vague a Notion?’ (*Verfassungsblog,* 1st March 2018) <https://verfassungsblog.de/the-eus-responsibility-to-defend-the-rule-of-law-in-10-questions-answers/> Accessed 14th March 2022
[26] Laurent Pech and Kim Scheppele, ‘Is the Rule of Law Too Vague a Notion?’ (n 25)

pluralism was developed with the noble intention of facilitating a smooth relationship between national constitutional courts and the Court of Justice in establishing the bounds of EU competence. The outcome, however, has fallen short. The doctrine of constitutional pluralism in combination with a pluralistic principle such as the rule of law has given worrying flexibility and ammunition to autocrats who wish to consolidate illiberal democracy in front of the very eyes of the Commission. The Polish government used the national identity clause of Article 4 TEU and accompanying scholarship on constitutional pluralism to justify its attack on the independence of the judiciary, a favourite tactic of autocrats.[27] In fact, Jarosław Kaczyński, Poland's de facto leader, confidently proclaimed that 'there is nothing going on in Poland that contravenes the rule of law.'[28] Klenemen and Pech suggest that constitutional identity clauses are prone to abuse by such autocrats, and while there is truth in this I believe that the concept of constitutional pluralism is better understood as a convenient tool with which to abuse the even more susceptible rule of law. The scope of the effect of constitutional pluralism would be much less damaging if confined to the debates of the *BVergF* for example, but the purpose has been twisted by those pursing a "thinnest" rule of law.

Scholarship on constitutional pluralism and national identity combined with Article 4 TEU provides a route to justify EU law non-compliance. Evading adherence to the founding values is a simple enough task when you may argue that the most illiberal conception of the rule of law is the one your constitutional tradition subscribes to- it is much easier to evade a hard to define principle. Member States intent on eroding rights protections and checks and balances find in the doctrine of constitutional pluralism the perfect stick with which to beat the rule of law. Divergences on the values become easy to justify; the use of these concepts by Poland and Hungary give a 'veneer of conceptual respectability'[29] to their autocratic reforms. For example, when Fidesz limited the competencies of the constitutional court, it argued to the concerned European bodies that not all European countries even *had* constitutional courts.[30] The result is it makes it far more difficult for the EU to challenge the 'systemic hollowing out of rule of law norms'.[31] Constitutional pluralism permits autocrats to evade any European Union level

[27] Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism' (n6) 59
[28] Laurent Pech, and Kim Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2019) Cambridge Yearbook of European Legal Studies 19, 3
[29] Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism' (n6) 66
[30] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 561
[31] Daniel Kelemen and Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism' (n6) 60

definition given to the principle by claiming their national constitutional order subscribes to the thinnest of the plurality of rule of law ideologies.

ii. The intangible nature of the rule of law

In the unlikely event a definitive list of concepts implied when referring to "the rule of law" was confirmed, there would still be a significant problem. Its abstract quality could be solved by a definitive understanding on how "thick" the rule of law is and consensus on a monist conception, but the significant *technical* aspects that escape such a definition remain. The lack of any technicalities identifiable within the concept, whichever conception you subscribe to, leads to the rule of law possessing something of an intangible quality alongside its exploitable abstract nature. Distinguishing between the two is useful to separate the conceptual and practical difficulties in the rule of law, both of which are manipulated in different ways in the EU.

The implications of the practical, technical issues inherent to the adoption of the rule of law as a fundamental value are perhaps better illustrated via the example of judicial independence. Judicial independence is one of the better agreed upon concepts up for inclusion, with all but the most far along the spectrum admitting that as a minimum, the procedural requirement of an independent judiciary is vital to the rule of law. It currently forms one of the central issues in the European Union, having created a pile up of associated case law and Commission level discussion. At first reading, judicial independence may seem a simplistic enough concept to engage with: the requirement that an independent judiciary may populate the courts, so trials are fair and the law unbiased. However, on a technical level how this is ensured and exercised proves something of a problematic concept- hardly a one-size-fits-all. Gretchen Helmke states that the US judiciary is famous for being more independent than most of its global counterparts, going beyond even what is required by the US Constitution.[32] By this, she means that the American system is subject to a strong, constitutionally entrenched separation of powers, suggesting the customary worship of the English system for its equivalent is 'ironic'[33] given that the historical development of the common law became in her view, an arm of the legislative will. This view is by no means widely supported, with many Europeans likely to be shocked at

[32] Gretchen Helmke and Frances Rosenbluth, 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' (2009) Annual Review of Political Science 12(1), 8
[33] *Ibid*

the claim that the American judiciary is famous for its independence. While Helmke values separation of powers, many others would believe that the judicial appointment system in the USA creates a judiciary famous not for its independence, but its politics. This has been particularly loudly debated in the wake of the death of Supreme Court Justice Ginsberg and the recent discussion of a Court known to have "conservative majority" and "Republican influence" rolling back abortion rights.[34] To many, even discussions of partisan judicial majorities feel alien, let alone the adoption of a judicial appointment system so markedly political. Already under the watchful eye over the Commission over his *de facto* 'judicial decapitation'[35] scheme, should Hungarian Prime Minister Victor Orbán move to adopt the American judicial appointments procedure it is beyond doubt that the Commission's reaction would be less than generous.

It seems then, that even the most widely agreed upon elements that maybe distilled from the abstractions natural to the rule of law are themselves fraught with more technical difficulties. Where in the previous section identifying a harmonised concept was problematic, here we see that even within these concepts, there is still great difficulty in their application at a practical level. Is independence down to separation of powers or who appoints the judges? How should powers be separated? Which branch should appoint judges? By what process? How many? What length should their terms be? Can we amend our constitutions to change the process? The list goes on. In the context of the European Union, these technical difficulties become very difficult to circumnavigate. A prominent example of how this surfaces in context is via the case of *Commission v Hungary*[36] (the full implications of which will be explored later in this paper). This case was the challenge to the aforementioned decapitation of around 300 judges as Orbán lowered the retirement age from 70 to 62. This proved too complex to challenge on the basis of judicial independence and was instead challenged on the grounds of age discrimination in line with Framework Directive 2000/78/EC.[37] Despite the clear implications of the removal of hundreds of members of the judiciary at once for the rule of law, how was this to be challenged on a judicial independence basis? It proved impossible. Poland also tested this move in order to reconstitute the court to favour the government by lowering its retirement ages to 60 and 65

[34] Mary Zeigler, 'The End of Roe vs Wade' (2022) American Journal of Bioethics 1-6, 1
[35] András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017), 236
[36] Case C-286/12 *Commission v Hungary* EU:C:2012:687.
[37] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2002] OJ L 303

for men and women, but this was challenged on the basis of EU equality law[38] under Directive 2006/54.[39] The variations in the technical applications of judicial selection procedures make it incredibly difficult to openly challenge Member States over policies that clearly have a more sinister edge. For example, Germany's judicial retirement age is 65, and in the USA judges have life tenure.[40] Poland could simply use the example of Germany to avoid confrontation over accusations there was a compromise of the rule of law. Harmonisation of such technicalities is beyond the reach of the EU in its current form, and with significant diversity of constitutional systems, policing technicalities is impossible because the standard with which to compare them is intangible.

