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Polexit? Hungarexit? Quo vadis EU? Reflexions on the latest solutions provided by EU constitutional law in the face of a persistent rule of law misery

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Abstract: Based on a talk at the University of Graz in November 2021, this article treats the current state and some consequences of the ongoing dismantling of rule-of-law standards driven by legislative "reforms" in some EU Member States. It connects to the Conditionality Regulation and highlights the attempts of EU constitutional law to avoid what has been called "backsliding" of EU Member States or - with the term used by the European Court of Justice (ECJ) in Repubblika[1] - "regression" in relation to rule of law standards. The ECJ operationalises art. 19 TEU as an objective right for protecting the judicial independence of Member States' courts. As is submitted here, the principle of non-regression is a new meta-principle to put an end to Member States' backsliding in their rule of law standards. It basically also applies to other fundamental values of the European Union. The new principle has to be seen together with the so-called context method applied by the ECJ in proceedings for preliminary ruling.

Keywords: rule of law, Conditionality Regulation, backsliding, ultra-vires, judicial independence, ECJ, principle of non-regression, meta-principle, identity of the Union, EU fundamental values, context method

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[1] ECJ C-896/19, *Repubblika*, ECLI:EU:C:2021:311.

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I. Introduction

When ten Eastern European countries joined in 2004, who would have thought that within a few years' time five Member States of the EU were no longer counted amongst pure democracies, but turned into semi-consolidated democracies or (in the case of Hungary) a "hybrid regime"[2]? A menetekel is shimmering on the wall that - due to the lack of a possibility of exclusion from the EU - there could be worse than the exit of a country from the EU (cf. Brexit), namely the so-called "Dirty Remain"[3], i.e. an unwillingness to abide by the law while at the same time rejecting to leave. Over the years, the subject of rule of law backsliding has advanced into one of the most important issues of discussion in literature[4], the general public, and with a certain delay also in the jurisprudence of the ECJ.

The following overview shall briefly remind of a few factual developments, point to the central legal problems and depict some consequences of rule of law deficiencies in selected EU Member States, before right away discussing up-to-date solutions provided under EU constitutional law, with a special emphasis on the financial aspect of reducing budgetary allocations to Member States suffering from systemic rule of law deficiencies. It will come to the conclusion that the legal developments instigated may also accelerate pro-integrational dynamics of Union law. One up-to-date example is the principle of "non-regression" in relation to judicial independence, to other rule of law standards, and even in relation to the other fundamental values of the EU, as evoked in art. 2 TEU.[5] Yet, even under the supposition that the various methods developed to protect the rule of law will be applied in combination, still the Member States affected remain responsible to take active measures for healing systemic deficiencies.

II. Regression and the way forward

A. Backsliding and the special character of rule of law deficiencies

A fundamental problem in dealing with rule of law deficits in EU member states is that these are not the results of "accidents", but root in intentional and systematic backsliding over a

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2 In the assessment of the NGO Freedom House.

3 *The Economist*, Poland is a problem for the EU precisely because it will not leave, https://www.economist.com/europe/2021/10/14/poland-is-a-problem-for-the-eu-precisely-because-it-will-not-leave (October 14, 2021).

4 For a selection: *Pech/Wachowiec/Mazur*, Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action, Vol. 13 The Hague Journal of the Rule of Law 2021, 1; *Pech/Kochenov*, Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case (2021); *Closa/Kochenov* (eds.), Reinforcing Rule of Law Oversight in the European Union (2016); *Lenaerts*, New Horizons for the Rule of Law Within the EU, Vol. 21 German Law Journal 2020, 29 (30-31); *Halmai*, The rise and fall of constitutionalism in Hungary in *Blokker* (ed.), Constitutional Acceleration within the European Union and Beyond (2018) 217; *Sadurski*, Poland's Constitutional Breakdown (2019); *Kovács/Scheppele*, The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union, in *H. Solomon Jr./Gadowska* (eds.), Legal Change in Post-Communist States: Progress, Reversions, Explanations (2019) 55; *Scheppele/Kochenov/Grabowska-Moroz*, EU Values Are Law, after All, Vol. 39 Yearbook of European Law 2020, 3; *M. Smith*, Staring into the abyss: A crisis of the rule of law in the EU, Vol. 25 European Law Journal 2019, 563; *Bogdandy/Bogdanowicz* e.a. (eds.), Defending Checks and Balances in EU Member States (2021).

5 On the increased level of transparency in relation to the confidential opinion of the Council legal service, see EC T-252/19, *Pech*, ECLI:EU:T:2021:203 – in appeal ECJ C-408/21, *Pech v. Council*; *Pech*, No more Excuses, https://verfassungsblog.de/no-more-excuses/ (February 16, 2022).

longer period of time. This fact alone helps to understand that an approach pointing to the need of "dialogue" could not turn out to be effective in the long run. A mere presumption that constitutional standards would be upheld, which are in line with the fundamental EU values, was a too static legal framework.

The circumstances, causes and consequences of the dismantling of rule-of-law standards driven by legislative "reforms" keep pushing the courts and jurisprudence, putting the European Union's ability to integrate and act to the test. The term most often used is *backsliding* or *regression* in relation to the Member States' law standards, and in particular in relation to the independence of the national judiciary.[6] Due to the arguments submitted as defence by the respective governments who rely on state sovereignty, democracy, ultra-vires acts of the Union and a novel interpretation of the principle of priority to defend their way of action, this controversy is also conducted under the aspect of supremacy of Union law, even though this is actually a different, but parallel constitutional discussion.[7] However, *backsliding* is not about striving for better compliance with Union law or the delimitation of competences, but rather about putting to question the legality and supremacy of Union law as such. For example, the explicitly European law friendly - but nevertheless criticized - line of case law of the German Constitutional Court actually calls for a *more intensive* and integrational control of EU institutions (in the case of PSPP: the ECB) by the ECJ as the guardian of the Union-law competency structure.

A blanket argumentation based on *ultra-vires* is not conducive because the legal conviction of the fundamental values mentioned in art. 2 TEU and shared by the EU member states can in no way be qualified as an excessive legal act of the Union.

As the Court of Justice states in its Opinion 2/13, the Union is "based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in art. 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member

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6 The term *backsliding* will here be used in the definition of *Scheppele/Pech*: "the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party", in *Pech/Scheppele*, Illiberalism within: rule of law backsliding in the EU, Vol. 19 Cambridge Yearbook of European Legal Studies 2017, 3 (10).

7 Cf. the dispute about the *ultra-vires* control of German Federal Constitutional Court BVerfG in its PSPP-judgment of 5 May 2020, in which it forms an independent interpretation of the principle of proportionality under Union law and, by doing so, intends to ensure its full application in Union law (BVerfG 2 BvR 859/15, ECLI:DE:BVerfG:2020:rs20200505.2bvr085915, para. 158, 165 EuZW 2020, 489 = integration 2021, 220 *(A.R. Börner)*; integration 2021, 227 (*Müller-Graff*); EuR 2020, 347 *(B. Wegener)*. Another example delivered by the Italian Constitutional Court in ECJ C-105/14, *Taricco*, ECLI:EU:C:2015:555, para. 58; ECJ C-42/17, *M.A.S. and M.B.*, ECLI:EU:C:2017:936, para. 62.

