UDK 341.645(4-67EU):340.131(439)
Review article

HUNGARY AND THE LUXEMBOURG COURT: THE CJEU'S ROLE IN THE RULE OF LAW BATTLEFIELD

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ABSTRACT

After the introduction of the then Article F.1 TEU by the Amsterdam Treaty, later supplemented by the Nice Treaty, Hungary has earned the dubious reputation to be the first Member State against which an Article 7 TEU procedure has been triggered. While the predominantly political process is apparently stalled for the time being, the Court had to deal with various aspects of the deteriorating rule of law situation. Although forming part of an undeniably fragmented approach, the Court's judgments nevertheless clearly attest the retrogressive developments in Hungary since 2010.

The analysis of the Court's jurisprudence is based on the qualitative measurement of the rule of law indicators drawn up by the Venice Commission of the Council of Europe. The identification of the cases pertinent to our investigation presents a challenge by itself as there is no label attached to a case dossier titled "rule of law". In addition, several relevant cases deal with issues which prima facie do not have a bearing on this topic. Thus, e.g. the case relating to the radical lowering of the retirement age for Hungarian judges apparently revolves around age discrimination in the workplace while in fact these measures were politically motivated and had an adverse effect on judicial independence.

The subject-matter of the cases identified so far range from the independence of the judiciary and regulatory bodies to the functioning of NGOs and higher education institutions; from the criminalisation of assistance for asylum seekers to the judicial challenge of the conditionality regulation. Most cases are infringement proceedings initiated by the European Commission but the Court was also turned upon through preliminary reference or actions for annulment.

By analysing the submissions of the parties, the opinions of the Advocate General as well as the Court's assessment thereof, the paper aims to evaluate the role of the Court: its potential and the limitations. While not denying the Court's contribution to the provision of consistent responses against the systemic threats against EU values, there are various institutional and procedural constraints hampering the Court's ability to secure compliance in the subject area.

Keywords*: Court of Justice of the European Union, conditionality regulation, rule of law, democratic backsliding, Hungary*

1. INTRODUCTION

Whereas at the beginning of the integration project it was thought that the Union posed more serious threat to the legal order of the Member States than the other way round,[1] this is not the case anymore. On the positive side, the EU has evolved into a value-based organization with a growing number of democratic traits, on the negative side, several Member States have recently backslid from liberal to illiberal democracies.[2]

In general, there are four major justifications invoked by illiberal governments to rationalize their variance with European values. According to Kochenov and Bárd, these include the invocation of national sovereignty in general and the invocation of national security in specific circumstances (see e.g. the so-called Lex CEU, Lex NGO and Stop Soros cases below), in addition, the more sophisticated tool of reference to constitutional identity, and finally, disinformation campaigns.[3]

As there are numerous studies on the illiberal system in Hungary and the systematic disabling of checks and balances,[4] the present article focuses on the role of the EU institutions, more specifically the role of the CJEU in the fight against rule of law backsliding in Hungary. In addition, the paper also examines the EU toolbox to counteract progressive destruction of law in Member States. The paper starts with the recapitulation of the concept of the rule of law and the identification of the cases related to rule of law in Hungary (Section 2), then it goes on to briefly

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1 See e.g. the *Solange*-saga: Solange I, BverfGE 37, 291 (1974); Solange II, BverfGE 73, 339 (1986); Solange III, BverfGE 89, 155 (1993); Solange IV, BverfGE 102 (2000). See also Hilpold, P., *So Long Solange? The PSPP Judgment of the German Constitutional Court and the Conflict between the German and the European Popular Spirit*, Cambridge Yearbook of European Legal Studies, Vol. 23, 2021, pp. 159-192; Komanovics, A., *A Lisszabonba vezető rögös út, avagy az Unió emberi jogi deficitjének felszámolása*, in: Pánovics A. (ed.), Együtt Európában. Múlt, jelen, jövő. Egyetemi tanulmányok, Budapest 2009, pp. 156-196

2 Democratic backsliding: rule of law backsliding is a 'process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.' Pech, L.; Scheppele, K.L., *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies Vol. 19, No. 3, 2017, at p. 8

3 Kochenov, D.; Bárd, P., *Rule of Law Crisis in the New Member States of the EU. The Pitfalls of Overemphasising Enforcement*, RECONNECT, Working Paper No. 1, 2018, [https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf], Accessed 17 May 2022, p. 10

4 See the various publications of RECONNECT, a multidisciplinary research project [https://reconnect-europe.eu/publications/], Accessed 17 May 2022, Kochenov; Bárd, *op. cit.*, note 3; see the 2020, 2021 and 2022 issues of the Hungarian journal Fundamentum [http://fundamentum.hu/], Accessed 17 May 2022; or various posts and debates of the Verfassungsblog [https://verfassungsblog.de/tag/rule-of-law/], Accessed 17 May 2022

describe the facts of the cases and the major findings of the Court (Section 3), finally it investigates the contribution of the Court, as well as other institutions, to the protection of rule of law and basic values of the EU (Section 4). In doing so, the article examines whether the toolbox available for the EU is sufficient to secure adherence to European values, whether the institutions deployed the instruments in a meaningful manner, and whether existing instruments should or could be fine-tuned.

The article finds that there is a great asymmetry between the values laid down in Article 2 TEU and the competence of the institutions to act upon these values.[5] The reasons for the EU's inaction[6] are numerous: as far as the Court is concerned, its room for manoeuvre is limited by its judicial character and the institutional and legal framework set by the TFEU (e.g. the types of actions or the *locus standi* rules). In addition, the Court sometimes failed to exploit even those restricted avenues. Indeed, the modest results are partly due to extrinsic factors, including the false claims to democratic legitimacy,[7] symbolic and/or creative compliance, as well as the selective strategy of the Commission in launching infringement actions.

2. THE IDENTIFICATION OF RULE-OF-LAW RELATED CASES

2.1. The concept of rule of law

In order to identify the cases, the notion of the "rule of law" has to be clarified first. While the founding Treaties did not originally contained the concept of the rule of law, it was "encapsulated in the first Treaty provision describing the role of the European Court of Justice" providing that the Court "shall ensure that in the interpretation and application of this Treaty the law is observed".[8] Formal enshrinement in the Treaties was preceded by a judicial reference in *Les Verts* where the Court found that "… the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic

5 Wouters, J., *Revisiting Art. 2 TEU: A True Union of Values*, European Paper Vol. 5, No. 1, 2020, pp. 255-277, at p. 260: "there is a striking asymmetry between the proclamation of the values in Art. 2 and the Union's competences to act upon these values."

6 *Ibid.*, p. 260

7 Since its election in 2010 until the latest (2022) reelection, Fidesz has enjoyed supermajority in Parliament with just a few exceptions, thus the capturing of institutions and the democratic backsliding has taken place without the *formal* violation of constitutional norms

8 Art. 164 EEC Treaty

constitutional charter, the Treaty."[9] It was the SEA which contained the first brief reference to the notion in its preamble, then in the Maastricht Treaty the term was mentioned in relation to the Common Foreign and Security Policy in TEU as well as the development cooperation in the EC Treaty.[10] The 1993 Copenhagen criteria defining whether a State is eligible to join the European Union provide, *inter alia*, that "[m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".[11] It is remarkable to note that at the time when the accession criteria were adopted the EU itself had no mechanism ensuring that "old" Member States meet the same criteria.

In 1997, a new provision was introduced in Article 6 TEU by the Amsterdam Treaty stipulating that the Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." The sanctioning mechanism introduced by the Amsterdam Treaty has been complemented by a preventive mechanism in the Nice Treaty, laid down in Article 7 TEU.

