

DRAFT

Can the ECJ Become a Guardian of EU Values?

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Introduction

The European Union is founded on the values, which are also an accession condition to become a EU Member State, of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, as laid down in Article 2 of the Treaty on European Union (TEU). There are three mechanisms envisaged under Article 7 TEU and Articles 258-259 TFEU and 267 TFEU that can be invoked against Member States on the grounds that the founding values of the EU are violated. While the former applies to situations which fall outside the scope of EU law, the latter two can be invoked in cases of non-compliance of a national law with EU law and EU values in individual and specific cases. The rule of law crisis on going in Poland and Hungary has demonstrated the weaknesses of these two mechanisms. While the requirement of unanimity in the European Council block the sanctions under Article 7, the limited scope of infringement mechanisms prevent to evaluate the violations of EU values from a large scale. However, the ECJ's (Court) recent case law established through preliminary ruling procedure on enforcement of the value of rule of law is defined as 'truly revolutionary'.

This paper is structured as follows. First the Court's interpretive power is examined in the scope of judicial activism and self-constraint. Second, the importance of EU values for the survival of the EU and the enforcement mechanisms pursuant to Article 7 TEU and Articles

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267 and 258-259 TFEU are analyzed by taking their weaknesses into account. Finally, it is discussed if the preliminary ruling procedure and the infringement mechanism could become effective in protecting the Union values within the context of teleological interpretation method for the former and interim measures for the latter on the grounds of Article 2 read in conjunction with Articles 49 TEU, 3 TEU and 4(3) TEU.

The Court and Its Creative Jurisprudence: An Overview

The European Union is an international organization which differs from others because of its supranational features which are independent institutions, autonomous decision-making, and the enforceable rights and obligations given to individuals. Actually, these features also provide *sui generis* nature to the EU and distinguish it from international law perspective. If today there exists European Union Law, it is a result of constitutionalisation of the EU Treaties by the Court through its case-law on the basis of these features.

The principles of direct effect and the primacy were the starting point of the constitutionalisation process of the Treaties which were declared by the Court in famous *Van Gend en Loos* and *Costa/ENEL* decisions. These two judge-made principles have paved the way for the Court to ensure not only the enforcement of EU law by individuals but also the uniform application of it in all Member States. After founding these main principles, the Court has begun to enrich EU law with more constitutional characteristics through recognizing the Treaties as the basic constitution. The first step was increasing the powers of the European Parliament in the institutional structure of the EU. While the consultative powers of the EP became obligatory in *Isoglucose*¹, the EP, contrary to the text of ex Article 173 EC, was entitled as litigant in actions for annulment in view of the principles of the rule of law² and institutional balance³ in the EU⁴. Furthermore, state responsibility for compliance

Koen Lenaerts, *Constitutional Law of the European Union*, Thomson, Sweet and Maxwell, 2005, p. 12.

1 Case 138/79, *Roquette Freres SA/Council*, ECLI:EU:C:1980:249.

2 Case 294/83, *Parti ecologiste "Les Verts"/European Parliament*, ECLI:EU:C:1986:166.

3 Case 70/88, *European Parliament/Council (Chernobyl)*, ECLI:EU:C:1990:217.

with EU law was declared by the Court in *Francovich*⁵ on the grounds that it was inherent in the European legal order without any explicit foothold in Treaties.

The protection of fundamental rights was the second step taken on the way to the constitutionalisation process of the EU law. Despite the lack of competence given to the EU on the protection of fundamental rights, it was put into EU's agenda in order to get approval for the principle of supremacy from some of EU Member States' constitutional courts at first. In time, the protection of fundamental rights has turned into a priority to transform the EU into a political union through Court's case-law⁶. Similarly, the Court has extended its judicial competence to not only third pillar issues that the Treaty expressly excludes direct effect in

⁴ David T. Keeling, 'In Praise of Judicial Activism. But What Does It Mean? And Has the European Court of Justice Ever Practised It?' (1998), s. 520.

⁵ Joined cases C-6/90 and C-9/90 *Francovich*, ECLI:EU:C:1991:428.

⁶ For a detailed analysis see, A. Aslı Bilgin, *Öncelik İlkesi Kapsamında Avrupa Birliğinde Temel Hak Koruması*, Ab Bakanlığı Yayınları 2013.

relation to framework decisions⁷, but also second pillar issues that the Court and its competence are excluded formally⁸.

The acceptance of EU law as a new constitutional legal order has provided Court not only the justification to interpret the Treaties in a dynamic way in accordance with the EU's objectives but also to act as a constitutional court. However, the case-law regarding the functioning of the internal market⁹ as well as the scope of free movement rights with the notion of EU citizenship¹⁰ are the best examples of how the Court interprets the Treaties on establishing a European political union rather than purely economic integration.