States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected"[8]. The mentioned concept of regression and backsliding is of significance and will provide one of the key to finding solutions. The article will come back to this in a few moments.

B. Overview on factual developments in Poland and Hungary

While it is true that some attempts to apply blueprints of how to fortify power advantages that shall be banned from modern democracies were at times also visible in other Member States (e.g. Romania, Bulgaria, Czech Republic), this overview focuses on the developments observed in Poland and Hungary.

1. Poland

Since the government led by the national populist *Law and Justice Party* (PiS) took office in November 2015, it has brought under its control first the Constitutional Court (TK), then other courts and the National Council of the Judiciary (KRS), which is responsible for nominating judges across Poland. Court judgments were partly not published, partly deleted from the register or left unobserved. In 2017, a state-owned company financed the "billboard campaign" against the judiciary, with which alleged disciplinary offenses by judges were described in public.

In July 2018, 40 % of Supreme Court judges were forced into early retirement and dozens of loyal judges were appointed thereafter. Two politically dependent special chambers were set up at the Supreme Court: The Disciplinary chamber and an Extraordinary Supervisory chamber, issued with the powers to overturn practically any final judgment of the past 20 years (of all instances) and responsible for reviewing elections.

The Minister of Justice (also Public Prosecutor General) dismissed the presidents and their deputies of almost all major Polish courts in 2017. He obtained power to extend the term of office of judges in retirement age at his own discretion. By now, around 1,500 of the 10,000 Polish judges are *Neo-judges* (not legally appointed). *Manowska*, the President of the Supreme Court, is also a *Neo-judge*, together with about 50 % of judges in that court.

In January 2020, the Supreme Court (still under the former President *Gersdorf*) passed a spectacular judgment, according to which the neo-judges are not allowed to adjudicate. In December 2020, Parliament passed a "Muzzle Act"[9] which prohibits any national court from

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8 ECJ Opinion No. 2/13, ECLI:EU:C:2014:2454, para. 168.

9 Art. 42a para. 1 and para 2 and art. 55 para. 4 of the Law relating to the organisation of the ordinary courts of 27 July 2001 (Dz. U. of 2001, No 98, item 1070), as amended by the Law amending the Law relating to the organisation of the ordinary courts, the Law on the Supreme Court and certain other laws of 20 December 2019 (Dz. U. of 2020, item 190; 'the amending law'), art. 26 para. 3 and art. 29 para. 2 and 3 of the Law on the Supreme Court of 8 December 2017 (Dz. U. of 2018, item 5), art. 5 para. 1a and para. 1b of the Law relating to the organisation of the administrative courts of 25 July 2002 (Dz. U. of 2002, item 1269).

reviewing compliance with the EU requirements relating to an independent and impartial tribunal previously established by law, and thus effectively forbids judges (1.) from speaking of Polish courts as illegal courts (i.e. the attempt to prevent a submission for preliminary ruling to the ECJ under art. 267 TFEU), (2.) to criticize the Disciplinary chamber, (3.) to criticize the KRS. The remedy aimed at alleging that a court was not properly established was abolished in February 2020.

On 8 April 2020, the European Court of Justice banned the activity of the Disciplinary chamber by order[10] of interim relief. On 15 July 2021, the ECJ[11] declared the disciplinary regime against judges to be unlawful. On 27 October 2021, the ECJ[12] decided to impose a fine of € 1 million per day while the said order (to cease the activities of the Disciplinary chamber) was not being implemented.

The activity of the National Council of the Judiciary KRS and of the Extraordinary Supervisory chamber constitute a violation of art. 6 ECHR (ECtHR case *Dolinska-Ficek and Ozimek*[13]), as well as the illegal composition of the Constitutional Court (ECtHR case *Xero Flor*[14]). So far, the Commission has not initiated any proceedings against the KRS or the Supervisory chamber, with the result that there is no ECJ ruling on these two bodies yet in infringement proceedings.[15]

On 7 October 2021, the TK proclaimed that the supremacy of Union law contradicted the Polish constitution and was incompatible with Poland's sovereignty; no obligations arose from art. 19 TEU.[16] The logical options for dissolving the internal legal discord evoked by the TK are (1.) a repeal of the mentioned TK-decision of 7 October, (2.) a change of the constitution in order to make it compliant with EU law, or (3.) a withdrawal from the EU.

The differences compared to Hungary are that the opposition in Poland is relatively strong, that stronger parts of the independent media remain, that the public is ready to demonstrate for the independence of the judiciary. The EU reacted more strongly than in the case of Hungary. The Hungarian government (unlike Poland) did not try to replace all judges. A commonality is that both countries would not qualify for acceding to the EU today (art. 49 TEU).

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10 ECJ C-791/19, *Commission v. Poland*, ECLI:EU:C:2020:277.

11 ECJ C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596.

12 ECJ C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:878.

13 ECtHR 8.11.2021, No. 49868/19 and 57511/19, *Dolinska-Ficek and Ozimek v. Poland*.

14 ECtHR 7.5.2021, No. 4907/18, *Xero Flor w Polsce v. Poland*.

15 Yet there is a clear statement of the ECJ on the legality of the Supervisory chamber contained in the preliminary ruling of ECJ C-487/19, *W.Ż*, ECLI:EU:C:2021:798, para. 153. A potential infringement ruling containing a decision of the ECJ on the Polish Supervisory chamber may be contained in the upcoming final decision on case C-204/21.

16 At the moment of this talk and printing of the article, the reasoning of the decision is still not available. Another reading of it is that only the Polish judicial "reform" is affected by the question of supremacy of EU law, whereas art. 9 of the Constitution otherwise subordinates Polish law to international law including Union law.

2. Hungary

In 2012, a "National Office for the Judiciary" was set up with the task of appoining, dismissing, promoting and transferring all judges. The judges' retirement age was reduced from 70 to 62, allowing 10-15 % of senior judges to be replaced. The ECJ declared this practice illegal because of age discrimination. The affair ended in most cases with the payment of compensations to the early retired.

The Constitutional Court has been in the hands of Fidesz supporters since 2013. A constitutional amendment[17] of 2013 annuls the entire case law of the Constitutional Court from 1990 to 2011, with the argument that former case law related to the old constitution, while the new constitution must be freshly interpreted.

The number of Supreme Court justices was increased by 21 judges to accommodate partisans. The President of the Court of Justice can change and assemble the composition of the chambers at his own discretion and he decides on the allocation of matters to the chambers. Overall, the tactic vis-à-vis the judiciary is to pave friendly pathways for judicial matters of concern to the government.

Other measures attack the opposition, human rights standards or civil society institutions: 50 out of 100 larger cities in Hungary are governed by opposition mayors. By decree, their tax revenues were transferred to district governments that are under Fidesz control. Another decree in 2020 prohibited party funding in favour of opposition parties. During pandemic, the Prime Minister was empowered to extend the duration of the state emergency indefinitely when it expires after six months.