The Lisbon Treaty moved the principles from Article 6 to Article 2 TEU, replaced the term "principles" with "values", a terminological variation probably devoid of legal relevance,[12] and expanded the list containing the values.[13] With the abolition of the pillar structure, the Court's jurisdiction was extended to cover the Area of freedom, security and justice. In addition, the Court gained jurisdiction to review of the legality of the acts of the European Council intended to produce legal effects vis-à-vis third parties.[14] Finally, the Court's jurisdiction was extended to give preliminary rulings concerning the validity and interpretation of acts of the bodies, offices or agencies of the Union.[15]

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9 Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166, par. 23

10 Art. J.1(2) TEU and Art. 130u(2) EC Treaty, respectively

11 European Council Conclusions of 21-22 June 1993, SN 180/1/93 REV 1; [https://www.consilium.europa.eu/media/21225/72921.pdf], Accessed 17 May 2022

12 Pech, L., *The Rule of Law in the EU: The Evolution of the Treaty Framework and Rule of Law Toolbox*, RECONNECT Working Paper No. 7, 2020, [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3608661], Accessed 17 May 2022, at p. 13

13 Art. 2 TEU provides that 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."

14 Art. 263 TFEU

15 Art. 234 TFEU. See e.g. Magen, A.; Pech, L., *The rule of law and the European Union*, in: May, C. and Winchester, A. (eds.): Handbook on the Rule of Law. Cheltenham: Edward Elgar 2018. pp. 235–256, at pp. 236-238; Pech, L.; Scheppele, K.L., *Illiberalism Within: Rule of Law Backsliding in the EU,* Cambridge Yearbook of European Legal Studies 2017, Vol. 19, pp. 3-47, at p. 3

Starting with the 1999 Austrian elections, the EU has been confronted with rule of law crises in several Member States, such as the collective expulsion of Roma people by France to Romania and Bulgaria,[16] the democratic backsliding starting with the compulsory early retirement of Hungarian judges and prosecutors, the 2012 constitutional crisis in Romania,[17] then the capture of the judiciary in Poland. Indeed, the enthusiasm for European values seems to have vanished in various "new" Member States.[18]

Until the 2010s, the gradual evolution of the Treaty framework was not matched with similar developments with regard to the EU toolbox. Since then, the European Commission and the Council have developed various instruments to ensure respect for the rule of law in all Member States. Certain tools aim at *prevention and promotion*, including the following:

- *The European Rule of Law Mechanism*[19] is a yearly cycle with an *annual rule of law report* at its centre. The second (the latest) annual report was adopted by the Commission in July 2021[20] including 27 country chapters.[21]
- The *EU Justice Scoreboard*[22] is an annual report prepared by the Commission, providing comparable data on the independence, quality and efficiency of national justice systems.

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16 "EU may take legal action against France over Roma", *BBC News, 14 September 2010*, [https://www.bbc.com/news/world-europe-11301307], Accessed 17 May 2022

17 Hipper, A. M., *Romania In Hungary's Footsteps: Different Victor, Same Strategy*, VerfBlog, 2012/7/12, [https://verfassungsblog.de/romania-hungarys-footsteps-victor-strategy/], Accessed 17 May 2022; Perju, V., *The Romanian double executive and the 2012 constitutional crisis*, International Journal of Constitutional Law, Vol. 13, No. 1, 2015, pp. 246–278

18 Kochenov; Bárd, *op. cit.*, note 3, p. 7; Scheppele, K. L.; Kochenov, D.; Grabowska-Moroz, B., *EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union*, Yearbook of European Law, Vol. 39, 2020, pp. 3–121

19 European Commission Communication, Strengthening the Rule of Law within the Union. A blueprint for action, COM (2019) 343 final, 17 July 2019

20 2021 Rule of Law Report: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2021) 700 final, Brussels, 20 July 2021. See also the 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary. Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2021 Rule of Law Report. The rule of law situation in the European Union. Commission Staff Working Document. SWD/2021/714 final, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021SC0714], Accessed 17 May 2022

21 2021 Rules of law report – Communication and country chapters, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en], Accessed 17 May 2022

22 Commission Communication, The EU Justice Scoreboard. A tool to promote effective justice and growth, COM (2013) 160 final, p. 1. See also EU justice scoreboard, available at: [https://ec.eu-

- *The European Semester* is a yearly process resulting in country-specific recommendations on macroeconomic and structural issues, including on justice systems and anti-corruption.[23]
- In the framework of the *Cooperation and Verification Mechanism*, the Commission monitors and reports on progress made in Romania and Bulgaria in a number of defined area, namely judicial reform, corruption, and the fight against organised crime.[24]
- In 2014, the Council introduced its own dialogue-based instrument, the *Annual Rule of Law Dialogue*.[25] The dialogues are conducted on a thematic basis. The first evaluation of the tool took place in 2019 when the Council found that the dialogue could be "stronger, more result-oriented and better structured", "preparations for the dialogue [could] be more systematic". The Council agreed that proper follow-up should be ensured.[26]

While the tools listed above focus on prevention, the EU has several instruments at its disposal to *respond* to rule of law issues:

- The Commission or the Member States may launch *infringement proceedings*.[27] Some scholars suggested that the Commission ought to make more extensive use of interim measures as rule of law infringements could lead to irreversible harm. It has also been argued that the Court should "automatically prioritize

ropa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en], Accessed 17 May 2022. The latest: [https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf], accessed 17 May 2022

23 The European Semester, available at: [https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en], Accessed 17 May 2022

24 Assistance to Bulgaria and Romania under the CVM, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm_en], Accessed 17 May 2022

25 Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20-21. The tool was adopted "as a response to the Commission's Rule of Law Framework, clearly disliked by the Council". Fleck, Z.; Chronowski, N.; Bárd P., *The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary*, MTA Law Working Papers 2022/4, [https://jog.tk.hu/mtalwp/the-crisis-of-the-rule-of-law-democracy-and-fundamental-rights-in-hungary], Accessed 17 May 2022, at p. 19

26 Par. 7 of the Presidency conclusions – Evaluation of the annual rule of law dialogue, 19 November 2019, [https://www.consilium.europa.eu/media/41394/st14173-en19.pdf], Accessed 17 May 2022. The next evaluation will take place in 2023

27 Arts. 258 and 259 TFEU

and accelerate" rule of law related cases.[28] The Commission indicated that it would develop its practice in this regard.[29]

- *Preliminary references*, while not specifically designed to address democratic backsliding, have proved to be a useful tool especially in those Member States that have adopted measures to curb judicial independence.
- *Art. 7 TEU* was introduced in Amsterdam with a view to address serious breaches to the rule of law, with dialogue and possible sanctions. In its current version, it includes a preventive as well as a sanction mechanism. The preventive mechanism can be triggered by one-third of the Member States, the Commission or the European Parliament, and as of May 2022, two Member States have become under scrutiny. As the sanctions mechanism requires the unanimous vote of the European Council, its useful effect is significantly curbed if more than one Member State are involved as they might join forces and mutually shield each other.
- In 2014, the Commission launched an early-warning, dialogue-based instrument, the *Rule of law framework*[30] to address systemic threats to the rule of law in EU countries. Whereas the Commission has refused to apply the tool against Hungary, in 2016 it was triggered in relation to Poland.[31] This led to the activation of Art. 7(1) against Poland in December 2017.
- Regulation 1303/2013 (the Common Provisions Regulation) envisages the suspension of payment from EU funds "if there is a serious deficiency in the effective functioning of the management and control system of the operational programme".[32]

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28 Bárd, P.; Chronowski, N.; Fleck, Z.; Kovács, Á.; Körtvélyesi, Zs; Mészáros, G., *Is the EU toothless? An assessment of the EU Rule of Law enforcement toolkit*, MTA Law Working Papers 2022/8, [https://jog.tk.hu/mtalwp/is-the-eu-toothless-an-assessment-of-the-eu-rule-of-law-enforcement-toolkit], Accessed 17 May 2022, at p. 6

29 Commission Communication, Strengthening the Rule of Law within the Union. A blueprint for action, COM (2019) 343 final, at p. 14

30 Commission Communication issued in 2014: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2, 19 March 2014

31 European Commission, Readout by the First Vice-President Timmermans of the College Meeting of 13 January 2016, Speech/16/71

