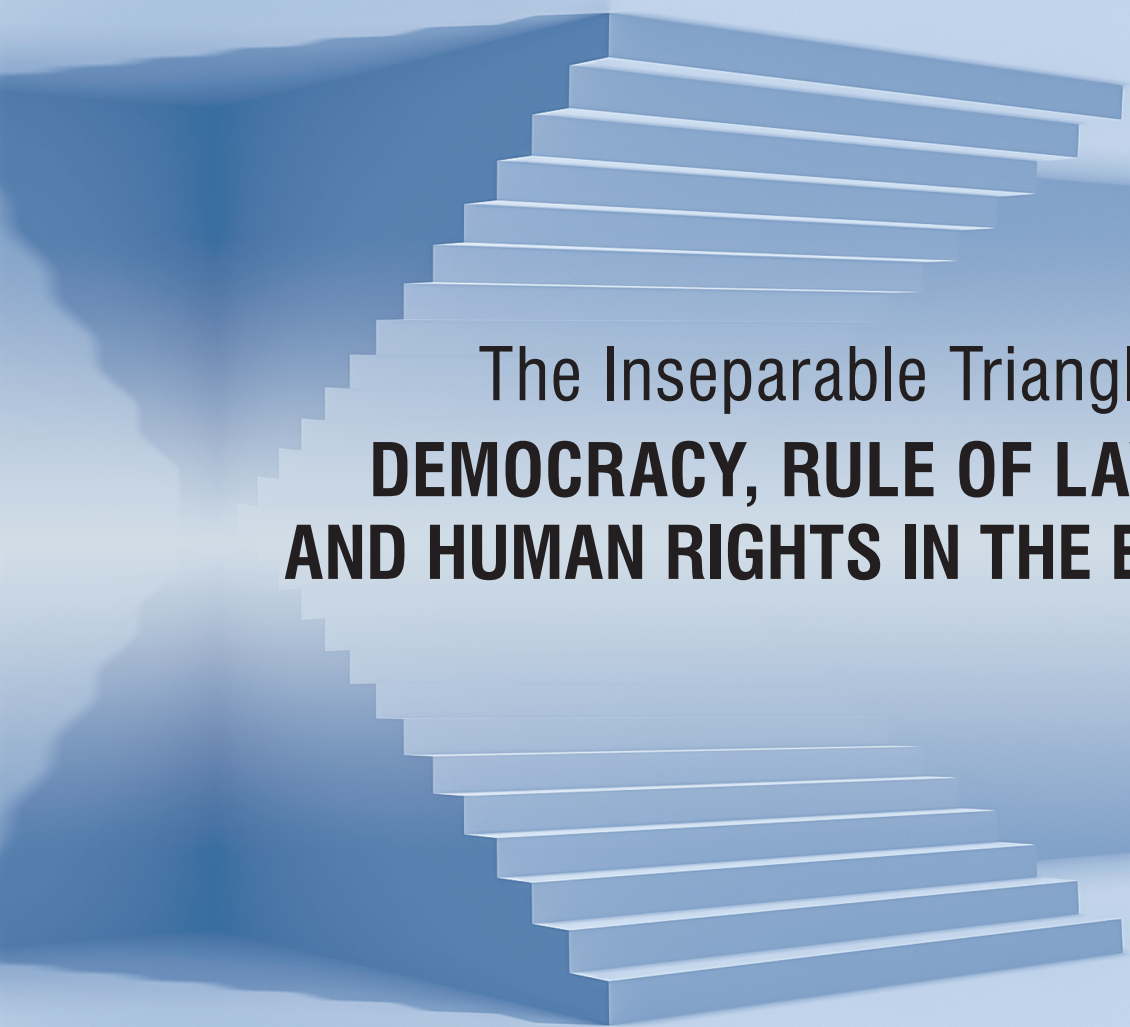
SÁRA HUNGLER (ed)



The Inseparable Triangle:
DEMOCRACY, RULE OF LAW AND HUMAN RIGHTS IN THE EU

PROCEEDINGS OF THE WEBINAR HELD
AT ELTE FACULTY OF LAW IN 2021

The Inseparable Triangle: Democracy, Rule of Law and Human Rights in the EU

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Edited by Sára Hungler

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Editorial Foreword

Human rights, democracy and rule of law have been regarded as a mutually reinforcing ensemble by many legal theorists to date. 'The Inseparable Triangle: Democracy, Rule of Law and Human Rights in the EU' represents relevant collection of chapters about the interconnected areas of human rights and European law. These issues have become particularly important in our times, when Europe is witnessing endangered democracies, and perfectly fit into the broader discussion related to necessary changes and improvement of the rule of law mechanism, a main pillar of modernity, and a concept necessary for the implementation of democracy, and the protection of human rights. These topics are also pivotal and constitutive of the European Human Rights LLM Program of ELTE Faculty of Law, and its Jean Monnet Module.

This book contains a selection of papers from the webinar on 'The Inseparable Triangle: Democracy, Rule of Law and Human Rights in the EU' for PhD students and postdoctoral researchers, held at ELTE Faculty of Law on 14 May 2021. The webinar was organised and chaired by Professor Pál Sonnevend, Dean of ELTE Faculty of Law and the Academic Coordinator of the Jean Monnet Module 'The Legal Enforcement of the Basic Values of the European Union'. The aim of the webinar was to promote a discussion on the broad theme of the fundamental values of the European Union.

This book, through various chapters, attempts to give an insight on how the EU and the Council of Europe must try to strike a balance between diverging interests and priorities of the nation states, and should implement a firm strategy to protect human rights. The book contains chapters providing an overview and comparison of different existing practices with constructive suggestions for future development, as well as chapters dealing with more specific issues related to human rights and democracy.

The challenges of rule of law influence and relate to both domestic and European law. This book analyses, through separate chapters, selected issues concerning all the legal areas (European, domestic and legal theory), offering a composite overview of the recent developments on the field. One of the key challenges is the extensive action to promote and favour access to justice and judicial remedies, and to ensure judicial independence. Therefore, this book also extensively addresses this issue.

The book starts with a chapter on 'Safeguarding the Rule of Law under the Conditionality Regulation – Is the Notion of "Generalised Deficiencies" Really Missing?' by *László Detre*. Detre examines EU Regulation on a general regime of conditionality for the protection of the European Union budget, and asks what exactly could be achieved if one aims at using the Regulation to address the rule of law backslidings in some Member States. He argues that the Regulation still has some

promises, especially from the point of view of institutions that are vital to safeguard liberal democracy.

Similarly, *David Löffler*'s chapter, 'The Conditionality Regulation: Procedural Aspects of the EU's New Rule of Law Mechanism', focuses on this Regulation from a rule of law crisis point of view. He argues that conditionality is not a new concept in EU law. In the beginning, they linked the granting of economic benefits to compliance with human rights standards in international agreements with third countries. He argues that the Council has so far failed to prove its absolute will in fighting rule of law deficiencies, but the new Regulation puts pressure on the Council with a concrete time limit, which might be a game-changer.

Márton Matyasovszky-Németh writes about 'The Current Theories of Human Rights in Light of Hannah Arendt's Concept of the Right to Have Rights'. He explains Arendt's complex multidisciplinary perspective, combining philosophy, history, and social criticism, and presents her work as a definite human rights theory, which can serve as a practical normative basis for contemporary socio-legal theories of human rights.

Dzsenifer Orosz takes a close look at the 'procedural turn' in the case law of the European Court of Human Rights in her chapter entitled 'Process-based Review Under Article 1 of Protocol 1 of the European Convention of Human Rights'. First, she examines how proceduralistaion has developed into a normative framework, providing procedural guarantees into the substantive provisions of the Convention. Second, Orosz argues that if the Court strategically applied a process-based review, the domestic bodies could have been more effectively defended Convention rights and freedoms. She then deep-dives into the effects of the procedural turn on interpretation and application of the right to property secured under Article 1 of Protocol 1 of the European Convention on Human Rights.

Judicial independence, a cornerstone of democracy and rule of law, is examined through an extraordinary appeal of the General Prosecutor and the proceeding of the Hungarian High Court, Kúria, in the chapter of *Anna Madarasi* and *György Ignácz*. In their contribution, 'Can a Judge Protect the Independence of the Judiciary?', they ask whether a national court or tribunal can rely directly on EU law to protect its independence, when a higher judicial authority might threaten it.

A series of Polish laws affecting the operation of its Supreme Court and the retirement of judges also sparked widespread domestic and foreign criticism. In 'Flowers for Blanguernon – Can Non-Performance of EU Obligations Justify Reciprocal Non-Compliance?' *Gergő Barna Balázs* uses this case to uncover the practice of the CJEU regarding claims of non-conformity and wrongful conduct, exploring the background of these claims in national and international law. He warns that states' reluctance not to comply with the EU's rule of law values cannot create a new legal reality.

Barbara Bazánth analyses another interesting and debated area connected to the notion of legitimacy. Her chapter, 'From Consistency to Legitimacy in the European

Union Regime – Consistency as a Principle, Value and Goal in European Union Law and the Practice of the European Court of Justice', analyses the different formations of consistency firstly reflecting on its role in international and European law. She then showcases an exciting collection of numerous forms of appearance of consistency in the European systems of human rights protection.

Overall, the book attempts not only to summarise the outcomes of the most intensively debated challenges, it also tries to provide constructive criticism and valuable suggestions for the future for legislators to move forward. Thus, the future outlook of the field looks promising, mainly due to the common belief that human rights protection has an utmost importance in the European terrain.

Sára Hungler

Acknowledgments

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The book would never have been completed without the invaluable assistance of many people. A special mention must be made of Katalin Sulyok, whose professionalism and enthusiasm for the project kept us all on our toes.

Special words of thanks have to be reserved for Professor Dimitry Kochenov, leader of the CEU Rule of Law Group, and for Professor Werner Schroeder, head of the Department of European Law and Public International Law at the University of Innsbruck. This book would not have been possible without the exceptional support of Professor Pál Sonnevend, Dean of ELTE Faculty of Law and the Academic Coordinator of the Jean Monnet Module.

[1] Grant decision number: 2018-2408.

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Barbara Bazánth is a PhD student at the Department of International Law of ELTE Law School. She is researching the legitimacy of international courts and tribunals with a special focus on the consistency of their jurisprudence. Barbara is also a Junior Associate at the Budapest office of CMS Cameron McKenna Nabarro Olswang LLP in the Dispute Resolution Practice Group. After finishing her J.D. degree, she has interned at the European Court of Human Rights in Strasbourg and she has also contributed to the first Hungarian language commentary to the European Convention on Human Rights forthcoming later this year. Barbara held a Public International Law seminar at ELTE Law School and a European Law seminar at ELTE Faculty of Social Sciences and also co-coaches ELTE moot court teams after having participated three times at the Philip C. Jessup International Law Moot Court Competition. Barbara holds a Master I degree from Université Panthéon-Assas (Paris II), studied with a scholarship at the summer courses of the International Law Institute and Georgetown University after receiving the International Law Institute Award, and will commence her studies as a Fulbright scholar and a Dean's Graduate at the International Legal Studies LL.M. program of NYU School of Law in Fall 2021.

László Detre has been working as the academic advisor for the Berlin-based programme 're:constitution' in Europe since December, 2020. László is responsible for the academic development of the programme under the supervision of its Academic Director. He graduated from the Faculty of Law Eötvös Loránd University, Budapest, in 2010. Right after, he started his career at the Constitutional Court of Hungary and he worked there as a legal adviser until December, 2020. He was appointed as the liaison officer to the Venice Commission in 2017. László spent a three-month research stay at the Secretariat of the Venice Commission in 2018-2019 in Strasbourg and he participated in the International Visitor Leadership Program in 2019, organized by the State Department of the United States. Besides

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David Löffler works as a University Assistant at the Department of European Law and Public International Law at the University of Innsbruck. He teaches in the field of European Law. His dissertation project focuses on the rule of law at EU level. In particular, he analyses how a conditionality mechanism, which links the payment of EU funds to compliance with the rule of law, can help to protect this fundamental value. Already during his studies, David Löffler gained work experience as a Student Assistant at the Department of European Law and Public International Law at the University of Innsbruck and as a legal associate at a law firm. An extended version of his diploma thesis 'Der Schutz von Whistleblowern in der Europäischen Union' ('The Protection of Whistleblowers in the European Union') was published as a book and awarded the Franz Gschnitzer Promotion Prize of the University of Innsbruck. After finishing his studies, he completed an internship at the Austrian Embassy in Bucharest in the course of the Romanian EU Council Presidency 2019, before returning to the University of Innsbruck.

Anna Madarasi is a judge of commercial law cases, specialized on insolvency and bankruptcy law and she serves at the Metropolitan Court of Budapest. She is a PhD candidate at ELTE Law Faculty and her research field covers international law and human rights, the right to a fair trial, she is specialized on the principle of open justice. She was the spokesperson of the Metropolitan Court of Budapest, where she had many experiences regarding the important aspects of the open justice principle. She earned her LL.M degree of juvenile justice at the Pázmány Péter Catholic University of Budapest in 2018. She studied at the Law Faculty of Universitá Roma Tre with the scholarship of the Region Lazio in Italy and during her studies she was an assistant of the Department of International Law. She is

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Márton Matyasovszky-Németh is a Junior Research Fellow at the Institute for Legal Studies, Centre for Social Sciences. Márton has been a PhD student at the Eötvös Loránd University, Faculty of Law, Centre for Law and Society. He will defend his PhD thesis in the Fall of 2021. His research is mainly focused on contemporary perspectives of the human rights culture and the political philosophy of Hannah Arendt. A graduate of the Faculty of Law, Eötvös Loránd University (2017), he teaches courses on legal sociology, jurisprudence and political sociology in his alma mater. He is also a mentor in the Department of Legal Theory of the István Bibó College for Advanced Studies. He had been a visiting research fellow in the School of Social Policy, Sociology and Social Research, University of Kent in 2019. He also works as the chairman of the Student Grievance Committee of Eötvös Loránd University. His most recent article in English was published in the *Jahrbuch für Ostrecht* under the title 'Taking Socio-Legal Studies Seriously: Some Comments on the Status of Social Rights in Hungary'.

Dzsenifer Orosz is a PhD student at the Department of International Law of ELTE Law School. Her research focuses on property protection before international and national courts, international human rights law and international investment law. She regularly publishes her research results, most recently she contributed to the first Hungarian language commentary of the European Convention on Human Rights forthcoming later this year. She earned her J.D. degree in 2018 and her LL.M. degree in European Human Rights Law in 2021 at ELTE Law School. She participated in the Philip C. Jessup International Law Moot Court Competition and studied international and European Law at the Katholieke Universiteit Leuven. After finishing her J.D. degree, she worked as a Junior Associate at the Budapest Office of Allen & Overy LLP. Currently she works as a Court Clerk and provides legal assistance to judges in the field of administrative law. She also holds Public International Law seminars at ELTE Law School as of Fall 2021.

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Safeguarding the Rule of Law Under the Conditionality Regulation: Is the Notion of 'Generalised Deficiencies' Really Missing?

Introduction

The second half of 2020 – besides the COVID-19 pandemic – was loud because of the Multiannual Financial Framework / Corona Recovery Fund negotiations and related to them, because of the adoption of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the European Union budget (Conditionality Regulation). The story of the Conditionality Regulation goes back to 2018, when the European Commission (Commission) in its Communication on 'A Modern Budget for a Union that Protects, Empowers and Defends – The Multiannual Financial Framework for 2021–2027' voiced that respecting the rule of law by the Member States is a precondition of the sound financial management of the European Union's (EU) budget. Bearing this in mind, the Commission felt necessary to introduce a new mechanism that would protect the EU's budget[1] from 'generalised deficiencies as regards the rule of law'[2]. The original proposal was issued in May 2018 with the title of 'Conditionality Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States'[3] (Proposal). The adoption of the final version – after the European Council's (EUCO) acknowledgment[4]; after long negotiations between the

[1] To be more precise, the Regulation – in line with the provisions of the Treaty on the Functioning of the European Union – embraces the notion of sound financial management and the protection of the financial interersts of the Union, see: Justyna Łacny, 'The Rule of Law Conditionality Regulation No 2092/2020 – Is it all About the Money?' (2021) 13(1) Hague Journal on the Rule of Law 85. The chapter – when it is not cited – uses the term: financial interests of the Union.

[2] COM(2018) 321, 4.

[3] 2018/0136 (COD).

[4] EUCO 10/20, A24.

institutions of the EU[5] and after a political compromise[6], embodied in the heavily criticized[7] conclusions of the EUCO[8] – was adopted lastly by the European Parliament (EUP) on 16 December, 2020.[9] Besides the political context that involves the arguments of some Member States, the institutional clashes within the EU revolved around the question: what should be the aim and the scope of the Conditionality Regulation: 'to protect the rule of law principle through the protection of the […] budget (European Parliament) or to protect the […] budget through the protection of the rule of law (Council)'[10]. The adopted version of the Conditionality Regulation can be considered as a combination of these two approaches.[11] However, it is still fair to ask – before its delayed application[12] happens – what exactly could be achieved if one aims at using the Conditionality Regulation to address the rule of law backslidings[13] in some Member States. This is even more a legitimate question if one bears in mind that the Conditionality Regulation itself allows to be used either as a specific anti-corruption tool or as a tool to protect the rule of law.[14] Should the case be the latter one, the definitions of the Conditionality Regulation (arts 2, 3 and 4) are the ones that one would look at. However, since it has been widely discussed within legal scholarship[15] and also suggested by other instruments of the EU[16] the notion of systemic or generalised

[5] See <https://www.europarl.europa.eu/news/en/pressroom/20201020IPR89708/rule-of-law-conditionality-good-will-to-achieve-a-functioning-mechanism>, <https://www.europarl.europa.eu/news/nl/press-room/20201024IPR90105/not-there-yet-rule-of-law-conditionality-trilogues-continue>, <https://www.europarl.europa.eu/news/en/press-room/20201104IPR90813/rule-of-law-conditionality-meps-strike-a-deal-with-council> accessed 1 August 2021.

[6] See <https://www.politico.eu/article/angela-merkel-all-sides-must-make-compromises-to-break-budget-deadlock-over-rule-of-law/>, <https://www.politico.eu/article/german-presidency-proposes-rule-of-law-compromise-text/> accessed 1 August 2021.

[7] Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' 2020/12/13 VerfBlog <https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/> accessed 1 August 2021.

[8] EUCO 22/20.

[9] For more details of the legislative process see: <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 1 August 2021.

[10] Aleksejs Dimitrovs and Hubertus Droste, 'Conditionality Mechanism: What's in It?' 2020/12/30 VerfBlog <https://verfassungsblog.de/conditionality-mechanism-whats-in-it/> accessed 1 August 2021.

[11] ibid.

[12] Bearing in mind the conclusions of the EUCO (EUCO 22/20) and the ongoing procedures in front of the Court of Justice of the European Union: Case C-156/21, *Hungary v European Parliament and Council of the European Union* and Case C-157/21, *Republic of Poland v European Parliament and Council of the European Union*.

[13] Kim Lane Scheppele and Lauren Pech, 'What is Rule of Law Backsliding?' 2018/3/02 VerfBlog <https://verfassungsblog.de/what-is-rule-of-law-backsliding/> accessed 1 August 2021.

[14] András Jakab and Lando Kirchmair, 'How to Quantify a Proportionate Financial Punishment in the New EU Rule of Law Mechanism?' 2020/12/22 VerfBlog <https://verfassungsblog.de/how-to-quantify-a-proportionate-financial-punishment-in-the-new-eu-rule-of-law-mechanism/> accessed 1 August 2021. See also: Łacny (n 1) 103.

[15] See the relevant literature later.

[16] COM(2014) 158, Communication from the Commission to the European Parliament and the Council on A new EU Framework to strengthen the Rule of Law.

deficiencies and the omission of this idea from the adopted Conditionality Regulation – as the EUCO emphasized in its rightly criticized conclusions that the Conditionality Regulation is not applicable in these cases[17] – shall also be investigated. The aim of this chapter is to assess whether the Conditionality Regulation still could be used as a tool to protect not just the EU's financial interests but also the rule of law in the Member States, and as such the EU as a community of values.[18]

1. From the original Proposal to the adopted version: A comparison

The first step is comparing what was proposed and what was adopted. Doing is so vital since the Proposal, at first glance, could have had a better chance to meet the original idea behind[19] the whole legislation: somehow enforce the value of the rule of law in the Member States by withholding financial support from the EU.

1.1. The Proposal

In its Explanatory Memorandum, the Proposal underlines that the EU's values – the rule of law notably, enshrined in art 2 of the Treaty on European Union (TEU) – shall be ensured throughout all the EU's policies as their respect is an essential precondition for the sound financial management of the EU's budget. Since this compliance is a general premise for the functioning of the EU's legal order,[20] the generalised weaknesses in national checks and balances become a matter of common concern[21]. Recital 3 states that the rule of law is a prerequisite for the protection of other fundamental values on which the EU is founded, it is intrinsically linked to them.

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[17] EUCO 22/20, I.2.f).

[18] COM(2019) 163, Communication from the Commission to the European Parliament, the European Council and the Council on Further strengthening the Rule of Law within the Union State of play and possible next steps, 1–2.

[19] Scheppele, Pech and Platon (n 7). But also see: <https://www.europarl.europa.eu/news/en/press-room/20201016IPR89545/77-of-europeans-insist-eu-funds-be-linked-to-respect-for-rule-of-law>, <https://www.europarl.europa.eu/news/en/press-room/20201104IPR90813/rule-of-law-conditionality-meps-strike-a-deal-with-council> accessed 1 August 2021.

[20] And as a matter of fact, it is a precondition of the functioning of the Union as a whole, see for example: C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158 e.g. [34], C-216/18 PPU, *LM* [2018] ECLI:EU:C:2018:586 e.g. [35].

[21] COM(2014) 158, 'Communication from the Commission to the European Parliament and the Council on A new EU Framework to strengthen the Rule of Law', 5; COM(2019) 343 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee on the Regions on Strengthening the rule of law within the Union A blueprint for action', 1.

Recitals 4–9 highlight that there is a clear relationship between the efficient implementation of the EU's budget in line with the principle of sound financial management and the rule of law. Recital 11 importantly states that generalised deficiencies as regards of the rule of law are to be considered cases that, in particular, affect the functioning of public authorities and effective judicial review. These can seriously harm the Union's financial interests.

According to art 1 of the Proposal, it aims at protecting the EU's budget in case generalised deficiencies as regards the rule of law in the Member States. Art 2(a) gives a rule of law definition for the purposes of the Proposal. Accordingly, rule of law, enshrined in art 2 TEU, shall refer to legality – implying a transparent, accountable, democratic and pluralistic law-making –; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection by independent courts – including fundamental rights –, separation of powers and equality before the law. Generalised deficiency means widespread or recurrent practice, omission or measure by public authorities [see: art 2(b)]. Art 3(2) provides more details as examples: generalised deficiencies as regards the rule of law – in particular – may endanger the independence of the judiciary and it could be established to situations that are: 'failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests' or 'limiting the availability and effectiveness of legal remedies, including through restrictive procedural rules, lack of implementation of judgments, or limiting the effective investigation, prosecution or sanctioning of breaches of law'. The mechanism could have been triggered if these affected or risked affecting the sound financial management or the financial interests of the Union [see: art 3(1)]. The very same provision provides examples to the latter such as the proper functioning of public authorities that implement the EU's budget and of the investigation and public prosecution services; effective judicial review by independent courts; prevention and sanctioning of fraud, corruption and other breaches of Union law related to the implementation of the EU's budget.

It is rather conspicuous that the Proposal is fraught with definitions. Firstly, it has its own rule of law definition, referring to art 2 TEU, based on the Communication from the Commission to the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law (Rule of Law Framework)[22] and also on the relevant case-law of the Court of Justice of the European Union (CJEU) (see: recital 2). This rule of law conception is to be considered thick as it involves democratic law-making and the protection of fundamental rights. Art 3(1) gives a non-exhaustive list on what – generalised deficiencies as regards the rule of law – shall be conceived as

[22] COM(2014) 158.

ones that would affect or risk to affect the principles of sound financial management or the protection of the financial interests of the EU. This implies that the recalled examples are to be considered as necessary elements to meet the requirements of the rule of law. Reading these together, it is fair to say that dysfunctions of any public powers of the Member States – legislative, executive and juridical – that seemingly are not related to the EU law could have triggered the application of the Proposal. This is so, since finding a link from them to the protection of the financial interests of the EU – mainly touching upon the proper functioning of public authorities – meant to be easy as they do not conduct their national and EU functions in parallel universes. In other words: the definitions meant to link a broader situation in the Member States (with relevance to the rule of law, enshrined in art 2 TEU) to a narrower problem [see: the protection of the financial interests of the Union, based on art 322(1)(a) of the Treaty on the Functioning of the European Union (TFEU)[23]]. This is exactly the way of – 'mutual amplification'[24] how art 2 TEU has been enforced by the CJEU.[25] All these means nothing less than the Proposal could have revoked compliance beyond the fields that are not covered by the EU at first glance. It is even more important then, that the legality of the applied measures could have been reviewed by the CJEU, in line with art 263 TFEU.[26] Thus, it may be rightly noted then that the Proposal might have circumvented the never-ending procedures of art 7 TEU.[27]

1.2. The Conditionality Regulation

The text greatly relies on the Proposal's and as such, only the differences need to be highlighted. The first is the title which does not refer to the rule of law at all (see above). Recital 4 and 5 are new ones. They refer to the criteria established by the Copenhagen EUCO in 1993 (strengthened by the Madrid EUCO in 1995) as essential conditions – in the light of art 49 TEU – to become a Member State of the EU. It is also underlined that the EU's legal structure is based on the fundamental premise[28]

[23] Also on Article 106a of the Treaty establishing the European Atomic Energy Community.

[24] Luke Dimitrios Spieker, 'From Moral Values to Legal Obligations – On How to Activate the Union's Common Values in the EU Rule of Law Crisis' MPIL Research Paper Series No. 2018-24, 25.

[25] However, it is questionable whether focusing on the acquis would solve value problems, see: Dimitry Kochenov, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the European Union' in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values – Ensuring Member States' Compliance* (Oxford University Press 2017) 9–27, for the initial notion see: ibid 26–27.

[26] Armin von Bogdandy and Justyna Łacny, 'Suspension of EU Funds for Member States Breaching the Rule of Law – A Dose of Tough Love Needed?' (2020) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-24.

[27] Ibid 6.

[28] For some critical remarks on the Union's passivity towards questioning this premise see: Dimitry Kochenov, 'The Missing EU Rule of Law?' in, Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight*

that the Member States share the common values enshrined in art 2 TEU.[29] Recital 6 states that despite the fact that there is no hierarchy between the EU's values, respecting the rule of law is an essential precondition for the protection of the others. As such, it is so for the sound financial management, enshrined in art 317 TFEU. Recital 14 and 17 makes it clear that the Conditionality Regulation is complementary to the other tools of the EU to promote the rule of law. In recital 15 the Conditionality Regulation drops the notion of generalised deficiencies as regards the rule of law switching its focus to the breaches of its principles. However, it states that harming the EU's budget may occur not just in individual cases but also when such breaches are widespread because of the recurring practices and omissions of the public authorities or because of the general measures that are adopted by them. Finding such breaches requires qualitative research that should be based on various sources including information from non-EU institutions as well, for example from the European Commission for Democracy through Law (Venice Commission) and its Rule of Law Checklist (Rule of Law Checklist)[30] (see: recital 16). Art 1 drops again the notion of generalised deficiencies as regards the rule of law and opts for the breaches of – the principles of – the rule of law. Art 2a provides the definition of the rule of law, which refers to the Union value enshrined in art 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood regarding the other Union values and principles enshrined in art 2 TEU. As for its breaches, art 3 repeats the same provision of the Proposal (see above) and art 4 sets the conditions for the application of the Conditionality Regulation. It states that the breaches of the rule of law shall affect or risk affecting the EU's financial interest in a sufficiently direct way. Such breaches should concern one or more of the list of art 4(2). This list is basically the same as it is in art 3(1). of the Proposal (see above) with two additional elements. Point (h) states that other situations, not listed in art 4(2) might also be considered If the authorities' conduct is relevant to the sound financial management of the EU budget or the protection of the financial interests of the EU.

in the European Union (Cambridge University Press 2016) 305–11. Concerning rebutting this premise see: Explanatory memorandum of the Proposal, Rule of Law Framework 2, Carlino Antpöhler, Armin von Bogdandy, Johanna Dickschen, Simon Hentrei, Matthias Kottmann and Maja Smrkolj, 'Reverse Solange – Protecting the essence of fundamental rights against EU Member States' [2012] 49(2) Common Market Law Review 489–519; Iris Canor, 'My brother's keeper? Horizontal solange: "An ever-closer distrust among the peoples of Europe"' (2013) 50(2) Common Market Law Review 383–421.

[29] The Regulation does not cite it but this has been formulated by the CJEU in *Achmea* (n 20) e.g. [34].

[30] CDL-AD(2016)007rev.

It is clear that the logic and the structure of the Proposal have been kept. However, there are great deal of differences. Firstly, the Conditionality Regulation does not focus anymore on the generalised deficiencies as regards the rule of law but on its principles. Still, recital 15 tries to keep this notion by repeating the Proposal's definition in art 2(b). Secondly, art 4 of the Conditionality Regulation clearly aims at narrowing down its scope when it states that the breaches of the rule of law principles have to affect or risk affecting the financial interests of the Union in a sufficiently direct way. Finally, art 4 sets rules on the conditions for the adoption of measures. As it has been indicated, one should understand these as circumstances that a Member State should meet to respect rule of law. The novelty of the Conditionality Regulation lies in art 4(2) when it states that the breaches of the rule of law principles should concern – one or more – elements of the given list (such as proper functioning of the authorities which implement the EU's budget, carry out financial control and audit; the proper functioning of investigation and public prosecution services in relation to fraud and corruption; effective judicial control by independent courts over these authorities and so on). The tricky point is art 4(2)(h), a *bridging* one to a wider range of cases that are not specifically enlisted. It is not surprising then that one of the main point of disagreements – even among the EU's institutions – revolve around this point. For example, the EUCO in its rightly criticized conclusions, clearly neglecting the wording of the text, sates that the triggering factors of the Conditionality Regulation are to be applied as a close list (and the Conditionality Regulation cannot be used in case of generalised deficiencies).[31] On the other hand, the EUP in its resolution[32] argues just the opposite: the Conditionality Regulation is applicable in cases of systemic breaches and the given list of art 4 does not preclude to consider other situation that may have a negative impact on the financial interests of the EU. The application of the Conditionality Regulation – at least at first glance – seems to be rather complicated. The very reason behind this points at the hardships of enforcing the rule of law through positive legislation. This maybe the very reason why the Conditionality Regulation is composed of definitions, legalizing each steps of its application. Having said that, there is still a wider room for discretion for the Commission (and for the Council) when it considers a situation and the applicability of the Conditionality Regulation. Importantly, the adopted measures may be challenged at the CJEU in line with art 263 TFEU.[33]

[31] EUCO 22/20, I.2.f).

[32] European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)), P9_TA(2021)0348, see: point 9, 12 and 23.

[33] See also: Łacny (n 1) 102–3.

2. The rule of law definition and the notion of generalised (or systemic) deficiencies

The question still stands: is the Conditionality Regulation capable of addressing situations where the breaches of the rule of law are of systemic nature? To answer this, two points need to be clarified: what could be understood under the breaches of the principles of the rule of law and whether is there a significance of the notion generalised deficiencies as regards the rule of law. In the light of these shall be the provisions of the Conditionality Regulation appraised.

2.1. The rule of law definition – theoretical background

The complexity of the Conditionality Regulation comes from the fact enforcing the rule of law – due to its nature (see later) – through positive law is quite a difficult task, but not impossible. The issue with the rule of law is that it overarches different dimensions, embracing ideas, principles, qualities and institutions on historical, theoretical, legal and sociological levels. There is a high degree of consensus within the legal scholarship that any rule of law discussion is quite challenging due to its widely complex, elusive and multidimensional nature.[34] It might be fair to say that any rule of law approach would require some choice that reflect assumptions and differing interests of the society.[35] In the European jurisprudence, this task is easier since the rule of law is essentially a Western concept.[36] The aim of this paper is not to analyse the rule of law debate in the greater – theoretical – sense and as such, mentioned choices are to be made.

Firstly, the rule of law is a political ideal[37] which aims at putting human conduct under, and constraining power (politics) by law.[38] Secondly, law shall be capable of accomplishing this task and as such it needs to meet certain qualities to be differentiated

[34] Paul Craig, 'The Rule of Law, Select Committee on Constitution – Appendix 5' (2007) <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm> 1 accessed 1 August 2021; Brian Z Tamanaha, *On the Rule of Law – History, Politics, Theory* (Cambridge University Press 2004) 3; or Daniel Zolo, 'The Rule of Law: A Critical Reappraisal' in Pietro Costa and Danilo Zolo, *The Rule of Law – History, Theory and Criticism* (Springer 2007) 3.

[35] Craig (n 34) 7.

[36] Gianluigi Palombella, 'The Rule of Law and its Core' in Gianluigi Palombella and Neil Walker, *Relocating the Rule of Law* (Hart Publishing 2009) 18.

[37] Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Oxford University Press 2009) 211.

[38] Pietro Costa, 'The rule of law: an outline of its historical foundations' in Christopher May and Adam Whinchester, *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 135; Lon L. Fuller, *The Morality of Law* (Yale University Press 1969) 74; Dieter Grimm, *Constitutionalism – Past, Present and Future* (Oxford University Press 2015) 345; Tamanaha (n 34) 114–15.

from pure managerial commands.[39] Thirdly, since law – as an instrument – may serve various purposes,[40] it should be constrained as well, by more general[41]/other norms.[42] If one acknowledges this nature of the law, society shall make a choice what purposes it may serve. Thus, rule of law is a cultural achievement[43] and without a consent in society[44] it is doomed to fail. In Europe, this choice is a liberal one,[45] safeguarding individual freedom[46]/liberty[47] that stands against arbitrariness. This is the reason why the founding notion behind the law in Europe is looking for a balance between power and liberty.[48] All further considerations of the rule of law are built around this starting point. The following definition may reflect the European thought:

> the rule of law is a normative and institutional structure of the European modern state, within which, on the basis of specific philosophical and political assumptions, the legal system is entrusted with the task of protecting individual rights, by constraining the inclination of political power to expand, to act arbitrarily and to abuse its prerogatives.[49]

On the second level of the theoretical considerations, there is a well-known division between rule of law experts on what does the thin and what does the thick concept cover. Literature here is tremendous and exploring all aspects would exceed the aim and the means of this chapter. Bearing this in mind, it is fair to say that the thin approach is generally associated with formalism and qualities. On the other hand, thick

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[39] Fuller (n 38) 207–8.

[40] Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 334; Raz (n 37) 226.