C. Potential consequences of deficiencies

This raises the question where systemic deficiencies in complying with the rule of law may lead to. First, there is a plethora of ramifications luring behind non-compliance with the law in general. The specific context of governance styles with intentional dismantling of standards for the purpose of fortifying party power at the cost of a democratic society warrants to keep the larger picture in mind, including the consequences for the EU as a whole. Only a few ramifications shall be sketched, without making any claim to be complete. Further analysis and assessment of each hypothesis may lead into potential research subjects.

1. Loss of confidence in the relationship between Member States and centrifugal forces amongst Member States.
2. Legal uncertainty for the economy within in the Member State concerned and internationally (economically, but also in judicial cooperation e.g. European Arrest Warrant).

[17] *Office of the Parliament*, Fourth Amendment to Hungary's Fundamental Law, Doc. No. T/9929, adopted 11 March 2013, art. 19.

3. Negative role model effect (blueprint) for governments wanting to secure power by authoritarian methods.
4. Loss of confidence in the EU Commission for negligent performance in its role as guardian of the Treaties (art. 17 TEU).
5. Potential state liability for damages under Union law against the Member States concerned, in the event of a sufficiently serious breach of legal norms intended to grant individuals rights, and direct causal link to the damage.[18]
6. Effects on the accession process of Balkan candidate countries: any connivance of authoritarian forms of government within the EU would delay the EU perspectives of candidate countries. In accession negotiations, the rule of law is the first chapter to be opened and the last to be closed.
7. Legal uncertainty can affect the national and international willingness to invest in the country, and a risk premium may be demanded on financial markets.
8. Risk of fragmentation of Union law and (with citizens' rights as reverse side of the coin of constitutional structures) non-compliance with individual rights of EU citizens.
9. The EU's role in advocating for rule of law and human rights protection worldwide in its cooperation with third countries may be weakened (not-throwing-stones-in-glass-house effect).
10. Risk of chilling effect on democratic participation in a country affected, less internal enforcement of rights and reduced civil society engagement for human rights protection. This also raises the question in how far the Union is affected, since its functioning "shall be founded on representative democracy" (art. 10 TEU).
11. Growing need to re-establish independent courts (removal of dependent judges), and other corrective measures to restore the rule of law.
12. New decision-making may be necessary in judgments already rendered, due to then involvement of neo-judges. However, where judges have actually started repair measures to overturn judgments rendered by neo-judges, they face disciplinary measures against themselves.

D. Solutions

The last part is dedicated to the analysis and assessment of the most recent attempts to provide ways out of the rule of law misery. As will be shown, these stem mostly from the case law of the European Court of Justice. Yet, under the existing EU constitutional structure, also

[18] ECJ C-497/20, *Randstad Italia*, ECLI:EU:C:2021:1037 seems to confirm this conjecture that Member States in default of their art. 19 TEU obligations may be liable to damages under Union law. *Randstad Italia* was a case with a factual scenario under procurement law, but the constellation could apply also to areas of judicial independence. As the Court in EC T-791/19, *Sped-Pro v. Commission*, ECLI:EU:T:2022:67 opined, a general deficiency in rule of law compliance, the two-steps test known under EAW procedures has to be applied by analogy also in the area of competition law.

other endeavours to curb illegal developments and pave the way for constructive solutions were undertaken and shall be briefly depicted up-front.

1. The traditional toolbox

The toolbox of approaches of handling EU Member States' rule of law infringements so far can be roughly grouped into three areas:

a) Primary law instruments

Proceedings for infringement and for preliminary rulings: under art. 258 TFEU (initiated by the Commission), art. 259 TFEU (initiated by Member States) and art. 267 TFEU (preliminary ruling proceedings initiated by Member States' courts), including systemic[19] infringement proceedings.

The first category comprises those measures that are laid out for legal enforcement under primary law. Despite obvious shortcomings and despite the fact that the rule of law drama is dragging on for years, only three judgments are at hands stemming from infringement proceedings initiated by the Commission. A fourth procedure, against the so-called "Muzzle Act"[20], stands at the interim relief that imposed a periodic penalty payment of € 1 Mio per day during non-compliance. All of these procedures relate to Poland. The Commission has not initiated a single infringement procedure against Hungary for problems relating to the rule of law in the narrow sense, but only for having infringed specific asylum, anti-discrimination and public procurement provisions. For example, on 16 November 2021 the ECJ ruled in Case C-821/19[21] on the unlawfulness under EU law of a Hungarian regulation stipulating that a person assisting with the filing of an asylum application (which is then unsuccessful) should be punished.

Not a single such (rule of law) infringement procedure has been initiated so far by other Member States in accordance with art. 259 TFEU, although this is not only possible for them, but their own constitutional situation is always also affected if another Member State calls into question shared fundamental principles such as here the rule of law.[22] Quite to the contrary, the example of Case *Turów mine*[23] where the action against Poland was filed by the Czech Republic, shows that a Member State's court action might yield suboptimal results for the

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19 Cf. *Scheppele*, Enforcing the basic principles of EU Law through systemic infringement actions, in *Closa/Kochenov* (eds.), Reinforcing rule of law oversight in the European Union (2016) 105-132.

20 The law was passed on 20 December 2019, see above section II.1.; ECJ C-204/21 R, *Commission v. Poland*, ECLI:EU:C:2021:593, para. 1. For a list of further potential subjects for future infringement procedures: *Pech/Wachowiec/Mazur*, 1825 Days Later: The End of the Rule of Law in Poland (Part I), https://verfassungsblog.de/1825-days-later-the-end-of-the-rule-of-law-in-poland-part-i/ (January 13, 2021).

21 ECJ C-821/19, *Commission v. Hungary*, ECLI:EU:C:2021:930.

22 On the values share and interdependency amongst Member States cf. *O. Mader*, Vol. 11 The Hague Journal of the Rule of Law 2019, 133 (139, 150 et seq.).

23 ECJ C-121/21 R, *Czech Republic v. Poland*, ECLI:EU:C:2021:752.

legal development and the environmental protection alike, when it does not end with a reasoned decision on the substance matter, but in a settlement between the countries that are parties of the legal dispute, with the consequence that the case is removed[24] from the register.

This category of solutions also embraces the sanction proceedings initiated against Poland and Hungary in accordance with art. 7 TEU (2017 against Poland[25], 2018 against Hungary[26]), which are stuck for political reasons: the two governments have assured each other of a reciprocal veto - and are therefore not discussed further here. From a legal point of view, there would be no reason for these procedures being stuck, because art. 354 TFEU (the non-participation of the respective Member State in the vote concerning itself) has to be applied by analogy. The veto rights fail if art. 354 TFEU was applied by analogy to all those Member States affected by art. 7 TEU proceedings at the same time (in parallel proceedings).[27] This is justified by the structural comparability of the situations of these two or more Member States in the art. 7 TEU proceedings, and by the fact that the legislator had not anticipated that more than one state is subject to art. 7 TEU proceedings at the same time.

b) Dialogue-oriented measures

The second category includes dialogue-oriented measures such as the rule of law framework[28], the justice scoreboard[29] and the Cooperation & Verification Mechanism (CVM) for selected Member States (Romania[30], Bulgaria and Croatia[31]) or even for all[32] Member States.

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24 ECJ C-121/21 R, *Czech Republic v. Poland*, ECLI:EU:C:2021:752.