32 Art. 142(1)a) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006

- Another noteworthy development is the adoption of the rule of law conditionality regulation.[33] The regulation focuses on the protection of the financial interest of the EU and is accompanied by a set of guidelines prepared by the Commission to clarify a number of elements related to the functioning of the conditionality regulation.[34]

Albeit the Treaties contain no definition thereof,[35] this does not mean that the rule of law "reveals serious conceptual uncertainties and serious inconsistencies" or is "a complex concept which cannot be precisely defined".[36] There are many fundamental concepts of EU law not specified in the Treaties which have been developed by the Court in its jurisprudence.[37] Furthermore, even if the rule of law is an "essentially contested concept",[38] there are various documents providing a detailed description of its elements. This article is based on the definitions provided by the Venice Commission, including the 2011 Report on the rule of law[39] and the 2016 Rule of law checklist[40] as well the European Commission's Communication on the Rule of Law Framework.[41] The latter provides that:

> The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system. Nevertheless, case law of the Court of Justice of the European Union … and of the European Court of Human Rights, as well

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33 Regulation (EU, Euratom) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22. December 2020, p. 1

34 Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, C (2022) 1382 final, 2 March 2022

35 Thus, the Hungarian government has argued that the concept "lacks well-defined rules and remains the subject of much debate internationally and among national constitutional bodies and academia.", Varga, J., *Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask | View*, Euronews, 22 November 2019, [www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to-know-about-rule-of-law-hungary-view], Accessed 17 May 2022

36 As argued by Hungary in case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 99 and 200. Furthermore "the 'core elements' of the concept of 'the rule of law' … are themselves theoretical categories and principles … and cannot be converted into rules" (par. 201)

37 The concept of charges having equivalent effect to customs duties, measures having equivalent effect to quantitative restrictions, worker, equal pay for equal work, etc.

38 Kochenov; Bárd, *op. cit.*, note 3, p. 19; Pech, L. *et al.*, *Meaning and Scope of the EU Rule of Law,* RECONNECT, Deliverable 7 February 2020, [https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf], Accessed 17 May 2022, p. 6

39 Venice Commission, Report on the rule of law, CDL-AD(2011)003rev

40 Venice Commission, Rule of Law Checklist, CDL-AD(2016)007

41 Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final

> as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.
>
> Those principles include *legality*, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; *legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law*.[42]

The list can be extended with e.g. the principle of accessibility of the law, the principle of the protection of legitimate expectations; the principle of proportionality, prohibition of corruption and the principle of civilian control of security forces.[43] In light of the definitions put forward by the Venice Commission and the European Commission, by now there is comprehensive and widely accepted definition of the rule of law and its elements.[44] The principle of rule of law, together with its core subcomponents can be found in the primary and secondary sources of EU law, in the case law of the CJEU as well as in soft law documents, thus "one may conclude that it is not the lack of a definition which may be the issue but rather the multiplication of provisions which emphasise different components of the rule of law."[45]

2.2. Identification of key cases

In view of the above, the next step is the identification of those cases which can be qualified as rule of law related. Not an easy task since the cases do not necessarily explicitly contain the keyword "rule of law", or they might be only indirectly related to the rule of law. Thus the cases stemming from a string of concerning developments impeding access to asylum in Hungary are in strong correlation with the rule of law deficit. In spite of this they are not listed here since they form part of

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42 COM (2014) 158 final, p. 4; emphasis in the original. See also 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, COM (2019) 163 final. This document adds *separation of powers* to the list, p. 1

43 Kochenov, D.; Pech, L., *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, European Constitutional Law Review, Vol. 11, No. 3, 2015, pp. 512-540, at pp. 522-523; Magen; Pech, *op. cit.*, note 15, p. 243

44 For a detailed analysis see e.g. Pech *et. al.*, *op. cit.*, note 39; Pech, L., *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, European Constitutional Law Review, Vol. 6, No. 3, 2010, pp. 359-396

45 Pech *et. al.*, *op. cit.*, note 39, pp. 21-24

a very specific problem.[46] Identification of relevant cases are further complicated by the miscategorisation of cases, as is the case with the compulsory retirement of Hungarian judges, which was decided on the basis of EU antidiscrimination law. This is not to say that the list is necessarily complete, yet it is submitted that the cases listed below are the most relevant from the perspective of this paper. The Venice Commission was also involved with regard to certain contested Hungarian legislation, thus its opinions will also be explored where relevant.

Table 1. List of cases

	Case	Issue	Type of action	Interveners (in support of whom)	Decision
1	C-286/12 *Commission v Hungary*	Radical lowering of the retirement age for Hungarian judges	Infringement proceedings	---	Infringement
2	C-288/12 *Commission v Hungary*	Premature termination of office of the Hungarian Data Protection Supervisor	Infringement proceedings	European Data Protection Supervisor (Commission)	Infringement
3	C-78/18 *Commission v Hungary*	Transparency of associations / Lex NGO	Infringement proceedings	Sweden (Commission)	Infringement
4	C-66/18 *Commission v Hungary*	Higher education / Lex CEU	Infringement proceedings	---	Infringement
5	C-650/18 *Hungary v Parliament*	Triggering Art. 7 TEU by EP	Annulment	Poland (Hungary)	Action dismissed
6	C-821/19 *Commission v Hungary*	Criminalisation of assistance for asylum seekers / Lex Stop Soros	Infringement proceedings	---	Infringement
7	C-564/19 *Criminal proceedings against IS*	Illegality of the order for reference	Preliminary reference	Observations by: Netherlands, Sweden, Commission	Incompatible with EU law
8	Cases C-156/21 & C-157/21 *Hungary and Poland v Parliament and Council*	Rule of law conditionality regulation	Annulment	Poland and Hungary (in support of the other) (in support of the EP and the Council) Belgium, Denmark, Germany, Ireland, Spain, France, Luxembourg, Netherlands, Finland, Sweden; Commission	Action dismissed

Source: Author

[46] See e.g. joined cases C-643/15 and C-647/15, *Hungary and Slovakia* v. *Council*, ECLI:EU:C:2017:631; joined cases C-924/19 PPU and C-925/19 PPU, *FMS and Others* v. *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, ECLI:EU:C:2020:367, or case C-808/18, *Commission* v. *Hungary*, ECLI:EU:C:2020:1029

3. THE KEY DECISIONS

3.1. Case C-286/12, *Commission* v. *Hungary* (Radical lowering of the retirement age for Hungarian judges)[47]

The contested Hungarian measures introduced by the amendment of the relevant Hungarian legislation in 2011 stipulated that judges and prosecutors who have reached the general retirement age, namely 62, were obliged to retire. As the European Commission considered this to constitute age-related discrimination contrary to the Directive on equal treatment in employment and occupation,[48] it brought an action against Hungary. In its submission, Hungary contended that the objective of the reform was the standardisation of the rules relating to retirement for all persons as well as the facilitation of the entry of young lawyers into the judicial system with a view to establishing a "balanced age structure".[49] Whereas the Court accepted that both aims could constitute legitimate employment policy objectives, it found that "the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned" and the objective could have been achieved by less restrictive measures, e.g. by the gradual decrease of the upper-age limit. As regards the second aim, the contested national legislation was not appropriate to achieve the objective of establishing a more balanced age structure.[50]

Whereas the Court's conclusions are certainly correct, it is regretted that the Court remained within the anti-discrimination framework suggested by the Commission and failed to consider the impact of the Hungarian measures on judicial independence. In its opinion, the *Venice Commission* could not find any convincing justifications either, bearing in mind that excessive duration of proceedings, partly stemming from the heavy workload of the courts, is a source of concern in Hungary. Thus, the real motives behind the new regulation seem to have been to overcome judicial opposition and constrain judicial independence by forcing the judges into early retirement, more specifically "to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system" where the President of the NJO (National Judicial Office), elect-

47 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0286], Accessed 17 May 2022

48 Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000], OJ L 303

49 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, paras. 25, 28 and 59

50 Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687, paras. 61-62, 68, 70-71 and 77

ed by the Parliament for 9 years, has excessive weight in the appointment of court presidents.[51]

A new legislation was adopted by the Hungarian Parliament on 11 March 2013 in the implementation of the judgment,[52] retired court leaders however were not reinstated into their former (leading) positions if that place was already filled with new appointees.