Whereas the Court is seen as the “motor” of European integration due to these landmark judgments, they are also the reasons of labeling the Court as judicial activist for some. Indeed, although the Court and its landmark judgments have been criticized frequently on the basis of *contra legem*, *ultra vires* and the absence of foothold, the level of integration that the EU has reached today is a result of these disputed decisions. These judgements, on the other hand

7 Case C-105/03, Criminal proceedings against Maria Pupino, ECLI:EU:C:2005:386.

8 Case C-91/05, Commission of the European Communities v Council of the European Union, ECLI:EU:C:2008:288

9 Case 8-74, Procureur du Roi v Benoît and Gustave Dassonville, ECLI:EU:C:1974:82; Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ECLI:EU:C:1979:42; Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano ECLI:EU:C:1995:411; Case C-212/97 Centros Ltd v Erhvervs- og Selskabsstyrelsen ECLI:EU:C:1999:126; Case 196/87 Udo Steymann v Staatssecretaris van Justitie, ECLI:EU:C:1988:475.

10 Case C-85/96 María Martínez Sala v Freistaat Bayern ECLI:EU:C:1998:217; Case C-184/99, Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve ECLI:EU:C:2001:458.

have been transferred into the Treaties unanimously as a provision or a Declaration annexed to them. Therefore, this situation raises the discussions on whether the Court acts as a judicial activist or as it should be.

Judicial Activism or Legal Interpretation?

As shown above, it is true that the Court has sometimes given its decisions beyond the wording of the Treaty provisions but it stems from the nature of EU Treaties which requires interpretation of the text. This requirement can be gathered under three reasons. First of all, the Treaties draw the framework to reach European integration, leaving details behind. Secondly, multilingualism in Treaties gives rise to complex legal translations to come up with a common meaning. Lastly, as Arnall explains Treaties are a result of diplomatic negotiations and text does not always provide an answer or a clear one¹¹. Actually, neither legislators nor the parties of an international treaty can predict every future scenario and provide for every possibility in the text¹². The judiciary, on the other hand, could not refuse to settle a dispute because of a lack of a provision in the text instead of applying judicial law making. In this regard, Article 19 (3) TEU provides that the Court has a monopoly on interpretation of EU legal order in accordance with the Treaties. Therefore, it is Court's duty, given by the Member States, to interpret the Treaty in a way to answer the questions when the text is ambiguous by taking EU's aims and objectives in compliance with its authors' will into consideration¹³. There is neither a provision nor a reference in the Treaties about interpretative methods of EU legal order, which makes the Court, in principle, free to choose the method that best fits¹⁴.

11 Anthony Arnall, 'The European Court and Judicial Objectivity: A reply to professor Hartley', (1996) (112) *The Law Quarterly Review* 413.

12 Ransford C. Pyle, Carol M. Bast, *Foundations of Law: Cases, Commentary and Ethics*, s. 94.

13 Anthony Arnall, 'Judicial Activism and the ECJ: How Should Academics Respond?' in M. Dawson, B. De Witte and E. Muir (eds), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar, 2013), 224.

However in its case-law, the Court put forward the rules that should be taken into consideration when EU law needs interpretation¹⁵. Actually the interpretative methods followed by the Court, - literal interpretation, contextual interpretation and teleological interpretation- are not different from the ones applied in national and international legal order. Yet, the Court may attach specific normative importance to those methods due to the autonomy of EU legal order¹⁶. Thus, contextual and teleological interpretation methods have taken a step forward among the others followed by the Court¹⁷ and the accusations against the Court for being judicial activist mostly based on the allegations of misuse of teleological method by interpreting the provisions of the Treaties contrary to the natural meaning of the words used. While Rasmussen entitles this activity as “revolting judicial behavior”¹⁸, Hartley calls it as “judicial legislation”¹⁹. Yet, these criticisms are missing the point of the special

European Law 6.

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Ibid. p. 5.

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Koen Lenaerts and Jose A Gutierrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2014) 20(2) Columbia Journal of European Law 6.

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Tobias Lonnquist, 'The Trend Towards Purposive Statutory Interpretation: Human Rights At Stake', (2003) Revenue Law Journal 23.

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Hjalte Rasmussen, *On law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (1986), p. 12.