25 Proposal of the Commission to introduce an art. 7 TEU procedure against Poland of 20 December 2017, COM(2017) 835 final, 24 et seq.

26 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)), OJ C 2019/433, 66.

27 For details, see *O. Mader*, Vol. 11 The Hague Journal of the Rule of Law 2019, 133 (164).

28 Cf. *European Commission*, 2021 Rule of Law Report - The rule of law situation in the European Union, COM(2021) 700 final (July 20, 2021); *European Commission,* 2020 Rule of Law Report - The rule of law situation in the European Union, COM(2020) 580 final (September 30, 2020); *European Commission*, A new EU Framework to strengthen the Rule of Law, COM(2014) 0158 final (March 11, 2014); see *Council of the European Union*, Presidency conclusions - Evaluation of the annual rule of law dialogue, Doc. No. 14173/19 (November 19, 2019); see also *Parliamentary Assembly of the Council of Europe*, Monitoring procedure on Poland (January 28, 2020).

29 *European Commission*, 2021 EU Justice Scoreboard, COM(2021) 389 (July 8, 2021).

30 Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ L 2006/354, 56 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption; *Popescu-Zamfir*, Building a constituency for rule of law. Lessons from the Romanian anti-corruption drive, https://www.oegfe.at/policy-briefs/building-a-constituency-for-rule-of-law-lessons-from-the-romanian-anti-corruption-drive/ (February 10, 2022).

31 See respective art. 37 and art. 38 in the Treaties of Accession for Bulgaria and Romania: Decision of the Council of the European Union of 25 April 2005 on the admission of the Republic of Bulgaria and Romania to the European Union, OJ L 2005/157, 9; and for Croatia see Decision of the Council of the European Union of 5 December 2011 on the admission of the Republic of Croatia to the European Union, OJ L 2012/112, 6.

32 Proposed in *O. Mader*, Vol. 11 The Hague Journal of the Rule of Law 2019, 133 (166).

Certainly, there is nothing against good communication, constructive dialogue and substantial exchange, yet in practice, the "method of dialogue" or the introduction of preparatory and preliminary measures *de facto* led to a delay in legal enforcement and to a worsening of the respective legislative and factual situation. In fact, "dialogue" had become the code for laissez-faire and procrastination.[33]

c) Financial instruments

The third category embraces the financial approach via the Conditionality Regulation[34] of December 2020, which links budget allocation to compliance with the rule of law. It originates at the idea of building up an incentive for correction by reducing financial allocations to be paid from the EU budget[35] and the pandemic recovery fund[36] to the Member State concerned. The purpose embraces the understanding that a Member State which receives EU funds must be able to manage them properly, including the ability to provide for independent courts in order to ensure effective legal protection within the meaning of art. 19 TEU.

Towards the end of the year 2020, a threat by the Polish and Hungarian governments to refuse or further delay the adoption of the 2021-2027 Multiannual Financial Framework and the recovery and resilience facility "*Next Generation EU"* caused that the adopted European Council Conclusions[37] - although not legally binding - further watered down the already modified content of the Conditionality Regulation. The originally envisaged reverse majority procedure was changed into a qualified majority procedure. Although it is to be perceived as a success for the protection of EU budget purposes that the Conditionality Regulation eventually entered into force, it is deplorable that fundamental principles relating to the rule of law have become the subject of negotiations along the development of the conditionality mechanism, and that its potential impact was weakened when changing into a less operational tool. Still, it allows to take protective measures also prospectively, because it embraces *serious risks* affecting sound financial management.

If the financial sanction of the mechanism is severe enough and applies timely, it could have a positive effect. After all, Poland (e.g. in the recovery and resilience facility "*Next Generation*

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33 An empirical, quantitative research on forbearance and under-enforcement: *Kelemen/Pavone*, Where have the Guardians Gone? Law Enforcement and the Politics of Supranational Forbearance in the European Union (2021); *Closa*, Reinforcing EU Monitoring of the Rule of Law, in *Closa/Kochenov* (eds.), Reinforcing Rule of Law Oversight in the European Union (2016) 33.

34 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, OJ L 2020/433, 1.

35 Cf. Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, OJ L 2020/433, 11.

36 In present prices, the recovery program foresees an investment of 807 billion €, with its core in the resilience facility at 672,5 b€ (in prices of 2018), out of which 360 b€ are planned as credits und 312,5 b€ as grants, see art. 2 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 2020/433, 23.

37 *European Council*, European Council meeting (10 and 11 December 2020) – Conclusions, https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

EU": grants of 23,9 billion €) and Hungary (there grants of 7.2 billion)[38] are the largest net recipients of EU funds in absolute terms. However, a sanction would run idle if a reduction in funds is to a certain extent only mathematically "offset" by parallel increases (and the *Next Generation EU recovery* fund first and foremost represents a massive increase in available funds), or would come too late to be attributed to the governments responsible for the backsliding, because elections would have brought a new government into power (while the inherited rule of law deficiencies would persist). That is the economic and political point of view, which probably hoped to have a sanctioning tool in hands.

aa) The question of the goal of conditionality

From a legal point of view, there is a preliminary question to be answered before focussing on a proportionate quantification of a budget cut as a measure of conditionality: should Member States, whose governments reject the concept of the rule of law and act accordingly by depreciating their standards over years, receive any funding from the EU at all? Already under formerly existing rules[39], EU funds can be retained or recovered (also set off[40] under budgetary law) by flat-rate corrections of up to 100 % in case of irregularities. The new rules attempt to pull the ropes together by tying rule of law breaches to the serious risks affecting sound financial management. Both are obviously conditions to be fulfilled cumulatively. As it stands, they require some operationalisation both on the *sufficiently direct link* and on the *quantification of reductions*: Art. 5 para. 3 of the Conditionality Regulation stipulates that "measures taken shall be proportionate", and "shall be determined in the light of the actual or potential impact of the breaches (...) on the sound financial management of the Union budget or the financial interest of the Union (...)". In accordance with art. 4 para. 1 Conditionality Regulation "appropriate measures shall be taken where it is established (...) that breaches (...) affect or

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38 *European Commission*, The EU's 2021-2027 long-term budget and NextGenerationEU, https://op.europa.eu/en/publication-detail/-/publication/d3e77637-a963-11eb-9585-01aa75ed71a1/language-en (April 2021).

39 Cf. art. 63 and art. 74 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, OJ L 2018/193, 1; art. 103 and art. 104 Common Provisions Regulation No. 2021/1060 of 24 June 2021, OJ L 2021/231, 159, flat-rate calculation in its Annex XXV; Commission Implementing Regulation No. 2017/646 of 5 April 2017 amending Regulation No. 2015/378 of 2 March 2015 laying down rules for the application of Regulation (EU) No. 514/2014 of the European Parliament and of the Council with regard to the implementation of the annual clearance of accounts procedure and the implementation of the conformity clearance, OJ L 2017/92, 36; see also Commission decision of 14.5.2019 laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement, C(2019) 3452 final (May 14, 2019) and other methodological texts for financial corrections in shared management: *European Commission*, Guidance on European Structural and Investment Funds 2014-2020, https://ec.europa.eu/regional_policy/de/information/legislation/guidance/.