iii. Backsliding

When discussing problems with the founding values of the European Union, or even the problems the EU faces as a whole, the so-called rule of law crisis is one of the most persistent. Candidate countries are vetted for their compliance with the common principles articulated in Article 2 TEU before they accede to the Union via the "Copenhagen criteria", but once Members no similar procedure exists to supervise continued adherence to these fundamental values.[41] The perhaps naïve assumption on behalf of the Union that Member States could be trusted to maintain their accession-level commitments to values such as the rule of law has proved costly. Individual violations are not an uncommon occurrence, but much more dramatic is the systemic issue commonly known as rule of law backsliding. Poland and Hungary are the two most infamous Member States guilty of post-accession value regression; and this unintended potential for sliding back from the accession criteria has become known as the Copenhagen Dilemma.

The problems inherent to the concept of the rule of law previously discussed in this paper are endemic, facilitating the emergence of this backsliding issue. Other constitutional norms such as the principle of legality or accountability are far more easily interpreted and enforced. In the

[38] Case C-192/18 *Commission v Poland* ECLI:EU:C:2019:924
[39] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204
[40] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary' (July 2013) Common Market Law Review 50(4), 9
[41] Petra Bard *et al*., 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights' [2016] CEPS Paper in Liberty and Security in Europe, 1

unique context of the Copenhagen Dilemma, we can see how the dual issue of the incorporation of an abstract value possessing intangible technical requirements into the EU system has created the perfect climate for a plurality of conceptions to emerge and for states pursing an illiberal agenda to distance themselves from the goals of the European project. The Copenhagen Dilemma is the result of at least two very different understandings and implementations of the rule of law emerging within one (convoluted) legal order.

The starting point is the conception adopted by the European Union. The rule of law has been outlined by a former Commission vice president as the 'prerequisite for the protection of all the other values of Article 2 TEU'[42] such as freedom, respect for human dignity, and democracy. The Commission level understanding of the concept has been further defined as indicative of a 'thick, substantive and ambitious' approach to the rule of law,[43] as despite the separation of the values in Article 2 TEU there seems to be a shift towards 'the integration of these concepts as mutually constitutive under the general rubric of the "rule of law."'[44] Crucially, during the pre-accession process, the Commission may *enforce* this thick rule of law requirement on candidate countries. In this stage it can enforce in both a conceptual and technical manner a monistic, substantive vision of the rule of law and intrusively intervene by dictating the required *technicalities* to domestic systems; telling candidate states how many judges to appoint, how many readings to have in parliament and what kind of public administration school to put in place in order to meet the accession requirements.[45] In this stage, the problems outlined previously in the paper vanish in the face of the power of strict implementation of a unitary conception.

The issue arises upon entry into the EU. As soon as a candidate country becomes a Member State, the hands of the Commission are tied by the principle of conferral. The continued compliance with the Copenhagen criteria has been rightly described as a convention dependent on self-restraint,[46] - a quality the likes of Orbán distinctly lack. From this it is inevitable that we will see patterns of governance begin to shift, and drift away from the conception strictly enforced in the pre-accession stages. Once comfortably in the EU, Member States slowly

[42] Viviane Reding, former Vice President of the European Commission, 'EU and the Rule of Law- What Next?' (Speech/13/677, 4th September 2013), 3
[43] Vasileios Adamidi, 'Democracy, populism, and the rule of law: A reconsideration of their interconnectedness' (2020) Politics 1-14, 8
[44] *Ibid*
[45] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8) 18
[46] Nicola Lacey, 'Populism and the Rule of Law' (n 5) 470

regress from this understanding; to the point that you may apparently proclaim your sympathy for Putin and declare yourself the consolidator of an illiberal state.[47] The Copenhagen Dilemma is best explained as EU's paralysis when Member States "thin down" the rule of law in their domestic systems at the expense of the consistent application of EU law. The situation that has emerged is comparable to a university imposing strict entry requirements yet be powerless to expel students who fail all their faculty exams. In this sense, it seems that the EU is crying out for a minimum standard to be set in order to correct the issues of conceptual plurality and technical intangibility post-accession. As a means to prevent rule of law backsliding, we should quickly move from a blind faith approach and adopt a minimum bar to ensure non-regression.

[47] Honor Mahony, 'Orbán wants to build "illiberal state"' *EUobserver* (Brussels, 28th July 2014)

Confronting the Rule of Law in the European Union

Chapter Two

'The very functioning of the Union and its internal market is endangered if in one of its Member States the fundamental values, in particular the rule of law, are no longer respected.'[48]

2.1 THE FRAMEWORK AND ITS FAILINGS

Despite what may be thought after the criticism levelled at the rule of law within the European Union so far in this paper, there does exist a mechanism within the treaties to deter Member States from advancing policies that threaten democratic institutions. Article 7 TEU establishes that the values contained in Article 2 are enforceable and bestows the power to monitor and sanction Member States should they be in breach of these principles. In 2013, former President of the European Commission José Manuel Barroso famously referred to Article 7 TEU as the EU's 'nuclear option',[49] however as I will demonstrate I believe this to be a gross exaggeration of the power of the procedure.

Article 7 TEU is generally broken down into two parts. Article 7(1) is commonly described as the preventative arm, providing for a public warning if it is possible to 'determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2',[50] and the arising of this situation prompts the Council to hear from the Member State in question and may address recommendations to it.[51] This declaration of the breach precedes the activation of the second part, the sanctioning arm. Once the breach is identified to be 'serious and persistent'[52] Articles 7(2) and (3) provide the Council with the ability to deprive the offender of their rights as derived from the treaties, including a Member State's voting rights. Furthermore, in 2014 the Commission adopted a "Rule of Law Framework" intended to aid in

[48] Answer by First Vice-President Timmermans on behalf of the European Commission to the question for written answer submitted by Claude Rolin (PPE), E-009716-16, 12 April 2017
[49] José Manuel Barroso, 'State of the Union Address' (n9)
[50] Article 7(1), Consolidated version of the Treaty on European Union (2012) OJ C 326
[51] *Ibid*
[52] Article 7(2), Consolidated version of the Treaty on European Union (2012) OJ C 326

the assessment of whether or not a Member State had sufficiently endangered the rule of law as would merit the trigger of Article 7 TEU.