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character of EU Treaties and its legal order. As Pollicino clarifies, “The Court refers to the aims of the Community and to general principles of EC law, and Community judges sometimes find themselves compelled to interpret from the standpoint of the existential necessities of the Communities and ensure the maintenance of their capacity to function”.²⁰ For instance, the EU is a supranational organisation which has a sui generis legal order without its own legal enforcement mechanism. Since the enforcement of EU law is handed over to Member States, it would not have been implemented uniformly unless direct effect and supremacy principles were created by the Court. These two principles - created through teleological interpretation - are the key milestones for the survival of the EU. In other words, the absence of these principles could have brought an end to the EU as soon as it was established. Similarly, the rule of law and the principle of institutional balance were accepted to tackle with growing lack of accountability by strengthening the status of the EP in EU’s institutional framework through Court’s interpretations. In addition, the vague and general wording of the EU Treaties has compelled the Court to find the correct meaning of a provision, taking into account policy considerations and the objectives of the EU, as in the *Dassonville*, *Cassis de Dijon* and *Keck & Mithouard* judgments. Teleological method is based on the idea that every legal rule has a purpose and sometimes it requires an interpretation to identify it²¹. Since the identification of the purpose of a provision entails the understanding of the true meaning of the whole legal text where it is in²², according to the case-law above, the

T. C. Hartley, 'The European Court, Judicial Objectivity, and the Constitution of the European Union' (1996) 112 LQR

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Oreste Pollicino, "Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint ", German Law Journal 5/3, 2004 p. 288.

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file:///C:/Users/BlueSky/AppData/Local/Temp/harasic.pdf, p. 27.

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Oliver Dörr and Kirsten Schmalenbach, Vienna Convention on Law of the Treaties- A Commentary, (2018) Springer 560.

Court has been doing exactly that. As it is explained by Maduro in EU law, teleological method "... does not refer exclusively to a purpose driven interpretation of the relevant legal rules. It refers to a particular systemic understanding of the EU legal order that permeates the interpretation of all its rules".²³

Under these circumstances, the accusations against Court of being judicial activist or pursuing objectives of the EU at the expense of the Member States becomes unfounded. In fact, as Kmiec points out there is not a monolithic definition for judicial activism, rather it has distinct and contradictory meanings. However, the interpretative method used or goal-oriented judging can be labeled judicial activism, as well as striking down the action of another branch of government or to overturn a judicial precedent.²⁴ While there is none clear-cut concept for judicial activism, it would be unfair to accuse the Court of being judicial activist in a Union founding on the objective of establishing an "ever closer union among the peoples of Europe". In accordance with this objective, what began as purely an economic union has transformed into an organization including political issues. Since the Treaties only set the framework for the purpose of integration, the needs for this evolution could not have been foreseen by the founding fathers.²⁵ Hence, it must be considered that filling in the details might have been left to the Court as a conscious choice due to its interpretive competence under Article 19 (1) TFEU²⁶. Indeed, the Bundesverfassungsgericht was right to declare that the Member States as

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Miguel Poiares Maduro , Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism, article 8 in the European Journal of Legal Studies, Vol.1, Issue 2, pg. 5, December 2007, available at <http://www.ejls.eu/current.php?id=2> ,last visited 22/10/2012

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Keenan D. Kmiec, The Origin and Current meanings of Judicial Activism, California Law Review Vol. 92, No. 5 (Oct., 2004), pp. 1441-1477; Britannica "judicial activism", <https://www.britannica.com/topic/judicial-activism>.

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Pollicino, p. 298.

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“the Masters of the Treaties” since the aims as well as the objectives of the EU set under Article 3 are their will and the Court, as it now considers, has to take them into consideration whenever an interpretation of Treaties is needed.

All in all, The European Union is an organization founded by international treaties spanning ultimate goals without specifying the path to be followed to achieve them precisely. While the aims and objectives clearly defined under Article 3 TEU, the path would be determined in accordance with the framework drawn in the Treaties. In this context, the Court has the responsibility to find out the real purpose of the provisions with respect to the will of the Masters of the Treaties through its interpretive power. As long as it interprets the provisions of the Treaties within the context of whole text, the accusations of judicial activism will go no further than a claim. However without the principles of direct effect and supremacy or the rule of law, democracy and institutional balance, the European Union could not exist and operate.

The EU Values in the EU

The Treaty of Amsterdam introduced the the founding principles of the EU which are liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law into the EU Treaties for the first time as an express provision. Yet, the Treaty of Lisbon not only modified those founding principles into values²⁷ but also inserted new references to the provision. Today Article 2 TEU provides as follows:

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

Although Article 2 TEU is envisaged for Member States, the candidate states are also bound by these values through Article 49 TEU and also Copenhagen political criteria. In other words, these values are not only preconditions for becoming a Member State but also the values that must be preserved and promoted even after acquiring membership.