40 Cf. art. 102 Financial Regulation 2018/1046 OJ L 2018/193, 1 and art. 100 para. 2 Common Provisions Regulation 2021/1060 OJ L 2021/231, 159.

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."

In the light of these terms, it is disputed under the Conditionality Regulation and its subsequent legal cases in how far the conditionality mechanism at all has the capacity to systemically protect rule of law standards in the Member State concerned. This very much depends on the objective of the Conditionality Regulation. To cast it into a short formula: while one side (broadly speaking represented by the Parliament) attempts to protect the rule of law in Member States by budgetary sanction means, the other side (broadly represented by the Council) tries to protect the Union budget by the rule of law.

When judging on the two actions for annulment brought forward by Poland and Hungary, the ECJ in full court clarified amongst other points that (1.) the EU must be able to *defend*[41] (within the limits of its powers) its shared values which define the very identity of the Union[42]; that (2.) Member States are able to determine the core content and legal requirements of the rule of law[43]; that (3.) the term 'financial interests of the Union' in the sense of art. 325 para. 1 TFEU encompasses not only revenue to the Union budget, but also expenditure covered by that budget,[44] because it contributes to the sound financial management of the budget; (4.) in relation to above-mentioned dispute about the goal and purpose of the Conditionality Regulation, the ECJ gave its preference to the second above interpretation when it states that the Conditionality Regulation "in no way conferred on the Council and the Commission an unlimited right to assess, in the light of political considerations, observance of the principles of the rule of law or to link any identified breach of those principles, in a general manner, to the principle of sound financial management of Union funds"[45], but that the mentioned conditions have to be fulfilled, particularly that a *sufficiently direct link* be systematically established between the breach and an effect or serious risk of an effect on that sound management and that the link must be "*genuine*"[46]. It is submitted here that, in result, some rule of law deficiencies will be spotted as to have a genuine[47] impact on spending and the Commission might choose to apply the conditionality mechanism for these, while in regard to other deficiencies that actually have an impact on sound financial management, are not beneficial for the country concerned, nor for its economic prosperity nor in line with EU law, it will not be undertaken by the Commission to establish in lengthy court proceedings that these deficiencies affect or

41 ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 145.

42 *Faraguna/Drinóczi*, Constitutional Identity in and on EU Terms, https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/ (February 21, 2002).

43 ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 264, 325.

44 ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 297; ECJ C-156/21, *Hungary v. EP and Council*, ECLI:EU:C:2022:97, para. 265; also ECJ C-357/19 i.a., *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para 183.

45 ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 305, 323, 358.

46 ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 178, 179, 215, 299.

47 Such as (in the case law for social security) a person seeking a jobseeker's allowance can be required by legislation to have sought work for a reasonable period - genuinely - in that Member State before: ECJ C-138/92, *Collins*, ECLI:EU:C:2004:172, para. 69, 70.

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. This latter group of breaches will sustain, as *faits accomplis*.

bb) Quantification of reductions

One avenue to justify budget cuts will lead via the establishment of proper evidence of irregularities in respect to sound financial management of EU funds. In practical terms, still, the question remains how genuinely linked deficiencies concretely translate into budget reductions. Not that it requires coordinated "guidelines"[48] to apply the Conditionality Regulation - that alleged obligation rather proceeds from an effort of how to avoid or at least delay the effective application of the Regulation. But the concept of quantification in the context of value protection deserves a basic a-priori consideration: it should be avoided to turn fundamental values into an object of mercantile trade-off, as if these could be "sold" at a certain percentage of flat-rate deductions against non-compliance. Looking at the political and legal hurdles, the most important motivation for a functional sanctions regime should not be punishment, the reduction of funds for a country or the protection of the EU budget, but rather the protection of the Union's legitimacy and credibility as a community of law and values, here in its special appearance as a solidary community capable of protecting sound financial management of its budget.

cc) Protection of final beneficiaries

According to art. 5 para. 2 of the Conditionality Regulation, the final recipients (i.e. the beneficiaries of the current regime) shall in any case keep the funds allocated to them, so that ultimately - in case of recovery of appropriations towards the EU - the taxpayers of the country concerned would have to carry the financial burden. A successor government (i.e. an opposition government in Hungary after the elections of 3 April 2022) would not be capable of acting in budgetary terms, because considerable amounts of state funds would have to be returned to the EU budget.

dd) Combined application of the available toolset

In terms of their approach, the three categories of instruments just mentioned (under primary law, dialogue-oriented and financial) are not mutually exclusive, but complement one another. The so far largely fruitless efforts to handle rule of law backsliding makes it clear that joint legal and political efforts in a combination of all three mentioned groups of instruments will be necessary in order not only to stop a further rule of law deterioration, but rather to

[48] C(2022) 1382 final of 2 March 2022.

sustainably embark on the paths towards better standards. At best, the other EU values that are structurally and socially closely related to the rule of law, namely democracy[49] and human rights in particular, are to be included in any solution for reasons of systematic interrelation. It is worthwhile taking a closer look at some recent judgments of the ECJ in this respect:

2. Operationalising judicial independence and non-regression

The type of development sought after was to find a consistent constitutional structure that would clarify the notion of independence of the judiciary, link it to the rule of law as art. 2 TEU value and at the same time operationalise the material scope of art. 19 TEU for national courts. The challenge was to achieve this in a way that protects the cooperation of national courts with the ECJ under art. 267 TFEU, without interfering with the responsibility of Member States to organise their court systems under national competence. The pathway chosen by the ECJ prepared the floor for developing the new principle of non-regression in respect to the values of art. 2 TEU.

a) Case ASJP and art. 19 TEU

For a long time, the Court of Justice has been deriving *subjective*[50] manifestations of the rule of law on the rights of individuals from general legal principles. One of these rights is the *effective judicial protection*.[51]

The potential of this right as an *objective* legal principle laid down in art. 19 TEU remained largely unrecognised. Yet, this provision is in fact suitable for uplifting the values out of the circle of political programmatic phrases foremost in order to outline the content and legally binding features of the rule of law. Therefore, an important dogmatic preparatory measure consisted in finding a link between the fundamental values of the EU and an organisational obligation in the treaties. With its judgment on Case *ASJP (Portuguese Judges)*[52] of 27 February 2018, the Court overcomes this challenge. It explicitly ties art. 19 TEU to the fundamental values by stating that art. 19 para. 1 subpara. 2 TEU gives concrete expression to the value of the rule of law stated in art. 2 TEU.[53] Art. 19 TEU assigns the task of ensuring judicial control in the legal order of the Union not only to the Court of Justice, but jointly also to national courts. Every Member State has to make sure that their courts within the meaning of Union law provide sufficient remedies to ensure effective judicial protection for individual parties in

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49 Cf. the link established by the ECJ when it states that a disciplinary chamber may or not be "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": ECJ C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, para. 153; in general, independence of the judiciary is linked to the trust a justice system enjoys in a democratic society: ECJ C-542/18 RX-II, C-532/18 RX-II, *Réexamen Simpson v. Council*, ECLI:EU:C:2020:232, para. 57.