The sanctioning arm of Article 7 TEU is undoubtedly what attracted its branding as a weapon of mass destruction. However, it seems that those who would view the sanctioning power as nothing short of nuclear seem to have misunderstood the scope and or the repercussions of its invocation. Article 7 does not command anything like an intervention within a Member State: it is better thought of as an insulating mechanism, isolating the government of the offending Member State from union decision making.[53] In fact, Muller describes it as a form of 'moral quarantine'.[54] I suggest the idea that a Member State promoting illiberalism and in breach of EU values losing the ability to indirectly influence the lives of other EU citizens through Council decision-making is a clearly justifiable and bare minimum guarantee. Furthermore, it is worth stressing the points emphasised by Pech and Scheppele who note that the insertion of Article 7 into the TEU reveals a distinct lack of confidence amongst the masters of the treaties in the efficacy of the Copenhagen criteria, particularly as the EU prepared to expand into Central Eastern Europe.[55] It was perhaps thought that this was a sufficient deterrent to prevent backsliding, hoping that no Member State would wish to run this risk of self-isolation. However, this seems to have manifestly failed.

The primary issue pertains to the structure of the Article 7 TEU sanctioning arm. A crushing loophole has emerged in light of the ongoing rule of law problems occurring simultaneously in a number of Member States, particularly Poland and Hungary. Article 7(2) requires a unanimous vote in the European Council in order to bring any sanction against a Member State. This structural failure means that as soon as more than one illiberal state is subject to Article 7 proceedings, they can, as Poland and Hungary have done, make a pact to mutually veto each other's sanctions. The result is that there exists only a theoretical possibility of a Member State's voting rights being removed, and in the current context it remains a practical *impossibility*.[56] Article 7 TEU is therefore extremely difficult to use, and the Commission's blindness to this possibility has annihilated the dissuasive nature of the sanctioning arm,[57]

[53] Jan Werner-Muller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) European Law Journal 21, 144
[54] *Ibid*
[55] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 5
[56] Maximilian Steinbeis, 'Article 7 and us' (*Verfassungsblog* 16th December 2017) <https://verfassungsblog.de/article-7-and-us/> Accessed 12th February 2022
[57] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 28

meaning even as a deterrent it is now ineffective. The possibility for enforcement of EU founding values has been effectively neutralised by the need for unanimity in the European Council.[58] The secondary issue with the Article 7 procedure has been identified by many scholars as one of time. An administrative and bureaucratic blockade has emerged eliciting dire consequences. Both of the current ongoing Article 7 procedures were set in motion after significant delays. In the case of Poland proceedings only began after two years of 'meaningless' dialogues and per Grabowska-Moroz, in year *eight* of ongoing 'constitutional destruction' identifiable in Hungary.[59] The addition of the preliminary "Rule of Law Framework" only reduced the speed of the Article 7 proceedings.

With regards to the pursual of an illiberal state, even the Commission itself has stressed that time is very much is of the essence, stating 'The longer [problems] take to resolve, the greater the risk of entrenchment and of damage to the EU, as well as to the Member State concerned.'[60] Although the initiation of the preventative arm and the public warning phase might provide some weakening of support for the offenders, this public shaming phase does not prevent shame*less* rogue governments from consolidating their power in plain sight- while the Commission 'dithers' over what to do.[61] This danger in delay leaves the Article 7 procedure as something of an ineffective warning system, alarm bells ringing long after the incident has occurred. The result: a failure to halt the consolidation of illiberal power before it becomes entrenched. In fact, this abject failure of the procedure to address the rule of law backsliding in Poland and Hungary led to Polish Foreign Minister Czaputowicz publicly declaring that the Article 7 procedure is dead, a moment described as his formal 'victory statement'.[62]

2.2 EVADING EU RULE OF LAW OVERSIGHT

Kim Scheppele developed the notion of the Frankenstate as a way of describing the ongoing "monstrous" constitutional reforms in states such as Hungary and Poland. Per her description, the Frankenstate is the result of legal and reasonable constitutional components being stitched

[58] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 35
[59] Barbara Grabowska-Moroz *et al.,* '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' (2020) yearbook of European Law 39(1), 40
[60] Secretariat-General, 'COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL AND THE COUNCIL: Further strengthening the Rule of Law within the Union State of play and possible next steps' (2019) Communication COM(2019)163
[61] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 5
[62] Barbara Grabowska-Moroz *et al.,* 'EU Values Are Law, after All' (n59) 40

together in order to create a monster. This monstrous quality is derived from the interaction of these conjoined pieces, and not the individual features of the pieces themselves.[63] In 2011 the Fidesz government adopted a new Hungarian constitution and proceeded to push through a number of laws that the constitutional court later held to be unconstitutional.[64] In response, Orbán's government combined these laws with a series of other constitutional changes into the Fourth Amendment to the constitution- the goal being to 'insulate them from invalidation'.[65] Despite the worry over Hungary's 2011 constitutional reform, when experts were commissioned to determine whether the offending amendment 'complied with European norms and standards',[66] they decided it did.

Scheppele's argument is that because of the nature of the Frankenstate, assessments such as this commissioned to review the Fourth Amendment are entirely ineffective. By analysing the provisions of a constitution in isolated and component parts,[67] a Frankenstate may pass a checklist of rule of law desiderata with flying colours.[68] Checklists and isolated analysis are ignorant of the fact that it is the *interaction* between various constitutional components that may produce undesirable outcomes. Despite the concern that Hungary had gone beyond the ordinary diversity in Member States' constitutional arrangements,[69] the Fourth Amendment slipped through the cracks. Of course, as emphasised with many issues throughout this paper, this problem is accentuated in the European Union context. Orbán was branded the 'pioneer' of the Frankenstate by Scheppele,[70] and a large part of the reason his strategy was so effective was because the sprawling nature of the EU system permitted it. Orbán was able to cherry pick provisions from the constitutional traditions of other Member States, carefully selecting those primed for a transition to illiberalism. For example, the regulation adopted by Fidesz on media control was modelled on French law,[71] and the resulting effect was the ability of the government to restrict media coverage and promote political advertising in its own favour. This makes the role of the European institutions very difficult as it is hard to unravel what the intentions of Fidesz are, and Orbán can always justify his government's actions to the Union by pointing to

[63] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 560
[64] Mark Tushnet and Bojan Bugarič, 'The Problem of the Frankenstate' in *Power to the People: Constitutionalism in the Age of Populism* (Oxford University Press 2021) 105
[65] *Ibid*
[66] *Ibid,* 106
[67] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 559
[68] *Ibid,* 561
[69] Mark Tushnet and Bojan Bugarič, 'The Problem of the Frankenstate' (n64) 105
[70] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 560
[71] Mark Tushnet and Bojan Bugarič, 'The Problem of the Frankenstate' (n64) 107

the same or similar regulation in another Member State. Because of the varied constitutional traditions of other Member States, Hungary could subvert the rule of law mechanisms available to the Commission and construct a deadly franken-cocktail of hand-selected individually justifiable reforms- the danger being in their interplay.