The Importance of EU Values for the EU

It is obvious that the aim of the EU is not only an economic integration any more. As it is enumerated in Article 3(1) TEU ‘... to promote peace, its values and the well-being of its peoples ...’ are also the aims of the EU. Indeed, all the Member States and the EU are legally obliged to cooperate with each other in order to achieve these aims.²⁸ As a supranational

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Dimitry Kochenov, “The Acquis and Its Principles: The Enforcement of the ‘Law’ vs. the Enforcement of ‘ in the European Union Values’ in A. Jakab and D. Kochenov (eds), *The Enforcement of Eu Law and Values: Ensuring Member States’ Compliance Justice* (Oxford: OUP, 2016), 9-10.

organisation, the functioning and survival of EU depend on EU legal order which entails uniform application through the EU in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. In addition, since the EU has limited power of enforcement under primary law, EU law is required to be enforced by Member States.²⁹ The achievement of the objectives of the EU requires the sincere cooperation of the Union and its Member States in the fulfillment of the tasks arising from the Treaties, avoiding any measures that might endanger the achievement of the EU's objectives pursuant to Article 4(3).³⁰ With this provision, Member States are expected not to ignore EU values based on constitutional initiatives and to help the Union fulfill its promotion of value mission.³¹ However just sincere cooperation is not enough for this, mutual trust among the Member States is also required. Advocate General Sharpston explained mutual trust as follows:³²

Christopher Hillion, 'Overseeing the rule of law in the European Union: Legal mandate and means' (2016) SIEPS 2 < <https://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/>> accessed 07 February 2022.

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<https://www.europarl.europa.eu/factsheets/en/sheet/6/sources-and-scope-of-european-union-law>

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Katalin J Cseres, 'Rule of Law Values in the Decentralized Public Enforcement of EU Competition Law', Andras Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States Compliance* (OUP, 2017) 195.

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Christopher Hillion, 'Overseeing the rule of law in the European Union: Legal mandate and means' (2016) SIEPS 2 < <https://www.sieps.se/en/publications/2016/overseeing-the-rule-of-law-in-the-european-union-legal-mandate-and-means-20161epa/>> accessed 07 February 2022.

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Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and the Czech Republic* ECLI:EU:C:2019:917, Opinion of Advocate General Sharpston para 243.

'... the Member States are obliged, ... to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU'. As a result, the achievement of the Union's objectives requires the uniform application of Union law in all Member States, based on sincere cooperation and mutual trust. And this can only be possible with the embracement of the values laid down in article 2 by all EU Member States. Moreover, these values are also adopted as accession criteria in article 49 in order to protect the proper functioning and the survival of the European Union by preventing the accession of ineligible states.

On the other hand, the values included in Article 2 are intertwined concepts and cannot be considered solely. For instance while rule of law is directly related to equality, democracy, the protection of fundamental rights includes liberty, democracy and rule of law. Therefore, it can be said that article 2 actually determines one of the preconditions regarding the states that could become members of the EU through describing the governmental policy that EU Member States should have. As a matter of fact, the governmental policy in which all these values are included is liberal democracy and the functioning of the European Union seems to depend on the existence of Member States governed by liberal democracy. Thus, the adoption and promotion of these values are a crucial prerequisite not only for launching accession negotiations and signing a treaty of accession, but also for the Member States to sustain the survival of the EU after accession. While article 49 TEU set out the values as a precondition for the accession, the second sentence of the Article 2 TEU emphasizes them as *sine qua non* for the Member States.

To cut it short, both a uniform application of EU law and the main principles, sincere cooperation and mutual trust, which serve the EU to survive and reach its goals can only be exist if only all the Member States have a governmental policy that embraces these values.

The Protection of EU Values

There are three procedures that can be used to protect the EU values in the EU legal order. While the Article 7(2) TEU procedure can be invoked only in case of a 'serious and persistent breach by a Member State' of the values laid down in Article 2, the infringement procedures set out in Article 258-260 TFEU and the preliminary ruling procedure laid down in Article 267 TFEU as an indirect enforcement tool can be the other tools to apply for.

Article 7 TEU

Article 7 provides a two-stage political mechanism to ensure that all EU countries respect the EU common values set out in Article 2. The preventive mechanism, laid down in Article 7 (1) TEU, which can be invoked only in case of a 'clear risk of a serious breach' provides the Council to warn the Member State in question before a 'serious breach' has actually occurred. Only if the serious violation has persisted for a period of time, the sanctioning mechanism, set out in Article 7(2) TEU, which allows the Council to suspend the certain rights of the Member State concerned stemming from EU Treaties can be activated.