[41] Palombella's concept on *gubernaculum – jurisdiction*: Gianluigi Palombella, 'The Rule of Law as an Institutional Idea' in Leonardo Morlino and Gianluigi Palombella, *Rule of Law and Democracy, Inquires into Internal and External Issues* (Brill 2010) 3–39.

[42] On the first place by fundamental rights, see: Grimm (n 38) 349. It has to be noted that according to Habermas, modern legal systems are build up by individual rights, see: Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy' (1995) 3(1) European Journal of Philosophy 14.

[43] Grimm (n 38) 351.

[44] According to Jakab, there is no Western legal system without shared Western values within the society, see: András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary' (2020) 68(4) The American Journal of Comparative Law 771.

[45] Many authors could be cited but see: Randall Peerenboom, 'Varieties of Rule of Law: an introduction and provisional conclusion' in Randal Peerenbpoom, *Asian Discourse of the Rule of Law – Theories and implementation of rule of law in twelve Asian countries, France and the U.S.* (Routledge Curzon 2004) 4; For a detailed explanation, see: Tamanaha (n 34) 32–44.

[46] Zolo (n 34) 7, 19.

[47] Liberty shall be considered as a condition that allows one to pursue his own vision of good, see: Tamanaha (n 34) 41. It is decisive for the whole legal system is liberty is the key value for the community, see: CDL-DEM(2009)006, European Commission for Democracy through Law (Venice Commission) – The Rule of Law in the European Jurisprudence 2.

[48] Habermas (n 42) 13.

[49] Zolo (n 34) 19.

supporters would add to these conditions elements of political morality, such as certain form of government or the protection of fundamental rights.[50] The thin viewers argue in favour of their position mostly from an analytical point of view[51], while the thick supporters believe that their approach is better designed to meet the original ideal: providing protection against arbitrariness.[52] The first reason is why the thin concept is more popular among lawyers, but there is an agreement that in the West – and within that in Europe – the thick or substantive approach is followed.[53]

2.2. The rule of law definition – practical background

In the light of these theoretical considerations, the rule of law definition of the Conditionality Regulation meets the European, substantive thought. The question may be asked whether its definition [see: art 2(a)] is arbitrary? The answer is definitely a no. In general, European institutions within the European Legal Space[54] – national, EU, Council of Europe (CoE) – associate greatly overlapping sub-principles with the rule of law that appear in the Conditionality Regulation. Enormous comparative studies[55] show that the rule of law has a firm, well-established European understanding[56]. It does so even if many national constitutions do not even refer to it or provides details on its meaning. Neither does the TEU, the Statute of the CoE or the European Convention on Human Rights.[57] This means that the rule of law needs to be interpreted by (constitutional) courts, scholars and by competent European institutions.[58]

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[50] For thorough evaluations on the two approaches see: Adriaan Bedner, 'The promise of the thick view' in Christopher May and Adam Whinchester (eds), *Handbook on the Rule of Law* (Edward Elgar Publishing 2018) 34–47; Jørgen Møller, 'The advantages of the thin view' in: ibid 21–33.

[51] Møller (n 50) 32–33.

[52] Bedner (50) 46.

[53] Tamanaha (34)111.

[54] Armin von Bogdadny, 'The Idea of European Public Law Today – Introducing the Max Planck Handbooks on Public Law in Europe' MPIL Research Paper Series No. 2017-04 1, 2–30.

[55] Joelle Grogan and Laurent Pech, 'Unity and Diversity in National Understandings of the Rule of Law in the EU' RECONNECT Work Package 7 – Deliverable 1 April 2020 <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf> accessed 1 August 2021; Joelle Grogan and Laurent Pech, 'Meaning and Scope of the EU Rule of Law' RECONNECT Work Package 7 – Deliverable 2 April 2020 <https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.2-1.pdf> accessed 1 August 2021; Joelle Grogen and Laurent Pech, 'The crystallisation of a core EU meaning of the rule of law and its (limited) normative influence beyond the EU' RECONNECT Work Package 7 – Deliverable 3 Arpil 2021 <https://reconnect-europe.eu/wp-content/uploads/2021/04/D7.3.pdf> accessed 1 August 2021.

[56] Grogran and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 5–6; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 5–6.

[57] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 13–30 and 48–69.

[58] ibid 32–34.

Despite the fact that the implementation of the rule of law may and shall vary,[59] the migration of certain understandings can be witnessed vertically and horizontally.[60] Examining the different jurisprudences of the European Legal Space (national, EU, CoE), one could easily and rightly come to the following conclusions.[61] Rule of law is: a political ideal and a legal principle (of constitutional value)[62] (a meta[63] or umbrella[64]); source of certain sub-principles[65] (formal and substantial[66]) that are common[67] in the European legal systems (national, EU and CoE[68]) and form the minimum standards of the European rule of law;[69] with the aim of constrain not just state but any public power to protect the individual;[70] strongly – or even inseparably – linked to the other European values of democracy and the protection of fundamental rights.[71] The rule of law is stemming from the common constitutional traditions, forming Europe's common constitutional heritage and a foundational value of the EU and of the CoE.[72] Having all these said, nothing of these means that the implementation

[59] ibid 34; Loughlin (n 40) 313; Zolo (34) 17.

[60] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 13-30 and 48–69; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 42.

[61] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 13–30 and 48–69; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 6–38.

[62] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 34.

[63] ibid 33. But the rule of law serves as a principle for juridical interpretation and source of standards, see: Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 60

[64] Laurent Pech: 'The Rule of Law as a Constitutional Principle of the European Union' Jean Monnet Working Paper 04/09, 48–62.

[65] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 33; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 19, 43.

[66] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 33 and 34; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 41

[67] Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 5–6, 39. According to point 34. of the Rule of Law Report and point 18. of the Rule of Law Checklist, there is a consensus on the core meaning of the rule of law and on its core elements.

[68] Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 5–6, 39.

[69] ibid 5.

[70] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 33; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 43

[71] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 41; Grogan and Pech (n 55) 'The crystallisation of a core EU meaning of the rule of law and its (limited) normative influence beyond the EU' 8–14; Or see: Laurent Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law'. (2010) 6 European Constitutional Law Review 367. But see according to point 31. of the Rule of Law Checklist, the rule of law is just an 'empty shell' without the protection of human rights.

[72] Grogan and Pech (n 55) 'Unity and Diversity in National Understandings of the Rule of Law in the EU' 31 and 34; Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 39 and 60. Immense literature could be cited here, but see: Armin von Bogdandy, 'Founding Principles of EU Law – A Theoretical and Doctrinal Sketch' (2010) Revus 12, 35–56. Also, the common constitutional culture of the European States can be regarded as the core of their identity, see: von Bogdandy (n 54) 23.

of the rule of law needs to be uniform.[73] Thus, it might be useful to think about these as commonly shared principles, functioning as 'red lines'[74].

It is clear from above that the rule of law is usually interpreted in a negative way (on all levels within the European Legal Space), mostly by courts. Due to the elaborated nature of the rule of law, pointing at *what is it* might be difficult. However, it is not impossible, but such an attempt shall focus on the sub-principles that associated with the rule of law and it should keep a certain level of abstraction. So to say: such lists should be considered (and made) as evaluation of the *law of the land*. This is exactly what the Commission did with the Rule of Law Framework, the Venice Commission with its Rule of Law Report[75] and its Rule of Law Checklist. Later, the Commission in its already mentioned – legally non-binding – Communication,[76] based on the case-law of the CJEU, identified the principles of the rule of law (adding the principle of separation of powers)[77] which are, with minor wording differences, identical to the ones in art 2 of the Proposal and of the Conditionality Regulation. Finally, the Communication from the Commission to the EUP, the Council, the European Economic and Social Committee and the Committee of the Regions[78] on the 2020 Rule of Law Report – The rule of law situation in the EU shall be mentioned as it uses the rule of law definition of the Communication. These all have been said to demonstrate that the rule of law definition of the Conditionality Regulation contains the European minimum rule of law standards, respecting not just the theoretical premises but also the European jurisprudence. However, should this not be the case, the Conditionality Regulation bears another legitimizing power: it is an adopted legal text, being in force and binding entirely.

2.3. What does generalised (or systemic) breaches as regards the rule of law mean?

To assess the real potentials of the Conditionality Regulation – from the point of view of addressing a rule of law backsliding in a Member States –, its triggering points are to be examined. This needs to be done in the light of the missing notion of 'generalised

[73] Grogan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 38. And also see: Rule of Law Framework 4; Rule of Law Checklist, point 34. In other words, in the light of constitutional pluralism, the implementation cannot be identical: Armin von Bogdandy, 'Principles of Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' (2020) 57(3) Common Market Law Reviews 711.

[74] See about this concept: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Maciej Taborowski and Matthias Schmidt, 'A potential constitutional moment for the European rule of law – The importance of red lines' (2018) 55(4) Common Market Law Review 983–95.

[75] CDL-AD(2011)003rev.

[76] COM(2019) 163, see: n 19.

[77] Gorgan and Pech (n 55) 'Meaning and Scope of the EU Rule of Law' 22.

[78] COM(2020) 580.

deficiencies as regards the rule of law'. Before doing so, it is necessary to point out that the very notion equals to systemic violations as they are used – among other terms – as synonyms.[79] This study uses the systemic adjective as it is widespread in legal scholarship.[80] As for the merits of the issue, it has to be answered, why dealing with this notion is important. Firstly, even the wording suggests that when such phenomena happen with the rule of law, problems are serious.[81] Secondly, it is not a coincidence that the institutions of the EU debates over it (see above). Thirdly, this notion – being mostly called systemic – has been already used by various European institutions[82] and it has been strongly advocated within legal scholarship.[83] The followings are understood in the current state of constitutional pluralism.

It is commonly acknowledged that these situations are different from 'normal' violations of the law.[84] That is to say, they have four common characteristics as they (1) are violations of the law; with (2) special gravity[85] (duration, intention, number of cases, nature, affecting the whole system);[86] (3) have to do something with the whole system;[87] and (4) there are no remedies within the system.[88] Qualifying problems with different weight shall not be new to lawyers: criminal law uses this technique when appraises the seriousness of a crime with a different gravity due to its nature, circumstances and so on. Grasping systemic breaches might be approached in a similar way. One piece or pieces of reality, under pre-defined indicators can be considered in a more serious manner than normally. As such, it is rather a matter of interpretation

[79] Armin von Bogdandy, Principles and Challenges of a European Doctrine of Systemic Deficiencies, MPIL Research Paper Series No. 2019-14, 15–16.

[80] ibid 15.

[81] von Bogdandy (n 73) 717.

[82] For example: (CJEU) C-404/15 *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198; C-659/15 PPU *LM* [2018] ECLI:EU:C:2018:586; *Broniowski v Poland* app no 31443/96 (ECtHR 22 June 2004). But also see the two ongoing Article 7 (1) TEU procedures against Hungary [P8_TA(2018)0340] and against Poland [COM(2017) 835 final].

[83] See the cited literature in the followings.

[84] Armin von Bogdandy and Michael Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51(1) Common Market Law Review 72, 93.

[85] For a general evaluation, see: von Bogdandy (n 79) 10–17; Barbara Grabowska-Moroz, Dimitry Vladimirovich Kochenov and Kim Lane Scheppele, '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 Yearbook of European Law 10; According to Scheppele, individual elements are added up and constitute a more serious violation, see: Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 108.

[86] von Bogdandy and Ioannidis (n 84) 60–61; von Bogdandy (n 79) 15–17; Scheppele (n 85) 114, 119–22. These critera have been reflected by the Rule of Law Framework and by the Proposal as well.

[87] von Bogdandy and Ioannidis (n 84) 60; von Bogdandy (n 79) 15–16.

[88] von Bogdandy and Ioannidis (n 84) 64, 'domestic ineffectiveness' 68, 72; von Bogdadny (n 73) 14; Dimitry Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt, *Defending Checks and Balances in EU Member States – Taking Stock of Europe's Actions* (Springer 2021) 141; See also the Rule of Law Framework.

than legislation. Of course – from the point of view of the rule of law itself[89] – the latter cannot be neglected. The interpretation must be holistic, taking all factors – intention, duration, weight, societal circumstances, or interactions and patterns – into consideration.[90] It is even more so if one accepts that the real issue with systemic problems is finding the threshold.[91] To be very precise, this is the key factor, and it can only be decided by taking information from different sources and various parts of – not just legal – reality into consideration. For example, signals of different legal orders (EU, CoE, other Member States) within the European Legal Space might lead to a high level of certainty if systemic breaches are at stake.[92] Systemic breaches within the Member States – with a great chance – would violate not just the functioning of the EU's legal system[93] but even more so the foundational values[94] of the EU, its existence as an alliance of liberal democratic states[95] and the common identity of the Member States.[96]

2.4. Is the Conditionality Regulation powerless without the notion of generalised (or systemic) deficiencies?

The notion behind the Proposal was specifically to grasp these situations. Systemic problems that generally concern the proper functioning of the public authorities may have easily lead to the application of the Proposal. This is important since the Proposal's legal base is art 322(1) TFEU, not on the 'unrestricted'[97] art 2 TEU. Thus, reality, even if at first glance it is outside the realm covered by Union law, could have been taken

[89] Werner Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What does it mean and imply?' in Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt, *Defending Checks and Balances in EU Member States – Taking Stock of Europe's Actions* (Springer 2021) 116; One could have considered the Proposal's solution regarding generalised deficiencies rather blurry, see: von Bogdandy and Łacny (n 26) 7–8. Also see the cited case-law of the CJEU here.

[90] von Bogdandy and Ioannidis (n 84) 60; Grabowska-Moroz, Kochenov and Scheppele (n 85) 18–19; von Bogdandy, Bogdanowicz, Canor, Taborowski and Schmidt (n 74) 989; Armin von Bogdandy, 'Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States' in Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt, *Defending Checks and Balances in EU Member States – Taking Stock of Europe's Actions* (Springer 2021) 93–94; Scheppele (n 85) 122.

[91] von Bogdandy and Ioannidis (n 84) 71, 73.

[92] von Bogdadny (n 79) 29–30.

[93] Scheppele (n 85) 110.

[94] von Bogdandy and Ioannidis (n 79) 60.; Scheppele (n 85) 114.

[95] von Bogdandy and Ioannidis (n 79) 60, 70.

[96] COM(2019) 343, 1; von Bogdandy (n 54) 13, 23.; von Bogdandy (n 73) 707, 712; Grabowska-Moroz, Kochenov and Scheppele (n 85) 19–21.

[97] Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20(8) German Law Journal 1198. But see the concept of von Bogdandy: von Bogdadny (n 54) 23.

into consideration. As such – since systemic problems require systemic measures[98] – the reactions would have addressed the bigger picture indirectly.

Bearing all these in mind, in principle, the same can be done with the Conditionality Regulation. Reading together especially recital 15–16; art 2a; arts 3 and 4, with special attention to the *bridging* art 4(2)(h) – 'other situations that are relevant' – of the Conditionality Regulation, it can be said that systemic issues still could be addressed. The Conditionality Regulation does not rule out that breaching more principles of the rule of law can be taken into consideration which is highly important due to the fact that the rule of law is enforced through its sub-principles.[99] This is vital since individual violations may not tackle the real issue: the autocratization of a Member State.[100] Secondly, recital 15 puts up to a matter of interpretation whether breaches of the rule of law shall be considered widespread and as such, systemic. The Conditionality Regulation is definitely sharper here than the Proposal: even individual – normal – breaches of the law could trigger its application. However, more systemic the breaches are, the application of the Conditionality Regulation is more likely.[101] This shall be taken into consideration if one bears in mind the real regrettable issue with the Conditionality Regulation: art 4(1). requires that the breaches shall affect or risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU *in a sufficiently direct way*. This provision is the matter of concern as it could greatly narrow down the applicability of the Conditionality Regulation: requiring concrete interference with the list of indicators of art 4(2).

However, the list of examples of the EU's financial interests is still heavily institution focused, containing a *bridging* provision. As such, finding a link from the breaches of the rule of law principles may still be relatively easy. In other words, the Conditionality Regulation is capable of addressing a great deal of institutional concerns [including law-making – general measures – recital 15 and art 2(a)]; interactions[102] through the principle of separation of powers; and also, some violations of fundamental rights which may be connected to these issues (right to effective judicial remedy, right to fair trial or equality before the law notably). Changes in these fields may change the bigger picture after all. On top, recital 16 prescribes qualitative, holistic assessment from various sources within the European Legal Space, which has been indicated as a key to find and establish systemic violations of the rule of law. To conclude, one might say that the Conditionality Regulation is sufficiently clear for application and bears the potential to address systemic breaches. The issue could be the matter of its

[98] Scheppele (n 85) 122.

[99] Schroeder (89) 117.

[100] von Bogdandy, Bogdanowicz, Canor, Taborowski and Schmidt (n 74) 988.

[101] Łacny (n 1) 85.

[102] According to Scheppele, this is one of the main points with rule of law measurements, see: Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26(4) Governance: An International Journal of Policy, Administration, and Institutions 559, 562.

interpretation by the Commission and by the Council. However, the CJEU might also be involved and as such, judicial review, the 'essence'[103] of the rule of law, is guaranteed.

Conclusions

One could say that the glass is half empty or half full.[104] However, the Conditionality Regulation still has some promises, especially from the point of view of institutions which are vital to safeguard liberal democracy.[105] In legal scholarship, it is rather debated whether financial coercion could lead to real changes[106] but the signs – bearing in mind the example of Greece[107] – are promising. Having said that two points are to be made. Firstly, despite the fact that the Conditionality Regulation bears a great potential, it is useless without the political will to apply it.[108] Secondly, the indirect effect of the Conditionality Regulation is the real treat. The goal would be putting back the concerned Member State – its institutions – in line with the European values.[109] However, here, the question will be whether the Member State – or more precisely, the governing majority – is willing to pay the price of its policies that run against the fundamental values of the EU.[110] Ultimately, this may be the real problem with such issues:[111] it could easily turn out that the presumably shared values within the EU are not that shared, or they are so in parallel universes. This is the reason why solving value issues in a community, in which its members are not on the same page is close to impossible.[112] If a society strongly believes in a certain policy that runs against *red lines*, it might be willing to pay a literally high price for it,[113] regardless how much the system is depended on the concerned funds. In this case, no financial – or any kind[114] of – coercion within the current setting of the Union will save the day.

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[103] Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] e.g. [36].

[104] Łacny (n 1) 102.

[105] Jakab (n 44) 768, 790.

[106] von Bogdandy and Ioannidis (n 84) 29; Daniel R. Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 24(3) Journal of European Public Policy 333; Kochenov (n 25) 19; Scheppele (n 85) 127.

[107] von Bogdandy and Ioannidis (n 84) 77–81, 87–90.

[108] Łacny (n 1) 103.

[109] Scheppele (n 85) 122, 125.

[110] In other words, value debates often lack rationality, see: von Bogdandy (n 79) 4.

[111] von Bogdandy and Ioannidis (n 84) 94: 'Systemic deficiencies raise difficult questions of [...] broader compatibility with the European project'.

[112] For example, only the citizens can restore the separation of powers, see: von Bogdandy, Bogdanowicz, Canor, Taborowski and Schmidt (n 74) 985, 994.

[113] Act with caution, such debates may lead to explosive conflicts, see: von Bogdandy (n 73) 713–15.

[114] In this regard see: Grabowska-Moroz, Kochenov and Scheppele (n 85) 22.

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The Conditionality Regulation: Procedural Aspects of the EU's New Rule of Law Mechanism

Introduction

The rule of law crisis is one of the biggest challenges the European Union (EU) has faced in recent years. With the Regulation on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation), a new instrument has been created to help to overcome this crisis. It entitles the EU to suspend payments of EU funds to Member States that breach the principles of the rule of law. In this contribution, the procedural aspects of the Conditionality Regulation will be examined. Firstly, the effects of the rule of law crisis on the EU are presented, before the genesis of the Conditionality Regulation is examined. Subsequently, the focus lies on the functioning of the Conditionality Regulation. In particular, the conditions for adopting measures and the resulting burden of proof will be dealt with. The main part of the contribution then concentrates on the procedural steps of the Conditionality Regulation, especially on those which are decisive for its success. The respective responsibilities of the EU institutions will be discussed to show whether the Conditionality Regulation has the potential to help protecting the rule of law in the EU. The findings of the analysis will be summarised in the conclusions.

1. The rule of law crisis in the EU

The EU has been confronted with some major challenges in the last years. These challenges also include the so-called 'rule of law crisis'.[1] According to art 2 of the Treaty on European Union (TEU) the rule of law is one of the fundamental values on

[1] Peter Van Elsuwege and Femke Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' (2020) 16 EuConst 8, 10.

which the EU is founded and which is common to all its Member States.[2] However, in some Member States there are currently serious deficiencies regarding the rule of law. This is particularly the case in Hungary[3] and Poland.[4] Yet worrying developments can also be observed in other Member States. The rule of law crisis has far-reaching consequences for the EU. Above all, it jeopardises the principle of mutual trust, which is essential for the judicial cooperation between the Member States.[5] It requires each Member State 'to consider all the other Member States to be complying with EU law'.[6] The principle of mutual trust is based on the premise that all Member States respect the fundamental values of art 2 TEU.[7] If a Member State systematically violates these fundamental values, however, the basis for mutual trust no longer exists.[8] Moreover, if the judiciary of a Member State is no longer independent, this affects the functioning of the preliminary ruling procedure, which is one of the cornerstones of the EU's judicial system.[9] The political consequences of the rule of law crisis should not be underestimated either. The EU is in danger of losing its integrity if it promotes its fundamental values in its external relations but fails to act in the event of serious breaches of these values by its own Member States.[10]

Although art 7 TEU provides a mechanism for sanctioning serious breaches of the EU's fundamental values (Article 7 procedure), this 'nuclear option'[11] is hardly applicable, as it requires a unanimous decision by the European Council.[12] In regard to Hungary and Poland art 7 TEU has proven to be ineffective and not so nuclear at all. The European Court of Justice (ECJ) has made an important contribution to the

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[2] For the rule of law as a fundamental value of the EU see Werner Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Springer 2021).

[3] Gábor Attila Tóth, 'Illiberal Rule of Law? Changing Features of Hungarian Constitutionalism' in Maurice Adams, Anna Meuwese and Ernst Hirsch Ballin (eds), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism* (CUP 2017).

[4] Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 HJRL 1.

[5] See Clemens Ladenburger, 'The Principle of Mutual Trust between Member States in the Area of Freedom, Security and Justice' (2020) 23 ZEuS 373.

[6] Case Opinion 2/13 *Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454, para 191; Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* [2016] ECLI:EU:C:2016:198, para 78; Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586, para 36.

[7] Case Opinion 2/13 *Accession of the EU to the ECHR* [2014] ECLI:EU:C:2014:2454, para 168; Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158, para 34; Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586, para 34.

[8] Carlos Closa, 'Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals and the Procedural Limitations' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 16f.

[9] Marek Safjan, 'Domestic Infringements of the Rule of Law as a European Union Problem' (2018) 64 OER 552, 554f.

[10] Werner Schroeder, 'The European Union and the Rule of Law: State of Affairs and Ways of Strengthening' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) 4.

[11] Commission, 'State of the Union 2012 Address' (Speech) SPEECH/12/596, 10.

[12] TEU, art 7(2).

protection of the rule of law with its jurisprudence on art 19(1) TEU, which obliges the Member States to guarantee effective legal protection in the fields of EU law.[13] However, infringement procedures are only suitable for claiming individual violations of EU law.[14] Otherwise, only non-binding measures exist so far to protect the rule of law, such as the newly introduced rule of law report of the Commission.[15]

This institutional deficiency has led to many debates for a new instrument to strengthen the rule of law in the EU.[16] Due to the principle of conferral,[17] the EU only has limited room for action. It lacks a general competence to adopt measures regarding the rule of law. In the course of time, the idea came up to link the payment of EU funds to compliance with the rule of law.[18] An idea that was put into practice in the middle of January 2021, when the Conditionality Regulation entered into force.[19] It links the EU funds of a Member State directly to the rule of law as it enables the EU to suspend or reduce EU funds of a Member State in case of a violation of the rule of law. Officially, the Conditionality Regulation is not an instrument to protect the rule of law, but an instrument to protect the EU budget.[20] However, it is quite obvious that the main goal was to create an instrument to effectively sanction violations of the rule of law.

Conditionality is not a new concept in EU law. In fact, conditionality mechanisms exist in EU law since the end of the 1970s. They were originally used in the EU's external policy. At that time, the EU began to link the granting of economic benefits to the compliance with human rights standards in international agreements with third countries.[21] Nowadays, such conditionality clauses are usually included in international agreements of the EU. Conditionality mechanisms are also increasingly

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[13] See Case C-64/16 *Associação Sindical dos Juízes Portugueses* [2018] ECLI:EU:C:2018:117; Case C-619/18 *Commission v Poland* [2019] ECLI:EU:C:2019:531; Case C-824/18 *AB and others* [2021] ECLI:EU:C:2021:153.

[14] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 108ff.

[15] Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' COM(2020) 580 final.

[16] See for example Carlos Closa and Dimitry Kochenov, 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in Werner Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016); Gábor Halmai, 'The Possibility and Desirability of Rule of Law Conditionality' (2019) 11 HJRL 171; Jan-Werner Müller, 'Protecting the Rule of Law (and Democracy!) in the EU: The Idea of a Copenhagen Commission' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016).

[17] TEU, art 5(2).

[18] Critical on this Iris Goldner Lang, 'The Rule of Law, the Force of Law and the Power of Money in the EU' (2019) 15 CYELP 1, 5ff.

[19] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

[20] cf Conditionality Regulation, art 1; the Conditionality Regulation is also not listed among the other rule of law instruments on the Commission's homepage.

[21] Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Martinus Nijhoff Publishers 2003) 41ff.

found in the EU's internal policies. This development started with the then Cohesion Fund,[22] which was introduced in the mid-1990s to realise the establishment of the European Monetary Union. Accordingly, some Member States (Greece, Ireland, Portugal and Spain) would only have access to the Cohesion Fund's resources if they adopted the economic convergence plans and complied with the EU's budgetary deficit rules (called macroeconomic conditionality).[23] The current Common Provisions Regulation[24] also contains a conditionality mechanism. This regulation contains common provisions regarding the European structural and investment funds (ESIF). According to art 142(1)(a) Common Provisions Regulation, the Commission may suspend payments from the ESIF if 'there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken'. Some scholars argue that this provision already authorises the EU to suspend payments to a Member State that violates the rule of law.[25]

2. The genesis of the Conditionality Regulation

The road to a mechanism, which explicitly links compliance with the rule of law to payments of EU funds, was certainly a rocky one. It started with the Commission's proposal for the Conditionality Regulation (Commission's proposal) in May 2018.[26] While the European Parliament adopted its position for the legislative procedure about

[22] Council Regulation (EC) No 1164/94 of 16 May 1994 establishing a Cohesion Fund [1994] OJ L130/1.

[23] Viorica Viță, 'Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality' (2017) 19 CYELS 116, 128f.

[24] 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 [2013] OJ L347/320.

[25] Israel Butler, 'Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs' (2018) Liberties Study 11ff; R. Daniel Kelemen and Kim Lane Scheppele, 'How to Stop Funding Autocracy in the EU' 10 September 2018 Verfassungsblog <https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/> accessed 1 August 2021; Laurent Pech and Dimitry Kochenov, 'Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid' (2019) Reconnect Policy Brief 2 and 10f.

[26] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States' COM(2018) 324 final; see for this Justyna Łacny, 'Suspension of EU Funds Paid to Member States Breaching the Rule of Law: Is the Commission's Proposal Legal?' in Armin von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States* (Springer 2021); Goldner Lang (n 18).

a year after the Commission's submission,[27] no agreement could be reached in the Council regarding the Conditionality Regulation. The discussion on the implementation of the mechanism gained new momentum during the negotiations of the Multiannual Financial Framework 2021–2027. In July 2020, the European Council decided that '[t]he Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU'.[28] After some tough negotiations between the European Parliament and the Council,[29] a preliminary agreement on the adoption of the Conditionality Regulation was reached at the beginning of November 2020.[30] However, this is not the end of the story.

Based on art 322(1)(a) of the Treaty on the Functioning of the European Union (TFEU), the regulation could be adopted with qualified majority. However, the Conditionality Regulation was a thorn in the flesh of Hungary and Poland from the beginning. As the two Member States could not block the coming-into-entry of the regulation, they blocked the new Multiannual Financial Framework and the EU recovery package (Next Generation EU) instead, which both required unanimity. Hungary and Poland demanded the Conditionality Regulation either not to be adopted or to be weakened. However, the European Parliament was not willing to renegotiate the regulation. A solution had to be found quickly; after all, a lot of money was at stake, which was urgently needed in the Member States. In the end, a compromise was reached through the Conclusions of the European Council of 10 and 11 December 2020 (December Conclusions).[31] Thus, the Multiannual Financial Framework and the Next Generation EU fund could be adopted. On 16 December 2020, also the Conditionality Regulation was officially adopted.[32] Despite the compromise, Hungary and Poland each brought an action for annulment against it.[33]

According to the December Conclusions, the Commission will develop guidelines for the application of the Conditionality Regulation. However, these guidelines will

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[27] European Parliament, 'European Parliament legislative resolution of 4 April 2019 on the proposal for a regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States (COM(2018)0324 – C8-0178/2018 – 2018/0136(COD))' P8_TA-PROV(2019)0349.

[28] European Council, 'Conclusions – 17, 18, 19, 20 and 21 July 2020' EUCO 10/20, para A24.

[29] European Parliament, ''Not there yet': Rule of law conditionality trilogues continue' (Press release) 20201024IPR90105.

[30] European Parliament, 'Rule of law conditionality: MEPs strike a deal with Council' (Press release) 20201104IPR90813; Council, 'Budget conditionality: Council presidency and Parliament's negotiators reach provisional agreement' (Press release) 750/20.

[31] European Council, 'Conclusions – 10 and 11 December 2020' EUCO 22/20.

[32] European Parliament, 'European Parliament legislative resolution of 16 December 2020 on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget (09980/1/2020 – C9-0407/2020 – 2018/0136(COD))' P9_TA(2020)0356.

[33] Case C-156/21 *Hungary v European Parliament and Council* (pending case; last status: 10 July 2021); Case C-157/21 *Poland v European Parliament and Council* (pending case; last status: 10 July 2021).

only be finalised, after the ECJ has ruled on Hungary's and Poland's actions for annulment.[34] In practice, this leads to the inapplicability of the Conditionality Regulation for quite some time. However, the regulation explicitly states that '[i]t shall apply from 1 January 2021'.[35] Although Commission President Ursula von der Leyen has assured that any case that arises in the meantime will be pursued later,[36] there has been some disappointment about this approach. It was rightly argued that the European Council is not involved in the legislative procedure of the EU. Moreover, art 278 TFEU explicitly states that an action only has suspensive effect if the ECJ orders this.[37] The European Parliament has therefore announced that it may bring an action for failure to act against the Commission.[38] At the end of June 2021, it initiated the first stage of the procedure and officially called upon the Commission to act in accordance with art 265(2) TFEU.[39] Even if the Conditionality Regulation is yet to be applied, it is worth taking a closer look at it. In the following, the functioning and procedure of the regulation are presented.

3. The functioning of the Conditionality Regulation

The Conditionality Regulation allows the EU to take a variety of financial measures.[40] For example, in the case of direct or indirect management, payments may be suspended, an early repayment of loans may be ordered or the conclusion of new

[34] EUCO 22/20 (n 31), para 2(c).

[35] Conditionality Regulation, art 10 sentence 2.

[36] Commission, 'Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the European Council meeting of 10–11 December 2020' (Speech) SPEECH/20/2442: 'The regulation will apply from 1 January 2021 onwards. And any breach that occurs from that day onwards will be covered. […] No case will be lost.'

[37] Alberto Alemanno and Merijn Chamon, 'To Save the Rule of Law you Must Apparently Break It' 11 December 2020 Verfassungsblog <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/> accessed 1 August 2021; Kim Lane Scheppele, Laurent Pech and Sébastien Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' 13 December 2020 Verfassungsblog <https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/> accessed 1 August 2021.

[38] European Parliament, 'European Parliament resolution of 17 December 2020 on the Multiannual Financial Framework 2021-2027, the Interinstitutional Agreement, the EU Recovery Instrument and the Rule of Law Regulation (2020/2923(RSP)' P9_TA(2020)0360, para 9; European Parliament, 'European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP))' P9_TA(2021)0103, para 14; European Parliament, 'European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP))' P9_TA(2021)0287, paras 11f.

[39] The letter is available here: <https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20to%20EC%20RoL%20230621/Sassoli%20Letter%20EC%20230621.pdf> accessed 10 July 2021.

[40] See also Justyna Łacny, 'The Rule of Law Conditionality Under Regulation No 2092/2020: Is it all About the Money?' (2021) 13 HJRL 79, 90ff.

agreements on the granting of loans may be prohibited.[41] In the case of shared management, programme approvals, commitments or payments may be suspended, among other measures.[42] Unless otherwise ordered, the Member State concerned remains obliged to implement the programmes or funds affected by a measure and to make payments to the final recipients or beneficiaries.[43]

For any of the mentioned measures to be adopted, the conditions of art 4(1) Conditionality Regulation must be met. According to the provision '[a]ppropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way'. Thus, two conditions have to be met. First, a breach of the principles of the rule of law is required. In addition, there must be a sufficiently direct impairment or at least a serious risk to the EU finances due to such a breach. Art 4(2) Conditionality Regulation conclusively lists the areas, to which a breach of the rule of law must relate:

> (a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures;
>
> (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
>
> (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;
>
> (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c);
>
> (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities;

[41] Conditionality Regulation, art 5(1)(a).
[42] Conditionality Regulation, art 5(1)(b).
[43] Conditionality Regulation, art 5(2).

(f) the recovery of funds unduly paid;

(g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation;

(h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

Based on this exhaustive enumeration, not every breach of the rule of law triggers the application of the Conditionality Regulation, although there is a catch-all clause in art 4(2)(h) Conditionality Regulation. For example, it is questionable whether the regulation can be used to sanction systematic violations of fundamental rights. A further limitation of the regulation's scope of application results from the second condition of art 4(1) Conditionality Regulation, which requires a 'sufficiently direct' connection between the breach of the rule of law and the EU budget or the financial interests of the EU. A fundamental question in this regard is the threshold of the Commission's burden of proof, which is responsible for initiating and carrying out the procedure.[44] Proving that there is a breach of the rule of law should not be too difficult. The challenge will be to show that the breach has a 'sufficiently direct' impact on the EU finances. The Commission's proposal was less strict in this respect. It only spoke of a 'risk', not of a 'serious risk' for the EU budget or the financial interests of the EU. The wording 'in a sufficiently direct way' was also not to be found.[45] The Commission's proposal therefore required a lower burden of proof than the final regulation.