In order to prevent this, Scheppele suggests we urgently need to move away from tick-box approaches that allow these regulations to go unchallenged. She recommends a new technique, a form of 'forensic legal analysis'[72] that would force those commissioned in the review to ask *what if?*- and work through the potential scenarios that could occur as these stitched together pieces start to move as one. It would seem however that this advice has not been heeded. In the European Union, the Venice Commission developed a Rule of Law Checklist that utilises a number of benchmarks to assess respect for the rule of law amongst member states. Pech and Scheppele acknowledge that this may be a useful tool, but again remind us that where the Commission can be applauded in adopting benchmarks, this is no miracle cure when it comes to monitoring and guaranteeing a Member State's adherence to the rule of law.[73] Scheppele strongly believes that without forensic legal analysis, these checklists alone simply do not work.

2.3 THE COMMISSION DEBACLE

The flaws inherent in the framework is perhaps the fault only of the drafters- but what has happened in the EU institutions that has caused illiberal states to declare *victory* over them? The Von der Leyen Commission has been the subject of extreme criticism over its handling of rule of law backsliding in the EU, the most worrisome of which will be explored here.

The danger in delay of the Article 7 TEU procedure was previously discussed. Much of the delay is caused by technical problems such as the mutual veto or the arduous rule of law framework, however, the Commission itself is also guilty of continuously making the wrong choices and choosing to entertain discussions with Member States when the need for action was glaringly obvious. With the Framework's first activation contra Poland, a vast amount of time was wasted in discussions, with no deadline imposed for the eventual invocation of Article 7 should Warsaw not cease to ignore the recommendations of the Commission. As has been established, this gave the Polish government ample time to 'double down' on its capture of the

[72] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 562
[73] Laurent Pech and Kim Scheppele, 'Is the Rule of Law Too Vague a Notion?' (n 25)

judicial system.[74] Despite watching this move happening in Warsaw - the Commission *still* chose not to active Article 7 and dedicated even more time to dialogues. The danger in delay is clear- the judiciary was sacrificed. The rule of law framework and Article 7 TEU combination is itself a slow process, but the actions of the Commission render it even *less* effective by letting the procedures stagnate. Where this initial error in the primary invocation of the rule of law framework may be forgivable, the Commission should have known better than to make the same mistake twice- particularly when the subsequent failure in Hungary provided Poland with a better roadmap for evading the Commission and consolidating illiberalism in plain sight. The Commission, however, persistently refused to activate the rule of law framework in Poland and as Pech makes clear it is hard to imagine how the Commission could still consider that a period of 'structural dialogue' could constrain anyone using Orbán as a model.[75] Konecewicz believes that the dismantling of the rule of law on the domestic front has now got so out of hand it is being 'reinforced, aided and abetted' by the 'inaction and spineless bargaining' at the supranational level.[76] This brutal condemnation of the EU institutions succinctly encapsulates the current reality: the Commission has fallen far short of treaty guardianship and has permitted rule of law regression to become entrenched before it was ever expressly challenged.

These failings have not gone unnoticed, the 'spectre' of a motion of censure is 'looming' over the Von der Leyen Commission after its failings regarding the rule of law.[77] Much of this recent distaste for the Commission is due to the perceived sell-out over various budget and financial initiatives. For example, the Conditionality Regulations were intended to make distribution of EU money on compliance with the rule of law- so that EU money did not fund autocrats.[78] As procedures were stuck in the Council, the German presidency gave both Hungary and Poland what they wanted in a so-called 'compromise' after discussions so they would not take the EU budget and recovery fund hostage.[79] This 'shameless pact' was dubbed 'institutional humiliation', allegedly leaving the Commission as little more than a puppet of the Member

[74] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 19
[75] *Ibid* 27
[76] Tomasz Koncewicz, 'How the EU is Becoming a Rule-of-Law-less Union of States' (*Verfassungsblog,* 28th April 2021) <https://verfassungsblog.de/how-the-eu-is-becoming-a-rule-of-law-less-union-of-states/> Accessed 8th March 2022
[77] Alberto Alemanno, 'Censuring von der Leyen's Capitulation on the Rule of Law' (*Verfassungsblog* 8th June 2022) <https://verfassungsblog.de/censuring-von-der-leyens-capitulation-on-the-rule-of-law/> Accessed 10th June 2022
[78] Sébastien Platon *et al.,* 'Compromising the Rule of Law while Compromising on the Rule of Law' (*Verfassungsblog* 13th December 2020) <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/> Accessed 19th January 2022
[79] *Ibid*

States.[80] Even more recently, the Commission decided to approve Poland's recovery plan despite total non-compliance with its rule of law recommendations and refusal to implement CJEU or ECtHR judgements.[81] Once again, Polish scholar Tomasz Koncewicz denounces the 'cowardice and blatant incompetence of the European Commission and the spinelessness of its leadership' and portrays the European institutions as abandoning the people of Poland who wish to live in a peaceful Europe of values.[82]

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The unlucky combination of elevating a 'fuzzy concept',[83] inextricably tied to liberal ideology and the achievement of the goals of the European project, to a supranational level with poor supporting framework continues to be the EU's biggest headache. It seems the Commission is lacking both in ability and in willingness to address the Copenhagen Dilemma in any meaningful way. The scaling up problem has meant that the pluralist approaches to the rule of law have been hijacked in the name of constitutional pluralism by Orbán and the lack of a tangible minimum standard has allowed a warping of democracy and a shift to autocracy that the EU has failed to prevent with its current (non)nuclear option. The appearance of the Frankenstate and the failure of so-called dialogues show that without anything to hold states *accountable* to, the rule of law is very much up for discussion.

[80] Tomasz Koncewicz, 'How the EU is Becoming a Rule-of-Law-less Union of States' (n76)
[81] Alberto Alemanno, 'Censuring von der Leyen's Capitulation on the Rule of Law' (n77)
[82] Tomasz Koncewicz, 'How the EU is Becoming a Rule-of-Law-less Union of States' (n76)
[83] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11) 559

A New Avenue for Safeguarding the Rule of Law?