It is not clear from the wording of Article 7 what serious breach of the values is, the European Parliament has explained it and the scope of Article 7 through its resolution of 17 September 2020. According to this document "*the scope of Article 7 of the Treaty on European Union is not confined to areas covered by Union law, as indicated in the Commission's Communication of 15 October 2003. therefore, the Union can assess the*

*existence of a clear risk of a serious breach of the common values referred to in Article 2 of the Treaty on European Union not only in the event of a breach in this limited field but also in the event of a breach in an area where the Member States act autonomously. Also, this assessment derives from whereas any clear risk of a serious breach by a Member State of the values referred to in Article 2 of the Treaty on European Union does not concern solely the individual Member State where the risk materialises but has a negative impact on the other Member States, on mutual trust between Member States and on the very nature of the Union.*³³ Since the resolution is about the rule of law backsliding in Poland, the EP states that the amendments made on the functioning of the legislative and electoral system, the independence of the judiciary and the rights of judges, the protection of fundamental rights are all her concerns.³⁴ The rule of backsliding and also the violations of the other EU values in both Poland and Hungary are a result of change of governmental policy in both states and if the current governmental policy had been in place at the time of signing the accession agreements, both countries would not have been accepted for membership on the grounds that they did not meet the conditions in Article 49. Hence, the scope of Article 7 TEU includes changes of governmental policy that transforms the regime into illiberal democracy in Member States which threaten the functioning or the survival of the EU.

However, the requirement of a high decision-making threshold in the Council and in the European Parliament to suspend the certain rights of a Member State in question makes the application of sanction mechanism troublesome. The Member States refrain to invoke the sanction mechanism due to worries that the mechanism may in turn be used against them³⁵.

For the first time in EU's history, Article 7(1) mechanism was initiated against Poland and Hungary due to a clear risk of a serious breach of the rule of law and EU values which derive from the transformation of the regime into authoritarianism in both countries, but the attempt failed on the ground that the threat of these two states to block the invocation

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European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)).

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ibid.

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Gloria Budo, 'EU Common Values at Stake: Is Article 7 TEU an Effective Protection Mechanism?', Barcelona Center for International Affairs, 01 May 2014 <https://www.cidob.org/en/publications/publication_series/documents_cidob/eu_common_values_at_stake_is_article_7_teu_an_effective_protection_mechanism> accessed 13 April 2022.

of the sanction mechanism.³⁶ Thus, purely political nature of this mechanism that relies on Member States' willingness to take action makes it difficult to implement.

The Preliminary Ruling Procedure

The preliminary ruling procedure is laid down in Article 267 TFEU. This procedure is invoked in cases where the interpretation or validity of an EU law is in question by the national courts, including guidance from the Court empowering them to set aside national measures, on their own authority, that runs counter to the EU law.³⁷ The preliminary ruling given by the Court is legally binding not only on the national court which referred it but also on all Member States and their authorities in order to ensure the uniform application of the EU.

The procedure has been triggered by several Member States' national courts regarding the violation of EU values. Although in none of these cases the Court based its decision directly on the non-compliance of Article 2 or Article 49 TEU, the Court's recent case law established through teleological interpretation on enforcement of the value of rule of law is defined as 'truly revolutionary'.³⁸

The first case where the Court discussed the rule of law in the terms of effective judicial protection and judicial protection was *Portugese Judges*.³⁹ The Court stated that

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Reuters staff, 'Poland says it will block any EU sanctions against Hungary' <<https://www.reuters.com/article/us-eu-hungary-poland-idUSKCN1LT0ND>> accessed 07 February 2022; Jan Cienski and Maia de La Baume, 'Poland strikes back at EU on media law' (Politico, 08 January 2016) <<https://www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda/>> accessed 09 May 2022.

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<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legisum:114552>

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Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara 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' (2020) 39/1 Yearbook of European Law p. 6.

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Article 19(1) not only gives a concrete expression to the value of the rule of law specified in Article 2, but also empowers the responsibility of ensuring judicial review in the EU legal order to the Court and the national courts.⁴⁰ The Court based its decision on the relationship of two concepts, sincere cooperation and mutual trust, with the second subparagraph of Article 19(1) TEU, on the grounds that the effective judicial protection is a general principle of EU law stemming from the constitutional traditions common to the Member States.⁴¹ And the relationship between effective judicial protection and judicial independence was linked to the fundamental right to an effective remedy set out in Article 47 of the Charter of Fundamental Rights.⁴² Although the Court emphasized, 'respect for the rule of law as a value, is the basis for common trust between the national judiciaries within the EU',⁴³ it was discussed through Article 19 rather than Article 2 and 49 TEU.