The Conditionality Regulation does not further elaborate on the topic of burden of proof. Art 6(9) Conditionality Regulation merely notes that '[t]he proposal shall set out specific grounds and evidence on which the Commission based its findings'. The previously mentioned art 4(2) Conditionality Regulation could put some clarification on the burden of proof required. Each of the listed cases already has a connection to the EU budget and the financial interests of the EU. One could argue that there is already a certain presumption that the breach needs to risk affecting the EU finances. Of course, a proposal of the Commission must be sufficiently reasoned; after all it is bound by the rule of law itself. The Commission must carefully analyse the situation in a Member State and provide sufficient evidence for a proposal. However, the burden of proof must not be inappropriately high. Otherwise, it would undermine the

[44] Conditionality Regulation, art 6(1)–(9).

[45] cf Commission's proposal, art 3(1).

applicability of the Conditionality Regulation. The following can be considered: the more serious a breach of the rule of law, the more likely a sufficiently clear risk to the EU budget or the financial interests of the EU should be assumed.[46] It will also be interesting to see how much margin of judgment the ECJ will grant the Commission regarding the burden of proof, if the Member State concerned challenges the decision.

4. The procedure of the Conditionality Regulation

The following section deals with the procedure for adopting measures, which is basically regulated in art 6 Conditionality Regulation. In this regard, the roles of the EU institutions will be discussed in detail. The main actors of the procedure are the Commission and the Council. In exceptional cases, the European Council may also be involved.

4.1. The initiation of the procedure

The competence to initiate the procedure lies with the Commission.[47] An essential question, which has caused a great debate, is whether the Commission is entitled or obliged to act. This would be of importance if the European Parliament will bring an action for failure to act against the Commission for not yet applying the regulation. According to art 265 TFEU the Member States and the EU institutions, including the European Parliament, may bring an action against an EU institution which unlawfully fails to act. For such an action to succeed, the ECJ needs to agree with the European Parliament that the Conditionality Regulation enshrines an obligation of the Commission to initiate a procedure if the conditions of art 4(1) Conditionality Regulation are met.

An interpretation of art 4(1) and art 6(1) Conditionality Regulation might help to find out whether this is the case. Therefore, the wording of these provisions will be the starting point. According to art 4(1) Conditionality Regulation 'measures shall be taken'. This wording indicates an obligation for the Commission. Art 6(1) stipulates that '[w]here the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in the Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out

[46] Same view Takis Tridimas, 'Editorial Note: Recovery Plan and Rule of Law Conditionality: A New Era Beckons?' (2020) 16 CYELP VII, XVIf.

[47] Conditionality Regulation, art 6(1).

the factual elements and specific grounds on which it based its findings'. The beginning of the sentence ('reasonable grounds to consider') shows that the Commission has some discretion in initiating the procedure. This discretion increases by the fact that it may initiate other procedures if it considers them more appropriate to protect the EU budget. However, art 6(1) also states that the Commission 'shall' send a written notification, and not 'may' send a written notification in such a case. To sum it up, the wording of art 4(1) and art 6(1) Conditionality Regulation indicates an obligation of the Commission to initiate a procedure if it considers the conditions of art 4 are met and no other procedures are more appropriate.[48] This is not changed by the fact, that art 5(1) states 'one or more of the following appropriate measures may be adopted'. In this way, the Commission's freedom to decide on the measures to be taken is expressed. The principle of effectiveness clearly speaks in favour of such an interpretation. The purpose of to the Conditionality Regulation it is to protect the EU budget from any damage caused by breaches of the rule of law. This aim can merely be effectively realised if the Commission has a legal obligation to apply the Conditionality Regulation under certain circumstances.

Nevertheless, it is doubtful, whether an action for failure to act would be successful in this context. Before such an action can be brought, the EU institution concerned must be called upon to act. The latter then has two months to state its position.[49] If the institution concerned complies with this request, an action for failure to act is inadmissible. It is not necessary that the decision requested by the applicant is taken. It is already sufficient if the institution concerned deals with the content of the request and clearly states its position. Only if it does not respond to such a request at all, an action for failure to act would be admissible.[50] On 23 June 2021, the President of the European Parliament, David Maria Sassoli, officially called upon the Commission to apply the Conditionality Regulation.[51] From this date, the Commission has two months to define its position.[52] It could avoid an action by claiming that the conditions set out in art 4(1) Conditionality Regulation are not met. However, such a response is unlikely as Commission President Ursula von der Leyen has assured the European Parliament that the Commission 'will start the first files in autumn'.[53] It is noteworthy that the

[48] For a similar view see Merijn Chamon, 'A Hollow Threat: The European Parliament's plan to bring the Commission before the Court of Justice' 16 June 2021 Verfassungsblog <https://verfassungsblog.de/a-hollow-threat/> accessed 1 August 2021.

[49] TFEU, art 265(2).

[50] Case 8/71 *Komponistenverband v Commission* [1971] ECR 705, para 2; Joined Cases 166/88 and 220/86 *Irish Cement v Commission* [1988] ECR 6473, para 17; Joined Cases C-15/91 and C-108/91 *Buckl and others v Commission* [1992] ECR 6061, para 17.

[51] See <https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20to%20EC%20RoL%20230621/Sassoli%20Letter%20EC%20230621.pdf> accessed 10 July 2021.

[52] This contribution was finalised before the expiry of the Commission's two-month time limit.

[53] Commission, 'Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the European Council meeting of 24-25 June 2021' (Speech) SPEECH/21/3526.

Commission could not claim that it still needs time to analyse the matter. According to the case-law of the ECJ, such stalling answers are not considered to be a statement in the sense of art 265(2) TFEU.[54]

Even if the European Parliament would bring an admissible action for failure to act, it is hard to imagine that the ECJ will uphold it. In fact, the Commission has no absolute obligation to act. It has already been shown that the Conditionality Regulation grants a certain degree of discretion in this matter. For an action to be successful, the European Parliament would have to prove that the Commission has violated the limits of its discretion.[55] However, it would be extremely difficult to provide such evidence.[56] Moreover, it would take some time until the ECJ has ruled on the European Parliament's action for failure to act. By then, a judgement of the ECJ on the actions for annulment brought by Hungary and Poland will certainly have been delivered and the conditions for the application of the Conditionality Regulation set out in the December Conclusions of the European Council will be fulfilled. Therefore, it would have been more efficient to take legal action against this Conclusions, as has also been suggested by several scholars.[57]

Despite an action for failure to act, how could the Commission otherwise be mobilised to act? This question will still be relevant once the ECJ has ruled on the action for annulment brought by Hungary and Poland. In fact, the Commission is criticised for its inaction in fighting rule of law deficiencies in the Member States.[58] The Article 7 procedure against Hungary was also not initiated by the Commission, but by the European Parliament.[59] How could the Commission therefore be pressured to apply the Conditionality Regulation? Firstly, the European Parliament could vote on a motion of censure against the Commission under art 234 TFEU.[60] It has already pointed out to this option in its resolutions of March and June 2021 regarding the Conditionality Regulation.[61] In addition, the European Parliament could ask the

[54] Case 42/58 *S.A.F.E. v High Authority* [1959] ECR 183, 190f; Joined Cases 42 and 49/59 *S.N.U.P.A.T. v High Authority* [1961] ECR 53, 73f; Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, para 88.

[55] Markus Kotzur, 'Article 265 TFEU' in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties: A Commentary* (C.H.Beck, Hart Publishing 2015) para 15.

[56] Chamon (n 48); Sébastien Platon, 'Bringing a Knife to a Gunfight: The European Parliament, the Rule of Law Conditionality, and the action for failure to act' 11 June 2021 Verfassungsblog <https://verfassungsblog.de/bringing-a-knife-to-a-gunfight/> accessed 1 August 2021; see in this context also the case-law of the ECJ, in which it denies an obligation of the Commission to initiate an infringement procedure: Case 247/87 *Star Fruit Company v Commission* [1989] ECR 291, paras 11f; Case C-87/89 *Sonito and others v Commission* [1990] ECR I-1981, paras 6f; Case C-72/90 *Asia Motor France v Commission* [1990] ECR I-2181, para 13.

[57] Alemanno and Chamon (n 37); Scheppele, Pech and Platon (n 37).

[58] Pech, Wachowiec and Mazur (n 4) 21ff.

[59] See European Parliament, '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))' P8_TA(2018)0340.

[60] Alemanno and Chamon (n 37).

[61] P9_TA(2021)0103 (n 38), para D; P9_TA(2021)0287 (n 38), para G.

President of the Commission to withdraw confidence in a Member of the Commission.[62] The legal basis for this can be found in section 5 of the Framework Agreement between the European Parliament and the Commission.[63] In such a case, the President of the Commission considers whether to make use of the possibility of art 17(6) TEU and to request the Member of the Commission concerned to resign. Of course, these would be drastic measures, which should only be considered as *ultima ratio*. The European Parliament should first try to convince the Commission to act through a dialogue. Nevertheless, it would be preferable that such measures will not be necessary, and the Commission will fulfil its role as guardian of the Treaties and actually use the new instrument to protect the rule of law on its own initiative.

4.2. The adoption of measures

If the Commission initiates the procedure of the Conditionality Regulation and sends a written notification to the Member State concerned, the latter must provide the required information and may submit an observation on the Commission's findings. The Member State concerned shall be given a time limit of one to three months to do so.[64] Moreover, the Commission shall inform the European Parliament and the Council of such a notification.[65] Within one month of receiving the required information or of the expiry of the time limit set for the Member State concerned, the Commission shall again assess the situation.[66] If the Commission intends to submit a proposal for a decision, it shall inform the Member State concerned in advance and give it the opportunity to state its position within one month.[67] After receiving the observations of the Member State concerned or after the expiry of the one-month time limit, the Commission shall submit its proposal for a decision on the adoption of measures to the Council.[68] In its proposal, the Commission is bound by the principle of proportionality. Moreover, the impact of the breach of the rule of law on the EU budget or the financial interests of the EU must be taken into account. In particular, the nature, duration, gravity and scope of the breach are decisive factors. Furthermore, the proposed measures shall, as far as possible, be related to the EU actions affected by the breach of the rule of law.[69]

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[62] Alemanno and Chamon (n 37).
[63] Framework Agreement on relations between the European Parliament and the European Commission [2010] OJ L304/47.
[64] Conditionality Regulation, art 6(5).
[65] Conditionality Regulation, art 6(1).
[66] Conditionality Regulation, art 6(6).
[67] Conditionality Regulation, art 6(7).
[68] Conditionality Regulation, art 6(9).
[69] Conditionality Regulation, art 5(3).

The final decision on whether to adopt measures is made by a qualified majority vote of the Council.[70] The Commission's proposal provided for the Council to decide by a reversed qualified majority. This would have meant that a decision would be deemed adopted if the Council did not reject a submitted proposal of the Commission by a three-quarters majority within one month of its adoption by the Commission.[71] The European Parliament was also in favour of this form of voting in the Council.[72] Of course, this would have made it easier to take measures against a Member State. Nevertheless, there were some doubts whether this form of voting would have been compatible with primary law.[73] Art 16(3) TEU states that '[t]he Council shall act by a qualified majority except where the Treaties provide otherwise'. However, the EU Treaties do not provide for the Council to act by a reversed qualified majority. Hence, this form of deciding within the Council could probably not be introduced by a secondary act.

In the final regulation, it was established that the Council decides by a qualified majority. Compared to the unanimity requirement in the Article 7 procedure, a qualified majority decision is an improvement as it ensures that a decision cannot be blocked by a single Member State. Still the involvement of the Council implies that the decision on whether to suspend or reduce EU funds from a Member State is to some extent a political one. It could depend not only on whether the conditions of art 4(1) Conditionality Regulation are met, but also on other factors. This does not necessarily mean that a decision cannot made objectively, but the following should be kept in mind: What if the Member State concerned uses a leverage to prevent the Council's approval? The genesis of the Conditionality Regulation is the best example of such a constellation. The consent of Hungary and Poland was not necessary for the adoption of the regulation, as this was done with qualified majority. However, the two Member States managed to exert influence on the Conditionality Regulation by blocking the Multiannual Financial Framework and the EU recovery package. This was, of course, an exceptional situation at an exceptional time, but it is not entirely precluded that a similar situation could arise.

Furthermore, the Council has so far failed to prove its absolute will in fighting rule of law deficiencies. Some years ago, procedures under art 7(1) TEU were initiated against both, Hungary and Poland, to determine 'a clear risk of a serious breach' of the EU values. The Council has not yet taken a decision in either case, although it could already act with a majority of four fifths. Art 7(1) TEU does not oblige the Council to act within a certain time limit. The Conditionality Regulation is different in that aspect, as it puts pressure on the Council with a concrete time limit. In fact, the Council has to decide on

[70] Conditionality Regulation, art 6(10) in conjunction with TEU, art 16(3).

[71] Commission's proposal, art 5(7).

[72] P8_TA-PROV(2019)0349 (n 27), art 5(6b).

[73] Jens Brauneck, 'Gefährdung des EU-Haushalts durch rechtsstaatliche Mängel in den Mitgliedstaaten?' (2019) 54 EuR 37, 52; Armin von Bogdandy and Justyna Łacny, 'Suspension of EU Funds for Member States Breaching the Rule of Law: A Dose of Tough Love Needed?' (2020) MPIL Research Paper Series No 2020-24, 15ff.

the Commission's proposal within one month, or within a maximum of three months if exceptional circumstances arise.[74] If it does not adopt any measures of the Conditionality Regulation within the given time limit, it has to face the question of why it has come to this. It is a positive aspect of the Conditionality Regulation that precise time limits are set for each procedural step. A decision in the procedure of the Conditionality Regulation can be expected within seven to nine months. In contrast to the Article 7 procedure, the risk of no action being taken on a matter for years is therefore diminished.

4.3. The role of the European Council

Under certain circumstances, the European Council also has a role in the procedure of the Conditionality Regulation. According to recital 26 sentence 1 Conditionality Regulation 'the procedure for adopting measures should respect the principles of objectivity, non-discrimination and equal treatment of Member States'. If the Member State concerned is of the opinion 'that there are serious breaches of those principles, it may request the President of the European Council to refer the matter to the next European Council'.[75] The December Conclusions explicitly state that the President of the European Council will comply with such a request.[76] In the event of a referral to the European Council, no measures should be adopted until it has discussed the matter.[77] This 'emergency brake'[78] was not included in the Commission's original proposal. Now, in the final regulation, it can only be found in recital 26 Conditionality Regulation, in the legal text of the regulation, however, there is not a single mention of a referral to the European Council. This, of course, raises some questions.

Does recital 26 Conditionality Regulation give the Member State the right to refer the matter to the European Council? And is the procedure really to be suspended in such a case? After all, recitals of a regulation are not legally binding. The soft formulation is also characteristic for a recital and rather speaks against an obligation. Recital 26 Conditionality Regulation states that no measures 'should be taken until the European Council has discussed the matter'. A legal right of the Member State concerned to a suspension of the procedure must therefore be denied. The EU legislator consciously chose to incorporate this issue only in the recitals and not in the regulation itself. Therefore, the Member State concerned could not bring an action for annulment claiming that the procedure of the Conditionality Regulation has been violated if it

[74] Conditionality Regulation, art 6(10).

[75] Conditionality Regulation, recital 26 sentence 2.

[76] EUCO 22/20 (n 31), para 2(j).

[77] Conditionality Regulation, recital 26 sentence 3.

[78] Aleksejs Dimitrovs and Hubertus Droste, 'Conditionality Mechanism: What's in It?' 30 December 2020 Verfassungsblog <https://verfassungsblog.de/conditionality-mechanism-whats-in-it/> accessed 1 August 2021.

had requested the President of the European Council and the procedure was not suspended. As can be seen, recital 26 Conditionality Regulation is not really an emergency brake. Nevertheless, it can be doubted that the Council will not suspend the procedure if the Member State concerned contacts the President of the European Council. After all, the EU institutions are obliged to 'practice mutual sincere cooperation' according to art 13(2) TEU.

Another point which is worthy of discussion is the content of the role given to the European Council in the procedure. It is understandable to involve the European Council in such an important matter as the suspension of EU funds is a serious measure for the Member States. However, the European Council must not interpret its role as assessing whether the Commission, which is responsible for carrying out the procedure, has complied with the principles of objectivity, non-discrimination and equal treatment of the Member States. The Commission is an independent institution, which acts free from instructions.[79] Of course, it is bound by the mentioned principles. Nevertheless, the legal control of the Commission remains the exclusive responsibility of the ECJ. The European Council must respect the limits of its competences.

Recital 26 Conditionality Regulation also contains a time limit. The discussion in the European Council 'shall, as a rule, not take longer than three months after the Commission has submitted its proposal to the Council'. Here, the verb 'shall' indicates a binding time limit for the European Council. However, it is written 'as a rule', which suggests that a longer period is also possible in exceptional cases. Nevertheless, the procedure must not be seriously delayed by a referral to the European Council. It is also obliged by art 13(2) TEU to sincere cooperation. Therefore, the European Council shall only intervene in the procedure if there is actually a suspicion of a serious breach of the mentioned principles and deal with the matter as soon as possible. In any case, the involvement of the European Council means that the procedure of the Conditionality Regulation will become more political.

Conclusions

The rule of law crisis has been a serious issue for the EU for several years now. There are significant rule of law deficiencies in some Member States. These deficiencies affect not only the respective Member States but the entire EU. This is particularly true for the principle of mutual trust on which judicial cooperation between the Member States is built. Moreover, with the preliminary ruling procedure, a fundamental element of the EU judicial system is at risk in Member States that no longer have an

[79] TEU, art 17(3).

independent judiciary. The EU's credibility also suffers if Member States violate the rule of law without any serious consequences. The rule of law crisis thus confronts the EU with far-reaching problems. So far, not enough has been done to solve these problems. On the one hand, this is due to the EU's limited scope for action. The Article 7 procedure for the protection of the EU fundamental values is not practicable because of its voting modalities. On the other hand, there has also been a lack of political will in the EU to sanction violations of the rule of law effectively.

With the Conditionality Regulation, a new instrument has been created to protect the rule of law at EU level. It implements the idea of linking the payment of EU funds to compliance with the rule of law. The genesis of the Conditionality Regulation was dominated by political tensions, which led to Hungary and Poland blocking the Multiannual Financial Framework and the EU recovery package. Finally, a compromise was reached in the form of the December Conclusions. However, these resulted in the Conditionality Regulation not being applied yet. The new regulation has not met all the expectations. Many would have preferred a stronger mechanism. It was especially criticised that the conditions for adopting measures were made more restrictive in comparison with the Commission's initial proposal. Art 4(1) Conditionality Regulation now requires a 'sufficiently direct' connection between a breach of the rule of law and the EU budget or the financial interests of the EU.

In fact, the Conditionality Regulation will not solve the rule of law crisis on its own. Its scope of application is simply too limited. Because of the exhaustive enumeration in art 4(2) Conditionality Regulation, only certain breaches of the principles of the rule of law can be sanctioned. Nevertheless, the Conditionality Regulation can make an important contribution to the protection of the rule of law in the EU. It opens the door to take targeted actions against certain violations of the rule of law. The applicability of the Conditionality Regulation will depend, in particular, on the burden of proof for the Commission. Of course, it has to provide sufficient evidence proving that a breach of the rule of law has an impact on the EU budget or the financial interests of the EU. However, the requirement of connectivity must not be interpreted in such a way as to make the Conditionality Regulation inapplicable in practice. It should not be forgotten that even a serious risk to the EU budget or the financial interests of the EU is sufficient to adopt measures. The more serious the rule of law deficiencies are in a Member State, the more likely such a risk should be assumed. The ECJ will hopefully grant the Commission some margin of judgement in the case of a judicial review of the measures adopted.

The Conditionality Regulation has the potential to be a game changer in fighting rule of law backslidings in the Member States. Its success depends heavily on the EU institutions involved. The Commission is responsible for initiating the procedure. In this respect, it is given a certain degree of discretion, but this has its limits. If the Commission considers the conditions for adopting measures are met and no other instruments are more appropriate, it is obliged to initiate a procedure. This is also required by the

principle of effectiveness. An action for failure to act is not the appropriate instrument to get the Commission to act. The European Parliament has other options available in the course of its political control over the Commission. However, it would be desirable that the Commission fulfils its responsibility as guardian of the Treaties and applies the Conditionality Regulation on its own initiative.

As the Council acts by a qualified majority, the adoption of measures cannot be blocked by a single Member State. In this respect, the Conditionality Regulation does not face the same fate as art 7 TEU. The Council shall not be guided by political considerations when making its decision and adopt a proposal of the Commission within the given time limit. Involving the European Council leads to a further politicisation of the procedure. If it is called upon to discuss whether there have been serious breaches of the principles of objectivity, non-discrimination and equal treatment of the Member States, the procedure may be suspended. However, the Member State concerned does not have a legal right to suspend the procedure, as this possibility is only mentioned in the recitals. In any case, the European Council must ensure that the procedure is not unnecessarily protracted and respect the limits of its competences. If the EU institutions take the responsibility assigned upon them and muster the necessary political will to act, the Conditionality Regulation can help to overcome the EU's rule of law crisis. However, the EU will have to take further steps to achieve this goal. Hopefully, the Conditionality Regulation was only the beginning of a process.

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The Current Theories of Human Rights in Light of Hannah Arendt's Concept of the Right to Have Rights

Introduction

In the literature on human rights theory of the past two decades, a vibrant debate has ensued between moral[1] and political[2] justification theorists. The 2010s have seen the emergence of new theoretical works combining the two earlier positions, which reconsider the moral-political controversy and simultaneously acknowledge the moral and political-legal characteristics of human rights. This article attempts to take this new paradigm as a starting point to show that it is possible to approach human rights theory from a different perspective. It is argued that this new approach should be based on the theoretical tradition of socio-legal studies, using a holistic methodology and taking into account the results of sociology and anthropology.[3]

This article attempts to show that after the Second World War, beginning with Hannah Arendt's theory of human rights,[4] there already existed an understanding of human rights

[1] A non-exhaustive list of the most influential works on moral theories of justification in the last decades: Alan Gewirth, *The Community of Rights* (University of Chicago Press 1996); James Griffin, *On Human Rights* (Oxford University Press 2008); John Tasioulas, 'Taking Rights out of Human Rights' (2010) 120 Ethics 647; John Tasioulas, 'On the Nature of Human Rights' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter 2011).

[2] Major authors of political justification and their works: John Rawls, 'The Law of Peoples' (1993) 20 Critical Inquiry 36; Joseph Raz, 'Human Rights without Foundation' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Charles R Beitz, *The Idea of Human Rights* (Oxford University Press 2011).

[3] For more information see: Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press; Oxford University Press 1995); Brian Z Tamanaha, 'A Holistic Vision of the Socio-Legal Terrain' (2008) 71 Law and Contemporary Problems 89; William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press 2009); Roger Cotterrell, *Sociological Jurisprudence: Juristic Thought and Social Inquiry* (Routledge 2017).

[4] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973); Hannah Arendt, *The Human Condition* (The University of Chicago Press 1998). The paper is mainly based on Arendt's ideas as expressed in these two books, but we have also placed great emphasis on minor essays and lectures.

which utilized the aforementioned comprehensive approach. Arendt studied human rights theory from a complex multidisciplinary perspective, combining philosophy, history, and social criticism; her approach treated human rights as social facts and not as an abstract theoretical problem. Arendtian theory can therefore be used as a theoretical basis for a socio-legal paradigm of human rights theory.[5] It is important to note that Arendt linked the practical operation of human rights to the existence of active political communities based on civic action. For, according to her theory, human rights cannot be conceived of as innate, natural rights, but as artificial social institutions created by human beings. In addition to seeking to demonstrate the existence of an independent Arendtian human rights theory, this chapter also attempts to demonstrate that Arendt can provide an eminently applicable theoretical paradigm for the study of the relationship between human rights and political communities. One that both acknowledges the legitimacy of the existence of human rights, but is sufficiently critical of certain features of human rights that are accepted in mainstream political and legal discourse.

As mentioned above, one of the recurrent problems in Western legal theory is the issue of human rights. Over the last two decades, theoretical literature has been engaged in an unremittingly intense debate on the philosophical foundations of human rights.[6] Two dominant positions have emerged, which, following Adam Etinson, can be described as the juxtaposition of the orthodox and the political camps.[7] The moral approach derives the existence of human rights from a higher, moral value. It is based on the theoretical paradigm that human rights are natural rights that all human beings are due by virtue of their very human existence.[8] Representatives of the political perspective build their theory and catalogue of human rights from practical ends, linked to the justification of political action. They argue that human rights play a crucial role in international politics.[9]

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[5] We have taken Tamanaha's work as a starting point for the explanation of the theory of socio-legal studies: Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press 2001); Brian Z. Tamanaha, *A Realistic Theory of Law* (Cambridge University Press 2017).

[6] Samantha Besson, 'Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights' in Donald Earl Childress III (ed), *The Role of Ethics in International Law* (Cambridge University Press 2012); Adam Etinson (ed), *Introduction*, vol 1 (Oxford University Press 2018); Gerhard Ernst and Jan-Christoph Heilinger (eds), 'Introduction', *The Philosophy of Human Rights* (De Gruyter 2011); Rowan Cruft, S. Matthew Liao and Massimo Renzo, 'The Philosophical Foundations of Human Rights' in Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press 2015).

[7] J. Tasioulas, 'Towards a Philosophy of Human Rights' (2012) 65 Current Legal Problems 1; Besson, 'Human Rights: Ethical, Political...or Legal? First Steps in a Legal Theory of Human Rights' (n 6); Etinson (n 6) 1; Andrea Sangiovanni, *Beyond the Political–Orthodox Divide*, vol 1 (Oxford University Press 2018) 174. The two theoretical positions are known by a variety of names, from Samatha Besson's political and ethical theories to John Tasioulas, who captured the theoretical problem of human rights in the 'functionalist-foundationalist' pair of concepts. In addition, Etinson found the terms naturalistic, humanistic, traditionalist, old-fashioned, or philosophical to designate the orthodox camp in theoretical literature. For the political camp, we find the designation such as practical, institutional and functional.

[8] Etinson (n 6). Exemplars of this view are Alan Gewirth, John Griffin, John Tasioulas.

[9] ibid 1–2; Cruft, Matthew Liao and Renzo (n 6) 2–3. The 'political' camp includes John Rawls, Joseph Raz and Charles Beitz, among others.

Because of the contradictions in the theoretical debates surrounding the justification of human rights, both sides acknowledge that their theories on the nature of human rights are difficult to comprehend[10] and consequently, they often do not bring us closer to their original aim, which is to help us better understand the nature of human rights.[11] Recognizing this, a third, separate school of thought has emerged over the last decade alongside the two traditional positions.[12] In this third camp, one can find Jeremy Waldron, Samantha Besson and Andrea Sangiovanni, who argue that 'there is no reason why these two approaches cannot be combined,'[13] since human rights theory must grasp both the moral and practical dimensions of these rights in order to provide a genuine contribution to understanding their essential features.[14] According to these authors, this theoretical synthesis could serve as a missing link, because the traditional moral-political discourse mostly fails to consider that human rights have a socio-legal practice. According to the dissenters, neglecting practice consequently cannot lead to a credible theory. Thus, it is important that theories take account of this.[15] Besson argues that these dissenting voices which go beyond the moral-political debate can draw on the work of Arendt as a theoretical starting point.[16] Arendt's perhaps best-known theoretical writing on human rights can be found in her book published in 1951, entitled *The Origins of Totalitarianism*.[17] This is what Besson considers her main starting point.[18]

This chapter is divided into three major sub-chapters. To understand the context in which the idea of the *right to have rights* emerged, the first part presents the relationship between totalitarianism and human rights, as explained in *The Origins of Totalitarianism*. The second part outlines the ideal political community that, in *The Human Condition*, Arendt considered capable of providing its citizens with equality and freedom, and thus the essence of human rights.[19]

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[10] Jeremy Waldron, *Human Rights: A Critique of the Raz/Rawls Approach*, vol 1 (Oxford University Press 2018) 136; James Griffin, 'Human Rights: Questions of Aim and Approach' in Gerhard Ernst and Jan-Christoph Heilinger (eds), *The Philosophy of Human Rights* (De Gruyter 2011) 6.

[11] Griffin (n 10) 6.

[12] I will refer to this theoretical trend in the rest of this chapter as the dissenting trend and the representatives of this trend as the dissenters.

[13] Waldron, *Human Rights: A Critique of the Raz/Rawls Approach* (n 10) 119.

[14] Samantha Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' in Marco Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the Law* (Hart Publishing 2012) 336.

[15] ibid 342; Etinson (n 6) 4.

[16] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 338–39.

[17] Arendt, *The Origins of Totalitarianism* (n 4).

[18] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 336.

[19] Martin Jay, an American historian, considers Arendt to be a continuation of the political existentialist tradition of the 1920s, which tradition, according to Jay, was 'a movement asserted the primacy of the political realm over society, culture, economics or religion as the arena in which man's most quintessentially human quality, his capacity for freedom could be realized. [...] Although Hannah Arendt's definition of the political cannot be simply equated with that of her predecessor, she nonetheless shared with them a strong desire to rescue politics from the debased state into which much nineteenth-century thought had cast it.' Jay also includes Heidegger, Carl Schmitt, Ernst Jünger, Alfred Bäumler and Herbert Marcuse in this tradition. Martin Jay, 'The Political Existentialism of Hannah Arendt', *Permanent Exiles: Essays on the Intellectual Migration from Germany to America* (Columbia University Press 1986) 240–41.

The third part focuses on the Swiss legal philosopher Samantha Besson, who argued that the conflict between orthodox and political theories can be reconciled if we accept that human rights have both moral and political attributes and human rights theory should place much greater emphasis on human rights practice.[20] Besson is particularly important for Arendtian human rights theory because she constructs her own synthesizing theory based on Arendtian political philosophy.

1. The concept of the 'right to have rights'

In the chapter entitled *Human Rights Complications* in her book *The Origins of Totalitarianism*, Arendt, reacting to the Universal Declaration of Human Rights (UDHR), stated that international legal protections can be of little value without adequate nation-state institutions. According to the German philosopher, the legal anchoring of universality and innateness can even be misleading, as it creates false expectations in people: it gives the impression that international law can protect every human being against certain violations, even against their own nation state. However, Arendt saw from her experiences during the Second World War that once a state deprives its citizens of the protection to which they are entitled, human rights, however universal and inherent in human nature, are empty promises for the disenfranchised.[21]

According to Arendt, instead of drawing up human rights catalogues, what is needed is the recognition of two universal rights, which are mutually conditional: *the right to have rights*, which can only be realized if a second right, 'the right to belong to some kind of organized community'[22] is provided.[23] According to Besson, Arendt, by stressing the link between universal human rights and the local political community 'remains still extraordinarily actual in three related respects: first, its ability to straddle the universal and the particular by putting universal human rights and particular political membership in a mutual equilibrium and tension; secondly, its sense of the

[20] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14).

[21] As a concrete example, she referred to the situation of Jewish citizens of Nazi Germany, who, deprived of their basic rights, were completely defenceless against the National Socialist totalitarian state. Arendt, in her book *Eichmann in Jerusalem*, directs our attention to the fact that 'it is also true that those who asked the question did not understand that for Israel the only unprecedented feature of the trial was that, for the first time (since the year 70, when Jerusalem was destroyed by the Romans), Jews were able to sit in judgment on crimes committed against their own people, that, for the first time, they did not need to appeal to others for protection and justice, or fall back upon the compromised phraseology of the rights of man — rights which, as no one knew better than they, were claimed only by people who were too weak to defend their "rights of Englishmen" and to enforce their own laws'. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books 2006) 271.

[22] Arendt, *The Origins of Totalitarianism* (n 4) 297.

[23] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 340.

hybrid nature of human rights that Arendt situates between politics and morality, […] and, lastly, her intuition about membership in a modern international community, where all of us are both insiders and outsiders at the same time depending on the political level in consideration'[24].

This hybrid theory of human rights which focuses on both the moral and the political-practical aspects may be important for the representatives of the dissenting theory. This is because Arendt pointed out that instead of theoretical debates on the nature of human rights, it is more important to focus on the community that is able to guarantee for its members the rights enshrined in the various conventions in a realistic way, in the political practice of everyday life. Arendtian human rights theory, however, can not only provide an appropriate theoretical starting point for a dissenting theory of human rights, but can also serve as an important theoretical basis for socio-legal research on human rights, since Arendt's political anthropology focuses on political practice, human action and human communities.

Arendtian philosophy is therefore not a human rights theory in the strict sense of the word. Her ideas on human rights can be found in her three major works written after the Second World War, *The Origins of Totalitarianism*,[25] *The Human Condition*,[26] *On Revolution*,[27] and in her shorter essays.[28] The idea of the *right to have rights* has been interpreted in different ways. Unfortunately, many interpreters stopped at *The Origins of Totalitarianism*,[29] ignoring Arendt's further writings which give substance to this rather fragmentary theoretical initiative.[30] Consequently, the present chapter aims to show that Arendt's *oeuvre* can be used to present a definite human rights theory, distinct from other authors, which can serve as a useful normative basis for socio-legal theories of human rights.

After the publication of *The Origins of Totalitarianism* in the United States in 1951, Arendt was the subject of a multitude of criticisms, primarily regarding the

[24] ibid.

[25] Arendt, *The Origins of Totalitarianism* (n 4).

[26] Arendt, *The Human Condition* (n 4).

[27] Hannah Arendt, *On Revolution* (Penguin Books 2006).

[28] Hannah Arendt, *Men in Dark Times* (Harcourt, Brace & World, Inc 1968); Hannah Arendt, *Thinking without a Banister: Essays in Understanding, 1953-1975* (Jerome Kohn ed, 1st edn, Schocken Books 2018).

[29] See further: Bhikhu C Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (Macmillan 1981); George Kateb, *Hannah Arendt: Politics, Conscience, Evil* (Rowman et Littlefield 1986); Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (New ed, Rowman & Littlefield 2003).

[30] According to Margaret Canovan, the British philosopher who has written perhaps the most comprehensive monograph on Arendt's work, '[…] the train of thought she herself spun linked themselves together as if of their own accord into an elaborate and orderly spider's web of concepts, held together threads that were none the weaker for being hard to see. […] this means that one cannot understand one part of her thought unless one is aware of its connections with all the rest'. This is why Canovan does not approve of the fact that some authors evaluate some of Arendt's remarks without being aware of the broader context of her works. Margaret Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (1st edn, Cambridge University Press 1992) 6.

methodology and historical authenticity of her book.[31] American political philosophers criticized the overly German and impressionistic style of the work, while social historians criticized the generous treatment of historical facts.[32]

For a better understanding of Arendt's methodology, the essay collection *Desolation and Enlightenment* by Ira Katznelson might be of help. Katznelson argues that Arendt found the terminology used in philosophy and the social sciences prior to the Second World War inadequate for exploring the origins of totalitarianism thus '[she] crafted a language of politics in the face of dark realities [she] could not elide.'[33]

By exploring the foundations of totalitarianism, Arendt's historiography seeks to explain how the liberal bourgeois state born of the Enlightenment could have given rise to the totalitarian dictatorships of the first half of the twentieth century.[34] In addition to explaining historical and ideological reasons, her aim is to show that Enlightenment philosophy and humanist values are traditions to be preserved for the social order that emerged after the Second World War.[35]

The aim of the 'political sociology'[36] of the 'unorthodox'[37] author, who is both disciplinarily and politically unclassifiable, was, according to her own description, the 'crystallization the elements of totalitarianism.'[38] The latter meant that Arendt 'combined three types of analysis: a macrohistorical account […]; systemic propositions about such institution as political parties; and, inside both, explanations of variations in the preferences, choices, and activities of historical actors.'[39] This *modus operandi* is also evident from the internal structuring of *The Origins of Totalitarianism*, as the book is divided into three major sections (*Anti-Semitism, Imperialism,* and *Totalitarianism*), which are broken down into smaller subsections, further unravelling the causes of the phenomena considered to be most important.