Chapter Three

'The European Union has to decide whether it comprises illiberal democracies or whether it fights them.'[84]

3.1 COMMISSION v HUNGARY

As the new Hungarian Constitution entered into force on the 1st of January 2012, the mandatory retirement age for all judges was reduced by 8 years from 70 to 62. This brought about the forcible retirement of just shy of 300 public prosecutors and judges, a move dubbed a 'highly perilous outcome for the independence of the judiciary'[85] which opened the door for the government to influence the re-composition of the courts. This move, although deeply concerning, does not come as any particular surprise. The progress (or regress) of Orbán's government and the drafting of the new constitution had already attracted polite concern from the relevant Venice Commission report in 2011 and much more direct criticism from a range of scholars and academics- with particular emphasis on the effect of the limitation of powers on the functioning of democracy and the lack of transparency in the drafting process.[86] In this context, the revelation that the electoral procedure for judges was changed in such a way that the votes of Orbán's Fidesz party alone sufficed to appoint new judges[87] was a predictable next step from a state suffering from a notorious authoritarian slide.[88]

Naturally, the alarming move by Fidesz to essentially decapitate the Hungarian judiciary was quickly ruled unconstitutional by the domestic Constitutional Court, followed by the European Court of Justice which established a violation of EU law later in the year in the *Commission v*

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[84] Armin von Bogdandy, 'Fundamentals on Defending European Values' (*Verfassungsblog*, 12th November 2019) <https://verfassungsblog.de/fundamentals-on-defending-european-values/> Accessed on 15th December 2020

[85] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs' (n40) 1

[86] European Commission, *European Commission for Democracy Through Law (Venice Commission)- Opinion no. 621/2001 - On the New Constitution of Hungary*, CDL-AD(2011)016, at 145

[87] Kim Scheppele, 'How to Evade the Constitution: The Hungarian Constitutional Court's Decision on Judicial Retirement Age' (*Verfassungsblog*, 9th August 2012) <https://verfassungsblog.de/evade-constitution-case-hungarian-constitutional-courts-decision-judicial-retirement-age/> Accessed 27th April 2022

[88] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs' (n40) 18

Hungary case.[89] The Commission challenged the Hungarian provisions on the basis of Framework Directive 2000/78/EC which prohibits workplace age discrimination, concluding that the new retirement did not comply with the principle of proportionality and conflicted with the principle of equal treatment. The Commission seemed to doubt its ability to directly address the issue of judicial independence and rule of law backsliding, and so instead chose to successfully frame its case upon this anti-discrimination framework. Nagy notes that this tactic employed by the Commission sheds light on the shortcomings of the various EU mechanisms to combat the rising authoritarianism witnessed in Hungary, something also referred to as the use of 'Al-Capone tricks'[90] by the Court in order to uphold the rule of law. The relevant section of the press release was titled "independence of the judiciary" and despite the legal arguments employed it is clear that the intention was to address emerging autocracy even if this did not form the substantive legal arguments put forward in the case.[91] Orbán reacted to this judgement by stating it was just "beating a dead dog", or to use the more familiar English idiom, flogging a dead horse. [92] It is interesting to note that Orbán considered this something of a victory despite the successful challenge from the CJEU. Scheppele notes that although at first glance the ruling appears to be a major defeat for Orbán, it is in fact bad news for the Commission as the Court waited so long to make its decision that most of the judges had already been fired, and it provided no sure way for them to get their jobs back.[93]

Ultimately, this judgement highlights how much the Commission and the Court struggle to combat the rise of the Frankenstate.[94] Despite awareness that this is a clear instance of authoritarian reform, the judgement itself seems little more than a formal declaration of disapproval evasively channelled through the wrong legal framework. The reluctance of the court to challenge the Hungarian government on the basis it wanted to demonstrates just how shaky a ground the rule of law is to stand on. Particularly with respect to independence of the judiciary, the Commission encounters an extreme difficulty regarding the practical tangibility of technical standard- with no consistent procedure for judicial appointments available across democracies- and the problem in Hungary only comprehensible in this "franken-context" of

[89] Case C-286/12 *Commission v Hungary* EU:C:2012:687
[90] Csongor Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation à l'Européenne' (2020) German Law Journal 21(5), 884
[91] *Ibid*
[92] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs' (n40) 1
[93] Kim Scheppele, 'How to Evade the Constitution' (n87)
[94] Kim Scheppele, 'The Rule of Law and the Frankenstate' (n11)

Hungary's particular political background:[95] for comparison, the retirement age of German judges is 65 and as explored earlier, the American system is markedly strategic.[96] Even if there is strength in associating rule of law backsliding with judicial reforms such as Orbán's, there is no technical legal framework providing just how an independent judiciary must be maintained- the (forcibly) retired judges could not even be reinstated following *Commission v Hungary*. The system appears to remain permeated by a lack of ability to prevent the Hungarian government from weakening checks and balances and undermining judicial independence.[97]

Scheppele does provide some good news, however. Notwithstanding the 'tricks'[98] relied upon to achieve the desired outcome, the judgement in *Commission v Hungary* remains positive in her eyes as the Court 'reached the clear constitutional right answer, defending the rule of law, the constitution and its own precedents.'[99] It seems to be a case of right answer, wrong method- but unfortunately lacking any strong consequence. The primary significance of the judgement is exemplary of the Court's unequivocal support of the Commission's stated intention to counteract Hungary's gradual slide towards authoritarianism,[100] and the anti-discrimination strategy also evidence of the Commission picking a fight it knew it had the best chance of winning in order to pursue this goal. Despite the reluctance to rely on the rule of law in Article 2 or the measures of Article 19 TEU, it's clear this case marks a significant, albeit tentative, step towards tackling the EU value lacuna head on.

3.2 THE PORTUGUESE JUDGES CASE

The case of the *Commission v Hungary* now appears redundant in light of the ruling in the *Portuguese Judges*[101] case.[102] Less than 12 months after the Hungarian forced retirement saga, Viviane Reding observed that the unprecedented rule of law problems that the EU faced were systemic in nature.[103] It seems there was a lot still to be done, and the 2014 *Portuguese Judges* case is an important milestone in the Court doing it.

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[95] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs' (n40) 17
[96] *Ibid* 9
[97] Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges' in Fernanda Nicola and Bill Davies (eds), *EU Law Stories* (Cambridge University Press 2017), 472
[98] Csongor Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights' (n90) 884
[99] Kim Scheppele, 'How to Evade the Constitution' (n87)
[100] Uladzislau Belavusau, 'On Age Discrimination and Beating Dead Dogs' (n40) 18
[101] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.
[102] Csongor Nagy, 'The Diagonality Problem of EU Rule of Law and Human Rights' (n90) 884
[103] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 8

Portugal introduced a temporary reduction in the salary of judges while pursuing strict austerity measures, as the government deficit was seen as excessive in light of the EU financial assistance the country had received.[104] The case of *Florescu*[105] had previously found that the Charter applied to Memorandums of Understanding conducted between the EU and the relevant Member State in receipt of balance-of-payments,[106] and it would have been reasonable to predict that this case would have followed a long line of austerity-related jurisprudence brought before the Court. However, rather than follow the approach supported by its own case law, the remarkable decision was made by the Court to place itself "right in the middle of the rule of law action".[107]