The question referred to the Court in case C-216/18 was whether Ireland should surrender a Polish national to Poland via a European Arrest Warrant, despite negative reports from the Vienna Commission about the independence of the Polish judiciary.⁴⁴ Since the

Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117.

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Ibid. para. 32

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Case C-64/16 (n 40) para.34-35.

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Ibid. para. 41.

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[Protecting the rule of law in the EU \(europa.eu\)](#); Case C-64/16 (n 40) para.30.

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European Arrest Warrant is generally based on mutual trust between national judiciaries, “*not only the decision on executing a European arrest warrant, but also the decision on issuing such a warrant, must be taken by a judicial authority that meets the requirements inherent in effective judicial protection – including the guarantee of independence*”.⁴⁵ The existence of effective judicial review requires ‘... *the national courts, tribunals and the CJEU to ensure the full application of EU law in all Member States and the judicial protection of the rights of individuals under that law*’.⁴⁶ The Court has recognized that there may be limitations on the principles of mutual recognition and mutual trust between Member States in case of exceptional circumstances, such as not having a right to a fair trial. Similarly to the *Portuguese Judges* case, the Court linked Article 19 to the value of the rule of law rather than relying directly on Article 2 and the independence of the judiciary.

*Repubblika*⁴⁷ case was the first decision where the Court linked the rule of law and the judicial independence with Articles 2 and 49 TEU directly through introducing a new principle called non-regression. Its importance emerges from the important statements of the Court that ‘... *compliance by the Member States with these values is a condition for the enjoyment of all the rights deriving from the Treaties and that a State cannot amend its legislation in such a way that would reduce the protection of the value of the rule of law. As such, a Member State is required to ensure that any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules that would undermine the independence of the judiciary*’.⁴⁸ Therefore, the Court, referring to Article 49 and stating

Case C-216/18 PPU *LM* ECLI:EU:C:2018:586.

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Case C-216/18 PPU *LM* ECLI:EU:C:2018:586, para. 56.

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Case C-216/18 PPU *LM* ECLI:EU:C:2018:586 para 50-51; Scheppele et al pp. 6-7.

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Case C-896/19, *Repubblika v Il-Prim Ministru* ECLI:EU:C:2021:311.

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the principle of non-regression, stressed that EU values are precondition for EU membership and that any reduction in the protection of these values would constitute a violation of EU law. Moreover, when reading the Article 49 and the principle of non-regression together, it can evoke the famous customary international law principle -fundamental change of circumstances (*rebus sic stantibus doctrine*)-, since any reduction in the protection of EU values in the Member States after their accession to the European Union would threaten the functioning and the survival of the EU.

Although the non-regression principle was not implemented in *Repubblika*, as predicted it has been used as a legal basis in later cases⁴⁹ such as *Romanian Judges Forum*,⁵⁰ *Poland's Disciplinary regime for judges and Muzzle Law*.⁵¹

As a result, since the *Portuguese Judges* case the Court has evolved a well-established and coherent case-law on the rule of law backsliding.⁵² In addition, the non-regression principle introduced in *Repubblika* has the potential to be used in case of any reduction that threatens the functioning and survival of the EU in the protection of EU values. Since

Mathieu Leloup, “*Repubblika: Anything new under the Maltese Sun?: The ECJ rules on the system of the appointment of judges in Malta*”, *VerfBlog*, 2021, <https://verfassungsblog.de/repubblika/> accessed 10 May 2022.

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For a detailed legal analysis see Laurent Pech, “*Protecting Polish Judges from Political Control: A brief analysis of the ECJ's infringement ruling in Case C-791/19 (disciplinary regime for judges) and order in Case C-204/21 R (muzzle law)*”, *VerfBlog*, 2021, < <https://verfassungsblog.de/protecting-polish-judges-from-political-control/>> accessed 10 May 2022.

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Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația ‘Forumul Judecătorilor din România and Others v Inspekția Judiciară and Others* ECLI:EU:2021:393.

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Case C-791/19 Commission v. Poland (Régime disciplinaire des juges), *EU:C:2021:596*; and also *Case C-204/21 R Commission v Republic of Poland* *EU:C:2021:878*.

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For full list of cases and detailed analysis see [ECJ case law on judicial independence \(europa.eu\)](https://european-courts.eu/cases-and-judgments/)

respecting and promoting EU values is a prerequisite for EU membership, Member States are considered to meet this condition. From that, considering the importance of this condition for the functioning and survival of the EU, it might be considered that Article 49 and 2 are violated if a serious and persistent regression in these values jeopardizes the functioning of the Union. Therefore, preliminary ruling procedure could be the way to make the violating State come into line through interpretive power of the Court as long as national courts apply for preliminary ruling procedure.