3.2. C-288/12 *Commission v Hungary* (Premature termination of office of the Hungarian Data Protection Supervisor)[53]

In Hungary, the Data Protection Supervisor was made responsible for the performance of the tasks entrusted to supervisory authorities under the Data Protection Directive.[54] In 2012, however, the system was reformed to replace the Supervisor with a national authority for data protection, thus Mr András Jóri, who was appointed Data Protection Supervisor in 2008 for a term of six years, had to vacate office before serving his full term. The Commission, supported by the European Data Protection Supervisor, took the view that the Hungarian measures were contrary to the Directive, which stipulates that the independence of the authorities responsible for the protection of personal data is to be guaranteed.

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51 "The Venice Commission examines this issue *not from the special angle of age discrimination, but from its effect on judicial independence*. From this point of view, the retroactive effect of the new regulation raises concern. … The Commission does not see a material justification for the forced retirement of judges (including many holders of senior court positions). *The lack of convincing justifications may be one of the reasons for which questions related to the motives behind the new regulation were raised in public*. […] This provision seems not to be related to the general issue of the retirement age, but to *the will of Parliament to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system*, giving the newly elected President of the NJO the essential role in these appointments. Bearing in mind the heavy workload of several courts, it is difficult to justify forcing judges to retire early, on the one hand, while not providing for a speedy filling of vacancies, on the other." (Emphasis added) Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, CDL-AD(2012)001-e, paras. 104 and 106, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e], Accessed 17 May 2022. Described as "losing by winning" by Scheppele; Kochenov; Grabowska-Moroz, *op. cit.*, note 19, p. 3

52 Law XX of 2013 on the legislative amendments relating to the upper age limit applicable in certain judicial legal relations,11 March 2013, Magyar Közlöny, 2013/49

53 Case C-288/12 *European Commission v Hungary* ECLI:EU:C:2014:237, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62012CJ0288], Accessed 17 May 2022

54 Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281, p. 31

The Court started by pointing out that the data supervisory authorities must be allowed to perform their duties free from external influence. This entails an obligation for the Member States to allow that authority to serve its full term of office. Supervisory authorities are hindered in the independent performance of their tasks if State authorities could exercise a political influence over their decisions. If premature termination of office were permissible it could lead the Supervisor to enter into a form of prior compliance with the political authority, which is incompatible with the requirement of independence.[55]

Similarly to the early retirement case, the Court missed the opportunity to consider the wider context even though here it made references to the danger of inadmissible political influence. The Venice Commission was more categorical: it was not convinced by the contention of the Hungarian Government that the reform was necessary as new information technology required more efficient action, and that an administrative body could work more efficiently. The *Venice Commission* took the view that the Supervisor could have been endowed with the necessary resources if there had been the requisite will of the political decision-makers.[56]

3.3. Case C-78/18 Commission v. Hungary (Transparency of associations / Lex NGO)[57]

In 2017, Hungary introduced a law[58] (Transparency Law) which imposed obligations of registration, declaration and publication on certain categories of civil society organisations directly or indirectly receiving support from abroad exceeding a certain threshold, and which provided for the possibility of applying penalties to organisations in violation of the provisions of the law. Such NGOs must also indicate on their homepage and in their publications that they had been classified as an organisation in receipt of support from abroad.

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55 Case C-288/12 *European Commission v Hungary* ECLI:EU:C:2014:237, paras. 50-54 – The only step made in implementation of the judgment was a simple apology issued by the minister of justice to the former Data Protection Supervisor, [https://tasz.hu/cikkek/nyilt-level-az-igazsagugyi-miniszternek], Accessed 17 May 2022. This also shows the inexplicable lack of use of interim measures by the Court, and the pressing need therefor.

56 Opinion on Act CXII of 2011 on informational Self-determination and Freedom of Information of Hungary, CDL-AD(2012)023-e, available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)023-e], Accessed 17 May 2022, paras. 28-29

57 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0078], Accessed 17 May 2022

58 Law No. LXXVI of 2017 on the Transparency of Organisations which receive Support from Abroad,13 June 2017, Magyar Közlöny 2017/93. Sport associations as well as religious organisations are, however, exempted from the application of the law

In the view of the Commission, supported by Sweden, this constituted discriminatory, unjustified and unnecessary restrictions on foreign donations to civil society organisations, in breach of Hungary's obligations under Article 63 TFEU and Articles 7, 8 and 12 of the Charter of Fundamental Rights of the European Union.

The Court found that the difference in treatment based on the origin of the capital, thus based on the place of residence or the registered office of the donors, constituted *indirect discrimination on the basis of nationality* contrary to the free movement of capital.[59] While the objective consisting in increasing transparency in respect of the financing of associations may be considered to be an overriding reason in the public interest, Hungary did not establish the existence of a genuine, present and sufficiently serious threat to a fundamental interest of society.[60] The Transparency Law was based on a presumption that financial support sent from other Member States or third countries was intrinsically suspect.[61]

By hindering the activities of civil society organisations, and hence the achievement of the aims which they pursue, the Transparency Law restricted the right to the *freedom of association*, which constitutes one of the essential bases of a democratic and pluralist society.[62] Similarly, the Court found that imposing or allowing the communication of personal data such as the name, place of residence or financial resources of natural persons to a public authority must be characterised as an interference in their *private life* and the right to the *protection of personal data*. While it is true that public figures cannot claim the same protection of their private life as private persons, donors granting financial support to civil society organisations cannot be regarded as public figures, contrary to the submission of Hungary.[63]

Hungary contended that increasing the transparency of the financing of associations must be regarded as an objective of general interest recognised by the Union, this was, however, dismissed by the Court which found that the provisions of the Transparency Law could not be *justified* by any of the objectives of general interest which Hungary relied upon.[64]

In its opinion on the Transparency Law, the *Venice Commission* found that whereas on paper certain provisions requiring transparency of foreign funding may appear

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59 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 62

60 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 95

61 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, par. 93

62 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 116-119

63 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 120-134

64 Case C-78/18 *European Commission v Hungary*, ECLI:EU:C:2020:476, paras. 139-142

to be in line with the standards, they cannot serve as a pretext for limiting the legitimate activities of these associations. The reasons behind the exclusion of sports and religious organisations from the scope of the act is not clear; the reporting, labelling obligations imposed on civil society organisations are excessive and the sanctions are disproportionate.[65]

The contested Hungarian legislation was repealed on 18 May 2021, with effect from 30 June 2021, and such a quash would have constituted adequate implementation of the CJEU judgment. Regrettably, the 2017 law was replaced by Law XLIX of 2021 on the transparency of civil organizations whose activity is liable to influence public life, which is again based on the presumption that any activity aimed at influencing public life is *a priori* suspicious. In addition, the State Audit Office[66] was vested with the task of carrying out and publishing annual audits of NGOs with a budget of over €55,000, even if the organisations do not receive public funds. It must be noted that under Hungarian law the competence of the State Audit Office covers only *public* finances.[67] Finally, religious and sports organisations are once more exempt from such audits, constituting an incomprehensible and unjustified discrimination between the various types of civil organisations.