Portuguese Judges determined that all legislation affecting national judges who *may* be asked to apply EU law is under the purview of the Court of Justice.[108] It did so by applying a combined reading of the rule of law in Article 2 TEU and Article 19(1) of the treaty, which provides:

> *The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.*
>
> ***Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law[109]***

This novel approach was heralded as 'arguably the most important judgement since *Les Verts'*[110] regarding the meaning and scope of the rule of law within the EU system, and indeed the conclusion the Court has managed to draw here is trailblazing. The link established between Articles 2 and 19 TEU has the effect of bringing the national judiciaries of the Member States within reach of the Court of Justice. It obliges them to ensure the independence of their own

[104] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat: The Court of Justice to the Rescue in the ASJP Case' (2018) Common Market Law Review 55, 1829
[105] Case C-258/14 *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448
[106] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat' (n104) 1834
[107] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8), 6
[108] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical Dos Juízes Portugueses' (2018) European Constitutional Law Review 14(3), 623
[109] Article 19(1) Consolidated version of the Treaty on European Union (2012) OJ C 326
[110] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat' (n104) 1820

judges, a principle said to be inherent to Article 19 TEU.[111] In fact, the Court described Article 19(1) TEU as giving concrete expression to the value of the rule of law in Article 2 TEU.[112]

It does not seem likely that the Court has by chance stumbled upon such an outcome, the reality is that such a judgement occurs as a result of the context- that of a 'systemic'[113] rule of law problem. The careful transformation of an austerity case into one concerned with the rule of law is designed to have a significant impact on the developments in Budapest and Warsaw, and the court has most definitely seized the opportunity to develop its views on the topic.[114] This is a clever move by the Court, a calculated 'annihilation'[115] of the Polish assertion that their questionable judicial reforms fall outside the scope of EU competence. This is admittedly a considerable and perhaps formidable extension of the powers of the Court, with clear 'political objectives'[116] at play as it removed itself from the fringes of the discussion and began to sketch itself a role in preparation for the inevitable confrontation in Eastern Europe.

However, Pech assures us that although this intervention by the Courts is bold, it is warranted.[117] As previously explored, there are many difficulties in actually mobilising Article 7 TEU and the Commission appears to have fallen short. This judgement occurs in the acknowledgement that there is a real danger in continued delay. Bonelli has suggested it is a positive development that the EU should acquire new possibilities for intervention; pointing out many scholars believe the Court of Justice should be able to have a hand in reviewing value compliance.[118] Although the Court opens itself up to criticism for perceived interference with Member States' retained competences, he tells us that this is not a reason to deny intervention, but rather should be understood as a call for caution.[119] This is likely the best approach, as after all like the majority of significant problems the EU has faced, it seems inevitable that the rule of law would find its way to the Court.

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[111] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 623
[112] Case C-64/16 *Associação Sindical dos Juízes Portugueses* EU:C:2018:117.
[113] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 8
[114] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 628
[115] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat' (n104) 1828
[116] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 623
[117] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat' (n104) 1833
[118] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 640
[119] *Ibid,* 641

The continued success of the Court of Justice is evident in this ruling. If *Commission v Hungary* was good news for the rule of law, *Portuguese Judges* is even more compelling. It is a concerted effort to give meaning and scope to the value contained in Article 2 TEU and draw from that value a justiciable principle of judicial independence. However, this alone is not an entirely satisfactory solution capable of combatting the serious deterioration of EU values in some Member States. Although the combined reading of Articles 2 and 19 TEU opens the door to a much more direct challenge of Orbán's reforms, it remains vulnerable to some of the criticisms outlined previously in this paper. The major implication of this judgement is the Court has finally managed to reduce some of the abstraction inherent in the principle of the rule of law. By concretely outlining that the principle of judicial independence is inherent to Article 2 TEU and making this justiciable, the Court has made significant inroads in tackling one of the biggest lacunas of the system, taking steps to define exactly what principles *constitute* the rule of law in the EU (applicable therefore to all Member States), and precisely what states must do to adhere to it. It certainly proves to Orbán that dead dogs can still bite, likely an underlying goal of the Court.

However, there is an argument to be made that the developments of the *Portuguese Judges* case present something of an out of the frying pan into the fire scenario. The issue of tangibility remains, and despite attaching the concept of judicial independence steadfastly to the rule of law- have we not simply opened the door to a different sort of problem- the technical issue of judicial independence? Without doubting the significance of this judgement in advancing value review in the courts, technicalities cannot be avoided. As was discussed in relation to the *Commission vs Hungary* case, challenging a Member State over judicial independence remains incredibly difficult. *Portuguese Judges* seems to have taken only half a step towards guaranteeing this in the EU- a step to confirm judicial independence is actionable by the Court, but with no word on what this consists of. The problems fuelling the reluctance of the Court to challenge Orbán over his judicial decapitation scheme on a judicial independence basis remain- what provisions guarantee a suitably independent judiciary? What steps must be taken by a Member State to compromise it? Amplified by the supra-national context, the opportunity to cherry pick from the constitutional systems of fellow Member States to justify the stitching together of a judicial franken-system in order to evade the Court remains a real worry- the aforementioned lowering of retirement age to one comparable with Germany is hard to challenge singularly even if the door is opened for the Court to review independence.

Essentially, just because the Court may now call a spade a spade, it doesn't make the card any easier to play.

Kim Scheppele foresees an additional problem arising from this judgement. In order to activate Article 19(1) TEU, the executive must be targeting judges. She anticipates that autocratic governments will still be able to compromise judicial independence by choosing to act against all checks and balances in one simultaneous move without explicitly targeting the judiciary- thereby bypassing Article 19 TEU.[120] The reach of Article 19(1), although a significant 'operationalisation'[121] of rule of law mechanisms, clearly does not have the same scope as Article 2 TEU and loopholes such as these demonstrate it. The application of Article 19 TEU requires a link with EU law, a much narrower scope than that of Article 2 which applies 'across the board',[122] despite its reliance on the substandard Article 7 TEU procedure for enforcement. *Portuguese Judges* then, may be considered a success in terms of crystalising a requirement inherent to the Article 2 TEU commitment to the rule of law, and devising a new means of intervention. However, it seems politicians such as Orbán who toe the line of autocracy still have avenues through which to undermine the Commission; and given his evasive track record it is unlikely any loophole will be left unexploited. The correct thing to do is to expand judicial competence in the area of value review such as has occurred in *Portuguese Judges* as a means to free the Commission from the stalemate over Article 7 TEU procedures. In fact, I emphatically welcome an increased role for the Court moving forward in order to increase the capacity of the EU to challenge illiberal democracies and to close the gaps left by attempts such as *Portuguese Judges*. Furthermore, judicial independence is not the only emerging area of concern - Hungary in particular has placed alarming limits on media and journalistic freedom, attracting the attention of NGOs such as Amnesty International for their potential rule of law violations. Broader scope for value review in the EU is therefore necessary in order to adequately confront the Copenhagen dilemma.