The Infringement Procedure

The infringement mechanism is one of the enforcement mechanisms set out under Article 258 and 259 TFEU that can be invoked where Member States fail to implement a provision that is directly enshrined in EU law, by the Commission or any of the Member States. From that, the Commission as the guardian of EU Treaties, and any of the Member States can initiate this mechanism against a Member State of the EU committing serious and persistent violation of founding EU values. Indeed, the Commission applied for infringement mechanism against the rule of law backsliding taking place in Poland and Hungary for several years. In all these cases, the Court held that Poland and Hungary had failed to fulfill their obligations stemming from Article 19 (1) and Article 47 CFR that gives a concrete expression to the value of the rule of law specified in Article 2. However, since the court's jurisdiction is limited to a legally binding determination of a breach of EU law, the only sanction envisaged in case of non-remedy of the breach of EU law is financial penalty which could be useless unless the violation is remedied. On the other hand, interim measure laid down in Article 279 TFEU can be requested from the Court through infringement procedure in order to prevent the damage only if the situation is urgent and the prima facie validity of the factual and legal arguments that justify the acceptance of the application.⁵³ the case-law has added another cumulative condition, balance of interest, to implement interim measure, which means that 'the judge hearing such an application must, ... also weigh up the interests involved'.⁵⁴

However, this procedure remained ineffective against the ongoing rule of law crisis in Poland. Poland not only ignored the Court's interim measure decision but also the financial penalty ordered by the Court due to the non-compliance of its decisions.⁵⁵ And unfortunately there is no other enforcement/sanction mechanism envisaged in EU Treaties to cease Poland's

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Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases and Materials* (5th ed, OUP, 2011) 439; Massimo Francesco Orzan, 'The Procedural Features of Interim Relief Before the Court of Justice of the European Union' in Fulvio Mario Palombina, Roberto Virzo, Giovanni Zara (eds.), *Provisional Measures Issued by International Courts and Tribunals* (Springer 2021) 200.

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Koen Lenaerts and Matthew Radley, 'Recent Case Law of the European Court of Justice in Interim Measure Cases' (2016) 1 *European Law Reporter* 2; Orzan (n 95) 200.

violation. Therefore if the Member States do not comply with Court's decisions, as Poland did, while the breach of EU law continues they still enjoy the advantages of membership.

All in all, all three mechanisms discussed above seem insufficient for different reasons. While Article 7 could not be implemented due to its political nature, preliminary ruling and infringement procedures could be ineffective as it would be enforced by the violating Member State.

An Alternative Way to Protect the EU Values?

As laid down in Article 49 TEU, the respect for and promotion of fundamental values of the EU are preconditions for joining the EU. However, the Member States are also obliged to this condition as it is explained in the decision of the Court where Poland and Hungary challenge the legality of Rule of Law Conditionality Regulation.⁵⁶ According to the Court, the values contained in Article 2 TEU not only define the very identity of the European Union as a common legal order, but also legally binding obligations for the Member States.⁵⁷ Indeed, these values constitute the essential basis of EU's constitutional identity.⁵⁸ In other words if the reduction in the protection of the values occurred now had existed at the time of accession to the European Union, the Treaty of Accession would not have been signed with the Member State in question due to the non-fulfillment of the precondition set out in Article 49. In this

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Case C-791/19 R ECLI:EU:C:2020:277; Case C-204/21 R-RAP ECLI:EU:C:2021:834; Case C-204/21 R ECLI:EU:C:2021:878; Case C-204/21 R ECLI:EU:C:2021:593.

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Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98.

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Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para. 127, 232.

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Ibid.

context, since the existence of these values constitutes an essential basis of the consent of the parties to be bound by the EU Treaties, a serious and persistent change in terms of regression of both candidate and Member States' laws on the respect for and promotion of these values could not only prevent the participation of the candidate countries, but also may cause the suspension of membership rights arising from the EU Treaties. The functioning of the European Union depends on the uniform application of EU law within the scope of the principles of mutual trust among Member States and sincere cooperation between the EU and its members. This can be possible only if the European Union consists of states that respect for these values. Therefore, the precondition of founding values referred to in Article 49 and Article 2 should be read in conjunction with article 3 and article 4(3), and states should still comply with this condition after the membership.