In the chapter on *The Decline of the Nation State and the End of the Rights of Man* in *Totalitarianism*, we find the core of Arendtian human rights theory.[40] From the title

[31] Canovan (n 30) 1–17.

[32] ibid 17.

[33] Ira Katznelson, *Desolation and Enlightenment: Political Knowledge after Total War, Totalitarianism, and the Holocaust* (Columbia University Press 2003) 23.

[34] ibid 63. Arendt's philosophical self-identification is also tied to this ambition. The task of the philosopher is not defined in terms of a solitary philosophical contemplation in an ivory tower, but in terms of an active and constant communication with a wider public. She associates this active, philosophical attitude with one of her masters, Karl Jaspers, who, through his numerous public engagements during the Second World War, demonstrated his 'conviction that one can appeal to reason and to the "existential" concern in all men. Philosophically this has been possible only because truth and communication are conceived to be the same'. Hannah Arendt, 'Karl Jaspers: Citizen of the World?', *Men in Dark Times* (Harcourt, Brace & World, Inc 1968) 86–87.

[35] Katznelson (n 33) XIII; Csaba Olay, *Hannah Arendt politikai egzisztencializmusa* [The political existentialism of Hannah Arendt] (L'Harmattan 2008) 21–23.

[36] Benhabib (n 29) 69.

[37] Canovan (n 30) 1.

[38] Katznelson (n 33) 98.

[39] ibid.

[40] Arendt, *The Origins of Totalitarianism* (n 4) 267–305.

alone, it is clear that the theory set out in this chapter essentially attributes the failures of human rights to the imperialist economic policies of the 19th century and the disintegration of the structure of the nation state in the first half of the 20th century. At the same time, it cannot be ignored that the title of the paper, *The End of the Rights of Man* published only three years after the adoption of the Universal Declaration of Human Rights in 1948 could have been seen as provocative by Western academics and politicians.

According to Arendt, the evisceration of the humanist ideal and the emergence of totalitarian regimes were the result of the bourgeoisie's hunger for power, which was precipitated by imperialism, and the nationalism and racism of the great powers of the 19th century. From the mid-19th century onwards, these enabled the development of a state of affairs best described by Hobbes' notion of the state of nature. That is, by the 19th century, the drive for economic expansion and the accumulation of capital had given rise to a political system of imperialism where '[p]ower became the essence of political action and the centre of political thought when it was separated from the political community which it should serve.'[41]

The emergence of universal human rights during the French Revolution had, according to Arendt, two consequences. On the one hand, 'it meant nothing more nor less than that from then on Man, and not God's command or the customs of history, should be source of law,' and on the other hand, '[t]he proclamation of human rights was also meant to be a much-needed protection in the new era where individuals were no longer secure in the estates to which they were born or sure of their equality before God as Christians.'[42] The inalienable human rights to which everyone is entitled from birth 'had to be invoked whenever individuals needed protection against the new sovereignty of the state and the new arbitrariness of society.'[43]

The idea of human rights thus offered genuine promises for the society of the industrial revolution of the 19th century: it was to both replace the lost identity of the masses that were uprooted from their traditional communities, and to protect them against the changed conditions of the system of imperialism.

The nation-state, which Arendt models on the French nation state, has two functions: on the one hand, as a well-defined set of legal institutions, it can guarantee real rights for its own citizens.[44] On the other hand, it constituted a political community of citizens with equal rights. The European nation states of the 19th century were still able to protect all their citizens, so there was no need to treat human rights as a '*kind of additional law.*'[45]

[41] ibid 138.
[42] ibid 290–91.
[43] ibid 291.
[44] ibid 175–84.
[45] ibid 293.

The *perplexities of the rights of the man* arose when the balance between the exclusivity of the concept of the rule of law and the concept of the nation in the nation states was upset. Thanks to overstretched economic competition and the increasingly popular race theory, '[…] these notions became the standard slogan of the protectors of the underprivileged, […] a right of exception necessary for those who had nothing better to fall back upon'[46].

The rightless emerged *en masse* after the First World War in the form of minorities, whose situation between the two world wars and then during the Second World War highlighted the 'paradox involved in the declaration of inalienable human rights […as…] it reckoned with an "abstract" human being who seemed to exist nowhere […]'[47]. The situation of the masses, forced into minority status by the changing national borders, and of stateless persons, deprived of their citizenship under totalitarian regimes, highlighted the fact that '[…] loss of national rights was identical with loss of human rights, that the former inevitably entailed the latter'[48]. '*Whenever people appeared who were no longer citizens of any sovereign state*' the universal and inalienable human rights did not materialize as universal. On the contrary, they were found to be quite alienable when stateless persons sought protection in the name of human rights against the deprivation of rights by totalitarian regimes.[49]

As already mentioned above, Arendt believed that the ineffectiveness of human rights stemmed from the inconsistency of the natural law theory of these rights. She argued that this theory emphasized innateness and did not take into account the consequences of political practice.[50] The existence of human rights on the other hand was, in her view, not a natural endowment of humanity at all, but rather an artificially created system of ideas that was meant to defend '*the abstract nakedness of being nothing but human*'[51] against human nature.

The failure of this aim demonstrates that these rights can only become real social institutions if we are able to create, through active action, political communities that are based on equality and freedom.[52] Therefore, Arendt holds that the loss of human

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[46] ibid.

[47] ibid 291.

[48] ibid 292.

[49] ibid 293.

[50] ibid 291. Jürgen Habermas describes this phenomenon as '[h]uman rights are Janus-faced, looking simultaneously toward morality and the law. Their moral content notwithstanding, they have the form of legal rights. Like moral norms, they refer to every creature 'that bears a human countenance', but as legal norms they protect individual persons only insofar as the latter belong to a particular legal community-normally the citizens of a nation-state. Thus a peculiar tension arises between the universal meaning of human rights and the local conditions of their realization: they should have unlimited validity for all persons – but how is that to be achieved?' Jürgen Habermas, 'Remarks on Legitimation through Human Rights' (1998) 24 Philosophy & Social Criticism 157, 161.

[51] Arendt, *The Origins of Totalitarianism* (n 4) 300.

[52] Jürgen Habermas, 'Hannah Arendt's Communications Concept of Power' in Lewis P Hinchman and Sandra Hinchman (eds), *Hannah Arendt: critical essays* (State University of New York Press 1994) 214.

rights is in fact related to the 'loss of a polity'[53]. Here, polity denotes an existing political community in which political existence based on equality and freedom does not depend on the existence of political or legal declarations, but on 'the assumption that we can produce equality through organization'.[54]

It is precisely by becoming human, then, that man can shed *the banality of evil,* by becoming somehow unnatural. And this means that it is our actions, not our innate qualities, that go beyond our natural existence, that are capable of creating a community of citizens capable of securing freedom, equality, and rights for the citizens who run that community.[55]

2. The principles of political community in Arendtian political philosophy

For our rights to be effectively exercised, we need to be members of a political community. Being a member of a community is the primary and truly universal right: 'the right to have rights.'[56] In order to ensure that our rights can be exercised as broadly as possible, it is necessary to define the contours of a political community capable of guaranteeing its citizens the basic conditions of freedom and equality. Arendt identifies this ideal political community with the system of the ancient Greek polis, which must function in such a way that always bears in mind that '[m]an, […] exists – or is realized – in politics only in the equal rights that those who are most different guarantee for each other. This voluntary guarantee of, and concession to, a claim of legal equality recognizes the plurality of men, who can thank themselves for their plurality and the creator of man for their existence.'[57]

As Jeremy Waldron argues, in accordance with Arendt's political theory, that '[…] politics need housing, and that building such housing can be equated with the framing of a constitution.'[58] Arendt lays the foundations for this argumentation in her 1958 book *The Human Condition*, in which she outlines the polis as a paradigm of the ideal political system.[59] Here, she provides an insight into the basic pillars of the polis, which in Arendt's political philosophy are indispensable conditions for the practical operation of human rights: (i) equality based on human plurality, (ii) a strict separation of public

[53] Arendt, *The Origins of Totalitarianism* (n 4) 297.
[54] ibid 301.
[55] Hannah Arendt, *The Promise of Politics* (Jerome Kohn ed, Recording for the Blind & Dyslexic 2010) 118.
[56] Arendt, *The Origins of Totalitarianism* (n 4) 296.
[57] Arendt, *The Promise of Politics* (n 55) 94.
[58] Jeremy Waldron, 'Arendt's constitutional politics', in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2000) 203, https://doi.org/10.1017/CCOL0521641985.011.
[59] Arendt, *The Human Condition* (n 4).

and private spheres, and (iii) the possibility of citizens to appear before each other at all times which can only be achieved through free communication (*words and deeds*) between them.[60]

Equality allows us to understand each other and to empathise with our fellow human beings, while distinctiveness impedes attempts to equalise.[61] Arendt stresses that the differences inherent in people's individuality expresses their uniqueness, which can be evoked through action and speech. Arendt believes that uniqueness implies man's capacity for initiative, that is the capacity to create the world that is the basis of human plurality.[62] Arendt considers appearing before others a *second birth*, because she believes that within every human being lies the capacity for initiative and appearance, the capacity to create human plurality. Therefore, by appearing we do nothing more than *actualise our natality*.[63] The presence of other people is essential for the second birth. Only by appearing before others can a human being overcome the nakedness of his biological existence. In her view, only by taking this aspect into account can the problem of the abstract nature of human rights be resolved.[64]

3. Samantha Besson's interpretation of the Arendtian human rights theory

As already mentioned in the introduction, Samantha Besson, Swiss international lawyer and philosopher of law, is one of the dissenting authors who do not seek to approach human rights from solely their moral or political side, but rather attempts to synthesize these approaches. Besson bases this eccentric theory of human rights on Arendt's political philosophy, and, at the same time, she updates Arendtian human rights theory for the context of contemporary legal and social conditions.[65] The Swiss author argues that a synthesis of moral and political theories of human rights can only be achieved by accepting that human rights have both moral and legal-political characteristics, and

[60] Jay notes that '[l]ike the existentialists, she was anxious to avoid adopting a normative view of essential man; only the "human condition," not human nature, can be meaningfully discussed. Whether Platonic or Cartesian, Kantian or Hegelian, a philosophy that tries to introduce rational considerations into the vita activa's highest mode, political action, is in the serve of oppression.' Jay (n 19) 243.

[61] Arendt, *The Human Condition* (n 4) 173.

[62] ibid 178. Jeremy Waldron, 'Arendt on the Foundations of Equality' in Seyla Benhabib (ed), *Politics in Dark Times – Encounters with Hannah Arendt* (Cambridge University Press 2010) 33. Waldron highlights that Arendt's 'political equality is an artificial construct, it presupposes that some humans will have the impulse to participate, that they do have what it takes to submit to the discipline of equality, and that neither the superiority of the few nor the inevitable unanimity of the many makes the project of equality irrational.' (33)

[63] Arendt, *The Human Condition* (n 4) 178.

[64] Canovan (n 30) 131–32.

[65] Besson, 'Human Rights: Ethical, Political... or Legal? First Steps in a Legal Theory of Human Rights' (n 6); Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14).

that neither of these characteristics can be neglected if we want to provide an authentic and up-to-date theory of human rights that is applicable to practice.[66]

Although Besson's writings – following Arendt – place great emphasis on the role of human rights in local political communities,[67] she remains firmly in the field of traditional legal doctrinal scholarship, thus examining the particular context of human rights only *vis-à-vis* national legislation and not in a deeper socio-legal context.[68] Nevertheless, Bessonian theory can provide an excellent theoretical foundation for the socio-legal study of human rights by highlighting that human rights operate at both the universal and local levels, and that it is the local aspects of these rights that can help us to understand the role of political communities in human rights practice.[69]

Besson thus retains a particular jurisprudential perspective that focuses little on the socio-legal aspects of human rights. Nonetheless, her theory represents a breakaway from the so often stalled philosophical and jurisprudential-doctrinal theoretical debates on human rights, opening the way to a fresher social theory of human rights that embraces human rights in all their complexity. The Swiss philosopher of law describes her own theory, which she calls 'legal human rights theory,'[70] as a 'theory of human rights [that] can bridge the gap between current theorizing of human rights by philosophers (even the most applied ones) and by lawyers: philosophers either see human rights law as a mere translation or enforcement of moral human rights (e.g. Griffin, Tasioulas), or take it as a static and conservative reality that one can then reconstruct morally (e.g. Beitz, Rawls), while lawyers' dogmatic discussions of human rights law do not easily embark into normative theorizing (e.g. Clapham; also in a more nuanced way Luban)'.[71]

3.1. The nature of human rights in light of the Bessonian theory

According to Besson, the theory of human rights must answer three questions, which Arendt had already described in *The Origins of Totalitarianism* but were left unanswered.[72] The first question seeks to answer what makes these rights human rights and whether they can be considered rights at all, in the same way as we do with contractual or civil rights.[73] The second question asks whether we are talking about legal or moral rights in the case of human rights, and the third question seeks to explore what level

[66] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 336–41.

[67] Samantha Besson, 'International Human Rights and Political Equality: Some Implications for Global Democracy' in Eva Erman and Sofia Näsström (eds), *Political Equality in Transnational Democracy* (Palgrave Macmillan US 2013) 99 <http://link.springer.com/10.1057/9781137372246_5> accessed 15 June 2020.

[68] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 344.

[69] ibid 351.

[70] Besson, 'Legal Human Rights Theory' (n 14).

[71] ibid 328.

[72] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 340.

[73] ibid.

of legislative activity can create human rights and who can be the rightsholders and duty-bearers of these human rights.[74] Besson's answer to the first two questions is convincing, because when she asks the question *what makes these rights human* and whether it is conceivable that human rights are both moral and legal entitlements, she provides a simple and practical definition that allows further analysis of the concept of human rights defined this way. According to her definition, 'human rights are inherently moral and legal: the law cannot create universal moral rights but it can recognise or even modulate them, and turn them into human rights *stricto sensu*. Of course, there can be universal moral rights that are not matched by legal rights, and legal norms that go by the name of human rights which are not human rights. However, there cannot be human rights which are not à la fois universal moral rights and legal rights.'[75]

On the question of the nature of human rights, Besson takes a completely different view from previous positions, recognizing that human rights have both a moral and a legal-political character. According to Besson '*human rights* stricto sensu *can only exist as moral rights* qua *legal*'[76] which, in Besson's case, means that only moral rights that are recognized by law as human rights may be considered human rights. She states that 'moral rights can exist independently from legal rights, but legal rights recognise, modify or create moral rights by recognising moral interest as sufficiently important to generate moral duties.'[77] The relationship between law and morality in the case of human rights is thus a two-way system: in the transformation of moral rights into human rights, law plays the role of both translator and that of creator.[78] Given the two-way approach to human rights, the relationship between morality and law is one of mutual tension, where legal practice is constantly under pressure from abstract moral ideas and law also reflects on the moral world.[79]

Besson's theory is practice-oriented, and she places great emphasis on the local context of human rights. She sees them, as Arendt does, as always being concretized in political communities, which, unlike Arendt, are no longer exclusively within the framework of nation states, but go beyond these, creating a variety of 'overlapping political communities (e.g. international organisations).'[80] Besson develops Arendt's theory at a crucial point, by no longer identifying nation states as the sole political communities that ensure the protection of human rights. However, she does not go beyond the mention of communities created by law and does not deal with political

[74] ibid.
[75] ibid 354.
[76] ibid 345.
[77] ibid.
[78] Besson, 'Legal Human Rights Theory' (n 14) 331.
[79] ibid.
[80] Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 343.

communities that are not formally recognized by law, which in many cases have a stronger regulatory power than either national or international legal institutions.[81]

The theory outlined in this subsection, apart from its narrowness discussed above, nevertheless develops the Arendtian theory's interpretation of the relationship between political communities and human rights in a way that is intelligible and operational in a 21st century international legal and political context. Besson takes as her starting point what she calls the 'Arendtian aporia,'[82] which sees nation states as the only political community that effectively protects human rights, but also recognizes its limitations by analysing the series of minorities between the two world wars.[83] Besson therefore distinguishes between two categories of human rights: the first category includes those rights that relate to the right to belonging to a political community, which she calls *rights to membership*; the second category includes those rights that arise when one belongs to an existing political community, which she calls *membership rights*.[84]

In making this distinction, she seeks to resolve the tension between international human rights and democratic legitimacy and to make sense of the Arendtian theory of the *right to have rights*.[85] Regarding the second category of human rights, she explains that '[i]nternational human rights norms can only be regarded as human rights if they match, in a minimal way, an existing set of domestic human rights. This occurs through the mutual relationship of reception and consolidation between international legal human rights norms and citizens' rights.'[86] This would also solve the dilemma of the lack of democratic legitimacy and the local embeddedness of human rights, since, in her opinion, 'in the absence of such a set of domestic human rights, international human rights are legal rights that correspond to the universal moral rights to have human rights in a given political community.'[87] However, these rights can only be interpreted within the category of *rights to membership*, which requires recognition under national law in order to become human rights.

Rights to membership, which Besson identifies with the Arendtian *right to have rights*, are, unlike membership rights, the only human rights whose legitimacy is sufficient for international legal recognition, since their establishment is usually

[81] Samantha Besson, 'Ubi Ius, Ibi Civitas: A Republican Account of the International Community' in José Luis Martí and Samantha Besson (eds), *Legal Republicanism* (Oxford University Press 2009). Besson argues that, starting from a republican political philosophy, a gradual democratization of international law-making can be achieved by taking the concept of the international community seriously. The author argues that a similar approach can be found in contemporary international law and cites the institutional system of the European Union as an example.

[82] Samantha Besson, 'Human rights and democracy in a global context: decoupling and recoupling' (2011) 4(1) Ethics & Global Politics 27.

[83] ibid.

[84] ibid 23; Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 348.

[85] Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (n 82) 40; Besson, 'The Right to Have Rights: From Human Rights to Citizens' Rights and Back' (n 14) 349.

[86] Besson, 'Human Rights and Democracy in a Global Context: Decoupling and Recoupling' (n 82) 40.

[87] ibid.

necessary precisely because 'there is no applicable national legal recognition.'[88] The right of belonging to a political community thus becomes a normative principle that makes human rights function both as a 'political irritant and as a mechanism of gradual inclusion.' [89]

3.2. On the path of Arendt and Besson towards a socio-legal theory of human rights

It should be remarked that, although the distinction between rights to membership and membership rights and the recognition of the co-existing moral and legal-political attribute of human rights does indeed develop the idea of the *right to have rights*, the legal theory of human rights, as developed by Besson, does not fully support the human rights theory thus delineated. The main limitation of Besson's theory is precisely where she makes one of the most remarkable statements about the rights to membership, namely that human rights are both facilitators of political irritation and mechanisms of gradual inclusion. Without sufficient justification, these remarks of the author seem rather like platitudes, based on which Besson criticizes the moral and political camps of traditional human rights justifications. Besson's theory makes good points when discussing the two-way nature of human rights. But by linking the fulfilment of the effects of the rights to membership, which she assumes to be fulfilled solely by the existence of international and national law, her theory remains, like the theories she criticizes, abstract and achieves little advancement in the understanding of practice.

In fact, Besson completely ignores the analysis of the socio-legal reality of human rights, and her advocacy of the analysis of human rights jurisprudence does not make it clear how the theoretical methodology she presents differs from the traditional doctrinal method of legal analysis. Besson's ideas on the right to membership should thus be amended by considering Arendt's writings on public space and on free speech and appearance.

Arendt, unlike Besson, does not confine the space of the exercise of human rights to legal space, but situates it in a much broader perspective. We can come much closer to a realistic theory of human rights if we do not confine ourselves to the narrow research framework offered by Besson, but rather follow Arendt in examining human rights as social phenomena which become a social reality in often overlapping political communities, often with significant differences.

To get from the Bessonian theory to the socio-legal theory of human rights, one can draw on the theoretical and methodological insights of Lawrence M. Friedman

[88] ibid.
[89] ibid 343.

in his book *The Human Rights Culture: A Study in History and Concept*.[90] Friedman aims to explore the 'sociological dimension'[91] of human rights. As a result, he explains that '[he is] not going to draw up a list or catalog of basic human rights, […his] idea is, instead, to try to explain them; to discuss where they fit, in contemporary society; where they came from; and why [they have such a powerful legitimacy for those who invoke them].[92] Friedman, as can be seen from the preceding quote, believes that both human rights movements and human rights theories should be seen as 'massive social facts'[93] that are 'culturally and historically contingent.'[94] As a result, we can observe significant differences in human rights practice between different social groups.[95]

Augmenting the Bessonian theory with the findings of socio-legal rights theory may be a much more viable way of making statements about human rights that are consistent with social reality. This brings us closer to the research question Friedman sets out to understand why the idea of human rights can function as a globally dominant 'social ideal, and a part of the normative baggage of ordinary people in our times.'[96] In this way, we can also understand why this essentially philosophical ideal has become a dominant and inescapable part of positive law.[97] Indeed, the Bessonian theory identifies the main problems in the field of human rights. However, by seeing the way forward from the confrontation of moral and political theories in the analysis of human rights law in doctrinal legal theory, it is unable to provide fresh answers to the questions it raises. This latter point of deficiency may also be due to the fact that scholarship in the decades preceding the dissenting theorists, as Friedman notes, was essentially defined by lawyers and philosophers, who focused mainly on 'texts and procedures; and tend to be highly normative. They have strong ideas about what should be the social and legal reality. [...However,] the work, on the whole, lacks the tough fibre of social reality.'[98]

Conclusions

According to Adam Etinson, the debate over the justification of human rights is as much '[...] about how to theorize human rights – and to what end – as it is about human

[90] Lawrence M Friedman, *The Human Rights Culture: A Study in History and Context* (Quid Pro Books 2012); Tamanaha, *A Realistic Theory of Law* (n 5).
[91] ibid 1.
[92] ibid 3.
[93] ibid 1.
[94] ibid 3.
[95] ibid 9. He refers to this phenomenon as 'each country has its own story; and the differences are significant.'
[96] ibid 5.
[97] ibid 2.
[98] ibid 6.

rights themselves. In part, the debate reflects recent trends in moral and political philosophy [...b]ut most of all the debate selects the innate complexity of its subject matter – the many lives of human rights, as it were".[99] Etinson's lines summarize the most salient feature of Arendtian human rights theory, namely that Arendt always presented her conceptions of human rights in a much broader social-philosophical context, making visible the complexity of the subject.

Arendt's works, which always proceeded from the *praxis*, can therefore provide an appropriate basis for a comprehensive approach to a bottom-up, socio-legal theory of human rights, because they do not get trapped in the current orthodox-political debates, which are concerned with details and unable to grasp a holistic concept of human rights. The human rights theory in Arendt's works which is often self-disputing and thus necessarily self-contradictory can provide a more credible basis for approaches based on socio-legal research specifically because of these qualities. These approaches – as we have seen with Friedman – view human rights as social facts that are historically and culturally determined and, despite their universality, are subject to divergence in their translation into practice.

To support this latter claim, this paper set out to present the basic pillars of Arendtian (and Bessonian) human rights theory, on which it is possible to build a social theory of human rights. The tension between universality and differences in local practices is highlighted by what Besson calls the *Arendtian aporia*. The universality of the supranational trait enshrined in human rights theory and international law and the fact that the protection of human rights is typically still able to be ensured by the safety net of the nation states' legal system remains a global phenomenon, despite the prosperity of international human rights protection in recent decades.[100] The contradiction, or *aporia*, lies in the fact that, although the legal systems of nation states are supposed to provide the most accessible protection of human rights, the authorities of nation states are among those actors who typically carry out human rights abuses. Arendt, however, illustrated that the latter protection is very often inadequate through the situation of the stateless and refugees. That in order for those whose rights are violated to have real rights, they would have to become members of an existing political community. This is expressed by the Arendtian *right to have rights*, which is the first human right in the Arendtian human rights catalogue, and which is a precondition to the existence of any further rights.

However, theories of human rights that Friedman calls overly normative, whether moral or political, are unable to provide an authentic picture of human rights due to their reluctance to acknowledge the reality of human rights. Arendt and Besson, the latter building on Arendtian foundations, come much closer to making their findings

[99] Etinson (n 6) 5.

[100] Eric Posner is challenging the effectiveness of human rights at local level: Eric A Posner, *The Twilight of Human Rights Law* (Oxford University Press 2014).

operationalisable in contextual, socio-legal research on human rights by starting from the aforementioned *aporia*.

As I have already pointed out in the previous parts of this paper, Arendt's and Besson's hypotheses are not in themselves sufficient to provide a picture of human rights that is responsive to the contemporary socio-political context. It is therefore necessary to try to answer the questions raised by these authors through the complex methodology of socio-legal studies.

The question of human rights is therefore of particular importance today, since the reality of human rights is changing and is being questioned from day to day and from community to community, just as it was in Arendt's time. Each of the tendencies presented in this chapter seeks to capture this reality in some way, bearing in mind that 'different legal systems attribute very different contents to human rights, which in their very nature clearly carry with them a general socialization requirement and consideration.'[101]

Awareness of the differences between the various political communities also strikingly presents the state of the legal culture in specific communities. However, this requires the tools of socio-legal theory and its auxiliary sciences. The possibility of free participation in a political community, as emphasized by Arendt, is therefore also important. Its presence or absence in individual communities can provide important information on the extent to which human rights protection is achieved for the members of the community.

However, neither moral nor political human rights theory is able to provide adequate answers to the question – which can be considered the main purpose of the existence of human rights – of the extent to which human rights affect the social relations of communities at the level of the nation state or below, at the local level. This inability to provide answers, however, results in a lack of interaction between theory and practice (although in many cases it is also a question of whether there is any local practice). Thus, theoretical writings, however well-written, seem insufficient to provide a realistic reflection on a subject as practice bound as human rights.

[101] András Sajó, *Látszat és valóság a jogban* [Pretense and Reality in Law] (Közgazdasági és Jogi Könyvkiadó 1986) 79.

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Process-based Review Under Article 1 of Protocol 1 of the European Convention of Human Rights

Introduction

Scholars have written about a 'procedural turn' in the case law of the European Court of Human Rights (the Court or ECtHR).[1] In particular, President Judge Robert Spano has argued that the Court is undergoing a historical shift from the 'substantive embedding phase [into the] procedural embedding phase.'[2] In the 'substantive embedding phase', the Court's purpose was to give substance to international norms[3] by exercising strict scrutiny over the domestic evaluation of interferences with the European Convention on Human Rights (the Convention).[4] In the 'procedural embedding phase', the Court reviews whether the domestic authorities have adequately applied the Convention principles and if they have, the Court will not substitute the judgement of domestic authorities for its own independent assessment of the 'Conventionality' of the disputed measure.[5]

The Court's move towards the 'procedural embedding phase' is not accidental. It is well-known that the Court faces an overwhelming number of pending cases, which shows no sign of descent and the ECtHR is becoming a victim of its own success. In response to the growing number of individual complaints, the Council of Europe has considered numerous proposals to reshape the institutional design of the European human rights regime.[6] The substantive dimension of the reforms highlighted the

[1] Oddny Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and presumptions of Convention Compliance' (2017) 15 International Journal of Constitutional Law; Oddny Mjöll Arnardóttir, 'Rethinking the two margins of appreciation' (2016) 9 European Constitutional Law Review; Thomas Kleinlein, 'The procedural approach of the European Court of Human Rights: between subsidiarity and dynamic evolution' (2019) 68 International and Comparative Law Quarterly.

[2] Robert Spano, 'The future of the European Court of human rights-subsidiarity, process-based review and the rule of law' [2018] Human Rights Law Review 473.

[3] ibid 475.

[4] ibid 479.

[5] ibid 480.

[6] Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125.

embeddedness of the Convention in national legal systems. Embeddedness rests on the premise that the domestic legislature, judiciary and administration are responsible to first uphold the Convention rights and freedoms, while the ECtHR's protection is supplementary.[7] Therefore, embeddedness together with the Court's *procedural turn* serve to enforce the principle of subsidiarity in practice, as reflected in the Copenhagen Declaration.[8] Protocol No. 15 will enter into force on 1 August 2021, which could arguably provide a normative legal basis for the Court's *procedural turn*, because it will insert the principle of subsidiarity and the margin of appreciation into the Preamble of the Convention.[9]

The Court's *procedural turn* has attracted scholars to place the jurisprudential developments into a normative framework: on one hand, the proceduralisation of Convention rights means that the Court reads procedural guarantees into the substantive provisions of the Convention, where otherwise none exist. On the other hand, the process-based review requires the Court to focus on the quality of domestic procedures and inquire whether the Convention principles have been effectively embedded into domestic legal systems.[10] Arguably, the two jurisprudential developments have different role in the Court's reasoning, nevertheless, they are heavily interrelated. At its core, the process-based review rests on the premise that there exists an effective domestic mechanism, where the national court is competent to review arguable claims under the Convention or analogous national law provisions. Therefore, the more procedural guarantees are read into a Convention right, the more successful could a process-based review be. If the Court then strategically applies a process-based review, the domestic bodies can more effectively assume their role as the *first* defenders of Convention rights and freedoms.

This chapter's added value to the discourse on the proceduralisation in the ECHtR lies in the comprehensive evaluation of the property protection case law from the viewpoint of embeddedness. The right to property under Article 1 of Protocol 1 (art 1 of P1) together with its inherent procedural guarantees play a central role in the Court's case law. It is not uncommon to simultaneously invoke art 1 of P1 and art 6.1 to challenge substantially the same domestic measure. Specifically in 2020, out of 871 judgements 190 established violation of the right to fair trial and 122 established violation of the right to property.[11] While no extensive statistics are available, one may estimate that out of 64,950 pending applications[12] at least approx. 330 cases may

[7] Helfer (n 6) 130.

[8] Kleinlein (n 1) 91.

[9] Protocol No. 15 amending the Convention on the Protection for Fundamental Rights and Freedoms. <https://www.echr.coe.int/Documents/Protocol_15_ENG.pdf> accessed 11 June 2021

[10] Spano (n 2) 482.

[11] 'Violations by Article and by State in 2020' <https://www.echr.coe.int/Documents/Stats_violation_2020_ENG.pdf> accessed 30 June 2021.

[12] 'Pending applications allocated to a judicial formation on 31 May 2021' <https://www.echr.coe.int/Documents/Stats_pending_month_2021_BIL.PDF> accessed 30 June 2021.

concern the right to fair trial and/or the right to property. Even though the interferences with the right to property tackle complex political, economic and social issues,[13] the complicated internal dynamics of art 1 of P1 are still not resolved despite half a century of case law.[14] Instead, 'tremendous inconsistencies' have been claimed to exist regarding the means of justification.[15]

Against this background, the second part recapitulates the two jurisprudential developments relating to the Court's *procedural turn*. Part three explores the effects of the *procedural turn* on interpretation and application of the right to property. Part four provides for some concluding remarks.

1. The procedural turn of the ECHtR and its impact on the margin of appreciation and proportionality

This part recapitulates how legal scholarship has put the various dimensions of the Court's *procedural turn i*nto a normative framework. It starts with clarifying the two interrelated concepts that the Court's *procedural turn* represents: (1) the proceduralisation of Convention rights and (2) the process-based review. It then explores their influence on the Court's reasoning on the merits of the case, including the proportionality test and the margin of appreciation accorded to States.

1.1. Overview of developments relating to the proceduralisation of Convention rights

In general terms, proceduralisation means importing procedural obligations into substantive Convention rights, which do not contain explicit procedural requirements.[16] In contrast, some substantive rights include explicit procedural requirements (e.g.: art 5 relating to arrest and detention), while stand-alone procedural rights are the right to fair trial under art 6.1 and the right to an effective remedy under art 13.

In some cases, procedural rights have evolved into separate and autonomous duties of the State.[17] As a result, an applicant may allege the breach of the State's positive

[13] Davis Harris, Michael O'Boyle, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (OUP 2017)

[14] Richard Lang, 'Unlocking the First Protocol: Protection of Property and the European Court of Human Rights' 29 Human Rights Law Journal 205

[15] ibid 212.

[16] Spano (n 2); *Hatton and Others v UK* App no 36022/97 (ECtHR, 8 July 2003), para 101; *Fernández Martínez v the Kingdom of Spain* App no 56030/07 (ECtHR, 12 June 2014), para 147.

[17] Eva Brems and Janneke Gerards (ed), *Procedural Protection in Shaping Rights in the ECHR* (CUP 2014) 141; *Šilih v Slovenia*, App no 71463/01 (ECtHR, 9 April 2009), para 159.

obligation to carry out effective investigation without submitting any complaint as to the substantive aspect of the right concerned.

On other cases, the Court scrutinizes the domestic procedure, where the applicant has an arguable claim under domestic law, but it cannot be enforced due to the absence of effective domestic procedures. Yet, where the applicant does not have an arguable claim in the domestic law, the Court may nevertheless have recourse to the State's positive obligation to afford the applicant an effective and accessible procedure in connection with a substantive Convention right.[18]

In this respect, the Court has also elaborated on the qualitative requirements of domestic fair procedure in connection with the substantive provisions of the Convention.[19] The Court could examine many dimensions of fairness, including effectiveness, timeliness, independence and impartiality of the non-judicial body, participation of the individual and whether the domestic authorities have made their decisions on the basis of a thorough and objective analysis.[20]

The purpose of the proceduralisation is to ensure that the protection of rights is not theoretical or illusory but practical and effective.[21] The Court attains this purpose only if its review of the procedural dimensions of a right does not replace, but complements the substantive analysis of claims.[22] Thus, finding a violation of any procedural obligation should not result in the automatic violation of a substantive right.[23] Instead, only egregious denials of procedural guarantees should lead to the violation of a substantive right.[24]

1.2. Overview of developments relating to the process-based standard of review

The Court's review is process-based when it first examines whether the domestic authorities, in particular the courts, have struck a fair balance between the competing interests in conformity with the criteria laid down in the Court's case law. If they did, the Court would require strong reasons to substitute its judgement for that of the domestic courts.[25] In other words, subject to the domestic court's proper assessment,

[18] Brems and Gerards (n 17) 141; Šilih v Slovenia (n 17) para 158.