50 E.g. on the rights of the defence, right to be heard, legal certainty: ECJ 85/76, *Hoffmann-La Roche*, ECLI:EU:C:1979:36, para. 9, 129; principle of non-retroactivity ECJ 63/83, *Kirk*, ECLI:EU:C:1984:255, para. 22; *O. Mader*, Verteidigungsrechte 131-283.

51 ECJ 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, para. 16-20.

52 ECJ C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 29; cf. *Pech/Platon*, Judicial independence under threat: The Court of Justice to the rescue in the ASJP case, Vol. 55 Common Market Law Review 2018, 1827 (1827 et seq.).

53 ECJ C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 32, 33.

the fields covered by EU law. Apart from this sought-after "activation"[54] or operationalisation of art. 19 TEU, the ECJ reaches the important finding that art. 19 para. 1 applies in the areas covered by Union law, "irrespective of whether the Member States are implementing Union law, within the meaning of Art. 51(1) of the Charter".[55]

It would not have been possible to solve *ASJP* on the basis of the specific Union jurisdiction alone, as the EU has no competencies to set standards or interpret the remuneration of national judges (neither for the disciplinary law of judges, the vetting and selection of judges, their promotion and retirement, etc.).

b) Case Repubblika

In its judgment on *Repubblika*[56] of 20 April 2021, the Court of Justice speaks for the first time of an obligation on the Member States to avoid a *regression* in their legislation, which could result from the fact that newly enacted rules undermine judicial independence. The Maltese association Repubblika had launched a popular action to challenge the procedure for appointing judges in Malta. The relevant Maltese constitutional provisions, unchanged between 1964 and a reform in 2016, give the Prime Minister certain rights in the appointment of judges. Repubblika believes that these powers cast doubt on the independence of the judges so appointed. However, candidates must meet certain material requirements and, since the reform in 2016, a committee for appointments in the judiciary has been entrusted with assessing the candidates before their appointment.

According to the ECJ, the required effective judicial protection presupposes the independence of the institutions concerned, which includes access to an independent court.[57] In addition, the principle of separation of powers is taken up, defined here as the independence of the courts from the legislative and the executive branch.[58] Each Member State must ensure that the independence of its judiciary is preserved and must refrain from any action which might undermine that independence.[59] With these steps, the Court of Justice prepared the ground for the postulate that national provisions relating to the organisation of justice "which are such as to constitute a *reduction*, in the Member State concerned, in the protection of

54 *Pech/Kochenov*, Respect for the Rule of Law in the Case Law of the European Court of Justice 156.
55 ECJ C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C:2018:117, para. 29.
56 ECJ C-896/19, *Repubblika*, ECLI:EU:C:2021:311, para. 64.
57 ECJ C-824/18, *A.B. and Others*, EU:C:2021:153, para. 108, 155 et seq.; ECJ C-619/18, *Commission v. Poland*, EU:C:2019:531, para. 57.
58 ECJ C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, para. 124.
59 ECJ C-354/20 PPU and C-412/20 PPU, *Openbaar Ministry*, ECLI:EU:C:2020:1033, para. 40, regarding the execution of European arrest warrants and the independence of the issuing authority.

the value of the rule of law, in particular the guarantees of judicial independence"[60] do not comply with art. 19 para 1. subpara. 2 TEU.

In the concrete case of *Repubblika*, the Court of Justice has come to the conclusion that EU law does not conflict with national constitutional provisions such as the Maltese rules on the appointment of judges. The Maltese appointment procedure does not undermine the trust which justice in a democratic society governed by the rule of law must inspire in individuals. The principle of non-regression applied to circumstances of the case *Repubblika* led to the conclusion that the legislative development in the Maltese judicial system is to be assessed as positive because it has led to more effective methods for the selection of independent judges. In a different factual and legal context, however, a legislative development could be assessed as negative because it would have to be qualified as a step backwards. This is what we see in the following case.

c) Case Romanian Judges I

The judgment of the ECJ on the case of *Romanian Judges I*[61] of 18 May 2021 contains some indications which are more likely to let the referring courts assume that a regression in judicial independence has occurred. In six main proceedings, various Romanian regional and appeal courts put the conformity of a national judicial reform under EU law to the test, specifically the establishment of a specialized department of the public prosecutor's office with exclusive responsibility for investigating crimes committed by judges and public prosecutors. The management position of this department can be provisionally filled without complying with the ordinary appointment procedure under national law. According to the Court of Justice, "compliance by a Member State with the values enshrined in Article 2 TEU is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State". A Member State "cannot, therefore, amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU".[62]

In *Romanian Judges I*, the scope of protection is expanded: in addition to the judiciary, public prosecutors are now also covered by the principle of the independence of the courts, at least for the areas mentioned in the judgment. A question still to be clarified is to what extent other professional groups, especially notaries and lawyers, are included in the protection.[63]

The central point in defining a ban of regression is to set a corridor of a kind of allowed "direction of movement" of legislative development: A Member State may not amend its legislation in such a way that the protection of the value of the rule of law is reduced. Applying this

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60 ECJ C-896/19, *Repubblika*, ECLI:EU:C:2021:311, para. 65.

61 ECJ C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, *Asociația „Forumul Judecătorilor din România"*, ECLI:EU:C:2021:393, para. 206 et seq.

62 ECJ C-83/19 i.a., *Asociația „Forumul Judecătorilor din România"*, ECLI:EU:C:2021:393, para. 162.

63 ECJ C-55/20, *Ministerstwo Sprawiedliwości*, ECLI:EU:C:2021:500 (affirmative *Bobek* on June 17, 2021), while the ECJ itself found that in the constellation of the case art. 47 Charter did not apply.

idea to the independence of the judiciary, this means that the "Member States are thus required to ensure that, in the light of that value, any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary".[64]

In its judgment on Case *WB*[65], the ECJ combined this concept with a protection derived from the *right of an individual* when it argues that an arbitrary seconding of judges by the Polish Minister of Justice to another court not only infringes the independence of judges under art. 19 TEU, but also violates the presumption of innocence of the accused person – i.e. against an individual right of the accused. In the case at hands, the presumption of innocence was derived from an EU directive. Thus – to put it in a pointed way – the independence of justice also follows from the subjective right of the accused to be presumed innocent. Obviously, this concept is of limited scope, as it only works in criminal law.

d) Case Romanian Judges II – Euro Box Promotion

Euro Box Promotion confirms (subsequent to *Romanian Judges I*) the binding character of the CVM – cooperation and verification mechanism – in all its parts, including on the precautions for ensuring compliance with the rule of law, also in respect to establishing effective and deterring sanctions for the protection of the financial interests of the Union. The ECJ had to decide whether Romanian courts may follow their constitutional court's jurisprudence even if it led – in combination with the Romanian legal provisions for time-limitation periods – to the impunity of a number of criminal offences for severe fraud or corruption.[66]

The judgment provides an important clarification on the principle of primacy when it extends the decentralised competence of national courts to disregard[67] decisions rendered by that state's constitutional court in cases where these decisions infringe EU law and where non-compliance with these decisions may be sanctioned by disciplinary measures against the judges. Again, the ECJ formulates judiciary-specific guidance to differentiate unjustified disciplinary measures against judges from otherwise acceptable constitutional organisation of the judiciary.