On the other hand, it is difficult to prove any change as the breach of EU values and a threat to the functioning of the EU. However, a serious and persistent breach of EU values which endures systematically could endanger the survival of the EU, such as that occurred in Poland and Hungary.⁵⁹ In both these countries, since 2010 right-wing populist parties have become ruling parties and since then the governmental policies and the regimes of both Member States have been transformed into illiberal democracy and authoritarianism through 'reforms' adopted on constitution, judiciary, media and civil society.⁶⁰ With the change in the governmental policy of both countries, they no longer fulfill the condition related to EU's values which constitutes the essential basis of the consent of the parties to be bound by the EU Treaties. Thus, both Poland and Hungary are also violating the main principles – mutual trust and sincere cooperation – that require Member States to abide by the values set out in Article 2 in order to ensure the functioning of the EU Treaties. Consequently, the serious and persistent breach of EU values that endures systematically could imply to governmental policy changes in the Member States occurred after the accession, that would jeopardize the functioning of the EU, as in Poland and Hungary.

In this regard, there are two options for ensuring the compliance of Member States with Article 2. First, where a question related to the violation of founding values referred to it through preliminary ruling, it might be expected from the Court to ground its decision directly on the connection between Articles 2 and 49 TEU through evolving its non-regression principle. Since the respect for the founding values of the European Union is essential for the

For the explanation of "systemic infringement" see Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara 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' (2020) 39/1 Yearbook of European Law

For a detailed analyze regarding illiberalism and rule of law backsliding in Poland and Hungary see Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies' 3–47; [Miklós Bánkuti](#), [Gábor Halmai](#), and [Kim Lane Scheppele](#), '[Hungary's Illiberal Turn: Disabling the Constitution](#)', (2012) 23/3 Journal of Democracy 138–146

uniform application of EU law which is based on sincere cooperation and mutual trust, the condition set out in Articles 2 and 49 TEU is valid for not only candidate states but also Member States. Therefore, any systematic reduction in the respect for founding values after membership could be interpreted as serious and persistent breach of values that threatens the functioning of the EU on the grounds of Articles 2 and 49 TEU through preliminary ruling procedure. Second, Commission or any of the Member States, despite its being a delicate task to invoke Article 259 in the relations between Member States, may initiate an infringement procedure on the grounds that the Member State concerned no longer fulfills the conditions that constitute the constitutional identity of the EU laid down in Articles 2 and 49 TEU and it jeopardizes the functioning of the EU. Thus, Commission, as the guardian of EU Treaties, may request the suspension of certain rights of membership stemming from the EU Treaties as an interim measure set out in Article 279 TFEU on the grounds that the survival of the EU is at stake.

To put it differently, in accordance with the principle of non-regression, any systematic reduction in the protection of EU values in any of the Member State arising from a change of governmental policy that threatens the operation of EU Treaties constitutes a serious and persistent breach of EU values. And the suspension of the membership rights stemming from the EU Treaties as an interim measure would force the Member State in question to remedy the violation if it still wishes to enjoy the benefits of membership. However, it is clear that the criteria for interim measures are met, as the threat facing the Union is likely to cause imbalance of interest among the Member States and serious irreparable damage through the violation of EU values, linked directly to the principles of mutual trust and sincere cooperation. And since Article 279 empowers the Court to consider interim measures, it seems likely that it may decide to suspend the membership rights in order to prevent further damages.

Conclusion

The on-going rule of law crisis in the EU have displayed the weaknesses of the enforcement mechanisms in EU Treaties against the violation of EU values by EU Member States. While the purely political nature of the Article 7 mechanism and the high decision-making threshold make it difficult to implement, the need for close cooperation between Court and national courts for preliminary ruling, and the enforcement of infringement decisions by the Member State in question are also troublesome. However, the lawlessness of Poland and Hungary against the Court's decisions regarding their violations of the principle of rule of law confirms these weaknesses.

Consequently if the violation of EU values becomes systematic by a Member State due to the change of its governmental policy, the future of the union would be at stake, as this jeopardizes the uniform application of Union law. In this context, Commission as the guardian of Treaties could invoke infringement proceedings against the Member State concerned and ask for the suspension of its certain rights of membership as an interim measure from the Court or if the issue brought before the Court through preliminary ruling, the Court could base its decision directly on the connection between Articles 2 and 49 TEU by taking into consideration the principles of sincere cooperation and mutual trust through teleological interpretation.

Although the enforcement power still remains at Member States in these two options, while the suspension of rights as an interim measure prevents Member States in question to enjoy benefits of EU membership could be an effective sanction to force him to comply with Article 2 TEU. And the use of evolved non-regression principle as a legal basis in cases where EU values are systematically violated encourages individuals to invoke preliminary ruling.