[19] Brems and Gerards (n 17) 148.

[20] Brems and Gerards (n 17) 155.

[21] Brems and Gerards (n 17) 150–55; *Šilih v Slovenia* (n 17) para 153.

[22] Eva Brems, 'The "Logics" of Procedural-type Review by the European Court of Human Rights' in Janneke Gerards and Eva Brems (eds), *Procedural Review in European Fundamental Rights Cases* (CUP 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891280> accessed 19 May 2021.

[23] Brems and Gerards (n 17) 158.

[24] Eva Brems and Laurens Lavrysen, 'Procedural Justice in Human Rights Adjudication: The European Court of Human Rights' (2013) 35 Human Rights Quarterly 177.

[25] *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 7 February 2012), para 107.

the ECHtR omits examining whether the interference was proportionate or placed an individual and excessive burden on the applicant.[26]

The two modes of proceduralisation influence the proportionality test,[27] the depth of the Court's scrutiny, the extent to which the Court delivers its own assessment of the issues raised by the parties[28] and the scope of deference that the Court eventually accords to States as a result of its review.[29] It is submitted that the effects of proceduralisation could be best demonstrated by comparing the traditional strict review and the process-based review.

In the case of the *traditional standard of review* the default position is that the ECHtR is competent to fully review all matters concerning the interpretation and application of the Convention. Accordingly, the Court has stated that the national authorities are better placed than an international Court to make the initial assessment in the case, nevertheless, the *final evaluation* remains with the Court. Thus, the Court engages with the merits in light of the case as a whole and determines whether the interference was proportionate to the legitimate aim pursued.[30]

The Court's non-substitution argument has been generally present under the traditional standard of review, where it relates to the domestic court's fact-finding, interpretation of domestic law and assessment of evidence. The Court has stated that it should not 'substitute its own assessment of the facts for that of the domestic courts' and 'it is for the latter to establish the facts on the basis of the evidence before them.'[31] Admittedly, the Court is not bound by the domestic court's fact finding, but the Court 'requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts.'[32]

In a similar vein, the Court has argued that its jurisdiction to verify that domestic law has been correctly interpreted and applied is limited. In fact, the Court would require 'strong reasons to differ from the conclusion reached by those courts by substituting its own views for those of the national courts on a question of interpretation of domestic law.'[33] Nevertheless, the Court retains its power to intervene if the interpretation of domestic legislation proves to be arbitrary or manifestly unreasonable.[34]

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[26] Spano (n 2) 480.

[27] Patricia Popelier and Catherine Van den Heyning, 'Giving teeth to the proportionality analysis' (2013) 9 European Constitutional Law Review 230.

[28] Oddny Mjöll Arnardóttir, 'Rethinking the two margins of appreciation' (2016) 9 European Constitutional Law Review 27.

[29] Kleinlein (n 1) 96.

[30] Oddny Mjöll Arnardóttir, 'The "Procedural Turn" under the European Convention on Human Rights and presumptions of Convention Compliance' (2017) 15 International Journal of Constitutional Law 20; *Handyside v UK* App no 5493/72 (ECtHR, 7 December 1976), para 49.

[31] *Austin and Others v UK* App nos 39692/09, 40713/09 and 41008/09 (ECtHR, 15 March 2012), para 61.

[32] ibid para 61.

[33] *Fedorenko v Ukraine* App no 25921/02 (ECtHR, 1 June 2006), para 27.

[34] Arnardóttir (n 28) 24.

In any event, pursuant to arts. 19 and 32 of the Convention it is the Court's role to definitively interpret and apply the Convention and it is not constrained by the domestic court's legal conclusions as to whether or not there has been an interference with the applicant's fundamental right.[35]

In the case of the process-based review, the non-substitution argument relates to the domestic courts' assessment of proportionality and their legal conclusions. Therefore, the *innovative development* lies in the Court's affording full deference to the domestic actors' proportionality assessment, traditionally considered to be at the heart of the Court's judicial activity.[36] The underlying question is not whether the domestic courts have resolved problems of interpretation concerning the domestic law and how the Court could remedy an unreasonable interpretation. The *innovative question* is whether the national courts have correctly weighed in the balance between individual and general interests in accordance with the Convention and the Court's case law. If the answer is in the positive, 'the Court would require strong reasons to substitute its view for that of the domestic courts.'[37]

It is submitted that the degree to which the Court focuses on the domestic balancing exercise and omits engaging with the contested measure's proportionality varies, which could arguably result in the proliferation of standards of review applied by the Court.

The process-based review is the *most lenient* for the Court and the *most demanding* for the domestic actors when in the balancing of rights, 'the Court uses the findings of the domestic courts, in their entirety, almost word by word.'[38] As such, the Court omits making its own independent assessment of the facts, applying the relevant principles to those facts and eventually substituting its own views for those of the domestic courts.[39] It has been suggested that the domestic balancing exercise complies with the Convention if the domestic courts explicitly cite the Court's case law on the relevant criteria applicable to the case before them and the application cannot be considered as 'arbitrary, careless or manifestly unreasonable'.[40] In contrast, under the traditional standard of review, the Court would make its own assessment of the relevant facts and the law, apply them to the individual case at hand and reverse the domestic courts' findings 'without suggesting that the domestic courts had considered irrelevant principles or applied improper criteria.'[41]

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[35] *Austin and Others v UK* (n 32) para 61.

[36] Arnardóttir (n 28) 9, 34.

[37] *Von Hannover v Germany* (n 25) para 107.

[38] *Palomo Sánchez and Others v Spain* App nos 28955/06, 28957/06, 28959/06, (ECtHR, 12 September 2011) Joint Dissenting Opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jociene, Popović and Vucinić.

[39] *MGM Limited v UK* App no. 39401/04 (ECtHR, 18 January 2011) Partly Dissenting Opinion of Judge David Thór Björgvinsson.

[40] *Axel Springer AG v Germany* App no 39954/08 (ECtHR, 7 February 2012) Dissenting Opinion of Judge López Guerra joined by Judges Jungwiert, Jager, Villiger and Poalelungi.

[41] *MGM Limited*, Partly Dissenting Opinion of Judge David Thór Björgvinsson.

The purpose of the process-based review is to 'effectuate an approach triggering increased domestic engagement with the Convention'[42] and 'to incentivise national judges to engage forcefully with embedded principles […] throughout the assessment of proportionality of interferences with qualified right.'[43]

2. Impact of the Court's procedural turn on the right to property

This part is divided into two parts. The first sub-section (*semi-process-based review*) explores how the Court has developed autonomous procedural guarantees under art 1 of P1. The review is semi-process-based, because the Court makes its own assessment of proportionality while it already attaches weight to the procedural factors.[44] Importantly, the guarantees are autonomous because the Court does not explicitly refer to art 6.1 and its analysis remains within the scope of art 1 of P1. The second sub-section (*process-based review*) examines cases where the Court defers to the assessment and outcome of the proportionality test carried out by national courts. Importantly, this section does not intend to describe all instances of proceduralisation concerning the property protection case law. Instead, it focuses on illustrative examples to demonstrate and analyse the methodological issues raised by the Court's reasoning.

2.1. Semi-process-based review under Article 1 of P1

The *AGOSI v United Kingdom* case is one of the early cases where the Court attached some weight to the procedural aspect of the right to property. In this case, administrative authorities seized gold coins, which the applicant illegally imported into the United Kingdom.[45] The Court argued that, 'although the second paragraph of Article 1 of P1 contains no explicit procedural requirements [it must consider whether the applicable domestic procedures] afforded the applicant company a reasonable opportunity of putting its case to the responsible authorities. In ascertaining whether these conditions were satisfied, a comprehensive view must be taken of the applicable procedures.'[46]

The applicant contended that a purely administrative procedure was insufficient, because a judicial remedy was necessary to protect the innocent owner for the purposes

[42] Spano (n 2) 486.
[43] ibid 487.
[44] Arnardóttir (n 28) 21.
[45] *AGOSI v UK* App no 9118/80 (ECtHR, 24 October 1986), para 51.
[46] ibid 55.

of art 1 of P1. Even if such judicial review was available, its scope was insufficient to provide an effective remedy.[47] The Court ruled, referring to domestic case law, that the judicial review of the exercise of administrative discretion was available. Its scope was sufficient,[48] because it was open for national courts to examine whether the administrative authorities had given the owner opportunity to establish his lack of complicity, however the proportionality principle was excluded as a separate ground for review [49]

The decisive outcome of this case was to what extent the applicant company had been offered procedural guarantees under English law. In his dissenting opinion, *Judge Thór Vilhjálmsson* argued that insufficient procedural guarantees would entail the violation of art 6.1, because it clearly enunciated the right to fair trial, which art 1 of P1 did not expressly contain. He found the majority's interpretation somewhat problematic and unnecessary.[50]

In the *Air Canada v United Kingdom* case concerning the seizure of an aircraft, the Court found no reason to reach a different conclusion to *AGOSI.* In the dissenting opinion of *Judge Martens* joined by *Judge Russo*, he argued that confiscating property without examining any reasonable relationship between the behaviour of the owner and the breach of the law, was contrary to the rule of law and art 1 of P1. In his opinion, a sanction not allowing for the defence of innocent ownership upsets the fair balance between the protection of the right to property and the general interests.[51]

These early cases show that where proportionality was not a separate ground of review, judgements of domestic courts could have been contrary to art 6.1, but they did not breach the procedural requirements attached to property rights.[52] As the case law developed, it has become possible to strengthen the autonomous procedural requirements of art 1 of P1, which appear to be almost as stringent as those under art 6.1.

In the *Capital Bank v Bulgaria* case, the Court argued that the first and most important requirement of art 1 of P1 is that any interference with the right to property should be lawful.[53] The concept of lawfulness and the rule of law require that the applicant has a 'reasonable opportunity of presenting its case to the responsible authorities for the purpose of *effectively*[54] challenging the measures interfering its right'.[55] The Court admits that because art 1 of P1 does not contain explicit procedural

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[47] ibid para 57.

[48] ibid para 59.

[49] ibid para 60.

[50] *AGOSI v UK Dissenting Opinion of Judge Thór Vilhjálmsson.*

[51] *Air Canada v UK Dissenting Opinion of Judge Martens, joined by Judge Russo,* para 5.

[52] Laurent Sermet, 'The European Convention on Human Rights and Property Rights' (1999) 11 Human Rights Files <https://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11(1998).pdf> accessed 19 May 2021, 37.

[53] *Capital Bank AD v Bulgaria* App no 49429/99 (ECtHR, 24 November 2005), para 132.

[54] Emphasis added.

[55] *Capital Bank AD v Bulgaria* (n 53) para 134., *Druzstevni Zálozna Pria and others v the Czech Republic* App no 72034/01 (ECtHR, 31 July 2008), para 89.

requirements, the absence of judicial review, in itself, would not amount to a violation of that Article.[56] This matter has to be rather considered under art 6.1 of the Convention.[57] Instead, the Court must take a comprehensive view of the applicable judicial and administrative procedures in order to ascertain whether the procedural requirement has been satisfied.[58]

The right to access to court may nevertheless come under the Court's scrutiny if the absence of judicial review allegedly impairs the very essence of the right to property.[59] If the Court concludes that the interference with the applicant's property right is unlawful, because it has not been surrounded by 'sufficient guarantees against arbitrariness', the Court will not ascertain whether the impairment strikes a fair balance between the applicant's right to property and the demands of general interest.[60] In other words, the Court applies procedural requirements not to search for the right balance, but to provide a formal guideline, which the domestic law restricting human rights should follow.[61]

In a different line of cases, the Court does not differentiate between lawfulness and proportionality[62] and features autonomous procedural considerations in ascertaining whether a fair balance has been struck. In this respect, the Court has ruled that art 1 of P1 includes an 'expectation of reasonable consistency' between interrelated, but separate decisions of national courts and authorities concerning the same property or 'sufficient explanation' for the lack thereof.[63] Furthermore, public authorities must act in good time, in an appropriate manner and with utmost consistency. Failing to comply with these requirements leads to uncertainty experienced by the applicant, which upsets the fair balance.[64]

It is further submitted that the autonomous procedural guarantees of art 1 of P1 have been strengthened to such an extent that the dividing line between the right to property and the right to fair trial is blurred.

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[56] *Capital Bank AD v Bulgaria* (n 53) para 134., *Druzstevni Zálozna Pria and others v the Czech Republic* (n 55), para 89.

[57] *Capital Bank AD v Bulgaria* (n 53) para 134., *Fredin v Sweden (No. 1)* App no 12033/86 (ECtHR, 18 February 1991), para 50.

[58] *Capital Bank AD v Bulgaria* (n 53) para 134., *Druzstevni Zálozna Pria and others v the Czech Republic* (n 56), para 89.

[59] *Druzstevni Zálozna Pria and others v the Czech Republic* (n 53) para 91.

[60] *Druzstevni Zálozna Pria and others v the Czech Republic* (n 53) para 95., *Iatridis v Greece* App no 31107/96 (ECtHR, 25 March 1999), para 62.

[61] Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (OUP 2014) 118.

[62] ibid 117.

[63] *Jokela v Finland* App no 28856/95 (ECtHR, 21 May 2002), para 61., 65.

[64] *Beyeler v Italy* App no 33202/96 (ECtHR, 5 January 2000), para 120–21, *Megadat.com SRL v Moldova* App no 21151/04 (ECtHR, 8 April 2008), para 71.; *Kips Doo and Drekalovic v Montenegro* App no 28766/06 (ECtHR, 26 June 2018), para 136.

In some cases, the Court's assessment under art 6.1 may absorb the analysis of art 1 of P1, which prevents the Court from fully engaging with the substantive issues, including the balancing exercise. The Court rather argues that States are under the obligation to offer procedural guarantees, which enable the domestic courts to adjudicate a dispute fairly and effectively.[65] Serious procedural shortcomings rendering the domestic proceeding unfair within the meaning of art 6.1 then automatically upsets the fair balance under art 1 of P1.[66] The scope of serious procedural shortcomings depends on the circumstances of the individual case, but may include: considerable differences in the application and interpretation of the domestic law between the various levels of the judiciary, repeated reopening of the flagrant violations of the *res iudicata* principle,[67] extraordinary proceeding instituted by a state official not party to the ordinary court proceeding.[68] In addition, a failure to enforce a final and binding judgement within a reasonable amount of time or a law drastically changing the business and legal environment without providing for judicial review[69] also place an excessive burden on the applicant within the meaning of art 1 of P1.[70]

In another line of cases the Court attempted to clarify the scope of procedural requirements under art 1 of P1.[71] In the *Zagrebacka Banka v Croatia* case, the Court argued that not each and every violation of art 6.1. leads automatically to a violation of the State's procedural positive obligations in connection with the right to property. In fact, art 1 of P1 concerns the substance of the right of property and its breach cannot be determined solely in the light of the same criteria relevant for the right to fair trial. In order to find a violation of art 1 of P1 it is necessary for the 'procedural unfairness to have a direct impact' on the applicant's property rights.[72] In other cases, the Court has stated that even if the domestic proceeding was conducted in an unfair manner within the meaning of art 6.1, the Court requires 'exceptional circumstances' to find a violation of the applicant's right to property. [73]

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[65] *Sovtransavto Holding v Ukraine* App no 48553/99 (ECtHR, 25 July 2002), para 96.

[66] *Sovtransavto Holding v Ukraine* (n 65) para. 97–98., *Ivanova and Cherkezov v Bulgaria* App no 46577/15 (ECtHR, 21 July 2016), para 22.

[67] *Sovtransavto Holding v Ukraine* (n 65) para 154.

[68] *Ivanova v Ukraine* App no 4104/01 (ECtHR, 13 September 2005), para 22., See also *Agrotehservis v Ukraine* App no 62608/00 (ECtHR 5 July 2005) para 46.; *SC Maşinexportimport Industrial Group SA v. Romania* App no 22687/03 (ECtHR 1 December 2005), paras 32 and 46–47.; *Piața Bazar Dorobanți SRL v. Romania* App no 37513/03 (ECtHR, 4 October 2007), paras 23 and 33.

[69] *Könyv-tár Kft* and Others v Hungary paras 49–50.; para 60., *Beinarovic and others v Lithuania*, App nos 70520/10, 21920/10 ,41876/11 (ECtHR, 12 June 2018).

[70] *Vartic and Others v Moldova* App nos 12674/07, 13012/07, 13339/07, 13368/07 (ECtHR, 20 September 2011), para 23.; *Panorama and Milicic v Bosnia Hercegovina* App nos 69997/10 and 74793/11 (ECtHR 25 July 2017) para 74.

[71] *Zagrebacka Banka v Croatia* App no 39544/05 (ECtHR, 12 December 2013), para 269; *Agrokompleks v Ukraine* App no 23465/03 (ECtHR, 25 July 2013), para 170.

[72] *Zagrebacka Banka v Croatia* (n 71) para 269.

[73] *Industrial Financial Consortium Investment Metallurgical Union v Ukraine* App no 10640/05 (ECtHR, 26 June 2018), paras 191 and 198.

Notwithstanding the Court's attempts to differentiate between the procedural requirements under art 6.1 and art 1 of P1, the terms direct impact of unfairness on the property rights and exceptional circumstances are subject to further interpretation, therefore the dividing line remains blurred.

2.2. Process-based review under Article 1 of P1

The extensive proceduralisation of the right to property has arguably paved the way for a process-based review, because it requires that domestic courts effectively adjudicate property disputes falling under the scope of art 1 of P1. In this sub-section, the case law analysis is structured according to the degree of deference that the Court affords to the assessment and legal outcome of the proportionality test carried out by the domestic courts. Admittedly, the Court's approach is not uniform, therefore the analysis includes *hybrid* cases where the Court simultaneously applies various standards of review.

It was the *Paulet v United Kingdom* case[74] where the Court first deferred completely to the domestic court's review of proportionality in the area of property protection. It concerned a confiscation order, which the applicant argued, was a disproportionate interference with his right to peaceful enjoyment of possessions.

The Court citing *AGOSI* and *Jokela* cases law, first examined whether the applicant was afforded a reasonable opportunity to put his case before competent courts with a view to enabling them to establish a fair balance between the conflicting interests. It conceded that the Court of Appeal did examine whether confiscation was in the public interest, but it did not go as far as to determine whether the requisite balance was struck within the meaning of art 1 of P1.[75] Since, the scope of review carried out by the domestic courts was too narrow, it was sufficient for the Court to find a violation of art 1 of P1. Consequently, it was not necessary for the Court to reach any further conclusions in respect of the proportionality of the confiscation order.[76]

The Court's reasoning proved to be controversial among the judges of the ECHtR. *Judge Kalaydijeva* and *Judge Bianku* argued that the limited judicial scrutiny by domestic courts could, in principle, be sufficient for the Court to find a violation.[77] However, the majority judgement was limited to 'procedural aspects,' which did not

[74] *Paulet v UK* App no 6219/08 (ECtHR, 13 August 2014).

[75] ibid 67.

[76] ibid para 69. See also *Gyrlyan v Russia* App no 35943/15 (ECtHR, 9 October 2018); *Telbis and Viziteu v Romania* App no 47911/15 (ECtHR, 26 June 2018); *Sadocha v Ukraine* App no 77508 (ECtHR, 11 July 2019); *Markus v Latvia* App no 17483 (ECtHR, 11 June 2020); *Karapetyan v Gerogia* App no 61233 (ECtHR, 15 October 2020)

[77] *Paulet v UK* (n 74) *Separate Opinion of Judge Kalaydijeva joined by Judge Bianku* as regards Article 1 of Protocol 1 of the Convention.

afford relevant redress under art 1 of P1.[78] Avoiding to reach any conclusion on the lawfulness and/or proportionality of the confiscation measure, left the applicant's 'essential grievances unaddressed both at the domestic level and by the Court'.[79]

Judge Mahoney had 'some hesitations' regarding the fair balance test that the majority demanded from domestic courts to carry out.[80] He agreed that the direct examination of issues under the Convention and the Court's case law represent an ideal manner for the Contracting States to implement their general obligation under art 1 of the Convention.[81] However, he argued that it was not contrary to the Convention that a guaranteed right was implemented by means of equivalent domestic law concepts, provided that the minimum standard laid down by the Convention was complied with.[82] Judge Mahoney based this argument on the observation that the threshold for finding a violation under art 1 of P1 was lower than under arts. 8 to 11 of the Convention, therefore the intensity of domestic court scrutiny should be less than that under arts. 8 to 11.[83]

Judge Wojtyczek disapproved of the methodology applied in the majority reasoning.[84] Accordingly, the majority stated in a 'very general way' that the scope of review carried by the domestic courts was too narrow.[85] Therefore, it was very difficult to clearly identify what individual interests and circumstances should domestic courts take into account when assessing the measure's compatibility with the Convention.[86] He argued that applying the domestic criterion of 'oppressiveness' sufficiently weighed in the balance between the general interest of the community and applicant's individual interests.[87] Thus, there were 'no reasons for this Court to substitute its own assessment of the facts for that made by the domestic courts'.[88]

In the *Telbis and Viziteu v Romania* case, the applicants alleged that confiscation of their property had not been fair and that they had been unlawfully deprived of their property, in breach of art 6.1 and art 1 of P1.[89] The Court ruled that the findings under art 6.1 were relevant in order to examine whether the domestic proceedings afforded the applicants a reasonable opportunity of putting their case to the authorities in order to effectively challenge the confiscation measure.[90] In particular, the Constitutional Court

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[78] ibid.
[79] ibid.
[80] ibid.
[81] *Paulet v UK* (n 74) *Concurring Opinion of Judge Mahoney*.
[82] ibid.
[83] ibid.
[84] ibid.
[85] ibid.
[86] ibid.
[87] ibid.
[88] ibid.
[89] *Telbis and Viziteu v Romania* (n 76) para 3.
[90] ibid para 8.

held that the national law provisions on confiscation were 'fully compatible with the Constitution' and included the 'guarantees mentioned in the case law of the ECHtR'.[91] In addition, the domestic court made its contested decision in 'light of the guidance from the Constitutional Court'.[92] The ECHtR concluded the applicants had reasonable opportunity of putting their case through adversarial proceedings, the domestic courts 'fairly assessed the case' and their findings were not 'tainted with manifest arbitrariness.'[93] As a result, there was no violation of art 1 of P1.

The use of process-based review has two different outcomes, so far. In the *Paulet v United Kingdom* case, the domestic court's review of proportionality did not extend to the direct examination of the Court's case law, which amounted to a violation of art 1 of P1, without the Court's making its own (*de novo*) assessment of fair balance. On the other hand, in *Telbis and Viziteu v Romania* case, the domestic court's review was not manifestly arbitrary because it extended to the 'guarantees mentioned in the Court's case law,'[94] which arguably led the Court not to carry out the balancing exercise between the general interest and the individual right to property.

Conversely, the following cases will demonstrate how the deference to the domestic court's assessment of the Convention varies to some degree, which raises some methodological issues in the Court's reasoning.

In the *Svit Rozvag, Tov and Others v Ukraine*[95] case, the applicants' gambling licences were revoked when the national law prohibited gambling. They alleged the breach of art 6.1, because the domestic courts did not address their reference to Court's *Tre Traktörer AB* judgment by which they demonstrated that an unjustified interference with the right to property attracted an obligation to pay adequate compensation. In response, the Court argued that only the highest court addressed this argument, albeit in 'a very succinct fashion and without reference to any previous case law'.[96] The domestic court's reasoning was relevant for the merits under art 1 of P1, but it was 'not sufficient' for the Court to hold that the highest court's application of domestic law was arbitrary or manifestly unreasonable.[97] Thus, there was no violation of art 6.1.[98]

With respect to art 1 of P1, the Court accepted that the prohibition of gambling pursued a general interest and served the legitimate aims of preventing tax evasion and gambling addiction.[99] However, it found 'no evidence that any balancing exercise was undertaken at the legislative level: the legislature did not cite any reasons for choosing

[91] ibid para 37.
[92] ibid para 78.
[93] ibid paras 79 and 81.
[94] ibid para 37.
[95] *Svit Rozvag, Tov and Others v Ukraine* App nos 13290/11, 62600/12, 49432/16 (ECtHR, 27 July 2019), para 3.
[96] ibid para 98.
[97] ibid para 99.
[98] ibid para 99.
[99] ibid para 166.

the most restrictive policy of total prohibition out of the range of options open to it and, most importantly, for putting it into effect at such short notice. No such reasons were ever put forward at the stage of judicial review.'[100] 'The first applicant's allegation that the legislative proposal was not subjected to any meaningful expert analysis has not been contested.'[101]

Because the proportionality of the interference was not reviewed at the domestic level at all, the Court carried out its own assessment. It concluded that the measure was disproportionate, primarily on the account of the quality of the decision-making process, the lack of any compensatory measures and the lack of a meaningful transition period.[102]

The *Elisei-Uzun v Romania* case[103] is an example, where the Court disregarded the domestic court's legal assessment and missed a clear opportunity to exercise a process-based review under art 1 of P1.

The applicants relied on the national Anti-Discrimination Ordinance and art 1 of P1 to claim compensation for not having received 'loyalty bonus'.[104] The Târgu Mureş Court of Appeal, relying on the Court's case-law on art 14, awarded them compensation in a final and binding judgement in 2008.[105] As a result of the extraordinary appeal proceeding in 2009, that judgement was quashed, because the Constitutional Court declared the relevant provisions of the Anti-Discrimination Ordinance unconstitutional. Therefore, there were no legal grounds to support the applicants' claim.[106]

On one hand, the Court found violation of art 6.1, because the Court of Appeal did not give sufficient reasons for dismissing the applicants' claim and their right to fair trial was violated.[107] In particular, the Court of Appeal's judgement was not supported by the Court's case law, which otherwise had not been the object of constitutional review. According to the Court, it was not clear from the reasoning whether that question was considered to be irrelevant to the case, absorbed by the assessment of the domestic legislature, or whether it was simply ignored.[108]

On the other hand, the Court completely ignored the domestic court's reasoning with respect to art 1 of P1. Because the extraordinary appeal was lodged by a party to the proceeding within a short period of time,[109] the domestic courts struck a fair balance between the applicant's right to property and the general interest in correcting miscarriages of justice.[110]

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[100] ibid para 176.
[101] ibid para 176.
[102] ibid para 180.
[103] *Elisei-Uzun and Andonie v Romania* App no 42447/10 (ECtHR, 23 April 2019), para 17.
[104] ibid para 8.
[105] ibid para 10.
[106] ibid para 18.
[107] ibid para 67.
[108] ibid para 66.
[109] ibid para 45.
[110] ibid para 47.

The main takeaway of this decision is not easy to grasp. In essence, the Court of Appeal's decision to quash the first-instance court judgement was a result of a proceeding, which as a whole was unfair, mainly because it omitted considering the Convention and the Strasbourg case law. Still, the reasoning as to why the interference with the right to property was proportionate remained 'succinct.'[111]

In the *Ivanova and Cherkezov v Bulgaria*[112] case concerning the demolishing of the applicant's home, the Court took a similar approach to *Elisei-Uzun* case. In fact, it did not give any weight to the domestic court's reasoning for the purposes of art 1 of P1, still its own assessment of fair balance test was scarce.

With respect to art 8 of the Convention, the Court argued that the mere possibility of obtaining judicial review of administrative decisions causing the loss of home is not enough. Instead, the individual must be able to challenge those decisions on the ground of proportionality. The Court recapitulated that the relevant criteria to be assessed in terms of proportionality include: whether the construction was illegal, degree of fault on part of the applicant, precise nature of interest sought to be protected and whether a suitable alternative accommodation was available.[113] If the domestic courts have due regard to these factors and weighed the competing interests accordingly, the Court would afford them wide margin of appreciation and would be 'reluctant to gainsay their assessment.'[114] In the particular case, the Court found violation of art 8, because the Supreme Administrative Court did not envisage any proportionality assessment. It did not leave any discretion to the competent authorities, which were required to enforce the demolition order regardless of the individual circumstances.[115]

In contrast, the Court did not find a violation of the applicants' right to property. It conceded that the Court has assessed the proportionality of a measure under art 1 of P1 in light of the 'same factors' as those under art 8.[116] However, it argued that the assessment was not inevitably identical in all circumstances because the intensity of protected interests under the two articles were not 'necessarily co-extensive.'[117] However, the fair balance test was restricted to the establishing that the applicants had built the house in breach of domestic laws, therefore applicant's proprietary interest in the house should not prevail.[118]

The *Lekic v Slovenia* case,[119] concerning the automatic striking-off of insolvent and dormant companies, shows how elements of traditional review and process-based

[111] *Elisei-Uzun and Andonie v Romania* (n 103) *Partly Dissenting Opinion of Judge Kuris* paras 33–36.
[112] *Ivanova and Cherkezov v Bulgaria* App no 46577/15 (ECtHR, 21 July 2016).
[113] ibid para 53.
[114] ibid para 53.
[115] ibid para 47.
[116] ibid para 74.
[117] ibid para 74.
[118] ibid para 75.
[119] *Lekic v Slovenia* App no 36480/07 (ECtHR, 11 December 2018).

review could interact in the Court's reasoning. The Financial Operations and Companies Act (FOCA) provided that shareholders would be personally liable for the company's debt if they failed to apply for winding-up procedure within a reasonable period of time.[120]

The Court drew attention to its 'fundamentally subsidiary role in the Convention protection system' and argued that States should enjoy a wide margin of appreciation in securing the rights and freedoms enshrined in the Convention.[121] This does not mean however, that the quality of judicial and parliamentary review of the contested measures should fall beyond the Court's scope of scrutiny.[122] In particular, the Court's task was to examine the arguments taken into consideration during the legislative process and determine whether the domestic bodies have struck a fair balance between the competing interests of the State and those affected by the legislative choices.[123]

Arguably, the Court used a *qualified fair balance* test by which it attached significant weight to the fact that in the Constitutional Court's reasoning 'genuine efforts' were made to achieve a fair balance between the interests of creditors and company members.[124] As a result, the quality of parliamentary and judicial review of the necessity of the measure were such as to warrant a wide a margin of appreciation.[125]

However, the Court added that the margin of appreciation was not unlimited, and the Court's task was to give a *final* ruling on whether the contested interference was reconcilable with the applicant's rights under art 1 of P1 in the instant case. Therefore, the Court gave special weight as to how the domestic ordinary courts and the Constitutional examined the applicant's personal liability for debt in the individual case. Importantly though, such reasoning was complemented by the Court's own assessment of the arguments raised by the applicant.

Accordingly, the Court deferred to the Constitutional Court reasoning that the domestic courts had correctly applied the criteria differentiating between active and passive members to the applicant's individual situation and saw no reason to disagree with them. In addition, it considered the following factors raised by the parties: the applicant company was not adequately capitalised from its establishment. It had ample time to institute winding up proceedings on its own motion in order to avoid the application of the FOCA and its creditors were subjected to prolonged uncertainty. As a result of the above considerations, the Court found that the FOCA did not impose and individual and excessive burden on the applicant, thus the State did not overstep its wide margin of appreciation.[126]

[120] ibid para 51.
[121] ibid para 108.
[122] ibid para 109.
[123] ibid para 109.
[124] ibid para 118.
[125] ibid para 118.
[126] ibid para 129.

Conclusions

This chapter has inquired into the meaning of the Court's *procedural turn* and investigated its potential effects on the interpretation and application of the right to property. The research has been structured into two parts. The first part of the research has showed that the requirement to afford the applicant effective judicial review enabled that the proceduralisation of the right to property has become extensive. Therefore, the Court could scrutinize the scope and quality of the domestic court's review both under art 6.1 and art 1 of P1 to such an extent that a considerable overlap exists between the procedural obligations under the right to property and the right to fair trial.

The second part of the research has demonstrated that the extensive proceduralisation of the right to property facilitated the implementation of a process-based review. A selection of illustrative examples has demonstrated that the more the Court relies on the domestic balancing exercise, the less the Court makes its own proportionality assessment. Because its approach is not uniform, the process-based review, as applied under the right to property, could lead to the proliferation of standards of review and reshape the structure of the fair balance test.

As a result of this development, the Court may apply a standard of manifest arbitrariness, a standard of qualified fair balance test and the traditional review. The difference between these standards lies in the *extent* to which the ECHtR refers back to domestic court's application of the Convention principles under the fair balance test, imports them into its own reasoning and simultaneously reduces its own assessment of proportionality. In this respect, the case law analysis has showed that the Court does not clearly explain the reasons why it chooses a particular type of review or why it omits making its own reasoning either completely or partially on the issue of proportionality. These developments may arguably prejudice the Court's obligations under arts. 19 and 32 of the Convention and diminish the scope of protection of the substantive right.

Because the applicants could bear excessive burden if the national courts have not applied the Convention principles at all or their interpretation has been manifestly arbitrary, it is crucial to determine the obligations that the Court's procedural turn may impose on the domestic courts. On the basis of the case law analysis, it has become possible to suggest that the domestic courts are advised to genuinely apply the Convention, carefully balance the competing interests, cite the relevant criteria to be distilled from the case law and explain their dissent in case of a contradictory result.

If the Court's 'procedural turn is inevitable'[127] and the entry into force of Protocol No. 15 further strengthens its normative justification, the process-based review will not become an isolated exercise and the current inconsistencies will certainly be clarified.

[127] Spano (n 2) 494.

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Can a Judge Protect the Independence of the Judiciary?

Introduction

Recently the definition and the conception of rule of law enshrined in art 2 of the Treaty of the European Union (TEU) is in continuous discussion, with a particular focus on the importance of judicial independence, as a key feature of the right to a fair trial and to the rule of law. In our opinion judicial independence is not only a core value of rule of law but a cornerstone for the functioning of the EU: the judiciary has an essential role in democratic societies to guard and protect fundamental rights and judges can fulfil their duty when their independence is guaranteed by state administration too.

The Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) are currently facing new challenges regarding the interpretation of the scope, the meaning and the requirements of judicial independence. Latterly a number of cases relating to various Member States, in majority to Eastern European States, have been brought before the CJEU concerning respect for the rule of law and the principle of judicial independence. We have to notice that the latest developments of the European Union's constitutionalism are mainly generated by the Eastern European Member States, as they are forcing the interpretation and the application of the values enshrined in art 2 TEU by the Court in its judgements[1] and as Koen Lenaerts, the President of the CJEU wrote 'today, Europeans are facing a defining moment in history of integration'.[2]

[1] Orbán Endre, 'Hazai és uniós fejlemények a bírói függetlenség értelmezése köréből' [National and EU interpretation developments concerning judicial independence] [2021] 9 MTA Law Working Papers 17.

[2] Koen Lenaerts, 'New Horizons for the Rule of Law Within the EU', [2020] 21 German Law Journal 34.