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64 ECJ C-83/19 i.a., *Asociația „Forumul Judecătorilor din România"*, ECLI:EU:C:2021:393, para. 162; ECJ C-791/19, *Commission v. Poland*, ECLI:EU:C:2021:596, para. 51.

65 ECJ C-748/19, *WB and Others*, ECLI:EU:C:2021:931.

66 On the consequences for Polish courts: *Filipek/Taborowski*, From Romania with Love, https://verfassungsblog.de/from-romania-with-love/ (February 14, 2022).

67 Cf. (yet at the time without the aspect of disciplinary sanction for judges) ECJ 106/77, *Simmenthal* ECLI:EU:C:1978:49, para. 21/23.

3. Assessment and consequences of the non-regression principle

a) Preservation and homogenization

First and foremost, the ban of regression requires the Member States to refrain from doing something. The concept of this principle, which refers to the values of art. 2 TEU and restricts itself to the preservation of the existing level of legislation, is consequential because generally speaking the judiciary is neither entitled to prescribe a certain legislative activity nor to propagate a specific constitutional model or organization of the justice of the Member States. However, the legal order of the Union presupposes the preservation of fundamental guarantees and rule of law standards. All that remains is the option of specifying and (in case) updating the respective contents of minimum standards when invoking the ban of regression. There is a positive side in such judicial self-restraint: a mere prohibition of backsliding does not expose itself to the criticism of questioning the constitutional plurality of Member States. The judicial review of the Court of Justice does not run the risk of prescribing a certain type of constitution or a certain judicial organization for the Member States, but rather only ties in with the existing constitutional conditions, maintaining the *status quo* of the legal standard found. In this way, instead of aiming at uniformity, it achieves the homogeneity[68] of national legal systems - which is more important for the purpose of integration. In terms of European constitutional pluralism, the new principle has a function of homogenising constitutional minimum standards.

b) What is the reference point of (non-)regression?

According to the wording, the point of reference for avoiding regression is the existing legal framework in the respective Member State which is subject to a legislative change (particularly by way of a judicial reform). There would have been other options for development of this case law: The Court of Justice avoids using the historical rule of law situation – for example at the time of a Member State's accession to the EU – as a yardstick for assessing regression, it does not seek a connection to accession standards via art. 49 TEU or the *Copenhagen*[69] criteria.

Nor does it apply an abstract minimum standard of rule of law, which, in a way, should not be undermined as a normative threshold and reference point for stepping backwards. Rather, non-regression merely refers to the other principles. Only the respective baseline of legislation in the specific Member State can serve as a reference point for assessing regression.

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68 *O. Mader*, Vol. 11 The Hague Journal of the Rule of Law 2019, 133 (144 et seq.).

69 *European Council*, European Council in Copenhagen 21-22 June 1993 – Conclusions of the presidency, Doc. No. SN 180/1/93, 13; see *section* IV.3.d.

Nor does the Court of Justice use the precondition of judicial independence under art. 267 TFEU for its solution: As is well known, the independence and impartiality of courts are admissibility requirements for submitting requests for preliminary rulings to the ECJ. In the case of systemic rule of law deficits[70], the ECJ could have chosen the path of denying to the courts of a Member State their right to refer. By doing so, the Court would inevitably have broken off the judicial cooperation with this Member State – and any return would be extremely difficult.

The principle of non-regression as described here closes an important dogmatic gap: Because many changes of legislative and organisational norms having an impact on the realisation of the rule of law occur in the guise of an incremental change in a large number of individual norms that might be trivial in themselves, but, as part of an overall plan for systemic change in legal protection can cause a significant reduction in rule of law standards.

c) Non-regression as a metaprinciple

The principle of non-regression is a *metaprinciple* insofar as it does not contain its regulatory content in itself, but has to refer to other principles and necessarily relies on them: A ban of regression does not in itself indicate what a backsliding or progress may be, but its application requires a reference to the content of standards or values that act as addressees. Case law already recognises that European integration is not static, but subject to dynamics that are not only driven by Union law, but also by individual legislative and judicial activity in the Member States. In this sense, non-regression strives to orientate this dynamic in view of the values of art. 2 TEU and in relation to the accession requirements of art. 49 TEU.

d) Does this solve the Copenhagen dilemma?

In order to become a member of the EU, according to art. 49 TEU, the values specified in art. 2 TEU must be observed. The reference to constitutional and democratic principles goes back to the Copenhagen criteria, compliance with which induced suitable reforms and preceded the accession of every candidate country after 1993. Compliance with these requirements were thus the subject of accession negotiations. In this context, the *Copenhagen dilemma* is sometimes referred to in order to point out that the same political argument of delaying or refusing accession is no longer available as a means of pressure to improve the legal framework, once the accession of a state has taken place, because EU law only knows accession criteria, but not options for exclusion. It is worthwhile mentioning that at times, the term *Copenhagen dilemma* served as pretext for not appropriately and timely acting in the

[70] E.g. those pleading for this could point to the fact there are 1,500 neo-judges out of 10,000 Polish judges.

face of rule of law backsliding, and it is therefore suggested to use the term only with the required precaution.

Now, the new principle of non-regression provides the clarification that it is in any case not a permitted direction of development for an acceded member state to dismantle the standards once reached, let alone to go back below the basic requirements of art. 49 TEU for accession.[71] As the ECJ explicitly confirmed in subsequent case law, the obligation to abide by the shared[72] values of art. 2 TEU cannot be reduced to an obligation which a candidate State must only meet in order to accede to the European Union, but the obligation persists after its accession.[73] The "dilemma" (if there ever was one) is therefore resolved as far as it refers to the content of the rule of law determined autonomously by the Court of Justice, because from that perspective it is clear that *any* backsliding is not allowed, including certainly such a massive that would catapult a state back to a level before its accession.

e) Does the principle of non-regression protect all the values of art. 2 TEU?

The ECJ case law developed the principle of non-regression in connection with some aspects of the rule of law, in particular the guarantee of an effective legal remedy and the independence of Member State courts. An ensuing question is as to whether this concept, over and above the rule of law, also applies to a potential regression in *other* values of art. 2 TEU. The other basic values mentioned there are respect for human dignity, freedom, democracy, equality and respect for human rights including the protection of minorities; in addition, society should be determined by pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men. These values form abstract constitutional characteristics with very different directions of impact. Values are, to put it with *Luhmann*, an expression of "maximum relevance with normative content"[74], thus largely indefinite categories, about the normativity of which one would have to agree, also in order to avoid what was called a "tyranny of values"[75]. At least for the principles counted amongst the rule of law it can be said that the common and shared concept amongst the Member States is clear enough to be applied and adhered to, even if they undergo a development. Therefore, the assertion that the rule of law cannot be used as standard because it is too vague or because there may be

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71 cf. *Kochenov/Dimitrovs*, Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice, https://verfassungsblog.de/solving-the-copenhagen-dilemma/ (April 28, 2021); *Pech/Kochenov*, Respect for the Rule of Law in the Case Law of the European Court of Justice 165 et seq.