3.4. Case C-66/18 *Commission v Hungary* (Higher education / Lex CEU)[68]

In 2017, the Hungarian Law on Higher Education was amended,[69] providing first, that higher education institutions from States outside the European Economic Area (EEA) could continue their activities in Hungary only if an *international treaty* existed between Hungary and their State of origin and, second, that all foreign higher education institutions who wanted to offer higher education in Hungary were required also to *offer such education in their State of origin*. There

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65 European Commission for Democracy Through Law (Venice Commission), Hungary – Preliminary Opinion on the Draft Law on the Transparency of Organisations Receiving Support from Abroad. Opinion 889/ 2017 of 2 June 2017, CDL-PI(2017)002, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2017)002-e], Accessed 17 May 2022, para. 63

66 (*Hun.),* Állami Számvevőszék

67 Art. 43(1) of the Hungarian Fundamental Law (i.e. constitution) provides that "The State Audit Office shall be the organ of the National Assembly responsible for financial and economic audit. Acting within its functions laid down in an Act, the State Audit Office shall audit the implementation of the *central budget*, the administration of *public* finances, the use of funds from *public* finances and the management of *national assets*. …" (Emphasis added)

68 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0066], Accessed 17 May 2022

69 Law No CCIV of 2011 on national higher education was amended by Law No XXV of 2017. The legislative process was extremely time-constrained: the draft was tabled by the minister of human resources on 28 March 2017, the law was adopted just a week later, on 4 April 2017

was only one foreign institution in Hungary which did not meet the new requirements, the Central European University (CEU), founded under the law of New York State by the Hungarian-born US businessman George Soros. The Commission thought that the Hungarian measures are incompatible with GATS (General Agreement on Trade in Services), Articles 49 (freedom of establishment) and 56 TFEU (free movement of services) and Articles 13, 14(3) and 16 of the Charter of Fundamental Rights (academic freedom, the freedom to found higher education institutions and the freedom to conduct a business).

As regards compatibility with GATS, it suffices to say that the Court found the Hungarian measures incompatible with the commitments in relation to national treatment given under the GATS as both requirements modified the conditions of competition in favour of Hungarian providers, contrary to Article XVII of the GATS.[70]

The requirement of genuine teaching activity in the State of origin was found to be rendering less attractive the exercise of the freedom of establishment in Hungary for nationals of another Member State who wished to establish themselves in Hungary, thus constituting a restriction on the freedom of establishment which could not be justified by Hungary's arguments based on maintaining public order, nor on those based on overriding reasons in the public interest relating to the prevention of deceptive practices and the need to ensure the good quality of higher education.[71]

The Hungarian measures were found incompatible with the Charter inasmuch as the measures at issue were capable of hampering the academic activity of the foreign higher education institutions concerned within the territory of Hungary and, therefore, of depriving the universities concerned of the autonomous organisational structure that was necessary for conducting their academic research and for carrying out their educational activities. Consequently, those measures were such as to limit the academic freedom protected in Article 13 of the Charter.[72] In addition, those measures limited both the freedom to found educational establishments guaranteed in Article 14(3) of the Charter and the freedom to conduct a business enshrined in Article 16 of the Charter.[73] The Hungarian measures could not be justified by any of the objectives of general interest recognised by the Union upon which Hungary sought to rely.[74]

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70 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 94-156

71 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 167-170 and 178-190

72 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, par. 228

73 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, par. 234

74 Case C-66/18, *European Commission v Hungary* ECLI:EU:C:2020:792, paras. 239-242

According to Law LIV of 2021 adopted in the implementation of the judgment, universities based outside of the EEA are allowed to operate in Hungary if there is a prior international treaty with the State of origin and the education provided by the foreign institution is "equivalent" with the education of Hungarian institutions.[75] This however has no impact to the facts of the present case as CEU has ceased to operate in Hungary and in November 2019 opened a new campus in Vienna (Austria).

3.5. Case C-650/18, *Hungary v European Parliament* (Triggering Article 7 TEU by EP)[76]

On 12 September 2018, the EP adopted a resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded.[77] Four hundred and forty-eight MEPs voted in favour of that resolution, 197 voted against it and 48 MEPs abstained. It must be noted that the MEPs had been informed, one and a half days before the vote, of the fact that abstentions would not be counted as votes cast, thus they were well aware of the rules applying to the voting process.[78] Hungary sought the annulment of the resolution arguing that the Parliament wrongly excluded abstentions when counting the votes cast for the purposes of adopting the contested resolution and, in order to be adopted, a minimum of 462 votes in favour would have been necessary.

Article 354(4) TFEU stipulates that for the purposes of Article 7 TEU, the EP shall act by a two-thirds majority of the votes cast, representing the majority of its component Members. When interpreting the term of "votes cast", the Court found that the notion, in accordance with its usual meaning in everyday language, covered only a positive or negative vote on a given proposal. It held that abstention meant a refusal to adopt a position on a given proposal, thus it could not

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75 Art. 76(1) of Law CCIV of 2011 as amended

76 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62018CJ0650], Accessed 17 May 2022. Poland as intervener in support of Hungary – The legislative package is named after George Soros, whose "Open Society foundations have donated billions to promoting civil society and human rights, particularly in the former Communist countries of central and eastern Europe." *Hungary passes anti-immigrant 'Stop Soros' laws*, The Guardian, 20 June 2018, [https://www.theguardian.com/world/2018/jun/20/hungary-passes-anti-immigrant-stop-soros-laws], Accessed 17 May 2022

77 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL) [2018] OJ C307, p. 75

78 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, par. 12

be treated in the same way as a "vote cast".[79] As to the contention of Hungary that this interpretation would run counter to the principle of democracy and the principle of equal treatment, the Court recalled that MEPs had been informed in advance about the legal consequences of their abstention.[80]

3.6. Case C-821/19 *Commission v Hungary* (Criminalisation of assistance for asylum seekers / Lex Stop Soros)[81]

In 2018, Hungary amended certain laws concerning measures against illegal immigration, and added a new ground of inadmissibility of an application for international protection,[82] not listed in the Procedures Directive.[83] Furthermore, Hungary criminalised the organising activity of facilitating the lodging of an asylum procedure,[84] contrary to the Procedures Directive as well as the Reception Directive.[85] Finally, the Hungarian legislation provided for restrictions on the freedom of movement of persons suspected of having committed such an offence.[86]

The Court held that Hungary had failed to fulfil its obligations under the Procedures Directive by allowing an application for international protection to be rejected as inadmissible on the ground that the applicant arrived on its territory via a safe third country. Article 33(2) of the Procedures Directive sets out an exhaustive list of the situations in which Member States may consider an application for international protection to be inadmissible, and the *new ground for inadmissibility* introduced by Hungary is not among those.[87]

Similar conclusion was reached in relation to the *criminalisation of assistance to asylum seekers*. Hungary's submission that the introduction of that offence had been

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79 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, paras. 82-84

80 Case C-650/18 *Hungary v European Parliament,* ECLI:EU:C:2021:426, par. 96

81 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0821], Accessed 17 May 2022

82 Art. 51(2)(f) of Law No. LXXX of 2007 on the right to asylum, 29 June 2007, Magyar Közlöny 2007/83

83 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180 p. 60 (the Procedures Directive)

84 Art. 353/A of the Law No C of 2012 establishing the Criminal Code, 13 July 2012, Magyar Közlöny 2012/92, "Facilitating illegal immigration"

85 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180, p. 96) (the Reception Directive)

86 Article 46/F of Law No XXXIV of 1994 on the police of 20 April 1994

87 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 33

justified by the increased risk of misuse of the asylum procedure[88] was dismissed by the Court. It found that the scope of the Hungarian provision was not limited solely to the lodging of an intentionally abusive application or to misleading the authorities but gave rise to a risk of criminal prosecutions being brought against almost any person involved in the initiation of an asylum procedure in Hungary, thus restricted the right to have access to those applicants and to communicate with them.[89] The wording of the offence was capable of strongly discouraging any person wishing to provide assistance, and went beyond what was necessary to attain the objective of preventing fraudulent or abusive practices.[90] Finally, restrictive measures against persons who have been accused or found guilty of such an offence[91] was also held to be contrary to the two Directives.[92]

The *Venice Commission* was requested by the PACE to provide an opinion on the Hungarian government's "Stop Soros" legislative package, and it started with the premise that "[c]riminalising certain activities by persons working for NGOs in the framework of their functions represents an interference with their freedoms of association".[93] It went on to find that while pursuing the legitimate aim of prevention of disorder or crime, the Hungarian legislation went far beyond that aim by criminalising organisational activities which were not directly related to the materialization of the illegal migration, such as "preparing or distributing informational materials". It argued that "there may be circumstances in which providing 'assistance' is a moral imperative or at least a moral right".[94] The offence introduced by the Criminal Code "lacks the requisite precision and does not meet the foreseeability criterion as understood in the ECtHR case-law".[95]