The case examined in the present study is still pending front of the Court of Justice of the European Union.[3] Advocate General Pikamäe delivered his opinion on the 15 April 2021 and the final decision is expected. The preliminary ruling procedure is related to a criminal proceeding before a Hungarian district judge, who imposed a stay of the proceeding and referred three questions to CJEU for a preliminary ruling in 2019. The questions were related to the principle of fair trial and to judicial independence. Approximately a week after the decision the Prosecutor General presented to the highest Hungarian judicial authority (Kúria) an extraordinary appeal against the district court's decision, called appeal in the interest of the law, based on the Hungarian Code of Criminal Procedure. He requested regarding the relevance of the questions asked, the review of the preliminary reference order of the district judge's order. The Kúria declared the preliminary reference order unlawful.[4]

Examining the above-mentioned extraordinary appeal of the General Prosecutor and the proceeding of the Kúria an important question rises up: whether a national court or tribunal can rely directly on EU law to protect its independence, when it is – or might be – threatened by a higher judicial authority.

1. The case law of the European Court of Human Rights and the European Court of Justice

The principle of judicial independence is a key feature of the right to a fair trial and to the rule of law and it is protected by every major international document. In the law of the European Union these are the European Convention on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (CFREU), the national constitutions and regarding the essence of judicial independence both the ECtHR, and recently the CJEU developed its case law.

Art 6 (1) of the European Convention on Human Rights prescribes that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The right to an independent and impartial tribunal applies equally to criminal and civil cases, and there is a close inter-relation between the guarantees of an independent and an impartial tribunal, but the two guarantees are not synonyms. The ECtHR commonly considers the two requirements together, using the same reasoning to decide whether the tribunal is independent and impartial. In the following we would like to

[3] Case C-564/19 Criminal proceedings against IS, ECLI:EU:C:2021:292., Advocate General Priit Pikamäe's motion.

[4] Kúria Bt.III.838/2019/11.

focus on the criteria of independence, viewed for a long time mainly from a separation of powers perspective, including some exceptions when the Court has also stated that judicial independence refers to the independence of the parties to proceedings.

Previously in the case law of the ECtHR *independent* meant independent of the executive, of the parties[5], and of the Parliament[6]. The case law since 2009 has made a clear and explicit distinction between the internal and the external dimensions of judicial independence due to cases against former Communist countries in Eastern Europe, whose historical past and former hierarchical organisation of the courts increased the chance of violation of judicial independence.[7] In the *Parlov-Tkalčić v Croatia* the ECtHR summarises its case law on the requirement of an independent tribunal: '[the] Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence'[8].

As Sillen affirms the idea that the Convention should also protect judges against pressure from judges and other judicial officials within the judiciary went beyond this separation of powers perspective. This derives from the idea that the separation of powers itself does not sufficiently guarantee the independent administration of justice. Instead, it is also necessary that the individual judge hold a sufficiently autonomous position within the judiciary.[9] In the above-mentioned judgement the ECtHR argues that 'however, judicial independence demands that individual judges be free not only from undue influences outside the judiciary, but also from within. 'In the interpretation of the ECtHR this requires that judges has to be free from directives or pressures from fellow judges, the president of the court and the president of a division in the court. The absence of sufficient safeguards securing the independence of judges within the judiciary may lead the ECtHR to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified.[10]

In conclusion, when the case law of the ECtHR acknowledged the concept of the above-mentioned dimensions of the principle of judicial independence, then made it clear that the external aspect of judicial independence means that a judge should exercise its functions wholly autonomously, without taking any orders or instructions,

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[5] *Ringeisen v. Austria* A 13 (1971) para 95.

[6] *Crociani v. Italy No 8603/79*, 22 DR 147 para 221 (1980).

[7] Joost Sillen, *The concept of 'internal judicial independence' in the case law of the European Court of Human Rights*, EU Const 15 (2019), 106, <https://www.researchgate.net/publication/332937455_The_concept_of_%27internal_judicial_independence%27_in_the_case_law_of_the_European_Court_of_Human_Rights> accessed 1 August 2021.

[8] *Parlov-Tkalčić v Croatia No 24810/06*, 22 December 2009, para 86

[9] Sillen (n 7), 105–6.

[10] *Parlov-Tkalčić v Croatia No 24810/06*, 22 December 2009, para 86.

without being subjects of undue external pressure and other branches of powers should not influence the courts. The internal aspect of judicial independence, subject of the present case study, means that a judge should be protected against the undue pressure from colleagues, judicial executives, or higher courts and the individual judge has to hold a sufficiently autonomous position within the judiciary.

Art 47 of the CFREU states that everyone whose rights and freedoms guaranteed by the law of the EU are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

In recent years the CJEU has also developed its case law regarding judicial independence. We would like to highlight the *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*[11] case because this judgement is pivotal in the protection of judicial independence. In its further case law[12] the CJEU largely relies on the reasoning of this judgement to confirm that independence of the judiciary, which forms part of the essence of the fundamental right to a fair trial, is key to effective judicial protection and, in turn, to upholding the rule of law within the EU.

Shortly after the above-mentioned Portuguese decision the polish judicial reforms generated new decisions of the CJEU regarding the principle of judicial independence. Since 2018 it became a current topic in the CJEU's case law and in subsequent cases has clarified the meaning and the scope of the principle of judicial independence.[13] In *Minister for Justice and Equality (Deficiencies in the system of justice) v LM*[14] the CJEU stressed that the principles of mutual trust and judicial independence are deeply connected because national courts of Member States will stop trusting each other if they do not exercise their judicial functions wholly autonomously. The CJEU further affirmed that 'the requirement of independence also means that the disciplinary regime governing those who have the task of adjudicating in a dispute must display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions'.[15]

In 2018 the European Commission launched infringement proceedings against Poland alleging a failure to fulfil its obligations under art 19 TEU and art 47 CFR. In the *Comission v. Poland* case[16] the CJEU reminded that the requirement of judicial independence has two aspects: the first aspect is external in nature and the second aspect is internal in nature. In its judgement the CJEU found that 'the guarantees of independence

[11] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, case C-64/16, 27 February 2018., LMECLI:EU:C:2018:586.

[12] *Minister for Justice and Equality v. LM*, case C-216/18 PPU, 25 July 2018. paras 51–53.

[13] Lenaerts (n 2) 33.

[14] *Minister for Justice and Equality (Deficiencies in the system of justice) v LM*, case C-216/18., paras 58–59.

[15] ibid. para 67.

[16] *Commission v Poland (Independence of the Supreme Court)*, case C-619/18, ECLI:EU:C:2019:531, 24 June 2019, paras 72–74.

and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, that are such as to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'. The CJEU examined in detail another essential requirement of judicial independence, the principle of irremovability from office, which means that judges cannot be dismissed, suspended, moved or retired except on legitimate and compelling grounds complying with the principle of proportionality.

In another important Polish case *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*[17] the referring court in a preliminary ruling procedure had to ascertain whether the new Disciplinary Chamber of the Polish Supreme Court is independent, in order to determine whether that chamber has jurisdiction to rule on cases where judges of the Supreme Court have been retired, or in order to determine whether such cases must be examined by another court which meets the requirement that courts must be independent. The CJEU held that the right to an effective remedy, enshrined in art 47 of the CFREU precludes cases concerning the application of EU law from falling within the exclusive jurisdiction of a court which is not an independent and impartial tribunal. The CJEU considered that that is the case where the objective circumstances in which such a court was formed, its characteristics and the means by which its members have been appointed are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that court to external factors, in particular, as to the direct or indirect influence of the legislature and the executive branch and its neutrality with respect to the interests before it. Those factors may thus lead to that court not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society must inspire in subjects of the law.

The Court confirmed in the first place that the requirement of judicial independence forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial. These rights are of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in art 2 TEU, in particular the value of the rule of law, will be safeguarded. The CJEU sets out, in detail, its case-law on the scope of the requirement that courts must be independent and held that, in accordance with the principle of the separation of powers which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature, the executive branch and the parties. The judgement states regarding these criteria that the interpretation of art 47 of the CFREU is borne out by the case-law of the ECtHR on art 6(1) of the ECHR and the CJEU examines the concepts of independence and

[17] *A. K. and Others v Sąd Najwyższy, CP v Sąd Najwyższy and DO v Sąd Najwyższy*, case C-585/18, ECLI:EU:C:2019:982, 19 November 2019, paras 120–34.

objective impartiality according to the equally settled case-law of the ECtHR and recalls the internal and external dimensions of judicial independence as well.

In the decision of the Maltese *Repubblika v Il Prim Ministru case*[18] the CJEU added an important new element to the requirements of the protection of judicial independence when connected art 2 and 19 TEU and art 47 of the CFREU with the accession clause in art 49 TEU. The Court points out that under art 49 TEU, the EU is composed of States which have freely and voluntarily committed themselves to the common values referred to in art 2 TEU, such as the rule of law, which respect those values and undertake to promote them. A Member State cannot therefore amend its legislation, particularly in regard to the organisation of justice, in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by art 19 TEU. In the light of this value, the Member States are required to refrain from adopting rules which would undermine the independence of the judiciary.

Regarding the judicial independence in a national context Badó affirms that practically all existing constitutions provide a definition of the term *independent and impartial court* but requirements for the implementation of the concept may significantly differ from one legal system to another.[19] Art XXVIII of the Fundamental Law of Hungary declares the right to a fair trial, art 25 regulates the court system and art 26 states that judges shall be independent and only subordinated to Acts and they shall not be instructed in relation to their judicial activities.

2. Hungarian judicial reforms in 1997 and 2012

We refer briefly to the two recent major Hungarian judicial reforms of 1997 and 2012. After the first free elections of 1990 a comprehensive judicial reform was introduced in 1997, when all competences of judicial administration were given to a newly set up National Council of Justice, consisted of nine judges, the Minister of Justice, two members of Parliament, the Head of the Hungarian Bar Association and the Prosecutor General, led by the President of the Supreme Court.[20]

In 2012 the Government introduced a completely new model of administration.[21] The central administration of the judiciary is entrusted to the National Office for the Judiciary (NOJ) and practically, one person, the President of the Office has the most important powers, he is responsible for the central administration and management of the judicial system. The President has extensive powers, which include for example

[18] *Reppublika v Il Prim Ministru* case C-896/19, ECLI:EU:C:2021:311, 20 April 2021, paras 63–64.

[19] Badó Attila, *Fair Trial and Judicial Independence-Hungarian Perspectives* (Springer International Publishing Switzerland, 2014) ix.

[20] Act LXVI of 1997 on the Organization and Administration of Courts, Chapter IV.

[21] Act CLXI of 2011 on the Organization and Administration of Courts, Chapter VI–VII.

deciding on judicial appointments and initiating disciplinary proceedings against judges. A body of judicial self-governance, the National Judicial Council – whose members are elected by the judiciary – was preserved from the previous system but with very week powers. The Council is responsible for overseeing the actions of the President and approving his decisions in certain cases, but practically the Office is running the administration. The system was criticized from the beginning on both national and international level, according to Badó 'the Hungarian judicial reform received unprecedented international attention'.[22]

From mid-2016 onwards there have been signs of growing tension between judges of the Council and the central administration. By 2018 it escalated into an open conflict, because in its report the Council criticised many practices of the then President of the Office, for example the practice of appointing court executives, especially regional court presidents.[23] It is important to emphasize that regional court leaders, who are appointed by the President of the National Judicial Office, have very wide powers to affect the career and the everyday life of judges in mostly indirect ways, for this reason their appointment is a crucial issue. According to the Organisation and Administration of Courts Act[24] and the Act on the Status and Remuneration of Judges[25] regional court presidents have general administration responsibilities, compliance with the central administration and important duties related to judges, not only to regional court judges but district court judges as well. For example, regional court presidents exercise the employer's rights over judges, have the final word in their evaluating process, decide on the initiation of disciplinary proceedings and on the temporary transfer of judges, permit home office work or revoke the permission, and they have strong influence on the case allocation too.

By the time the judge of the Pest Central District Court, member of the NJC decided to refer the questions for preliminary ruling to the Court, there was a friction between the President and the Council, and currently the irregular appointment of the president of the Metropolitan Court of Budapest, as the largest court of Hungary with more than 700 judges, including the district court judge of our case study, was very strongly attacked.

2.1. The preliminary ruling procedure

At this point, it should be recalled that, in accordance with the art 19 of the TEU, it is for national courts and the CJEU to ensure the full application of EU law in all Member

[22] Badó (n 19) vii.

[23] 59/2018 (V. 2.) and 60/2018 (V. 2.) OBT decision.

[24] Act CLXI of 2011 on the Organization and Administration of Courts, Chapter VIII. 33.

[25] Act CLXII of 2011 on the Status and Remuneration of Judges.

States and judicial protection of the rights of the individual under that law. In other words, an important reason for the existence of the CJEU is to uphold the rule of law.

In particular, the judicial system has as its keystone the preliminary ruling procedure provided in art 267 of the Treaty on the Functioning of the European Union (TFEU), which, by setting up a dialogue between the CJEU and the courts of the Member States, has the object of securing uniform interpretation and application of EU law. This mechanism guarantees that citizens across the EU enjoy equal protection under EU law.[26]

Art 267 TFEU affirms that 'the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning (a) the interpretation of the Treaties, (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union'. Subparagraph 2 says that 'where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.' According to subparagraph 3 of art 267 TFEU 'where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.'

As Lenaerts observes the Member States' courts are not only courts of national law but also courts of EU law.[27] By applying EU law in disputes submitted to them, they play a key role in guaranteeing effective protection of the rights that EU law confers on individuals, and in protecting the rule of law within the EU legal order. The dialogue established by the preliminary ruling procedure is key to the uniform interpretation of EU law. Whenever a national court has doubts as to how an EU act should be interpreted, it is entitled to seek guidance from the CJEU and the answer has authority not only in the main proceedings but also in all cases where that same act applies. The preliminary ruling mechanism is therefore essential for ensuring protection of the rights that EU law confers on individuals for upholding the rule of law within the EU.

Examining the case law of the CJEU regarding the preliminary ruling procedure it is important to refer to the judgement of the *Cartesio case* because in a broad context this case was a prelude to the case of the present study. The CJEU in a preliminary ruling procedure initiated by a Hungarian court, affirmed that according to the case-law, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, art 267 TFEU does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling from remaining subject to

[26] Koen Lenaerts, *Overview of the case law of the Court of Justice of the European Union with respect to the rule of law*, Rule of law in Europe perspective from practitioners and academics, EJTN 2019, <https://www.ejtn.eu/PageFiles/19061/2019-056-RoL%20Manual-170x240-WEB_FINAL.pdf> accessed 1 August 2021, 72.

[27] ibid. 72.

the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by art 267 TFEU on that court to make a reference to the CJEU if it considers that a case pending before it raises questions on the interpretation of provisions of EU law necessitating a ruling by the Court.

The Court has thus held that jurisdiction cannot be called into question by the application of rules of national law which permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court which adopted that order to resume the domestic law proceedings. In accordance with art 267 TFEU, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the CJEU in accordance with the case-law cited. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.[28]

As we have already mentioned earlier, the judgement in the case *Associação Sindical dos Juízes Portugueses v Tribunal de contas* took a huge step towards the protection of judicial independence and pivotal in the CJEU's reasoning is the link between judicial independence and the procedure for a preliminary ruling. The CJEU noted regarding the concept of independence presupposes that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[29]

An important guidance regarding the final conclusions of our case study is, that it is essential to the proper functioning of the judicial cooperation system embodied by the preliminary ruling mechanism under art 267 TFEU that only national bodies that satisfy the criterion of independence may refer questions to the CJEU for a preliminary ruling. The logic of it is simple: no hindrance should result from pressure exercised on the judge to refer or not to refer a request for a preliminary ruling to the CJEU, or to ask a specific question instead of another one and only independent courts can ensure the proper implementation of preliminary rulings. It follows that only national courts that are genuinely independent may have recourse to the preliminary ruling mechanism in order to engage in a dialogue with the Court of Justice.[30]

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[28] *Cartesio Oktató és Szolgáltató Bt.*, case C-210/06, ECLI:EU:C:2008:723,16 December 2008, paras. 89, 93, 95, 96, 98.

[29] *Associação Sindical dos Juízes Portugueses*, case C-64/16, 27 February 2018, para 44.

[30] Lenaerts (n 26) 74.

2.2. The order of the district judge

In the following we refer briefly to the main criminal proceeding before the Pest Central District Court. In August 2015, a Swedish national of Turkish origin was arrested and questioned as a suspect by the Hungarian authorities for an alleged infringement of the law on firearms and ammunition. Before the questioning the accused requested the assistance of a lawyer and an interpreter. At the hearing, he was informed through only an interpreter of the suspicions against him, because the lawyer was unable to attend. He refused to testify because he could not consult his lawyer. Following the hearing the defendant was released and since then, he has been living outside Hungary and the summons sent to him by the Hungarian authorities was returned marked unclaimed. Since the prosecution of the offence in question relates to a mere fine, the district court is required under national law to continue the proceedings in the absence of the accused who is represented by a lawyer appointed by the State. At the court hearing the defence made a request for a preliminary ruling.

Art 490 (1) and (2) of the Hungarian Code of Criminal Procedure provides that a national 'court may, of its own motion or at a party's request, refer a matter for a preliminary ruling to the Court of Justice of the European Union in accordance with the rules of laid down in the Treaties constituting the basis of the European Union'. In accordance with the wording of (2) and (3) of that article the court is to decide, by way of an order, either to initiate preliminary ruling proceedings and at the same time stay the proceedings or to dismiss the request for preliminary ruling proceedings to be initiated. It is important to notice that under Hungarian procedural law no ordinary appeal is available against this order. Art 491 (1)(a) states that the suspended criminal proceedings must be resumed if the grounds for the stay have ceased to exist.

In the above-mentioned circumstances, the district judge decided to stay the criminal proceeding and to refer three questions to the CJEU for a preliminary ruling at the request of the accused's lawyer, on the 11 July 2019.[31]

The first question was related to some aspects of the right to a fair trial of a Swedish defendant who does not speak Hungarian and there were doubts about the conditions of interpretation. According to the court, there is no information about how the interpreter who participated in the questioning of the accused was selected, and how that interpreter's competence was verified, or whether the interpreter and the accused understood each other well. The court has doubts whether the Hungarian authorities have complied with the directives on the rights of accused persons in criminal proceedings in the European Union. Thus, the court requests from the CJEU an interpretation of the provisions of those directives[32] as to the scope of the right to interpretation of a sufficient quality and

[31] Pest Central District Court 1.B.30.263/2018/30., 11 July 2019.

[32] Directive 2012/13/EU of the European Parliament and of the Council of 22nd May 2012 on the right to information in criminal proceedings OJ 2012 L 142, p. 1, Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings

of the right of accused persons to be informed of the accusations against them, in the specific case of a trial *in absentia*. From the point of view of safeguarding the fairness of criminal procedures the issue is of great importance, but this question is not related to judicial independence, therefore it won't be further detailed here.

The second question is challenging the powers of the NJO President and refers to her unlawful practice of appointing of the court presidents, namely the president of the Metropolitan Court of Budapest. In the reasoning of his motion[33] the referring judge observes that, since the last judicial reform in 2012 the responsibility for the central administration and management of the judicial system has lain with the President of the NOJ, who is appointed by the National Assembly for a term of nine years and the President has extensive powers on judges. He further states that the NJC is responsible for overseeing the actions of the President of the NOJ and approving her decisions in certain cases. For this reason, on 2 May 2018, the NJC adopted a report stating that the President of the NOJ had regularly infringed the law by her practice of declaring vacancy notices for judicial and senior judicial posts unsuccessful without sufficient explanation and appointing temporary senior judges of her choice, such as the President of the Metropolitan Court of Budapest, which is the court of appeal for the referring court. There was currently friction between the President of the NOJ and the NJC. In those circumstances, the referring judge questioned whether such functioning of the NOJ is compatible with the principle of judicial independence enshrined in art 19 TEU and art 47 of the CFREU. He also wonders whether, in such circumstances, the proceedings before him may be regarded as fair.

The third question is related to the remuneration of judges. The referring judge observes that the national system of remuneration which provides lower pay for judges than for prosecutors and the discretionary award by the President of the NOJ and senior judges of various exceedingly high allowances compared to judges' basic pay may potentially constitute undue influence and entail a breach of judicial independence.

In his questions the judge practically doubts the independence of the whole Hungarian judicial system and his own personal independence as a judge, because of the previously mentioned conflict, and in the lack of judicial independence he affirms the violence of the right to a fair trial.

2.3. Extraordinary appeal 'in the interest of law'

As we mentioned in the preface, a week after the initial reference for a preliminary ruling had been submitted, the Hungarian General Prosecutor lodged an extraordinary

OJ 2010 L 280, p.1, Directive (EU)2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings OJ 2016 L 65, 1.

[33] Pest Central District Court 1.B.30.263/2018/30., 11 July 2019, para 2.1.

appeal, known as an appeal in the interests of the law, against the order of the district judge for reference according to the art 667 (1) of the Code of Criminal Procedure. This legal instrument provides the General Prosecutor the possibility to bring extra-ordinary appeal proceedings, seeking the declaration of the Kúria that a final judgement or a non-appealable order delivered by a lower court, is unlawful.

Art 669 of the Code of Criminal Procedure is worded as follows:

> '(1) If the Kúria considers the appeal in the interests of the law to be well founded, it shall find, in a judgment, that the decision complained of is unlawful and, if not, it shall dismiss the appeal by means of an order.
>
> (2) If the Kúria finds the decision at issue unlawful, it may acquit the accused person, rule out forced medical treatment, terminate the proceedings, impose a lighter penalty or apply a lighter measure, set aside the contested decision and, if appropriate, refer the case back to the competent court for fresh proceedings.
>
> (3) Except in the cases referred to in paragraph (2), the Kúria's decision shall be limited to a finding of illegality.'

The appeal in the interests of the law is a rarely researched legal instrument. It has been applied occasionally until 2019 and only in cases interesting for professionals at most.[34] Its original legislative scope was to remedy breaches of law not eliminable in any other way, but in a narrow circle: only in favour of the accused. It is important to emphasize that its main object is securing the uniform interpretation of national law, because with its judgement the Kúria affirms the breach of law without remedying it, so practically the decision issues guidelines to the lower courts.[35] Although it doesn't have a binding legal force, but according to art 561 (3) g) any judge may depart from the judgement published in the compendium of judgements only by expressly stating his reasons for doing so in the final decision of the case. Through this legal instrument the General Prosecutor can participate in the shaping of the uniform interpretation of national law, as the Kúria affirmed itself in the uniformity decision no. 2/2015 BJE.

By examining the case law of this legal instrument, we can see that in recent years the Kúria almost never expressed its opinion in pending cases with the exception of some cases when the General Prosecutor lodged the appeal against motions that overruled the first instance sentences.[36] But in our case the General Prosecutor asked for judicial remedy in a pending case, so there seems to be a paradigm shift in the Kúria's recent case law.

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[34] Lichtenstein András, 'A törvényesség érdekében bejelentett jogorvoslat elmélete és gyakorlata' [The theory and practice of appeals filed by the prosecutor] [2018] 4 Eljárásjogi Szemle 31. For the number of the proceedings and the legal issues examined by the Kúria see pages 34–35.

[35] Polt Péter (ed), *Kommentár a büntetőeljárásról szóló 2017. évi XC. Törvényhez* [Commentary of Act XC of 2017 on Criminal Procedure]. <uj.jogtar.hu/#doc/db/396/id/A17Y0090.KK/ts/20200701/lr/666/> accessed 1 August 2021.

[36] Lichtenstein (n 34) 38.

2.4. The sentence of the Kúria

In a final judgement of 10 September 2019, the Kúria declared the order of the district judge unlawful because in its opinion the first question referred, related to the interpretation, did not actually arise and it did not in fact seek an interpretation of EU law but to establish that the applicable Hungarian law was not consistent with the principles protected by EU law. Furthermore, the Kúria affirmed that the second and third questions referred had no connection with the case.

The sentence briefly refers to the procedural function of the appeal in the interests of the law and the reasoning itself states that the judgement doesn't affect the decision of the past, the object of the proceeding is effecting the future decisions as it secures the uniform interpretation of national law.

In the judgement the Kúria reviewed the lawfulness of the initial order in the light of art 490 of the Code of Criminal Procedure and ascertains that the Kúria had to answer whether the application of the rules of art 490 and the answering of the referred questions were necessary to enable to the ruling on the merits of the case under consideration, and whether the district judge had reason to ask the referred questions. Because if not, says the Kúria, then an important condition of art 490 (1) is missing. But the reasoning does not make it clear what the missing condition is, because the article itself states only that the 'court may, of its own motion or at a party's request, refer a matter for a preliminary ruling to the Court, in accordance with the rules of laid down in the Treaties constituting the basis of the European Union'. We presume that the Kúria wanted to express that the preliminary ruling procedure was not initiated according to the rules of the national procedural law. But if this would have been declared expressly in the sentence, then probably the Kúria itself would have questioned, which court had to deal with consequences of this infringement of law: the national appeal court or the CJEU.

In the following the reasoning summarises accurately the necessary requirements concerning requests for a preliminary ruling and the Kúria refers to its own case law regarding the order of a stay in relation to the initiation of preliminary ruling proceedings. But the case law cited in the reasoning refers only to decisions where the lower court judge dismissed the request for a preliminary ruling. We think that there is a fundamental difference in the extension of the appellate court's review when the decision complained of dismissing the request for a preliminary ruling or when accepts the request and orders a stay. When the request is dismissed, in the reasoning the court refers to the absence of the requirements concerning the request for a preliminary ruling, so this is what the appellate court has to review. But when the court orders a stay and refers questions to the CJEU, then it has exclusive jurisdiction to determine whether the questions referred for a preliminary ruling are admissible.

In the next paragraphs the sentence compares the conditions of the preliminary ruling procedure to the motion of the district court and as consequence, a mainly

acceptable reasoning affirms that the first question intends to establish that the applicable Hungarian law was not consistent with the principles protected by the EU law, the second and third questions referred had no connection with the case. We have no intention to argue against the reasoning of the sentence, but we think that, the reasoning of the sentence would show a more coherent procedural aspect without some of the grounds mentioned in it.

In the next section of the sentence the Kúria states that 'the case before the district court is simple both factually and from a legal point of view, it does not need any special reference to the law of the EU, or the clarficiation if it. The underlying criminal law and judicial practice is clear, the facts are simple and can be judged quickly'.[37] With the quoted remarks the Kúria expressed its views on the simplicity of the case before the district court without any jurisdiction to do so. This suggests that the Kúria made a decision on the merits of the case before the finishing of the evidentiary procedure. In the system of the criminal procedure the Kúria cannot be in the position where it has any legal option to form an opinion on the facts of a case before a district court.

In the end of the Kúria's reasoning is stated that 'it is not possible in a pending case to use a procedural instrument for bringing up not legal questions'[38]. A serious doubt arises from this statement: are the questions regarding the independence of justice and the right to a fair trial not legal questions in the point of view of the Kúria?

On 18 November 2019 the district judge decided to submit additional questions to the initial request regarding the above-examined extraordinary appeal of the General Prosecutor and the final judgement of the Kúria. On 15 April 2021 the Advocate General of the CJEU delivered his opinion, and he is of the view that the decision of the Kúria and the underlying national legislation undermine the power of the national court to refer questions to the CJEU for a preliminary ruling and therefore undermine the operation of the preliminary ruling mechanism. He states that the CJEU alone is empowered to evaluate the merits of that assessment when ascertaining whether the questions referred to it are admissible. He observes that, in accordance with the principle of the primacy of EU law, the referring judge is required to set aside the Kúria's decision and disapply the national legislation underlying it.

Conclusions

It is undoubted that the proceeding was not contrary to the words of the Code of Criminal Procedure, but the main question of our case study is whether the proceeding

[37] Kúria Bt.III.838/2019/11. 10 September 2019. para [69].
[38] Kúria Bt.III.838/2019/11. 10 September 2019. para [84].

was in accordance with the original legislative aim of the extraordinary appeal, with the scope of the clause of interpretation in art 28 of the Fundamental Law of Hungary and with the EU law, especially the previously examined case law of the Court of Justice.

Art 28 of the Fundamental Law of Hungary states 'in the course of the application of law, courts shall interpret the text of laws primarily in accordance with their purpose and with the Fundamental Law'. The simple grammatical interpretation of art 490 of the Hungarian Code of Criminal Procedure may suggest that the order on the stay of the procedure is unlawful if the questions are inadmissible by the CJEU. But the purpose of the aforementioned regulation of the criminal procedure is to settle the situation of the case when the judge has decided on the preliminary ruling procedure. The decision on the referred question is not the subject of the criminal procedure, hence the lawfulness of it cannot be judged in the criminal procedure.

By examining the relevant EU law, we have to take in consideration that art 267 TFEU, as interpreted by the Court, provides a system of cooperation between the national courts and the CJEU, which means that the preliminary ruling dialogue is not a triangular relationship including any other court than the CJEU and the referring court. The article gives national courts the widest discretion in referring matters to the CJEU, if they consider that a case pending before them raises questions involving the interpretation of EU law, which are necessary for the resolution of the case before them. National courts are free to exercise that discretion at whatever stage of the proceedings they consider appropriate, thus no rule of national law or case-law can deter a national judge from using this discretion and the CJEU has exclusive jurisdiction to determine whether the questions referred for a preliminary ruling are admissible and relevant. In conclusion, it seems that the Kúria in its judgement undertook a form of review of the admissibility of the order for reference and the sentence based on the previously examined grounds is contrary to the interpretation of art 267 TFEU in the case law of the CJEU.

In some opinions the real message of the sentence was that on the initiative of the General Prosecutor the highest judicial authority can anytime revise any submitted question to the CJEU and its possible effect is deterring other judges from asking similar questions or at worst any question from the CJEU.[39] From these opinions arise the question whether this effect endangers the personal independence of judges and whether from this point of view the procedure and the judgement was in accordance with the requirements of judicial independence set in the case law of the CJEU and the ECtHR. Taking in consideration the above examined scope of the extraordinary appeal

[39] G. Szabó Dániel, 'A Hungarian Judge Seeks Protection from the CJEU-Part I' 28 July 2019 Verfassunsblog <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/> accessed 1 August 2021. Bárd Petra, *'Am I independent?'- A Hungarian Judge Asks the CJEU in a Struggle against Judicial Capture*, <https://reconnect-europe.eu/blog/politics-newep-krum-2/> accessed 27 September 2019.

lodged by the General Prosecutor and the Kúria's own declaration that by securing the uniform interpretation of national law the decision has an effect for the future through publishing it in the compendium of judgements of principle, we can ascertain that the proceeding is liable to hinder the national judges from fulfilling their obligations to give full effect to the application of EU law and to its interpretation provided by the CJEU. From this point of view, we can establish that the examined proceeding is not in accordance with the case law of the CJEU and the ECtHR adopted regarding the requirements of the internal dimension of judicial independence, which clearly states that a judge should be protected against the undue pressure from colleagues, judicial executives, or higher courts.

As Lenaerts observed referring to the future decisions of the CJEU 'in the light of the pending cases on the rule of law, it is safe to say that in the near future, the Court of Justice will further clarify the guarantees that EU law requires in order for a national court to be – or to remain – independent'.[40]

[40] Lenaerts (n 2) 34.

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Flowers for Blanguernon: Can Non-Performance of EU Obligations Justify Reciprocal Non-Compliance?

Introduction

In 2018, Poland adopted a series of laws affecting the operation of its Supreme Court and the retirement of judges. The laws sparked widespread domestic and foreign criticism, including that of the European Commission, which has initiated an infringement procedure and later referred it to the Court of Justice of the European Union (CJEU). During the proceedings, Poland argued for the inadmissibility of the claim on the basis that similar provisions are in force in other member states as well. However, the Court dismissed this argument, considering it unsuitable to justify a non-compliance with EU law.[1] Whether the CJEU had accepted the argument, it would have set a dangerous precedent by potentially creating a slippery slope, triggering a chain of non-compliance with fundamental values of the European Union (EU). Although the Court's decision could be well argued not only from policy points and reflected findings of previous case-law, it is important to note that similar arguments are repeatedly advanced before the Court. These arguments are not unreasonable, as pleas on the basis of non-compliance of another party or on the basis of its wrongful conduct are frequently admitted in national and international law. Pleas on the basis of non-compliance may help courts in reaching an equitable and just solution in disputes, mostly in those arising from contractual matters.

The aim of the present study is to uncover the practice of the CJEU regarding claims of non-conformity and wrongful conduct. It will seek an answer to whether such claims are admitted in EU law, and if yes, to what extent, as well as whether the fundamental values of the EU have a distinct character and how these are protected from a procedural perspective. The chapter will explore the background of these claims in national laws and in international law, moreover, review literature and the CJEU's jurisprudence in order to provide an overview of the issue.

[1] *Commission v Poland, Judgment (GC)* [2019] ECR C-619/18 [107, 119–120].

1. Claims of non-compliance and wrongful conduct in different legal systems

The exploration of the legal background of these claims necessitates some clarification with regard to terminology. Different legal systems have developed different responses to claims originating from bad faith or where the remedy would mean an unjust benefit for the claimant, however, these solutions cover diverse situations and various approaches.

On the one hand, one of the main topics explored here is the question of non-compliance, which is understood here in broad terms, referring to the breach of an obligation. This breach may amount to the non-performance of an obligation, regardless whether it is reciprocal or unilateral. Wrongful conduct, on the other hand, here refers to unlawful actions committed by one party to a dispute. This does not necessarily involves the breach of the obligation in question, as it covers a wide range of scenarios, ranging from a situation where the moving party prevents the other in the due performance of its obligation to situations where the moving party is engaged in illegal activities, even if these are not directly related to the subject-matter.

1.1. Solutions in domestic legal systems

Researches in comparative law evince that a number of equitable principles, such as the principle of good faith or the prohibition of abuse of rights are present in some form in all major legal cultures.[2] The principle of good faith in essence poses a standard of fair behaviour, while equity in essence provides an option for the judge to remedy the rigour of law which would cause injustice in a given situation.[3] Another important related concept is the principle of reciprocity, which comes into play in the law of contracts, underpinning the importance of mutual respect of agreed terms between the contracting parties.

National legal systems showcase a variety of solutions owing to historical and conceptual differences. Regarding the dominant legal families of the Western hemisphere and Europe, we can observe that Anglo-Saxon systems approach the problem from a procedural perspective, while the continental legal tradition tackles it from a substantive point of view.

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[2] Francesco Francioni, 'Equity in International Law', *Max Planck Encyclopedias of International Law* (2013) para 3; Wilfred C Jenks, *The Prospects of International Adjudication* (Stevens 1964) 316.

[3] Földi András, *A jóhiszeműség és tisztesség elve – Intézménytörténeti vázlat a római jogtól napjainkig* [The principle of good faith – History of the institution from Roman law to present] (ELTE ÁJK 2001) 20, 21, 104, 107, 109; Lábady Tamás, *A magyar magánjog (polgári jog) általános része* [Substantive part of the Hungarian private law (civil law)] (Dialóg Campus 1998) 132–33; Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 219–20.