[120] Laurent Pech and Sébastien Platon, 'Judicial Independence Under Threat' (n104) 1851
[121] *Ibid*
[122] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 642

3.3 REPUBBLIKA V IL-PRIM MINISTRU

> *It was therefore on the basis of the provisions of the Constitution in force prior to that reform that the Republic of Malta acceded to the European Union under Article 49 TEU.*[123]

So came the judgement from the case of *Repubblika v Il-Prim Ministru*, a remarkably understudied case which may be the EU's breakout moment in finally gaining the ability to adequately address the rule of law crisis. The Court introduced the novel principle of non-regression into EU law, obliging Member States to maintain their adherence to accession level fundamental value commitments.

The case was brought as an *actio popularis* by Repubblika, a Maltese civil society organisation styled as 'seeking to promote civil rights, democratic life and the rule of law.'[124] This came as a response to the 2016 amendment to the Maltese Constitution which established a judicial appointments committee to accompany the original system of Presidential appointment via the proposal of the Prime Minister. Representatives of the Repubblika organisation claimed that the new Maltese judicial appointments system violated the principle of judicial independence in EU law as enshrined in Article 19(1) TEU.[125] The committee in question is tasked with the evaluation of candidates for a judicial role and to advise the Prime Minister on the decision. However, the Prime Minister is able to deviate from this advice if he or she so chooses, so long as the reasons for doing so are published and a statement is made to the House.[126] This was the system brought before the Court of Justice on the basis of Article 19(1) TEU.

The Court was essentially asked to verify the compatibility of the Maltese system for the appointment of judges with the previously established principle of judicial independence.[127] However, much like the *Portuguese Judges* case was expected to fall in line with austerity jurisprudence, *Repubblika* was expected to be the next domino, and to fall in line with the emerging judicial independence jurisprudence *Portuguese Judges* had created. However, once again the Court is witnessed to have taken the opportunity for expansion and shaped this case into one remembered for a 'completely different rabbit being pulled out of the magician's

[123] Case C-896/19 *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311
[124] Repubblika <https://repubblika.org> Accessed 30th May 2022
[125] Mathieu Leloup, 'Repubblika: Anything new under the Maltese Sun?' (*Verfassungsblog*, 21st April 2021) <https://verfassungsblog.de/repubblika/> Accessed 25th April 2022
[126] *Ibid*
[127] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8) 9

hat.'[128] I suggest it is best understood as the natural extension of the previous cases on values brought before the Court. It marks a significant development, transforming the 'discovery of EU competence'[129] in *Portuguese Judges* into a substantive obligation on Member States to maintain pre-accession commitments.

The Court "discovered" this new principle through the reading of Articles 49 and 2 TEU jointly. The chamber established that since Article 49 states that the union is composed of Member States freely and voluntarily committing themselves to the common values, it follows that Article 2 TEU compliance is a condition for enjoyment of rights deriving from the Treaties.[130] From this; the Court held:

> *A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law*[131]

This gave concrete expression to an emergent principle of non-regression, signalling a 'massive rethinking of the potential limits of EU competence'[132] and becoming the most important step the Court of Justice has taken to address the rule of law lacuna undermining the EU legal order.[133] It builds on the competences established in earlier cases, and most notably functions as a catch-all: not all the values of Article 2 TEU are related to the independence of the judiciary. It removes the need for Article 19 TEU to function as the activator of Article 2 values and thus constitutes an 'overwhelmingly significant' general upgrade to the 'value amongst values.'[134] Where *Portuguese Judges* broke a spell surrounding the utterance of the rule of law that was palpable in *Commission vs Hungary*, *Repubblika* is a confident proclamation of the Court's intention to take values seriously.

The confirmation that EU law prohibits post accession regression on the rule of law[135] essentially untied the hands of the Court as a guardian of Article 2 TEU. The imposition of a

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[128] Dimitry Kochenov and Aleksejs Dimitrovs, 'Solving the Copenhagen Dilemma' (*Verfassungsblog*, 28th April 2021) <https://verfassungsblog.de/solving-the-copenhagen-dilemma/> Accessed March 14th 2022
[129] *Ibid*
[130] *Repubblika* (n 121) [62-63]
[131] *Ibid* [63]
[132] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8) 3
[133] Dimitry Kochenov and Aleksejs Dimitrovs, 'Solving the Copenhagen Dilemma' (n128)
[134] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8) 16
[135] Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case' (20th May 2021) SIEPS 2012-3, 18

minimum standard of conduct has the effect of creating a blanket level of rule of law adherence and finally provides a tangible standard by which backsliding can be measured. The success of the *Repubblika* judgement is down to its all-rounder nature. By ensuring Member States adhere to their accession level commitments it has the dual effect of enforcing a tangible standard from which there can be no regression, solving the technical problems the rule of law presents that were so apparent in *Portuguese Judges,* and stamping out the claims of rule of law compliance and constitutional plurality its once more abstract nature left it vulnerable to.

3.4 A DEFENCE OF THE ROLE OF THE COURT

Such an obvious expansion of the competence of the Court by its own doing would not occur without a response from critics wary of judicial activism. However, within the wider context of the threat from illiberal democracies and the abject failure of the Commission to address this, I believe the actions taken by the Court through this line of case law should be welcomed if not applauded. The previous chapter was critical of the (non)role the Commission has played so far in addressing the rule of law crisis. However, there also has to be a certain understanding that it has been difficult for the Commission to be both bold and firm while working alongside various intergovernmental institutions- in particular the European Council which has been predictably reluctant to criticise Member States.[136] In this regard, the Court is better suited to share some of this burden as it is not suffocated by diplomacy or politics.

Naturally, no extension of the power of the Court would come without the risk of accusations of overconstitutionalisation, particularly when regarding the identification of a new principle forming part of the EU legal order. However, if we return to what we know: the rule of law value is flawed by lack of clarity on at least two fronts, the framework is not fit for purpose and the Commission is dragging its heels. Without action will the EU not, in some ways at least, implode? This action by the Court is essentially making up the shortfall left behind by the ineptitude of the other branches, and an advancement in the methods to protect EU vales seems necessary to ensure the Union stays true to itself as being composed of a community based on the rule of law.[137] The idea that we are witnessing the juridification of a political conflict is so far misplaced, that the landmark judgement of *Repubblika* has actually failed to make much of a mark on the land, and has so far failed to provoke the same level of academic and scholarly

[136] Laurent Pech, and Kim Scheppele, 'Illiberalism Within' (n 28) 5
[137] Case 294/83 '*Les Verts'* (n 7)

response as the *Portuguese Judges* did it in its day. Provided the Court remains sensitive and cautious in exercise of such powers, there is no reason that the legitimacy of the CJEU should become viciously contested. In fact, Bonelli suggests that a careful increase in legal pressure may incentivise the acceleration of the political procedures.[138] This would seem to suggest the Court may be able to take on the role of a catalyst for increased value enforcement, rather than the driving force which would leave it vulnerable to critique.