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88 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 45

89 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 45 and 95

90 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 116-133

91 Art. 46/F of the Law No XXXIV of 1994 on the police, 20 April 1994, Magyar Közlöny 1994/41, provides that police officers shall prevent any person suspected of offences including "Facilitating illegal immigration" (Art. 353/A of the Criminal Code) mentioned above from entering an area within a distance of less than eight kilometres from the external border of Hungary

92 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, paras. 151-164. The AG reached a different conclusion

93 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 70

94 Case C-821/19 *European Commission v Hungary* ECLI:EU:C:2021:930, par. 103

95 Venice Commission, Hungary – Joint Opinion on the Provisions of the so-called "Stop Soros" draft Legislative Package which directly affect NGOs (in particular Draft Article 353A of the Criminal Code on Facilitating Illegal Migration), adopted by the Venice Commission at its 115th Plenary Session (Venice, 22-23 June 2018), CDL-AD(2018)013-e, [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)013-e], Accessed 17 May 2022; paras. 100-105

3.7. Case C-564/19, C-564/19 *Criminal proceedings against IS* (Illegality of the order for reference)[96]

The facts of the case are rather complex and stem from a criminal procedure before a Hungarian court against a Swedish national. In the course of the proceedings, it became clear that Hungary did not have an official register of translators and interpreters and Hungarian law did not specify who may be appointed in criminal proceedings as a translator or interpreter, nor according to what criteria. Thus, (in his initial reference) the referring judge asked the Court whether this situation is compatible with two EU Directives on criminal proceedings (*first question*).[97] In addition, the national judge submitted two further questions relating to various elements of judicial independence: namely the direct appointment by the President of the National Office for the Judiciary (NOJ) of temporary senior judges (*second question*),[98]and the insufficient remuneration of Hungarian judges in relation to their responsibilities (*third question*).[99]

Following this, the Hungarian Prosecutor General brought an appeal in the interests of the law against the order for reference, and the Kúria (Supreme Court) ruled that the questions referred were not relevant and necessary for the resolution of the dispute concerned. The order by the first instance judge for referral to the CJEU was found to be unlawful, without, however, altering its legal effects. Parallel to this, disciplinary proceedings were brought against the referring judge which was, however, later withdrawn.

Thereafter, the referring judge decided to supplement his initial request for a preliminary ruling (the supplementary request for a preliminary ruling) with two additional questions: first, whether the Supreme Court can declare a reference for

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96 Case C-564/19 *Criminal proceeding against IS*, ECLI:EU:C:2021:949; [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62019CJ0564], Accessed 17 May 2022

97 Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L280, p. 1 and Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L142, p. 1

98 Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 34: "the President of the NOJ had infringed the law through the practice of declaring vacancy notices for judicial appointments and appointments to the presidency of courts unsuccessful without sufficient explanation and then, in many cases, appointing on a temporary basis court presidents who were the choice of the NOJ President"

99 Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, para 38: "… since 1 September 2018 – unlike the practice followed in previous decades – Hungarian judges receive by law lower remuneration than prosecutors of the equivalent category who have the same grade and the same length of service, and in which, in view of the country's economic situation, judges' salaries are generally not commensurate with the importance of the functions they perform, particularly in the light of the practice of discretionary bonuses applied by holders of high level posts"

preliminary ruling unlawful (*fourth question*) and secondly, whether the initiation, on the same grounds, of disciplinary proceedings against the referring judge is compatible with EU law (*fifth question*).

The Court started with the analysis of the fourth question recalling the importance of the cooperation between the national courts and the Court of Justice established by Article 267 TFEU. Accordingly, national courts have the widest discretion in referring questions to the Court involving interpretation of provisions of EU law.[100] It would be contrary to this cooperation if the supreme court of a Member State could declare that a request for a preliminary ruling is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of the dispute in the main proceedings. The assessment of whether the questions referred are relevant or not falls within the exclusive jurisdiction of the Court.[101] Any other conclusion would undermine the effectiveness of EU law and would prompt the national courts to refrain from referring questions to the Court.[102]

With regard to the fifth question on the disciplinary procedure against the referring judge, the Court held that the discretion of the national judge to make a reference for a preliminary ruling to the Court constitutes a guarantee that is essential to judicial independence. The mere prospect of sanctions would undermine the preliminary ruling mechanism under Article 267.[103]

As to the interpretation and translation in criminal proceedings (first question), the Court found that Member States must take specific measures to ensure sufficient quality of interpretation; and Member States must enable the national courts to ascertain that the interpretation was of sufficient quality, so that the fairness of the proceedings and the exercise of the rights of the defence are safeguarded.[104]

The second and third questions relating to various aspects of *judicial independence* were found inadmissible inasmuch as they were not "necessary" to enable the referring court to "give judgment" in the case before it.[105]

Recent years have witnessed various attacks against the independence of the judiciary not only in Hungary, but in Portugal, Romania, Malta and, most impor-

[100] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 68-69
[101] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 72
[102] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 73-81
[103] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 91
[104] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, paras. 98-138
[105] Case C-564/19 *Criminal proceeding against IS,* ECLI:EU:C:2021:949, par. 140

tantly, Poland as well.[106] In this context, Article 267 TFEU can be seen as a tool of self-defence if judicial independence and the right to a fair trial is undermined by national legislation or decisions.[107] As the Commission is rather selective in launching infringement proceedings, Article 267 is mobilised to secure the independence of the judiciary.[108] Disciplinary proceedings against judges, or the threat thereof, have a chilling effect whereby judges enter into a form of prior compliance with the political authority. Judges must enjoy an independence allowing them to perform their duties free from external influence.[109]

3.8. Cases C-156/21 & C-157/21, *Hungary and Poland* v. *Parliament and Council* (Rule of law conditionality regulation)[110]

On 16 December 2020, the EU legislature adopted a Regulation which established a general regime of conditionality for the protection of the Union budget in the case of breaches of the principles of the rule of law in the Member States. The sanctions envisaged by the Regulation contain the suspension of payments from the Union budget or the suspension of the approval of one or more programmes financed by that budget.[111] Hungary and Poland, the countries affected by rule of law procedures, sought the annulment of the Regulation. In support of its request, Hungary raised several pleas based on the alleged absence of legal basis, the circumvention of the procedure laid down in Article 7 TEU, and the breach of legal certainty. All submissions were dismissed by the Court.

As regards the legal basis for the Regulation, the purpose of the contested Regulation is *to protect the Union budget* from effects resulting from breaches of the principles of the rule of law in a Member State in a sufficiently direct way, and not

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106 For a detailed analysis see Pech, L.; Kochenov, D., *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*, Stockholm, 2021; e.g. the table on pp. 94 and 95

107 *Ibid*., p. 95

108 *Ibid*., p. 96

109 ENCJ (European Network of Councils for the Judiciary), *Independence, Accountability and Quality of the Judiciary. Indicators and Surveys: Leading a process of positive change*, ENCJ Report 2018-2019, 2019, [https://bit.ly/3M6XvqZ], Accessed 17 May 2022

110 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, [https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62021CJ0156]; see also Case C-157/21 *Poland* v *European Parliament and Council of the European Union*, ECLI:EU:C:2022:98, [https://eur-lex.europa.eu/legal-content/hu/TXT/?uri=CELEX:62021CJ0157], Accessed 17 May 2022

111 Regulation (EU, Euratom) 2020/2092, of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020], OJ L433I, p. 1

to penalise those breaches as such. Breach of the rule of law affects sound financial management or the financial interests of the Union in a sufficiently direct way.[112]

The Court found that the Regulation did *not circumvent Article 7 TEU* inasmuch as the Regulation seeks to protect the Union budget in the event of a breach of the principles of the rule of law in a Member State and not to penalise, through the Union budget, breaches of the principles of the rule of law.[113]

As regards the third plea, alleging *breach of the principle of legal certainty*, Hungary argued that the Regulation did not define the concept of "the rule of law" or its principles. The Court found that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, effective judicial protection, separation of powers, equality before the law and non-discrimination referred to in the Regulation had been the subject of extensive case-law of the Court. These principles are recognised and specified in the legal order of the European Union and have their source in common values which are also recognised and applied by the Member States in their own legal systems. Hungary cannot maintain that it is not possible to determine with sufficient precision the essential content of these principles, nor that those principles are of a purely political nature.[114] Hence, the claim for annulment of the contested Regulation was dismissed in its entirety.