The peculiarity of the Anglo-Saxon tradition lies with the concept of *clean hands*. The roots of this concept can be traced back to the 15th century England, where the Court of Chancery has developed set of rules (later to be known as *equity)* to complement shortcomings of the rigid *common law* by establishing remedies for a multitude of situations[4] The application of the clean hands deprives the claimant from defences and remedies provided by equity, if the claimant's 'hands' are soiled with actions contrary to the norms of equity.[5] These norms basically prescribe a fair and honest behaviour, without the intent of circumventing the letter of the law. The application of the concept requires a close connection between the subject-matter and the claimant's conduct, nonetheless, it is widely applied in a variety of situations encompassing unlawful, unfair, and bad faith motivated behaviour.[6]

In contrast, legal systems of the continental tradition do not have a single concept that could cover an equally wide range of situations as the idea of clean hands. Instead, a number of principles (often quoted as Latin maxims) are applied. A case in point is the exception of non-execution in the law of contracts (*exceptio inadimplenti non est adimplendum),*[7] which allows a party to refuse performance of an obligation without terminating it, if the other party which demands the performance does not fulfil its obligations.[8] Among others, both French and German law recognizes such an exception in the domain of synallagmatic obligations.[9] From several aspects, another counterpart could be a group of principles aiming to preclude the claimant to benefit from its wrongful, but not necessarily a contract-breaching conduct.[10] This group includes *inter alia* the principles of *ex delicto non oritur actio* and that of *nemo ex propria turpitudine commodum capere potest*.[11] This line of thought is also reflected

[4] Földi (n 3) 57. Equity as a body of Anglo-Saxon law must be distinguished from its homonym denoting fairness and justice, as well as from the notion of *ex aequo et bono*, where a judgment is not rendered on the basis of legal norms, but rather of principles of fairness. Francioni (n 2) para 1; Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 119 fn. 65.

[5] Henry Campbell Black, *Black's Law Dictionary* (Bryan A. Garner ed, 9th edn, West 2009) 286, 1408; Paul S Davies and Graham Virgo, *Equity and Trusts - Text, Cases, and Materials* (Oxford University Press 2013) 18.

[6] Davies and Virgo (n 5) 17; Charles Mitchell, *Hayton and Mitchell Commentary and Cases on the Law of Trusts and Equitable Remedies* (13th edn, Sweet & Maxwell 2010) 703; Hannah Leblanc, 'La Doctrine Des Mains Propres (« cleans Hands ») : Comparaison de Sa Portée Devant La Cour Internationale de Justice et En Droit Français et Américain' (*Les blogs pédagogiques de l'Université Paris Nanterre*, 30 May 2015) <https://blogs.parisnanterre.fr/content/la-doctrine-des-mains-propres-%C2%AB-cleans-hands-%C2%BB-comparaison-de-sa-port%C3%A9e-devant-la-cour-inter> accessed 1 August 2021.

[7] Also rendered as *exceptio non adimpleti contractus*, *exceptio inadimpleti contractus* or simply just as *exceptio*.

[8] James Crawford, 'Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur', *Yearbook of the International Law Commission*, vol II, Part One (United Nations 1999) paras 316, 320.

[9] Leblanc (n 6). referring to Article 310-1 of the German Civil Code, the *Bürgerliches Gesetzbuch*. Similar solutions are contained in the Italian *Codice civile* (Art. 1460) and the French *Code Civil* (Art. 1219).

[10] Robert Kolb, 'General Principles of Procedural Law' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, Oxford University Press 2019) para 55.

[11] These principles are formulated in a variety of ways, cf. Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law', *Collected Courses of the Hague Academy of International Law*, vol 92 (Martinus Nijhoff Publishers 1957) 117; Robert Kolb, 'La maxime « nemo ex propria turpitudine commodum capere potest » (nul ne peut profiter de son propre tort) en droit international public' (2000) 33 Revue belge de droit international 84, 105.

by the Hungarian Civil Code, which prohibits a claimant from profiting from its culpable conduct.[12]

1.2. Non-compliance, wrongful conduct and obligations in international law

Although general public international law differs significantly from the law of the European Union, its approach to these problems could serve as an illustrative example as to how the aforementioned principles could be used in disputes involving states.

It is common ground for most of the academic literature that many closely related principles are recognized in international law as well, such as the principles of good faith,[13] the prohibition of abuse of rights,[14] estoppel,[15] equity[16] and reciprocity.[17] Several authors have noted that the principle that no one can benefit from its own wrong is also acknowledged in international law.[18] The *exceptio* and the *nemo ex propria* principles are generally regarded to be applicable in international law, too, at the merits stage of a dispute.

The case of the clean hands doctrine is heavily debated.[19] The concept is interpreted in international law as a preliminary objection which leads to the refusal of the claim. Although, as it was pointed out by the Yukos tribunal, not a single majority decision

[12] Hungarian Civil Code (*Polgári Törvénykönyv*) Art. 1:4(2). Lábady (n 3) 145.

[13] Both as a general principle and as part of a number of treaties, often as crystallized in the form of sub-principles (the concept of abuse of rights and estoppel are frequently cited to be such). Markus Kotzur, 'Good Faith (Bona Fide)', *Max Planck Encyclopedias of International Law* (Oxford University Press 2009) paras 5, 7, 11, 15–16, 22–23.

[14] Robert Kolb, *La bonne foi en droit international public* (Graduate Institute Publications 2000) 27; Fitzmaurice (n 11) 54–55; Alexandre Kiss, 'Abuse of Rights', *Max Planck Encyclopedias of International Law* (2006) paras 7, 9–10.

[15] Thomas Cottier and Jörg Paul Müller, 'Estoppel', *Max Planck Encyclopedias of International Law* (2007) para 1; Kolb, 'La maxime « nemo ex propria turpitudine commodum capere potest » (nul ne peut profiter de son propre tort) en droit international public' (n 11) 126; *Temple of Preah Vihear, Merits, Judgment* [1962] ICJ Rep 1962 6, 34. Sometimes the concept is referred by the Latin maxim of *allegans contraria non est audiendum*. cf. Bin Cheng, *General Principles Of Law as Applied by International Courts and Tribunals* (Cambridge University Press 1953) 141.

[16] Thirlway (n 4) 119–21.

[17] Elisabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational 1984) 15, 18, 29.

[18] Fitzmaurice (n 11) 117; Aleksandr Shapovalov, 'Should a Requirement of "Clean Hands" Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate' (2005) 20 American University International Law Review 829, 839.

[19] See more about the debate in: Louis Delbez, *Les principes généraux du contentieux international* (Librairie générale de droit et de jurisprudence 1962) 196; Jean Salmon, 'Des mains propres comme conditions de recevabilité des réclamations internationales' (1964) 10 Annuaire français de droit international 225, 228–31; John Dugard, 'Sixth Report on Diplomatic Protection, by Mr. John Dugard, Special Rapporteur' (2004) A/CN.4/546 paras 14–15, 18.

affirmed its applicability in international dispute settlement,[20] parties and dissenting members of tribunals rely regularly on it in their submissions and opinions.

It is important to note that no codification project of international law incorporated any of the preceding principles, although these were frequently during the International Law Commission's preparatory work.[21] Both practice and literature are divided on the issue of how, at which stage of the proceedings and with what legal consequences should non-compliance and wrongful conduct be assessed.[22]

With regard to the nature of obligations in international law, several types of obligations could be distinguished, such as reciprocal, non-reciprocal and *erga omnes partes* obligations.[23] While reciprocal obligations are based on a synallagmatic interchange between the parties, non-reciprocal (absolute, objective) obligations are not dependent on corresponding performance.[24] *Erga omnes partes* obligations may encompass obligations from both preceding categories, where all state parties have legal interest in the performance, such human rights obligations and disarmament treaties.[25] We may call the latter obligations *fundamental* in a way, as these are applied in the context of multilateral treaties and usually ensure certain basic principles, which are important for the whole community of the contracting parties. The non-reciprocal nature also entails that objections and defences which are based on reciprocity, such as the *exceptio*, cannot be used in these circumstances.[26]

2. Claims before the CJEU

The first question of a court when it is asked to apply an objection is whether such an objection is recognized in the applicable law, that is, in our case, the law of the EU.[27] As the above-mentioned concepts are not mentioned in the EU's basic treaties, other sources have to be assessed.

Such a source could be the concept of general principles of EU law, a set of unwritten norms which is to be *found* by the judges of the court. These principles may

[20] 'Yukos Universal Limited (Isle of Man) v. The Russian Federation, Final Award' para 1362.

[21] Danae Azaria, 'Exception of Non-Performance', *Max Planck Encyclopedias of International Law* (2015) paras 5–8. See also Thomas Giegerich, 'Article 60 – Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 8, 72–73.

[22] Kolb, *La bonne foi en droit international public* (n 10) para 51; 475ur (n 13) para 24.

[23] Kirsten Schmalenbach, 'Article 26 – Pacta Sunt Servanda' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 33–44.

[24] ibid 34, 37.

[25] ibid 44.

[26] Fitzmaurice (n 11) para 102; Crawford (n 8) para 322; Francioni (n 2) para 29; Azaria (n 21) para 1.

[27] In certain disputes, especially the ones on a contractual basis, may stipulate a different applicable law, but be still referred to the Court.

stem from general principles of international law, the national laws of member states, EU law itself or even international conventions. [28]

Public international law may also give rise to certain legal arguments. Certain sources of international law, such as customary international law and general principles of international law, are accorded a minor, limited role in the settlement of disputes by the CJEU, but whether it is established that one of the proposed exceptions form part of general international law, one party may argue for its acknowledgement on this basis.[29]

2.1. The *exceptio* in infringement procedures

Member States show a remarkable ingenuity in constructing defences in infringement proceedings,[30] including citing different aspects of the *no one can benefit from its own wrong* principle. The Court has been consistent from the beginning of its jurisprudence on considering the *exceptio* inapplicable in the context of EU law.[31] It was quick to point out that the EU's legal system is a special regime, which contains non-reciprocal obligations.[32]

It has first deduced this finding in its landmark decision of *Commission v Luxembourg and Belgium* of 1964, a case concerning duties levied on the issue of import licences for certain milk products.[33] The defendants asserted on the basis of international law that the Community's complaint is not admissible, as their allegedly illegal actions had been the consequences of a situation created by the Community's infringement of law, when it had failed to set up the necessary legal framework.[34] The CJEU dismissed the defendant's arguments, underlining that the regime of EU law is a 'new legal order', where the treaty does not only create reciprocal obligations. Moreover, it emphasized that 'Member States shall not take the law into their own

[28] Alina Kaczorowska-Ireland, *European Union Law* (4th edn, Routledge 2016) 121–22.

[29] Armin von Bogdandy and Maja Smrkolj, 'European Community and Union Law and International Law', *Max Planck Encyclopedias of International Law* (Oxford University Press 2011) paras 22–23. See also Mathias Forteau, 'General Principles of International Procedural Law', *Max Planck Encyclopedias of International Law* (2019) paras 28, 33.

[30] Kaczorowska-Ireland (n 28) 48. See also Viktor Łuszcz, *European Court Procedure: A Practical Guide* (Hart Publishing 2020) 40.

[31] Catherine Barnard and Steve Peers (eds), *European Union Law* (3rd edn, Oxford University Press 2020) 201.

[32] One should also exercise caution: the assertion that the Community is of a sui generis character does not create *ipso facto* a special legal order. Similarly, the mere assertion that an obligation does not have a non-reciprocal nature does not make it not reciprocal. Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 516, 518–19. See also Bruno Simma, 'Self-Contained Regimes' (1985) 16 Netherlands Yearbook of International Law 111, 124–29.

[33] *Commission v Luxembourg and Belgium*, *Joined Cases* [1964] ECR C-90-91/63 626 627.

[34] ibid 628, 631.

hands', as the treaty has also provided for the necessary procedures to ensure its respect, therefore the Council's failure to 'carry out its obligations cannot relieve the defendants from carrying out theirs'.[35] The Court also held later on that even if the similar violation of EU law by one of the institutions follows that of a Member State, this would not justify the State's preceding infringement.[36] The case of 1964 was also important in separating EU law from international law, since it made impossible for Member States to have recourse to countermeasures in case of the non-compliance of other Members States by vesting the power with the EU itself to control the breaches of its law by providing appropriate remedies.[37]

Although the above-mentioned case concerned a non-compliance with EU law by an institution of the Community itself, not from another Member State, it seems to be unequivocal in the Court's jurisprudence that the same approach applies to non-compliance by Members States as well. The Court enunciated this position in 1976, by repeating the terms of the 1964 case in essence. This case concerned the performance of obligations imposed by a directive and the judgment emphasized that the delays of other Member States cannot justify the non-compliance of a Member State.[38] This finding has appeared frequently later in the Court's jurisprudence, in more general terms, prohibiting pleading the failure of the principle of reciprocity or relying on possible infringements of the Treaties by other Members States.[39] Moreover, the decision showed that Member States cannot plead in their defence that an EU institution has failed to act, as there are separate procedures for engaging its responsibility.[40] This position has been repeated on several occasions over time,[41] to the point that fifteen years later the CJEU considered its finding on dismissing the justification on the grounds of other Member States' failures to reflect 'well established case-law'.[42]

In an interesting turn, however, it was also debated whether the Community's institutions can rely on the *exceptio* in their Treaty-based relations. The question

[35] ibid 631. Later on this phrase was interpreted by AG Trabucchi as to exclude the recourse even in emergencies. *Société des Grands Moulins des Antilles v Commission*, *Opinion of Advocate-General Trabucchi* [1975] ECJ C-99/74, 1975 01531 1543.

[36] *Commission v Netherlands* [1995] ECJ C-359/93, 1995 I–00157 [16].

[37] Kaczorowska-Ireland (n 28) 201; Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Janek Tomasz Nowak ed, 1st edn, Oxford University Press 2014) 202-3. See also *Portugal v Commission* [2001] ECJ C-163/99, 2001 I-02613 [22]; *Blanguernon* [1990] ECJ C-38/89, 1990 I–00083 [7]. For a discussion on the responsibility on states under EU law and the law of state responsibility, see Gerard Conway, 'Breaches of EC Law and the International Responsibility of Member States' (2002) 13 European Journal of International Law 679.

[38] *Commission v Italy* [1976] ECJ C-52/75, 1976–00277 284; *Blanguernon* (n 37) para 7; *Commission v Germany* [2004] ECJ C-118/03, (not published) [8]; cf, Margot Horspool and Matthew Humphreys, *European Union Law* (7th edn, Oxford University Press 2012) 233; *Société des Grands Moulins des Antilles v Commission*, *Opinion of Advocate-General Trabucchi* (n 35) 1543.

[39] *Commission v Italy* [1996] ECJ C-101/94, 1996 I-2719 [27].

[40] Kaczorowska-Ireland (n 28) 450.

[41] *Commission v Germany* [1984] ECJ C-325/82, 1984 00777 [11]; *Commission v Germany* (n 41) para 8.

[42] *Commission v United Kingdom* [1991] ECJ C-146/89, 1991 I-03533 [47].

emerged when the Parliament adopted the 1986 budget without completing the required procedure, against the interest of the Council. Advocate General Mancini deduced from the CJEU's jurisprudence relating to the fulfilment of Member States' obligations that as nor states, nor the institutions can take the law into their own hands, therefore he argued for the annulment of the Parliament's decision.[43] The CJEU later declared the budget void.[44]

Possible infringements of Community law by other Member States are not only unfit to justify non-compliance, but the adoption of unilateral corrective or defensive measures against the potentially law-breaching Member State is also prohibited.[45] The Commission often warns the Member State of this principle before the procedure reaches the court.[46]

An important aspect of the reciprocal failures to comply with the law of the EU is the question of how and when the procedures laid out in the treaties can be activated. For example, it has been stressed by the Court that the admissibility of infringement proceedings cannot 'be affected by the fact that analogous infringement proceedings have not been brought against another Member State'.[47] Although some states may argue that this approach could create a double standard, as the Commission may only initiate a procedure against a few of the Member States for the same violation, this also makes the supervision easier. Violations could be treated separately, the Commission does not have to ensure that the same violation is unique in respect of a given country, before initiating a procedure against it. What is more, EU law also provides for *horizontal supervision*, i.e. Member States also could launch infringement procedures against others.[48] The prohibition of relying on a defence of reciprocity is not only applicable towards a Member States which is allegedly injured by the other Member States' actions, but to all other Member States as well.[49]

The existence of a system proper to the organization aimed at the enforcement of EU law is a recurring argument in the CJEU's jurisprudence. This seems to be an important policy consideration, as this argument encourages Member States to initiate infringement proceedings themselves against the state in question or have recourse to the Commission for action, therefore, not to engage in a spiral of non-compliance with

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[43] *Council v Parliament, Opinion of Advocate General Mancini* [1986] ECJ C-34/86, 1986 02155 2182–2183.

[44] ibid 2213.

[45] *Commission v France* [1979] ECJ C-232/78, 1979 02729 [9]; *Commission v Belgium* [1996] ECJ C-11/95, 1996 I-04115 [37]; *Hedley Lomas* [1996] ECJ C-5/94, 1996 I-02553 [20]; *Denuit* [1997] ECJ C-14/96, 1997 I-02785 [35]; *Commission v Sweden* [2005] ECJ C-111/03, 2005 I-08789 [66].

[46] cf *Amministrazione delle finanze dello Stato v Essevi and Salengo, Joined Cases* [1981] ECJ C-142-143/80, 1981 01413 [8].

[47] *Commission v France* [2001] ECJ C-1/00, 2001 I-09989 [75].

[48] Treaty on the Functioning of the European Union 2007 Article 259. The Court itself suggested this path several times in its judgments, see e.g. *Commission v Belgium* (n 45) para 36; *Portugal v Commission* (n 37) para 22.

[49] Kaczorowska-Ireland (n 28) 450; citing *Commission v Italy* (n 38).

EU obligations. Moreover, it has been underscored by an Advocate General in this regard that Community measures 'are better able to ensure legal certainty and that the law is observed by all'.[50]

2.2. The use of the *exceptio* outside of infringement procedures

It should also be recalled that apart from the aforementioned, self-citing and crystallized jurisprudence in infringement proceedings regarding the non-performance of treaty-based obligations, the underlying principle of the *exceptio* has been invoked several times in the CJEU's jurisprudence, outside of this realm as well.

For example, the question surfaced in the opinion of Advocate General La Pergola concerning a dispute relating to the workplace insurance of the Communities' staff, on the basis of a contract concluded between the Commission and a consortium of insurance companies. This means that the Communities were in a contractual position and the CJEU's jurisdiction was based a contractual clause. The companies pleaded in essence the *exceptio*, as the Commission allegedly failed to honour its obligations, nonetheless, the Advocate General concluded that there was no non-performance, therefore the defence cannot be relied on.[51] It is important to note that the Advocate General did not discard its application in general, but rather determined it inapplicable against a particular factual background.

In contractual relations, companies may also advance the *exceptio* on the basis of national laws, as these may govern contractual relations. An Italian company which participated in the Commission's programme aimed at supporting energy technology initiatives, has pleaded the *exceptio* as formulated in Article 1460 of the Italian Civil Code.[52] The *exceptio* may also be interpreted to be formulated in a contractual clause, not only in a national law.[53] If national law is applicable, the Court will assess the fulfilment of the conditions laid down by these norms.[54]

On another occasion, when international obligations of the EU and the effect of treaties concluded by it had been discussed, Advocate General Saggio underlined that the *exceptio* is recognized in public international law, as it forms part of customary international law.[55]

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[50] *Société des Grands Moulins des Antilles v Commission*, *Opinion of Advocate-General Trabucchi* (n 35) 1543.

[51] *Commission v Royale belge*, *Opinion of Advocate General La Pergola* [1996] ECJ C-76/95, 1996 I-05501 [1–2, 15, 23].

[52] *Lurgi and Lurgi v Commission*, *Application*, *Notice for the OJ* [2003] GC T-42/03. The Court did not pronounce on the issue, as the parties have reached a settlement before its decision. *Lurgi and Lurgi v Commission*, *Order* [2006] GC T-42/03, not published.

[53] See the dispute on the applicability of the *exceptio* in the *Amitié* case.*Amitié v Commission*, *Application* [2012] GC T-234/12; *Amitié v Commission* [2015] GC T-234/12 [276–281, 286].

[54] *Lior v Commission and Commission v Lior*, *Joined Cases* [2009] GC T-192/01 & T-245/04 [515–519].

[55] *Portugal v Council*, *Opinion of Advocate General Saggio* [1999] ECJ C-149/96 [21].

2.3. The notion of clean hands before the court

The jurisprudence of the Court seems to be consistent regarding the *exceptio*, its judgments and the Commission's official communications are basically repeating the same terms that were formulated early in the 1960s and the 1970s. These terms have a great impact on the terminology of proceedings, the CJEU has essentially created its proper language, *boilerplate clauses* to address these issues in the context of infringement procedures. Other phrases, maxims, which appear frequently in the jurisprudence of our courts, have a scarce application in EU litigation and more frequently mentioned outside the domain of infringement procedures.

For example, one of the oft-debated and frequently cited terms of international dispute settlement, the concept of clean hands, yields only a handful of examples from the CJEU's jurisprudence. This term first emerged during a reference for a preliminary ruling, as a parallel to the original equitable concept. The claimant of the proceedings has argued that the CJEU should refuse to answer the sub-questions pertaining to the rights of the defendant, as it aimed to commit fraud against the community, nonetheless, the Court did not refrain from answering.[56]

In a later case concerning competition matters, a Swedish corporation asserted that it was not the correct addressee of the Commission's Decision. The Commission itself argued that the applicant should not be able to contest that, as it was led to believe by the corporation that it was the correct addressee, therefore the applicant as does not 'come with clean hands' to the CJEU.[57] Although the CJEU has observed that the Commission was well-founded to believe that the company at issue was the correct addressee, it declared the plea admissible, arguing that 'acknowledgement of matters of fact or of law during the administrative procedure before the Commission […] cannot restrict the actual exercise of the right to bring proceedings [before CJEU]", as "such a restriction would be contrary to the fundamental principles of the rule of law and of respect for the rights of the defence'.[58] Therefore, the CJEU did not dismiss generally a defence based on the clean hands concept, rather interpreted it within the limits of the issue before it, underscoring the right to judicial review of administrative decisions of the Commission.

A recent example of the term *clean hands* could be found in an Advocate General's opinion.[59] The underlying dispute was also related to a reference for preliminary ruling, where the referring court questioned the possible issuance of an European Investigation Order, when there is no appeal against it in the national legal system.[60] The Advocate General used the phrase in a figurative sense, stating that 'whoever wishes to use the system of judicial assistance and mutual recognition […] must come, metaphorically

[56] *Redmond* [1978] ECJ C-83/78, 1978 02347 2352.
[57] *Stora Kopparbergs Bergslags v Commission* [1998] GC T-354/94, 1998 II-02111 [32-33].
[58] ibid 49–50.
[59] *Gavanozov II, Opinion of Advocate General Bobek* [2021] ECJ C-852/19, (not published) [91].
[60] ibid 1–3.

speaking, with clean hands'. This use is prevalent in international argumentation, as, although the wording evokes the Anglo-Saxon terminology, the phrase serves as an illustrative, palpable figure of speech. The Advocate General went even further with the play on words, when he compared this behaviour to the disrespect of the rules of 'basic hygiene'.[61]

2.4. Another player in the game: the principle of *ex iniuria*

Another typical notion of international proceedings, the principle of *ex iniuria ius non oritur* appeared sporadically in the last decade. Denoting the general concept that law (or right) does not arise from injustice, the principle has found its way in a variety of proceedings.

Its first appearance, the term was used in connection with the duty of cooperation with the Commission in a competition case. The Commission used the principle to argue that the breach of this duty cannot justify a subsequent breach of the same duty.[62] The CJEU uphold this allegation when it stated that even if could be established in a hindsight that the 'breach of the obligation to cooperate had no negative effects cannot be relied on in order to justify that conduct' and found that the company has breached its obligation to cooperate.[63]

A few years later, Advocate General Bobek advanced the principle again in a case about European Personnel Selection Office's policies on limiting which official EU languages could be accepted from candidates as their second language in the competition for selection. The Advocate General stated that in a (hypothetical) case where an institution would deliberately disregard the law in present to bring about factual changes in the future, to change the applicable norm of that time, the intervention of the CJEU would be even greater than in average situations.[64] Therefore, the Advocate General underlined that breaches of the law in force could not lead to change or to the development of a new norm – something which is perfectly imaginable in general international law.[65]

The last mention (to date) of the principle is found the opinion of another Advocate General. Tanchev issued his opinion in a case still under deliberation on the topic of judicial independence and rule of law in Poland. The Advocate General voiced that 'the national authorities may not take refuge behind arguments based on legal certainty and irremovability of judges […] if a person was appointed […] in a procedure which violated the principle of effective judicial protection, then he or she cannot be protected

[61] ibid 91.
[62] *Deltafina v Commission* [2011] GC T-12/06, 2011 II-05639 [64].
[63] ibid 134, 173.
[64] *Commission v Italy, Opinion of Advocate General Bobek* [2019] ECJ C-621/16 P [157].
[65] Higgins (n 3) 19.

by the principles of legal certainty and irremovability of judges."[66] Although the CJEU is still yet to render a judgment in this case, it is important to note that the opinion shows that these broad and rarely applied principles may find their way of application in disputes touching upon sensitive and fundamental issues.

Conclusions

The issue of non-compliance with obligations has led to a variety in solutions in different legal systems, many of which, or better to say, their constant refusal, have find way to the assessment of the performance of obligations arising under the law of the EU. Although EU law, its procedures and the relations between its Member States have many unique characteristics, practice shows that the tools formulated in domestic and partially in international legal spheres could have implications and important takeaways for those who try to understand the nature of EU law obligations as well.

Firstly, the we can discern a few concepts emanating from national legal systems. The *exceptio inadimplenti non est adimplendum* or the exception of non-performance which is widely recognized in continental legal systems and permits a party to a contract (usually to a reciprocal one) not to pay the consideration if the other party defaults on its obligation. The principle of *ex iniuria ius non oritur*, in turn, applies in a wider range of situations and prevents the claimant from benefiting of its own illegal actions, which are not necessarily linked to contractual failures. Last, but not least, the *common law* states embrace a single notion basically encompassing the scope of application of the two preceding principles, under the term *clean hands.* Whilst the latter would result in the inadmissibility of the claim, the former two are usually conceived as coming into play at the merits phase, during the assessment of the damages. These concepts, especially the *exceptio*, also benefit from a level of recognition in public international law.

The jurisprudence of the CJEU has revolved around a few central arguments concerning the refusal of pleas of reciprocity in infringement procedures, most of which have already been deduced in the *Commission v Luxembourg and Belgium* decision of 1964. The arguments focused on the special legal order created by the treaties, different from international law and based on non-reciprocal obligations. This legal order is guarded by its own institutions and unique proceedings. These unique proceedings are the sole instruments to reprimand and restore the violations of the legal order, ruling out the application of any other unilateral response, even if it would be accepted in public international law. The possible plea of reciprocity has been dismissed by the CJEU in inter-state, inter-institution and in institution-state relations as well.

[66] *Prokurator Generalny*, *Opinion of Advocate General Tanchev* [2021] ECJ C-508/19, not published [54].

The typical notions mentioned in connection with the non-performance of obligations, pertain in the great majority of cases to infringement procedures and to the concept of *exceptio inadimplenti non est adimplendum*, which is consistently rejected in that field. However, limited application of this very principle could be found in disputes involving the EU as a party to a contract. Interestingly, the *exceptio* appears mostly in the merits phase of proceedings under domestic law, but it was purportedly a cause of inadmissibility for its proponents. It could also be observed that the CJEU did not differentiate between obligations protection fundamental values and *ordinary* obligations, but held that treaty-based obligations in general are non-reciprocal in nature. Furthermore, mentions of the much broader concepts of *clean hands* and *ex iniuria ius non oritur*, could also be found in the CJEU's jurisprudence.

Finally, as the title has hinted at the celebrated novel of American author Daniel Keyes, we might ask whether the approach of the CJEU, which was also reflected in its *Blanguernon* judgment,[67] shows only short-term ingenuity or it could have laid the foundations of something more durable. The answer, in my view, lies with the second option. The CJEU has underlined the non-reciprocal nature of a number of treaty-based obligations and crystallized a strong resistance to dismiss claims on the basis non-compliance. This approach could have prevented vicious circles of non-compliance, what is more, could serve as a useful guidance for the handling of future cases as well, even when these concern questions of fundamental importance. A central issue among these is ensuring the respect of rule of law, which has recently at the forefront of fervent debates. The infringement procedure against Poland, which was quoted in the introduction, shows that even if certain enforcement mechanisms are tied to unanimity and could be blocked by a tandem of states (such as the famed *nuclear option* of the Art. 7 procedure in the Treaty on the European Union),[68] a rather political decision cannot change the legal assessment of the underlying situation. A reluctance of multiple of states not to comply with the EU's rule of law values cannot create a new legal reality, where the CJEU would approve it on the basis of similar violations in other states. Simultaneous violations could not hamper the separate initiation and conclusion of infringement procedures, which can still provide a response, even if not a systemic and, as it is sometimes argued, not a perfect one.

[67] See footnotes n 499 and n 500 above.

[68] Treaty on European Union 2007 Article 2 (2).

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From Consistency to Legitimacy in the European Union Regime: Consistency as a Principle, Value and Goal in European Union Law and the Practice of the European Court of Justice

Introduction

Consistency has an overarching role and position in European Union (EU) law and this is the reason why it is not possible to label it solely as a principle but rather, depending on the institutional and instrumental circumstances, either a principle, a value or a goal. The present chapter aims to analyse these differing formations of consistency by firstly reflecting on why consistency plays a role in international and European law and how it is connected to the notion of legitimacy. Afterwards, the author aims at collecting at a glance the numerous forms of appearance of consistency in the EU system, such its manifestations among the provisions of the Treaty of Lisbon, and then continues by introducing in substance how consistency is manifested in the practice of the Court of Justice of the European Union (CJEU). As such the author reflects on 1) its role in interpretational methods in EU law, 2) its status as the rationale behind the preliminary reference procedure; and 3) as a constitutional principle; 4) as a value manifested in legal reasoning; and 5) its expression in the Charter of Fundamental Human Rights and in the harmonisation of human rights adjudication by the CJEU and the European Court of Human Rights (ECtHR). The chapter concludes by discussing how consistency and legitimacy are connected based on the above findings.

1. Legitimacy and consistency under international law

The topic of legitimacy has been extensively discussed in legal scholarship in the past decades, *albeit* the focus of these discussions greatly varied.[1] Scholarship

[1] Examples in chronological order: HLA Hart, *The Concept of Law* (Clarendon Law Series, 1961); Thomas M Franck, *The Power of Legitimacy Among Nations* (Oxford University Press, 1990); David Beetham, *The Legitimation of Power* (Palgrave, 1991); Thomas M Franck, *Fairness in International Law and Institutions*

addressed several questions, ranging from whether international law generally lacks legitimacy; through what factors induce States' and other subjects' compliance with international law; to whether there has to be a coercive element included in the notion of legitimacy; what parallel factors are present in the national and international legitimacy notions; or what effects do non-compliance or non-enforcement have on the legitimacy of a particular norm or institution.

Legitimacy is a blanket concept assembling factors that affect our willingness to comply with commands voluntarily.[2] A myriad of different legitimacy-definitions can be identified in the pertaining literature, however, the definition of Franck is the most generally accepted in legal scholarship. In his opinion, legitimacy 'is a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.'[3] One may see that Franck centres his definition around the rule or the rule-making institution itself, defining legitimacy as their property inducing compliance in the addressees based on their belief of compliance with right process. To put it simply, the addressees comply with the rule or accept the procedure of the institution only if they believe that the rule or the institution was created in accordance with right process. We can thus shortly refer to legitimacy as *the right to rule*, as a consequence of which the addressees of legal norms and the decisions of international institutions regard authority to be justified, and obey by rules and decisions.

Legitimacy must be strictly distinguished from legality (lawfulness) which means in this context conformity with international law.[4] As Bodansky describes, legitimacy is a broader notion than legality in three aspects. Firstly, legality is one justification for the exercise of authority, but not the only one.[5] That is why it is possible for instance that a decision is illegal in some aspects but otherwise legitimate. Secondly, the non-legal exercise of authority may also raise legitimacy issues.[6] And thirdly, legitimacy not only relates to compliance, and therefore legality, but generally to the justification of authority.[7]

(Oxford University Press 1998); Allen Buchanan, *Justice Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford University Press, 2004); Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer, 2008); Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010); Armin von Bogdandy and Ingo Venzke (eds), *In Whose Name? A Public Law Theory of International Adjudication* (Oxford University Press, 2014); Karen J. Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (Oxford University Press, 2018).

[2] Franck (n 1) 150.

[3] ibid 24.

[4] Rüdiger Wolfrum, 'Legitimacy in International Law', *Max Planck Encyclopedias of International Law* [MPIL], March 2011, para. 1.

[5] Daniel Bodansky, 'The Concept of Legitimacy in International Law' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer, 2008), 311.

[6] ibid 311.

[7] ibid 311.

1.1. Approaches to legitimacy and factors inducing it

Legal theory distinguishes between normative and sociological legitimacy.[8] Under normative legitimacy, commentators usually refer to the *right to rule* the particular institution has, or the authority of norms and decisions brought about by such an institution.[9] This type of legitimacy is adjudged pursuant to predefined standards, and renders an institution legitimate if that institution, based on corresponding rules and norms, possesses a justifiable right to issue decisions of a kind which are to be obeyed by those normatively addressed.[10] Normative legitimacy may be assessed through legal, political and philosophical standards – therefore through fields which are able to attach normative force to such inconceivable notions as legitimacy.

Coupling normative legitimacy, one must speak of sociological legitimacy deriving from perceptions or beliefs that the institution in question has the above right to rule, or the rule or decision has been rendered by an institution possessing such right to rule, and is achieved by persuading the subjects of an institution or the addressees of a rule or decision to believe or act as if the institution or the rule is legitimate in fact.[11] In contrast to normative legitimacy which is a question of political theory and philosophy, sociological legitimacy is rather a matter of social psychology and politics.[12] It is assessed through empirical analysis, by measuring the perception of legitimacy among the relevant audience,[13] and may fluctuate over time based on the support the particular institution, norm or decision has.[14] Thus, an institution will be regarded as normatively legitimate if it *objectively* has the right to rule, that is to say if legal norms prescribe authority to it to be legitimate; and will be sociologically legitimate if the subjects of its procedures tend to follow its decisions not because of self-interest or coercion, but because they *subjectively* accept the institution to have a right to rule and its decisions to be legitimate.