Finally, the principle of non-regression established by *Repubblika* was categorised as discriminatory by Leloup in his analysis of the judgement. He cites the fact that countries like Greece were considered barely ready for accession, and therefore the value placed on the *moment* of accession as the standard a Member State must uphold is unequal.[139] However, I believe this works in the favour of the Court. By establishing a principle of non-regression, the CJEU has essentially established a "no backsliding" rule, citing that at the point of meeting the Copenhagen criteria will a standard be established. This is in reality a very clever move. It prevents an overgrowth of competence, binding countries only to a standard they voluntarily and willingly set themselves before they were even under the jurisdiction of the court. This prevents perceptions of an effort to harmonise Member State constitutional orders in a way inconsistent with treaty obligations. In terms of its intrusiveness in such domestic affairs of Member States, it is actually quite reserved. Furthermore, in the *Repubblika* case Malta emerged as the winning party, the Court having found that there was no violation resulting from the new system. It demonstrates that Member States still have the power to alter their own judicial systems and there is no restriction on constitutional amendments so long as there is no identifiable regression on their accession level commitment. This "hands-off hands-on" approach prevents a dictation of technical requirements or thickness on the rule of law- which has proved to be near impossible- and permits plurality of understanding to remain. As aptly stated by Muller 'the EU has always been about *pluralism within common political parameters*',[140] something *Repubblika* achieves perfectly.

[138] Matteo Bonelli and Monica Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (n108) 642
[139] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8), 18
[140] Jan Werner-Muller, 'Should the EU Protect Democracy and the Rule of Law' (n53) 158

Conclusion

On a final note, the point I wish to stress is that without a move towards the sincere implementation of a principle of non-regression into the *acquis communautaire*, there can be no adequate redress of the Copenhagen dilemma.

The rule of law suffers from an assault on two fronts. I previously identified two problems native to the concept; its pluralist nature and its intangible technical requirements. The fact the rule of law is open to interpretation and can be conceived as everything from autocracy compatible to fundamental rights inclusive indicates it is at heart a universalist principle. When enshrined into the treaties of a supranational organisation committed at once to its substantive iteration and to upholding pluralism alongside national constitutional identities, it becomes naturally vulnerable to conceptual exploitation. Furthermore, the inability of the EU to attach formalistic and technical details to the principle's requirements means that Member States can pursue 'judicial decapitation schemes'[141] and suffer little more than a retrospective admonishment. Member States can further evade rule of law oversight through the reliance on tick-box rule of law assessments, providing them with the dangerous ability to harvest constitutional principles from their fellows with the intention of constructing a Frankenstate of individually justifiable reforms that when taken together become a formidable illiberal force. In fact, the continued reference to Poland and Hungary's constitutional changes as mere reforms was referred to by one scholar as akin to 'describing waterboarding as a spa treatment',[142] and in the context of ensuring meaningful, substantive rule of law maintenance this does not feel far from accurate.

The European Commission, particularly under the leadership of Ursula von der Leyen, has been hesitant and perhaps at times even insincere in its intention to meaningfully tackle the rule of law crisis. Although in recent weeks there has been some significant steps forward,[143] the danger I discussed in delaying action has had the result of failing to prevent the consolidation

[141] András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values* (n35) 236
[142] Laurent Pech and Dimitry Kochenov, 'Respect for the Rule of Law in the Case Law of the European Court of Justice' (n135) 109
[143] European Parliament Press Release, 'Question time with Commission President Ursula von der Leyen' (5th April 2022) <https://www.europarl.europa.eu/news/en/press-room/20220401IPR26529/question-time-with-commission-president-ursula-von-der-leyen> Accessed 7th April 2022

of illiberal democracy before it became entrenched. The reluctance of the Commission to move past the dialogue stage and repeatedly choose discussion over action jeopardises the efficacy of the Article 7 TEU mechanism. Ultimately, this mechanism itself suffers a number of shortfalls, primarily through the existence of the mutual veto capability. It appears the sanctioning arm was designed primarily as a deterrent, and its early characterisation as nuclear has matured to an almost comical assessment.

Compounding these issues, I believe the natural progress of the Court to establishing the principle of non-regression is both justifiable and imperative for the continuation of meaningful commitment to EU values. In the first instance, establishing a minimum standard for rule of law compliance is the best solution by which to address the problem of pluralism and the lack of tangible technical requirements associated with the rule of law. The capability of maintaining the monist, substantive conception of the rule of law promulgated by the Commission during the pre-accession stage combined with the ability to modify technicalities to an EU standard is maintained, as post-accession review gains a comparable standard by which to compare new reforms to. This has the commendable effect of creating an enforceable minimum floor of value protection which does not have the appearance of manifest interference with domestic affairs- it is merely enforcement of what Member States willingly committed themselves to so they could enjoy the rights derived from the treaties. Naturally this remains a considerable expansion of CJEU competence, but to a certain extent this is a politic of perception.

Arguably, a principle of non-regression has more legitimacy than the current reliance on recommendations and sanctions, as to request adherence to the entry conditions is less controversial than the current perception of the Commission meddling arbitrarily in the constitutional orders of Member States. In the *Repubblika* case itself, the reforms to the Maltese judicial appointment system were accepted as the Court found they did not constitute a regression; demonstrating that domestic governments need not see this as a blanket restriction on their ability to conduct structural reform. Furthermore, Hungary and Poland's differing stances on the war in Ukraine may perhaps signal the end of the veto pact. Even though this would have the effect of "unleashing" the sanctioning arm of Article 7 TEU, non-regression would still be a valuable tool for the European institutions to access. It would eliminate the use of "franken-tactics" to evade liability and could permit the forensic legal analysis Scheppele envisaged. The principle of non-regression would enable an examination of the overall functionality of a justice system for example, with the provision of the Member State's

accession level approved arrangement as a frame of reference. In this way should Article 7 TEU regain its bite, the principle of non-regression could facilitate its exercise.

As has been remarked upon in this paper, the *Republblika* judgement remains underexplored, and in my view, undervalued. The reading of Articles 49 and 2 TEU together has indeed paved the way to 'radically new possibilities of supranational engagement',[144] and these are opportunities I hope to see the Court embrace in the near future. In order to stay true to itself as a community that has always been about its values,[145] the European Union must use every tool at its disposal to protect them.

[144] Mathieu Leloup *et al.* 'Non-Regression: Opening the Door to Solving the 'Copenhagen Dilemma'?' (n8) 20
[145] Jean-Claude Junker, 'State of the Union Address' (n 2)

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