72 On a wide and substantial („thick") understanding of the common values see ECJ C-621/18, *Wightman and Others*, ECLI:EU:C:2018:999, para. 63; ECJ C-619/18, *Commission v. Poland*, ECLI:EU:C:2019:531, para. 42; ECJ C-216/18 PPU, *Minister for Justice and Equality*, ECLI:EU:C:2018:586, para. 49.

73 ECJ C-157/21, *Poland v. Parliament and Council*, ECLI:EU:C:2022:98, para. 144, also 201, 282, 284; ECJ C-156/21, *Hungary v. Parliament and Council*, ECLI:EU:C:2022:97, para. 126.

74 „Höchstrelevanz mit normativem Gehalt": *Luhmann*, Gibt es in unserer Gesellschaft noch unverzichtbare Normen? (1993) 19.

75 Cf. *Schmitt*, Tyrannei der Werte (1967).

national distinct approaches was correctly refused by the ECJ in its two judgments on the Conditionality Regulation.[76]

Where the Member States pledge adherence to values, they may continuously develop concepts for their application. Under this presumption, in principle, the concept of non-regression may apply to the other values of art. 2 TEU, too, but requires further differentiation and substantiation of Union law in these value categories similar to what has been elaborated on the various aspects of the rule of law, in order to be determined and precise enough. The broadening of such concepts carries the risk that specific norms be used as door opener for the application of rights that are explicitly limited to a certain scope under the principle of conferral, most importantly the scope of the Charter of Fundamental Rights.[77] As has been shown above (section IV.2.a. Case *ASJP*), the ECJ used e.g. art. 19 TEU as a norm that served to operationalise the concept of judicial independence. A widened application of the principle of non-regression to other values (here particularly fundamental rights) should however not lead indirectly to an extension of the scope of application of the Charter of Fundamental Rights - which is explicitly limited: Art. 51 para. 1 Charter.[78]

f) Non-regression principle and Context Method

Preliminary rulings under art. 267 TFEU render an autonomous interpretation of terms under Union law, whereas the referring court then applies the interpretation and is to take a substantive decision on the specific case.[79] The division of tasks corresponds to the traditional understanding of cooperation between the courts in preliminary ruling proceedings. This method aims to secure "uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties"[80]. What can be observed is that since the decision in case *AK* of the year 2019, and even more clearly since the more recent judgments on case *AB* and *Romanian Judges I* of the year 2021, the Court of Justice applies the so-called "context method"[81] in the area of rule of law review as a special form of judicial cooperation style. It is

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76 ECJ C-156/21, *Hungary v. EP and Council*, ECLI:EU:C:2022:97, para. 234; ECJ C-157/21, *Poland v. EP and Council*, ECLI:EU:C:2022:98, para. 266: "the Member States adhere to a concept of 'the rule of law' which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times".

77 In detail on this aspect *O. Mader*, EuZW 2021, 917 (920).

78 Or cause any other interference with structural principles determined in art. 52 and art. 53 Charter.

79 ECJ C-83/14, *CHEZ Razpredelenie Bulgar*, EU:C:2015:480, para. 71.

80 ECJ C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2020:234, para. 55.

81 ECJ C-585/18, C-624/18 and C-625/18, *A.K.*, ECLI:EU:C:2019:982, para. 131, 140; ECJ C-824/18, *A.B. and Others*, EU:C:2021:153, para. 108, 155 et seq.; ECJ C-619/18, *Commission v. Poland*, EU:C:2019:531, para. 108, 155 et seq.; ECJ C-619/18, *Commission v. Poland*, EU:C:2019:531, para. 57; ECJ C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2020:234, para. 33; and six other judgments.

submitted that the combination of the non-regression principle and the context method in preliminary ruling proceedings amount to a paradigm shift.

For example, according to the context method, also the specific national setting, in which the legislative framework was created and in which the appointments were made, would have to be taken into account when assessing the question of the independence of the disciplinary chamber in terms of its competences, its composition, the conditions and modalities of appointment of the judges working in it, etc. The basic idea of the context method is that a national court, thanks to its special knowledge of the legal and factual circumstances ("*de iure & de facto*") can best assess how a legislative reform of a country's judicial organisation affects the independence of the courts and the working conditions of the judges on the ground. Both aspects of contextual assessment are therefore entrusted to the national court.

III. Summary and outlook

Linking legal compliance with budget allocations (conditionality) has become a necessary, but not sufficient measure to build up incentives for restoring conformity of national justice organisation with EU fundamental rule of law principles. A national legal development that encroaches the effectiveness of the judiciary or hinders an operational audit system rather cries out for restoring the independence of judges and for restoring the capabilities of sound financial management respectively. A sanction that on the other hand merely reduces funds might not be a proper means to obtain such goals.

The ECJ develops its solution (1.) by stating a principle of non-regression in relation to standards that have already been reached in that respective Member State, (2.) by operationalising art. 19 TEU as the fulcrum of a functioning European network of judicial cooperation that requires real independence and impartiality of Member State courts, and (3.) by introducing a context method in procedures for preliminary rulings on subjects relevant to the rule of law.

As advocated here, the new principle of non-regression basically also applies to other fundamental values of the EU. It cannot undo the damage that has occurred, and for the healing of which the Member State concerned remains responsible, particularly – but not only – by re-establishing appropriately high standards of judicial independence. This conclusion likewise can be drawn from the context method applied in referrals as the new paradigm for judicial cooperation in matters of rule of law breaches.

The measures taken in preliminary ruling proceedings to protect the rule of law somehow remain "incomplete" also due to the context method: In preliminary rulings, the actual decision on the substance matter has yet to be taken by the national court, only deciding on the individual case. At the same time, these national courts are under pressure from attacks on their own independence. In this respect, infringement proceedings would be methodologically the better option to allow the Court of Justice to exercise its jurisdiction in matters of the

rule of law effectively, with directly enforceable content and broader impact. Infringement proceedings conclude with abstract and general decisions, not just on a case-by-case basis, with the effect that the scope of legal effect is different, as the ECJ[82] itself states in *Miasto Łowicz*.

In circumstances where judicial independence has already been destroyed, the context method could lead to isolation and further dismantling of the rule of law if it enabled neo-judges to falsely (i.e. in bias) confirm the would-be "independence" of their court within the context of a broad contextual scope of assessment.

These considerations display how important it will be in practice to rely on the advantages and effects of *both* procedures concurrently (infringement proceedings and preliminary references). In any case, a legal development that is at large based on case law, heavily relies on appropriate case material to be put timely forward to the court. Sometimes, such development was even propelled in *obiter dicta* handed down on *inadmissible* applications (cf. the requests for preliminary ruling in *Miasto Łowicz*[83]).

The ECJ advances an adjusted method of cooperation to the national courts that also includes the constitutionally highly sensitive areas of fundamental values. Insofar as the ECJ integrates national judges in assessing the situation *de jure* and *de facto*, it renews its offer to the courts of Member States to determine together with the Court of Justice the fundamental values of the EU and to ensure their enforcement with joint efforts, now by applying the new meta-principle of non-regression.

82 ECJ C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2020:234, para. 47.

83 ECJ C-558/18 and C-563/18, *Miasto Łowicz*, ECLI:EU:C:2020:234, para. 55; on this *Platon*, Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Łowicz, Vol. 57 Common Market Law Review 2020, 1843.