Both within the ambit of sociological and of normative legitimacy, we differentiate between factors inducing the degree of legitimacy conveyed upon either a rule or an

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[8] Chris Thornhill and Samantha Ashenden, 'Introduction: Legality and legitimacy – between political theory and theoretical sociology' in Chris Thornhill and Samantha Ashenden (eds), *Legality and Legitimacy: Normative and Sociological Approaches* (Baden-Baden, 2010), 7–12.

[9] Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 79–96, 79.

[10] Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Geir Ulfstein, 'Legitimacy and International Courts – A Framework' in Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018), 1–40, 4.

[11] Cohen et. al (n 10) 4; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' [2006] 20 Ethics & International Affairs 405.

[12] Bodansky (n 5) 313.

[13] Cohen et al (n 10); Yuval Shany, '*Assessing the Effectiveness of International Courts*' (Oxford University Press, 2014) 137–58.

[14] Ian Hurd, 'Legitimacy and Authority in International Politics' [1999] 53 International Organization, 379, 381; Nienke Grossman, 'Legitimacy and International Adjudicative Bodies' [2009] 41 *George Washington International Law Review*, 117.

institution. Similarly to the differences regarding the definition itself of the notion of legitimacy, opinions of legal scholars also vary as to what establishes the authority required to regard a particular norm or institution legitimate. Theoretically speaking, literature in this respect differentiates between source-, procedure- and result- (or outcome-) oriented factors, or a combination thereof, which support (or the lack thereof erodes) the legitimacy capital of adjudicative bodies.[15]

As regards the value of consistency, the most relevant factors are the result-oriented factors as the outcome of decision-making procedures may also have legitimizing or de-legitimizing effects on authority. This is the case as decisions deemed inadequate by their addressees may result in the erosion of the legitimacy of the adjudicating body, even if their establishment and procedure were in accordance with the rules of international law.[16] Instructive questions refer to characteristics of the decisions, such as clarity and consistency, and to its effects, for instance on its implementation.[17] As the decision-making procedure of international bodies include the interpretation of the law and the legal reasoning provided in the decisions, the consistency of which and its relation to the legitimacy of adjudicative bodies are the subject of the present study, outcome-oriented factors will have the most relevance for the chapter.

Outcome-oriented factors denote particular challenges for assessing judicial legitimacy, as unlike the other two categories, outcome legitimacy is not content independent. Its assessment involves analysing the compatibility of judicial decisions with applicable legal norms and standards of justice.[18] In order to see in what sense are outcome-oriented factors linked with the consistency of decisions, the indicators of legitimacy are to addressed next.

1.2. Consistency as a definitional element of legitimacy

Besides addressing the factors inducing or eroding the legitimacy of international adjudicative bodies, norms and judicial decisions, we must also evaluate what establishes the authority required to regard a particular norm or institution legitimate. This means the inspection of not those factors externally influencing the degree of legitimacy described above, but the definitional elements of the notion of legitimacy itself, the indicators of legitimacy defined by Franck: *determinacy*, *symbolic validation*, *adherence* and *coherence*. These indicators concern 'the legitimacy of primary rules,

[15] Wolfrum (n 4) para. 5; Buchanan and Keohane (n 11) 25–62; Richard A Posner, 'The Problematics of Moral and Legal Theory' (Belknap Press, 1999) 90 et seq.

[16] Wolfrum and Röben (n 1) 7.

[17] Tullio Treves, 'Aspects of Legitimacy of Decisions of International Courts and Tribunals' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer, 2008) 172–73.

[18] Yuval Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions' in Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018), 354–71, 358–59.

the ordinary rules, whether made by the legislatures, bureaucrats, *judges* or plebiscites[19]".

The notion of coherence is key in explaining why rules compel.[20] The degree of a rule's legitimacy therefore depends, among the above factors, also on its coherence, meaning its connectedness to the other parts of that rule, as well as between the rule and other rules. This connectedness – in the long run – results in a network of rules underlying the community of states, and its members perceive the pull of this coherent rule system resulting in their voluntary compliance. [21] Thus, coherence legitimates a rule or the institution implementing it because it provides a reasonable connection between a rule, or the application of a rule, 'to its own principled purpose' or to 'principles previously employed to solve similar problems.'[22]

There must be a rational basis of distinction for the inconsistent application of a rule if the rule (and in this vain the decision in which it is applied) is to have coherence and therefore legitimacy.[23] By rational basis legal scholarship means a logical relationship as described above in the form of connectedness between a rule and its parts, and different rules of the legal order.

The prime example provided in legal scholarship for the working of the notion of coherence is the illustration of an attempt to deal with debt relief for developing countries by proposing to forgive all unpaid debts of countries with a name starting with letters A to M.[24] This solution would definitely be unjust and illegitimate. Unjust, as it would increase the wealth of some debtors regardless of their actual ability to pay, to the detriment of other debtors with a name starting with A-M, who may be more in need of such help.[25] It would also be illegitimate as there is no such accepted principle as using the alphabet as a basis for allocating benefits, thereby the solution lacks any real connection to the sphere of law.[26]

Some authors, including Franck himself, make a distinction between the notion of coherence, and that of consistency. In Franck's understanding, for instance, coherence requires that like cases are treated alike and that distinctions in the treatment of likes are justifiable in principled terms,[27] whereas consistency requires the uniform application of a rule in every similar or applicable instance, regardless of its content.[28]

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[19] Franck (n 1) 26.

[20] Richard Dworkin, '*Law's Empire*' (Belknap Prerss, 1986), 190–92.

[21] Franck (n 1) 180–81.

[22] ibid 147–48.

[23] Ibid 151.

[24] A solution proposed by Franck (n 1) 7, and Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998) 38–39.

[25] Franck (n 1) 39.

[26] ibid 39.

[27] ibid 144.

[28] ibid 38.

1.3. Consistency as a prerequisite of legitimacy in international law

There is a strong presumption against normative conflict in international law.[29] The present chapter posited that the inconsistent interpretations of rules of international law have detrimental consequences on the legitimacy international adjudicative fora and their decisions. As shown above, coherence and consistency are fundamental and definitional elements of the notion of legitimacy, which creates the link why the inconsistent applications of rules and principles of law result in the erosion of legitimacy. Several scholarly contributions assessed the legitimacy of international fora in general,[30] however, none of these focused on how the consistency of their jurisprudence affects legitimacy, how interpretational inconsistencies erode the legitimate nature of judicial decisions, and what prospective means of interpretation may be applied to solve these issues.

The quality of the reasoning of judicial decisions is a prerequisite of both the legitimacy of the decision itself, and the adjudicative body in general,[31] and its legitimacy is assessed based on how adjudicators apply and interpret the law.[32] On the other hand, it is generally presumed that when having their disputes adjudged by international fora, parties intend to achieve an outcome consistent with the rules of international law.[33] Both the above requirements may be ensured by the subject matter focused harmonization of decisions through the legal reasoning of judges. This approach was stressed in the Report on the Fragmentation of International Law prepared by the International Law Commission in 2006, which highlighted that there is a certain kind of systemic relationship between the different international rules and decisions, and it is the task of legal reasoning to establish it.[34] As such, by way of interpretation, legal reasoning can either harmonize conflicting standards or establish priority between them. However, the ultimate goal is always a coherent analysis both as regards the decision itself and the system of international law as a whole. Hence, the recognition of and compliance with decisions may be jeopardized by the inconsistent reasoning of the various fora, and may eventually lead to eroding their legitimacy.

In order to identify and resolve these inconsistencies, recourse is ought to be had to the principle of systemic integration codified in art 31(3)(c) of the Vienna Convention

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[29] ILC, 'Report of the International Law Commission on the Work of its 42nd Session' (1 May – 20 July 1990) UN Doc A/45/10, para. 37.

[30] Cohen et al (n 10); Alter, Helfer and Madsen (n 1); 107–80.

[31] Shany (n 18) 37.

[32] Nienke Grossman, 'Solomonic Judgments and the Legitimacy of the International Court of Justice' in Harlan Grant Cohen, Anadreas Føllesdal, Nienke Grossman and Geir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018) 61.

[33] Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th ed, London: Longman, 1992) 1275; J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 240–44.

[34] ILC (n 29) para. 33.

on the Law of Treaties.[35] This provision, the customary nature of which is uncontested,[36] operates like a 'master key'[37] to the house of international law: it requires a sense of coherence to be implemented into the legal reasoning of international courts, and assists judges in avoiding or handling inconsistencies. It views the international legal order as one whole system, and works by drawing conclusions from such perspective.[38] Systemic integration has great potential to be a means for mitigating the fragmentation of international law by identifying and avoiding inconsistent interpretations, and thereby ensuring the legitimacy of judicial bodies and their decisions.[39]

2. The notion of consistency in EU law

Several expressions of consistency can be identified in the EU legal system ranging from its status as an objective in the Lisbon Treaty, as a constitutional principle or the core of a method of interpretation, to it being a goal of the preliminary reference procedure or its position in the Charter of Fundamental Human Rights of the European Union (CFREU) settling the relationship between right in the Charter and the European Convention on Human Rights (ECHR). In the following, I address these expressions thereby outlining the map of consistency-related provisions and institutions in EU law. This part will not engage in the in-depth analysis of these provisions, but rather will remain on the level of demonstrating the extensive presence of consistency in the EU system in order to show that it plays a fundamental role in the EU law.

First, mention must be made of the numerous instances where consistency as a value is reflected in the Lisbon Treaty. We can distinguish the provisions referring to consistency based on whether they relate to legal drafting or judicial decision-making. As for legal drafting, the first reference to consistency in the Treaty of Lisbon may be found in art 7 of the Treaty on the Functioning of the European Union (TFEU) stipulating that 'the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers'.[40] As under the principle of conferral all EU acts must have a *lex specialis* legal basis in the TFEU – ensuring that the EU solely acts within the purview of its own

[35] The text of the article is as follows: "*3. There shall be taken into account, together with the context (c) any relevant rules of international law applicable in the relations between the parties.*"

[36] *Arbitral Award of 31 July 1989* (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, 69–70 (Nov. 12); *Certain Questions of Mutual Assistance in Criminal Matters* (Djib. v. Fr.), 2008 I.C.J. 37 (June 4).

[37] ILC (n 29) para. 420.

[38] Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) Art. 31, para. 91.

[39] ibid.

[40] Consolidated version of the Treaty on the European Union [2007] 2008/C 115/01, Article 7.

competences – which is believed to 'produce consistency, coherence and predictability',[41] art 7 TFEU assists in tackling the legitimacy gaps in the system.[42] Similarly, pursuant to art 13 of the Treaty of the European Union (TEU), 'the Union shall have an institutional framework which shall aim to […] ensure the consistency, effectiveness and continuity of its policies and actions'.[43] This suggests that consistency serves as a value also in the drafting of EU legislation.[44]

Further to institutional arrangements, pursuant to arts 16(6) and 18(4) TEU, both the General Affairs Council and the High Representative of the Union for Foreign Affairs and Security Policy have the task of ensuring consistency in the work of the different Council configurations and in the EU's external action respectively. Consistency in external actions and between EU policies also lies at the heart of art 21(3) TEU, analogically to art 26(2) TEU in the field of common foreign and security policy. Lastly, in terms of drafting and Union policies, art 334 TFEU also requires the Council's and the Commission's cooperation to ensure the consistency of activities undertaken in the context of enhanced cooperation and the consistency of such activities with the policies of the EU. Besides expressions of consistency affecting legal drafting, it plays a significant part in decision-making processes as well. Such aspect is stipulated by the procedures of the review of the decision of the General Court and that of preliminary reference in art 256 TFEU, as well as the corresponding procedural rules in arts 62 and 62b of the Statute of the CJEU.

Consistency as the goal of the preliminary reference procedure in itself warrants a second category among the expressions of consistency in EU law. A preliminary ruling can be sought from the CJEU if a case before a national court in one of the Member States of the EU requires a decision on the interpretation or validity of an EU legal measure.[45] The procedure provides a channel for dialogue between the CJEU and national courts to ensure the consistent application of EU law.

As a third category attention shall be drawn to consistency as a constitutional principle. In EU law, consistency is usually referred to as an all-encompassing principle embodying the absence of contradictions.[46] Consistency implies that two rules are consistent when they produce the same result on the same set of facts or raise a similar legal issue,[47] and as a systemic principle it is emphasized in constitutional texts an element of the rule of law helping to ensure legal certainty. In this respect we can recall

[41] Esther Herlin-Karnell and Theodore Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' [2013] 15 Cambridge Yearbook of European Legal Studies 139, 145.

[42] ibid, 145.

[43] Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ 115/13, Article 13.

[44] Herlin-Karnell and Konstadinides (n 41), 145.

[45] Consolidated version of the Treaty on the Functioning of the European Union [2007] 2008/C 115/01, Article 267.

[46] Herlin-Karnell and Konstadinides (n 41) 251.

[47] Herlin-Karnell and Konstadinides (n 41) 139, 141.

the Rule of Law checklist made by the Venice Commission which specifies the elements of rule of law in order to make it possible to assess the rule of law from the view point of constitutional and legal structures, the legislation in force and the existing case-law.[48] Under the category of legal certainty, the Venice Commission makes reference to the consistency of law and whether it is applied consistently as factors affecting legal certainty and thereby the level of rule of law.

Scholarship differentiates between vertical and horizontal consistency in EU law. Vertical consistency refers to a clear competence delimitation and conflict resolution between the EU and Member States, whereas horizontal consistency entails cooperation between different institutional actors in EU decision making.[49] While examples for the latter may include the instances referenced above with respect to the provisions of the Lisbon Treaty, an example for the former forms the fourth category of the present classification of the expressions of consistency, that is – the principle of consistent interpretation. This principle entails an obligation on national courts and administrative authorities to interpret the applicable national law as much as possible in a way which ensures the fulfilment of obligations deriving from EU law. As the principle will be further elaborated on inn the context of the CJEU's jurisprudence, for the purposes of the present categorization it suffices to reference that the principle, by solving clashes between different norms, aims at eliminating inconsistencies within legal interpretations.

Lastly, as a fifth category, reference shall be made to fundamental rights within the EU, and specifically art 52(3) of the CFREU addressing the relationship of the regimes of the CFREU and the ECHR. As stipulated by this paragraph, the corresponding rights contained in the CFREU and in the ECHR have similar meaning and scope. The rationale behind this provision was pointed out by Opinion 1/2013 of the CJEU stating that 'Article 52(3) of the Charter is intended to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed in the ECHR, without adversely affecting the autonomy of EU law and that of the Court of Justice of the European Union.'[50] As such, it was intended to avoid any conflicts and inconsistent interpretations of the CFREU and the ECHR by the CJEU and European Court of Human Rights (ECtHR).

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[48] European Commission for Democracy through Law (Venice Commission), Rule of Law Checklist CDL-AD(2016)007rev [2016] para. 24.

[49] Marise Cremona, 'Coherence through Law: What Difference Will the Treaty of Lisbon Make?' [2008] 3(1) Hamburg Review of Social Sciences 17; Esther Herlin-Karnell and Theodor Konstadinides, 'The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration' [2013] 15 Cambridge Yearbook of European Legal Studies 139, 142.

[50] Gerrit Betlem, 'The Doctrine of Consistent Interpretation—Managing Legal Uncertainty' [2002] 22(3) Oxford Journal of Legal Studies 397–418, 402, 398

3. Expressions of consistency in the practice of the European Court of Justice

After having described the different instances where consistency appears in EU law, in the following section, the different manifestations of consistency in the practice of the CJEU will be outlined. As such, the author will reflect on how consistency serves as the basis of the consistent interpretation doctrine, how the preliminary reference procedure aims at ensuring the consistent application of EU law, how consistency manifests as a core value to be safeguarded in judicial interpretation, and how the parallel rights in the CFREU and the ECHR and their interpretation by the CJEU and the ECtHR align with the requirement of consistency.

3.1. Consistency as the basis of an interpretational method: The principle of consistent interpretation

According to the doctrine of consistent interpretation, national authorities must interpret national law in line with EU obligations. The method aims to solve clashes between conflicting norms regulating the same issue or between a higher ranking norm constraining the effect of a lower norm via choosing between different possible interpretations.[51] Thus, the ultimate rationale behind this method of interpretation is the need for coherence, for eliminating inconsistencies and conflicts in within legal interpretations and jurisprudence.[52] Betlem distinguishes three levels in EU law in which the principle applies: 1) when national law gives effect to EU law in domestic law; 2) when secondary Community law must be construed in accordance with primary rules; and 3) the level where Community law and international law clash.[53]

The EU law principle of consistent interpretation was first established by the CJEU in the *Van Colson* case in which Von Colson and Kamann claimed compensation before German courts as they had applied to work in a men's prison in Germany but were rejected because they were women. They appealed the German court decision as the the court did not rule in favour of compensation, solely ordered the payment of the travel costs for the claimants. The CJEU ruled that national courts are required to interpret national legal provisions in conformity with Community law in order to achieve consistency between national and Community law.[54] Consistent interpretation is thus

[51] Betlem (n 50) 402, 398.

[52] Antonio Ali, 'Some Reflections on the Principle of Consistent Interpretation Through the Case Law of the European Court of Justice' in Nerine Boschiero et al (eds), *International Courts and the Development of International Law* DOI: 10.1007/978-90-6704-894-1_61, 882.

[53] Betlem (n 50) 402, 398.

[54] Cases C-14/83 *Von Colson and Kamann v Land-Nordrein Westphalen* [1984] ECR I-1891.

also referenced as indirect effect, as although an individual may not rely directly on a provision of an EU directive, the national court might achieve the same result through interpreting the provision.[55]

The interpretative obligation on national courts has been further developed and extended in the *Marleasing* case in 1990, when the CJEU furthered the obligation by stating that 'in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and purpose of the directive.'[56] As Betlem put it, based on this formulation provided by the CJEU, one of the most important aspects of the consistent interpretation doctrine is that it excludes the application of domestic law in cases when domestic law is contrary to Community law, even despite the fact that in national law usually there is a choice between the different relevant domestic rules to be applied.[57]

Although several authors have raised concerns regarding the uncertainties the decision in *Marleasing* brought about, especially with respect to the widening of the interpretative process, the most extensive interpretation of the principle has taken place in the *Dekker* case, which concerned liability under the Equal Treatment Directive[58] despite the lack of direct effect and liability under national law. The CJEU pronounced that a mere breach of the prohibition under the Equal Treatment Directive sufficed for civil liability without any possibility to invoke an exemption under national law. This quite radical meant that the national judge was prohibited from applying grounds for justification under the Dutch tort law in light of Community law. This decision, reaffirmed in *Draehmpaehl*,[59] demonstrates the uncertainties and difficulties surrounding the quest to reach consistency when conjointly applying EU law (more specifically directives in the above cases) and national legal provisions.[60]

Ironically, some inconsistencies can be pointed out even in the CJEU's application of the doctrine of consistent interpretation as the CJEU has not always been consistent in determining duties for national courts under EU law. On the one hand, the holding in *Marleasing* that a directive precludes the application of rule of national law leaves little field for the interpretative role of national courts.[61] On the other hand, there were instances, such as in the *Wagner Miret* case, where the CJEU left to the national court

[55] Noreen Burrows, 'The Advocates General and the development of the principle of direct effect' in Noreen Burrows and Rosa Greaves (eds), '*The Advocate General and EC Law*' (Oxford University Press 2007), 200.

[56] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8.

[57] Betlem (n 50) 402, 401.

[58] Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (Official Journal 1976 L 39, p. 40).

[59] Case C-180/95 *Draehmpaehl* [1997] ECR I-2195.

[60] Betlem (n 50) 402; Paul Craig, 'Indirect Effect of Directives in the Application of National Legislation' in Mads Andenas and Francis Jacobs (eds), '*European Community Law in the English Courts*' (Oxford University Press, 1998) 37, 53.

[61] Betlem (n 50) 402.

to decide whether consistent interpretation is possible '*without dictating*'[62] the conclusion made in the case. Nevertheless, for the purposes of the present article, it suffices to note that the doctrine of consistent interpretation, even if not always applied consistently or without generating jurisprudential uncertainties, has the ultimate goal of attaining consistency at its core which makes it another embodiment of consistency within the EU system and jurisprudence.

3.2. Consistency as a goal behind legal institutions: The preliminary reference procedure

The CJEU's preliminary reference procedure forms a foundational part of the judicial system established by the Lisbon Treaty and the EU's jurisprudence as it promotes the consistent and uniform application of EU law throughout the EU.[63] The procedure provided for in art 267 TFEU, by setting up a dialogue between one court and another, specifically between the CJEU and the courts and tribunals of Member States, has the object of securing consistency and uniformity in the interpretation of EU law.[64]

As such, national courts may bring a constitutional issue before the CJEU by submitting a question for a preliminary ruling in order to clarify a point concerning the interpretation of EU law, receive guidance from the CJEU and ensure the effective and uniform application of EU legislation, thereby preventing divergent interpretations.[65] Thus, preliminary rulings may not only be useful as regards new interpretations of EU law issues, but also in order to ensure the consistent interpretation of previously held findings.[66] The CJEU's preliminary ruling is not a mere opinion: it is a judgment or a reasoned order which the national court requesting the procedure must abide by.[67]

The keystone status of the preliminary ruling procedure has been pointed out by the above referenced Opinion 2/13 of the CJEU in 2014, in which the CJEU emphasized that the procedure's ultimate goal is to ensure the consistency, the full effect and the autonomy of the interpretation of EU law.[68]

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[62] Case C-334/92 *Wagner Miret* [1993] ECR I-6911.

[63] Opinion 2/13 (Accession of the EU to the ECHR), para 174; C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1962] ECLI:EU:C:1963:1, 12; C-284/16 *Achmea*, ECLI:EU:C:2018:158, para 35; C-234/17 *XC and Others* [2018] ECLI:EU:C:2018:853, para 41; Case C-824/18 *A.B., C.D., E.F., G.H., I.J. v Krajowa Rada Sądownictwa* [2021] ECLI:EU:C:2021:153, para 90.

[64] Opinion 2/13 (Accession of the EU to the ECHR), para 174; C-284/16 *Achmea*, ECLI:EU:C:2018:158, para 35.

[65] Adriana Almășan and Peter Whelan, *The Consistent Application of EU Competition Law: Substantive and Procedural Challenges* (Studies in European Economic Law and Regulation, 9) (1st edn, Springer 2017) 168.

[66] ibid 169.

[67] ibid 171.

[68] Opinion 2/13 (Accession of the EU to the ECHR), para. 176.

3.3. Consistency as a value to be manifested in jurisprudence: The consistency of the judicial interpretation and reasoning of the CJEU and the activity of Advocate Generals

Naturally, consistency as a value also plays a substantial role in judicial interpretation and legal reasoning both at the level of international law and in EU law.[69] As a result, the lack of consistency culminates in the erosion of legal certainty, one of the most fundamental values of legal adjudication and the legitimacy of the decision-making process.[70] In the EU regime and specifically the jurisprudence of the CJEU, lack of consistency would ultimately result in adversely influencing fundamental rights the protection of which largely falls on the CJEU to realize.[71] The importance of consistency in the framework of the judicial interpretation carried by the CJEU is aptly illustrated by the so-called *hard cases* before the CJEU requiring a considerable amount of balancing on the part of the CJEU.[72] As *Herlin-Karnell* and *Konstadinides* elaborate, consistency under EU law – or as they refer to it *strategic* consistency – is an effective judicial tool in the hands of EU judges for solving *hard cases* through a balancing exercise of national and collective EU interests, and to thereby bring uniformity into the application of EU law.[73]

When addressing the consistency of EU law, one must also make specific mention of the contributions of Advocate Generals. As art 252 TFEU specifies, an Advocate General, acting with complete impartiality and independence and in open court, makes reasoned submissions on cases which, in accordance with the Statute of the CJEU, require his involvement. There is ample scholarly debate about the exact parameters of the Advocate Generals' work and powers, however, as Advocate General Bobek eloquently and practically put it, their role is 'to offer institutionally trustworthy alternatives to the Court's alleged or genuine shortcomings in whatever activity or area'[74].

This above definition adequately grabs the situation when the CJEU's case law is inconsistent in a certain regard, and thus the Advocate General's opinion helps to safeguard the consistency of its jurisprudence. It is the practice of Advocate General which brings consistency and clarity to EU law.[75] Such added value of consistency

[69] Herlin-Karnell and Konstadinides (n 41).

[70] Presentation of Nils Engstad, President of the Council of Europe's Consultative Council of European Judges (CCJE), introduction at the High-Level Conference on the Harmonisation of Case Law and Judicial Practice, Athens, 29 September 2017.

[71] Herlin-Karnell and Konstadinides (n 41) 143; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P [2013] *Commission, Council and UK v Yassin Abdullah Kadi*, Opinion of AG Bot.

[72] Herlin-Karnell and Konstadinides (n 41) 143.

[73] Herlin-Karnell and Konstadinides (n 41) 148.

[74] Michal Bobek, 'A Fourth in the Court: Why Are There Advocates General in the Court of Justice?' [2012] 14 Cambridge Yearbook of European Legal Studies 529, 554.

[75] Cyril Ritter, 'A New Look at the Role and Impact of Advocates-General – Collectively and Individually' [2005] 12 Columbia Journal of European Law 759.

also contributes to maintaining the CJEU's legitimacy, which was also flagged by Advocate General Bobek stating that an Advocate General may be the 'explainer or dissenter'[76] in an individual case, enhancing legitimacy of the CJEU. Failures of the CJEU as well as their correction by the Advocate General benefit the same institution, the CJEU, thus increasing its overall legitimacy.

There were instances in the CJEU's case law when Advocate Generals explicitly made mention of the risks of inconsistency. This was the case for example in *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* which concerned the interpretation of the term *place where the harmful event occurred* contained in art 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. In his opinion Advocate General Darmon raised concerns regarding the unforeseeable consequences an exception to actions for compensation for indirect damage could cause to the consistency of the interpretation of the CJEU in previous case-law.[77] Similarly, in his opinion in the case of *Hermès International v FHT Marketing Choice BV*, Advocate General Tesauro reflected on the inconsistency between the CJEU's case law and the decisions made in *Fediol* and *Nakajima*, flagging that the approach accepted in those cases raise 'questions about the 'monist' consistency of the Court's case-law, which is openly at odds with the approach in Nakajima.'[78]

Contrariwise, there have been cases where such appeals to the CJEU's consistency have been declined to be entertained by either the Advocate Generals or the CJEU. This happened in the *Chalkor* case where the appellant criticised the General Court's inconsistency in its reviews in competition cases. However, the CJEU downplayed such argument by stating that it is of no relevance as it is the that concrete judgment under appeal which fell to be reviewed by the CJEU in the appeal in question, and not the General Court's case-law as a whole.[79] This would suggest, however, that there is no need for consistency at all in the jurisprudence of the CJEU and solely individual judgments exist in the system, a conclusion which would not be either substantiated or logical in light of the above described instances when both the EU institutional system in general and the CJEU system in particular mirrored an overarching aim to achieve some level of consistency.

3.4. Consistency between the interpretation of the CJEU and the ECtHR

Lastly, some practical elaboration on the jurisprudential aspects of the parallel rights in the CFREU and the ECHR and their interpretation by the CJEU and the ECtHR is

[76] Bobek (n 74) 554.

[77] C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*, Opinion of AG Darmon.

[78] C-53/96 *Hermès International v FHT Marketing Choice BV*, Opinion of AG Tesauro.

[79] C-386/10 *P Chalkor AE Epexergasias Metallon v European Commission* – Judgment [2011] para 48.

warranted. We may find examples when the CJEU interpreted the CFREU so as to provide a level of protection corresponding to that of the Convention. In the *Bougnaoui and ADDH v Micropole SA* judgment the CJEU interpreted the term religion in Directive 2000/78[80] in the same fashion as it is in both the CFREU and the ECHR.[81] In the *Florescu* case the CJEU expressly referred to the ECtHR's ruling in *Ionel Panfile v Romania* regarding legitimate expectations with respect to the right to property regarding the implementation of conditions set by the EU for financial assistance during a financial crisis.[82] Also, in the *Al Chodor and others* case, when interpreting the terms *detention* and *significant risk of absconding* in a case concerning asylum seekers, the CJEU accepted the findings of the ECtHR in its *Del Ríó Prada v Spain* case. All these instances show some kind of a positive attitude by the CJEU towards the jurisprudence of the ECtHR, and a willingness to approximate the approaches of the two courts.

The harmony was not that apparent, however, in the recent judgment of the CJEU in the case of *FMS and Others v. Országos Idegenrendészeti Főigazgatóság* and the corresponding opinion of Advocate General Pikamae. The judgment and the Advocate General's opinion interpreted the notions of detention and deprivation of liberty under the CFREU and the ECHR with respect to four persons who have submitted asylum applications to the Hungarian refugee authority but were subjected to return to Serbia due to inadmissibility and were placed in *aliens detention* in the Röszke transit zone. The decision followed the ECtHR's judgment in the *Ilias and Ahmed* case concerning two Bangladeshi nationals who arrived to Hungary through the Röszke transit zone, having had their asylum applications processed for twenty-three days by Hungary while in the transit zone. Hungary eventually rejected the applications on the grounds that it considered Serbia, which they crossed before their arrival to Hungary, a safe third country.

Both courts had to adjudicate whether the situation of asylum seekers in the Röszke transit zone amounted to detention, and despite the similar facts of the cases, the ECtHR found no violation of art 5 ECHR,[83] whereas the CJEU condemned Hungary for its violation of European asylum law.[84] The main argument was the difference in sectors in which the applicants were placed. Whereas Ilias and Ahmed entered the transit zone in the sector for asylum seekers – based on which the ECtHR argued that they could

[80] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 32000L0078, Official Journal L 303, 02/12/2000 P. 0016 – 0022.

[81] C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, ECLI:EU:C:2017:204 [2017] para 30.

[82] C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others*, ECLI:EU:C:2017:448, [2017] para 56.

[83] *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR 21 November 2019).

[84] 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* [2020], ECLI:EU:C:2020:367, Judgment [2020].

leave the transit zone towards Serbia and therefore were not in detention –, the applicants in the *FMS* case were placed by the authorities in the sector of third country nationals whose asylum request was denied,[85] and therefore they could not lawfully leave this zone except to their country of origin, classifying their circumstances as detention.[86] Although this might be true from a strictly legal point of view, in practice not even the applicants in the *Ilias and Ahmed* case could leave the transit zone in light of their ongoing asylum application process and the risk of having it rejected for leaving the zone.

The fact that the two courts delivered divergent decisions in the above cases raises the question whether these inconsistent outcomes concluded in spite of the corresponding provisions on the right to liberty included in art 6 of the CFREU and art 5 ECHR could affect the relationship between the two convention regimes, create some lacunae in the human rights protection of the countries of the EU and States adhering solely to the ECHR regime, and how it will affect the legitimacy of the ECtHR in light of the fact that the CJEU, a primarily not human right focused international court brought about a stricter approach that the Strasbourg court.

Conclusions

As we have seen above, there is no agreed *role* or definition of consistency under EU law. It can either be an objective set out in different provisions of the Lisbon Treaty, a value at the heart of the method of consistent interpretation, a goal behind the institution of preliminary rulings, a value to be manifested through judicial interpretation and reasoning, or a hardship in reconciling the activities of the CJEU and the ECtHR. Nevertheless, due to these various expressions, legal scholarship deems consistency to still remain an aspiration principle, a pointer to a number of different EU law obligations, and instrumental and institutional constructions.

What can be ascertained, however, based on the above analysed practice of the CJEU, is that, despite the legally inconclusive and undefined nature of consistency, parties from time to time tend to flag the inconsistency in the CJEU's jurisprudence in order to substantiate their position. The question is how the CJEU handles such arguments and how this affects legitimacy issues surrounding the CJEU. We may see the influence in two different regards. On the one hand, normative debates surround judicial activism as to the results-oriented approach of the CJEU[87] and its poor legal

[85] *FMS and Others* (n 84) para 72.

[86] *FMS and Others* (n 84) para 74.

[87] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU* (Oxford: Hart, 2013) 447; Hjalte Rasmussen, *On Law and Policy in the European Court of Justice* (Brill-Nijhoff, 1986).

reasoning failing to explain the the arguments put forward and the logic behind the outcome of the decisions.[88] This affects the CJEU's normative legitimacy.[89]

On the other hand, empirical evidence may also be found as regards the sociological legitimacy of the CJEU. A glaring example of such evidence is the study conducted by Caldeira and Gibson in the 1990s assessing and seeking to explain the public legitimacy of the CJEU by examining the public's opinion regarding the CJEU's work and its outcomes via a series of questions designed to measure both the public salience of the CJEU as well as awareness of the CJEU.[90] The study suggests that public opinion appears not to respond to controversial rulings of the CJEU, which might be interpreted to support Caldeira and Gibson's argument that public trust in the CJEU is at best weakly related to the actual behaviour of the judges and derives instead from more general attitudes toward the EU and the rule of law.[91]

Based on these findings it can be concluded that inconsistencies and controversies in the decision-making of the CJEU may more likely impact the normative legitimacy than the sociological legitimacy of the CJEU. Nevertheless, this does not mean that its sociological legitimacy is not affected negatively especially given the uncertain and hardly measurable nature of public opinion. Therefore, what can be concluded is that strengthening the status of consistency so that it becomes something more than just an aspiration principle would certainly help the CJEU in safeguarding its fragile legitimacy – let it be normative or sociological.

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[88] Mitchel de S.-O.-l'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press, 2009) 107.

[89] Mark A Pollack, 'The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence' in Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Guir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018), 150, 155.

[90] James L. Gibson and Gregory A. Caldeira, 'The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice' (1995) 39(2) American Journal of Political Science 459–89; James L. Gibson and Gregory A. Caldeira, 'Changes in the Legitimacy of the European Court of Justice: A Post-Maastricht Analysis' (1998) 28 British Journal of Political Science 63; James L. Gibson and Gregory A. Caldeira, 'The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support' (1995) 89 American Political Science Review 356.

[91] R. Daniel Kelemen, 'The Political Foundations of Judicial Independence in the European Union' [2012] Journal of European Public Policy, 19(1), 43–58, 49; M. Pollack, 'The Legitimacy of the European Court of Justice: Normative Debates and Empirical Evidence' in Harlan Grant Cohen, Andreas Føllesdal, Nienke Grossman and Guir Ulfstein (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018), 150, 169.

Human rights, democracy and rule of law have been regarded as a mutually reinforcing ensemble by many legal theorists to date. This book contains a selection of papers from the webinar on 'The Inseparable Triangle: Democracy, Rule of Law and Human Rights in the EU' held at ELTE Faculty of Law in 2021, and represents relevant collection of chapters about the interconnected areas of human rights and European law. The webinar was oraganised as a part of the Jean Monnet Module 'The Legal Enforcement of the basic Values of the European Union'. This book, through various chapters, attempts to give an insight on how the EU and the Council of Europe must try to strike a balance between diverging interests and priorities of the nation states, and should implement a firm strategy to protect human rights. The book contains chapters providing an overview and comparison of different existing practices with constructive suggestions for future development, as well as chapters dealing with more specific issues related to human rights and democracy.

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