The Court's reinforcement that Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains legally binding obligations[115] is particularly noteworthy. While upholding the Union's obligation to respect the national identities of the Member States, the Court refused to accept that the obligations stemming from Article 2 might vary from one Member State to another.[116] Moreover, acknowledging that compliance with the values enshrined in Article 2 TEU cannot be disregarded after accession, the Court accepted the application of the principle of non-regression as regards the Copenhagen criteria,[117] by holding that the Member States "have undertaken to respect at all times" the concept of the rule of

112 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 111, 119 and 144

113 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 168-171

114 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 236, 237 and 240

115 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 232

116 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 233

117 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 126

law.[118] The Court found an intrinsic link between respect for EU values and the principle of solidarity: the principle of mutual trust itself is based on the commitment of each Member State to respect the values contained in Article 2 TEU.[119]

4. CONCLUSIONS

All cases described above were decided against Hungary, and although the judgments were followed by minor legislative adjustments, they did not result in any material improvements on the ground. The reduction of democratic qualities in Hungary and other Member States arguably undermines the perception of Europe as a bastion of democracy. *The concept of the rule of law* has served as a basis for European integration right from its inception. Notwithstanding its consolidated definitional status,[120] the rule of law as a concept, however, appears to have become increasingly challenged.[121] According to the illiberal critique, or authoritarian populist critique, the concept lacks proper definition,[122] so that advocates of the double standard critique accuse the EU institutions with hypocrisy and contend that the rule of law actions against Hungary (and Poland) are ideologically motivated and the EU targets Central European Member States while being much more lenient in relation to Western members. The juristocracy critique maintains that judicial procedures take over the role of political debates, issues are decided along legal, constitutional and procedural quibbles and, as a consequence, decisions no longer reflect the will of the majority population.

Indeed, the juristocracy critique has been used to justify attacks against courts for their judicial or constitutional activism.[123] Béla Pokol, one the most prominent

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118 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 234

119 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, par. 129

120 There is arguably a *consensus* on the concept of the rule of law and its elements: "... it seems that a consensus can now be found for the necessary elements of the rule of law" – Venice Commission, Report on the Rule of Law, CDL-AD(2011)003rev-e, para. 41. The question remains, however, to what extent the common European values (Article 2 TEU) are reconciable with the protection of national identities (Article 4 TEU)

121 Pech *et al.*, *op. cit.*, note 39, pp. 45-61

122 See e.g. Varga, *op. cit.*, note 36, and the pleas raised by Hungary in Case 156/21 Hungary v European Parliament and Council of the European Union, ECLI:EU:C:2022:97 relating to the rule of law conditionality regulation

123 Pokol B., *A jurisztokrácia és a demokrácia határvonalán*, Jogelméleti Szemle, No. 4, 2015, pp. 4-18, at pp. 4 and 5. – A Hungarian law journal (Jogelméleti Szemle) dedicated a whole issue to the juristocracy debate (JESZ, 2015/4). See also Pokol, B., *A jurisztokratikus állam*, Dialóg Campus, Budapest, 2017; and the thematic issue of Jogelméleti Szemle 2019/2 on the Paradigm of juristocracy and juristocratic State ("A jurisztokrácia és a jurisztokratikus állam paradigmájáról")

Hungarian representative of this approach, disapproves the European Court of Human Rights and the Luxembourg Court as well. He argues that "decisions no longer reflect the will of the majority population, but the political constellation of judicial bodies, and the financial and organizational powers of jurists advising the judges or rights protection groups".[124]

The author of this paper opines that the concept of the rule of law is adequately developed, and while a certain measure of double standard cannot be totally dismissed, Hungary is usually the worst of all EU Member States on the list of e.g. Transparency International[125] or WJP Rule of Law.[126] As regards the juristocracy critique, restrictions on the power of the legislative constitute a prominent feature of constitutional democracies. Judicial review, including constitutional justice, serves to constrain legislative power in order to uphold the constitution. Furthermore, by acceding to the EU, Hungary has recognized and accepted the necessity of integration cooperation.[127]

When assessing the role of the EU institutions and the EU *legal* toolbox in securing compliance with European values, the first issue to be considered is *the use of infringement actions*. Contrary to the wording of Article 258 TFEU, the European Commission "is not bound to commence the proceedings provided for in that provision but in this regard has a discretion".[128] The Commission's decision is influenced by a range of factors, including the staff available; the gravity and effects of the violation; whether the contested measures constitute isolated acts of limited importance or, to the contrary, they stem from a structural deficiency; the pertinent political situation or whether the EU provision in issue might be altered in the near future. It is not easy to specify the Commission's response threshold but it seems to have taken a rather soft position: it has tolerated the creative compliance

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124 Pech et al., *op. cit.*, note 39, p. 58. – An example from Poland: Jarosław Kaczyński said that "no state authority, including the constitutional tribunal, can disregard legislation". Davies, C., *Poland is 'on road to autocracy', says constitutional court president*, The Guardian, 18 December 2016, [https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president], Accessed 17 May 2022

125 In 2021, Poland scored 56, Romania 45, Hungary 43, Bulgaria 42 points out of 100. The results are given on a scale of 0 (highly corrupt) to 100 (very clean). Transparency International, [https://www.transparency.org/en/cpi/2021], Accessed 17 May 2022

126 Out of the maximum of 1 (the last three EU Member States) Greece scored 0,61, Bulgaria 0,54, Hungary 0,52 points. (Adherence to the rule of law: weaker (0) to stronger (1).) World Justice Project, [https://worldjusticeproject.org/rule-of-law-index/global], Accessed 17 May 2022

127 Drinóczi, T., *Jurisztokrácia és alkotmányoligarchia vagy többszintű alkotmányosság és alapjogvédelem? Reflexiók Pokol Béla írására*. Jogelméleti Szemle, No. 4, 2015, pp. 32-45, at p. 35 and 37; Magen; Pech, *op. cit.*, note 15, p. 242

128 Case C247/87 *Star Fruit Company SA v Commission*, ECLI:EU:C:1989:58, para. 11. See also Case C431/92 *Commission v Germany*, ECLI:EU:C:1995:260, para. 22

and the solidification of quasi-authoritarian regimes for quite a while. The Von der Leyen Commission was also reluctant to launch rule of law related actions, the first being initiated only in 2021, three years after taking office.[129] Such a selective strategy is unacceptable in the case of systemic attacks against the rule of law.[130]

To further improve the effectiveness of infringement actions, it is of paramount importance that the Commission does not misconstrue or miscategorise the case. The landmark example for *improper categorisation* is the Hungarian early judicial retirement case where attack against judicial independence was framed as an age-related antidiscrimination issue.

In the infringement actions against Hungary, the Commission has never applied for *interim measures*, even though it would have been justified in order to avoid serious and irreparable harm to the interests of peoples or organisations affected by the contested legislation (e.g. in the cases relating to the early retirement of judges, the Ombudsman, Lex NGO, Lex CEU).[131] All in all, the Commission's approach to compliance assessment is rather fragmentary and is squeezed in a legalistic-technocratic framework.

It must be added that so far *the Member States* themselves have never seized the opportunity to take action under Article 259;[132] they tend to approach the Commission asking for action instead. Since the Commission pursues a selective strategy it might be argued that Member States have a moral responsibility to fill in this vacuum.[133]

The *Court's* room for manoeuvre is circumscribed by the types of actions specified in the Treaties, including the *locus standi* rules. Real change cannot be achieved if rule of law related cases are presented to the Court in a piecemeal fashion, dis-

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129 E.g. a letter of formal notice as regards legislation sanctioning discrimination in the field of education and vocational training [https://ec.europa.eu/commission/presscorner/detail/en/INF_21_2743], Accessed 17 May 2022, respect for the fundamental rights of non-discrimination of LGBTIQ people and freedom of expression, or the rejection of Klubradio's application for the use of radio spectrum on highly questionable grounds [https://ec.europa.eu/commission/presscorner/detail/en/INF_21_6201], Accessed 17 May 2022

130 Pech; Kochenov, *op. cit.*, note 107, p. 66

131 See, however, Order of the Vice President of the Court of 19 October 2018 in Case 619/18 *Commission v Poland,* ECLI:EU:C:2019:615; Order of the Grand Chamber of 18 December 2018 in Case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:615

132 On inter-State proceedings see e.g. Komanovics, A., *Inter-State Human Rights Litigation – The Possibilities and Limitations of Collective Enforcement*, VI Congresso Internacional de Direitos Humanos de Coimbra, Vol. 6, No. 1, 2021

133 Pech and Kochenov, *op. cit.*, note 107, p. 66

guising the systemic nature of the violations involved.[134] It must not be forgotten, however, that originally it seemed unlikely that the Court should be involved in rule of law cases and decide in politically highly-charged disputes. In any case, after a hesitant start the Court began to take a more vigorous stance in support of European values.[135] Thus, in the case relating to the rule of law conditionality regulation the Court reiterated that Article 2 TEU is not merely a statement of policy guidelines or intentions but contains legally binding obligations for the Member States through Article 19 TEU, and compliance therewith can be reviewed by the Court.[136]

In *preliminary reference cases* the Court's answer ought to be useful, practical, and sufficiently precise to enable the national judge to make EU-law compatible conclusions.[137] In rule of law related cases it is even more important that Luxembourg provide unambiguous answers leaving no room for doubt for the national judge as to what the only possible answer is. The rationale behind such a reduction of national judicial space is that "by the time its [the Court's] preliminary rulings need to be applied to the disputes at hand, there may well be no independent judges left to apply them."[138] It is also noteworthy that Article 267 TFEU has unexpectedly emerged as a tool of self-defence for the national judges under attack, and as an indirect way to enforce compliance with EU values.

As regards the *implementation of the judgments*, Hungary was repeatedly late in making the necessary adjustments, or employed "creative" or symbolic compliance techniques, designed to create the appearance of norm-conform behaviour. Regrettably, the Commission was also prepared to accept such a creative compliance with European values.[139]

The questions arises whether EU's current rule of law toolbox is sufficiently comprehensive and sophisticated. *Article 7 TEU* is considered too strong to be used: indeed, it took quite a while for the EU to trigger the mechanism against Hungary

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134 Scheppele, Kochenov and Grabowska-Moroz, *op. cit.*, note 19, p. 22.

135 Pech; Kochenov, *op. cit.*, note 107

136 Case C-156/21 *Hungary v European Parliament and Council of the European Union*, ECLI:EU:C:2022:97, paras. 161 and 232

137 Somssich R., *Az előzetes döntéshozatali eljárás közel hat évtized távlatából*, Iustum Aequum Salutare, Vol. XIV, No. 2, 2018, pp. 39–55, at pp. 50-51

138 Pech; Kochenov, *op. cit.*, note 107, p. 223

139 Batory, A., *Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU*, Public Administration, Vol. 94, No. 3, 2016. pp. 685-699, at 686. – "Symbolic and creative compliance occur when an addressee, in this case a member state, pretends to align its behaviour with the prescribed rule or changes its behaviour in superficial ways that leave the addressee's original objective intact." Ibid., p. 689

(and Poland) albeit it might have prevented the illiberal regimes from getting more and more entrenched. Article 7 remains a highly political process with Members States being reluctant to "interfere" in domestic matters of their peers. In addition, the process might result in an impasse if there are more than one Member State involved as they could mutually veto sanctions against the other.

The Rule of law conditionality regulation is, or could be, a real and powerful weapon but the great lengths the Hungarian and Polish government were to go against its introduction indicate that implementation will not be a bed of roses. In the Commission proposal, the competence to suspend or reduce payments from the EU budget was vested with the Commission, while the Council would have been able to veto the Commission's decision by a qualified majority.[140] In the final version, however, the Commission may only propose measures if rule of law breaches in a given Member State threaten the EU financial interests, whereas the final decision is taken by Council, a political institution.

The EU toolbox could be supplemented with other measures, like an automatic suspension mechanism in new legislative measures which would always be activated if Article 7 proceedings is triggered against a Member State.[141] A less radical solution would be similar to that already used in relation to environmental protection as provided for in Article 11 TFEU. By analogy, rule of law requirements could be integrated into the definition and implementation of the Union's policies and activities.

There are several ways to improve the EU's rule of law "ecosystem". The Fundamental Rights Agency could be given a more significant role to play in the protection of European values, e.g. it could be involved with the Article 7 TEU procedure. The European Anti-Fraud Office (OLAF) should be granted competence to do more than just issuing recommendations,[142] thus its findings might lead to the suspension of EU payments, or it could make a file public if the Member State does not act upon its recommendation. As regards the European Public Prosecutor's Office (EPPO), budget payments could be withheld from Member States who do not sign up to the EPPO. More systematic cooperation with the

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140 [https://www.europarl.europa.eu/legislative-train/theme-new-boost-for-jobs-growth-and-investment/file-mff-protection-of-eu-budget-in-case-of-rule-of-law-deficiencies], Accessed 17 May 2022

141 Pech, L.; Kochenov, D., *Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid*, RECONNECT Policy Brief, 2019, [https://reconnect-europe.eu/wp-content/uploads/2019/07/RECONNECT-policy-brief-Pech-Kochenov-2019June-publish.pdf], Accessed 17 May 2022, p. 13

142 After an investigation is concluded, OLAF recommends action to the EU institutions and national authorities concerned. [https://ec.europa.eu/anti-fraud/about-us/what-we-do_en], Accessed 17 May 2022

Venice Commission could also contribute to the promotion and protection of EU values.[143]

Whereas it could be argued that a "rule of law enforcement cocktail" can increase a number of "pressure points" which, in turn, could prevent democratic deterioration,[144] the EU already has a full set of instruments at its disposal, so far not used to its full potential, and there is no point in creating new tools if the EU fails to use existing ones.[145]

By way of conclusion, the EU's inertia undermines the integrity of common European values and the credibility of the EU in the eyes of candidate States as well as the international community. There is a pronounced gap between the EU's internal commitment to the rule of law and the external promotion of its values. Similarly, there is a marked asymmetry between Union's (pro-rule of law) rhetoric and its action or, rather, failure to act when it comes to the actual enforcement of values.[146] A clear example thereof is the rule of law backsliding in Hungary through measures disguised as well-intentioned "reforms" allegedly aiming to improve transparency, efficiency, the protection of families, quality of education, etc. but which in fact systematically erode democracy. Creative compliance, "instrumentalisation of the law has transformed the rule of law into 'rule by law', which dismantles the very essence of the rule of law."[147]

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143 Pech; Kochenov, *op. cit.*, note 142, p. 12-15

144 Pech; Kochenov, *op. cit.*, note 142, p. 17

145 Note however that besides formal instruments the EU has informal tools as well including shaming in press releases, scoreboards and other communication for creating social or normative pressure; Batory, *op. cit.*, note 118, p. 688

146 Magen; Pech, *op. cit.*, note 15, p. 248

147 Kochenov, D.; Grabowska-Moroz, B., *Constitutional Populism versus EU Law: A Much More Complex Story than You Imagined*, RECONNECT Working Paper No. 16, 2021, [https://reconnect-europe.eu/wp-content/uploads/2021/07/WOP16_July2021.pdf], Accessed 17 May 2022, p. 10

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