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CANARIES IN A COAL MINE: RULE OF LAW DEFICIENCIES AND MUTUAL TRUST

Abstract: *The value decline in the EU has manifold consequences. It jeopardizes the very essence of Europe as a community of values. At the same time it endangers legal principles, such as mutual recognition, which is based on mutual trust presuming that all Member States are based on the rule of law and protect fundamental rights. Once trust is rebutted, Member States' judicial authorities will refuse to cooperate and recognise each other's judgments in order not to become complicit in individual rights violations and not to contradict the European Convention for the Protection of Human Rights and Fundamental Freedoms. This paper argues that EU law must allow for such considerations and suspend mutual recognition-based laws not only on a case-by-case basis, as it happens today in practice, but in general with regard to Member States undergoing rule of law decline, in order to uphold the EU's fundamental rights culture, and EU law's equivalency with the Convention's human rights regime.*

Key words: rule of law, judicial independence, human rights, fair trial rights, mutual trust, mutual recognition, EU law, European Arrest Warrant, European Convention on Human Rights, Bosphorus presumption.

1. RULE OF LAW DECLINE IN THE EU

The rule of law, democracy and fundamental rights, all enshrined in Article 2 of the Treaty on the European Union (hereinafter: TEU) along some other values, have a special place in EU law. These are the values that capture the very essence of Europe as “a community of values (*Wertegemeinschaft*)”, a representative of a certain tradition, which has created – though amongst pain and failures – patterns for a humane and at the same time viable world order”.¹ These are the values that all Member

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1 Hassemer, W., 2004, *Strafrecht in einem europäischen Verfassungsvertrag*, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 116, No. 2, pp. 304–319, p. 308.

States are expected to share and promised to respect and promote when signing the Treaty of Lisbon.² The rule of law, democracy and fundamental rights are co-constitutive, and inherently interconnected. Once one of them is violated, the other cannot be left intact either.³ The rule of law without democracy is a contradiction, while democracy without the rule of law may easily turn into the dictatorship of the majority. In addition, fundamental rights are closely interlinked with the other two values.⁴ Take for example the relation between freedom of expression, the right to receive information and informed participation in a democracy. One can only make informed choices during elections, or meaningfully participate in public debates in the possession of knowledge about the facts.⁵ One may wish to add academic freedom to show the interrelatedness of rights and democracy: “[o]ne of the things about a democracy that people forget is how important knowledge is [...] If you don’t have knowledge then all you get to go on is tweets and Facebook, and rumors and fantasy and paranoia [...] You need knowledge in order to make choices.”⁶ Finally let me mention an aspect of the correlation between values that is of direct relevance for this paper. Judicial independence, an integral part of the rule of law is one side of the coin, the other side of which is the suspect’s right to a fair trial. Should the former be violated, the latter will not be guaranteed either.

Taking up on this latter point, from among Article 2 TEU values, the rule of law including judicial independence, or rather the lack of it, is of

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- 2 Cf. Art. 2 TEU: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” Art. 3(1) TEU: “1. The Union’s aim is to promote peace, its values and the well-being of its peoples.”
 - 3 Carrera, S., Guild, E., Hernanz, N., 2013, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, Brussels, CEPS.
 - 4 Bárd, P. et. al., 2016, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels, CEPS.
 - 5 Bayer, J. et. al., 2019, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States*, Brussels, European Parliament, Policy Department C, Citizens’ Rights and Constitutional Affairs, p. 62.
 - 6 See the speech by Michael Ignatieff, Professor and then Rector and President of the Central European University chased out of Hungary by the government in the middle of the legal and political turmoil around the university’s presence in the country, (https://www.youtube.com/watch?v=FoMd_Bxn5rg&feature=youtu.be&fbclid=I-wAR2uHR_3m4w5DbB1ndIBRbvYHfHT_eIB9_V9kaaXvfi7_X16dDYclajnDEg). See also CJEU, case C-66/18, *Commission v. Hungary* (Higher Education), Judgment of the Court (Grand Chamber) of 6 October 2020, ECLI:EU:C:2020:792.

special importance for illiberal regimes.⁷ Interpreting and applying EU law is the joint task of the Court of Justice of the European Union (hereinafter: CJEU) and domestic courts. Upholding EU law is only possible if judiciaries at the various levels of EU governance cooperate. A prime form of this cooperation is the procedure of preliminary references under Article 267 TFEU. Whenever the meaning of a piece of EU law is unclear, domestic courts must turn to the CJEU, which is the sole interpreter of EU law. Should national judges be subjected to disciplinary proceedings for inviting the CJEU to give an interpretation of EU law, as the Polish ‘muzzle’ law dictates,⁸ and as it happens in Hungary on an *ad hoc* basis,⁹ the application of EU law, and thus the whole EU legal system is fundamentally jeopardized. In other words, judicial independence is important for both guaranteeing human rights with an emphasis on the right to a fair trial in criminal cases, but also for the proper application of EU law.

In this chapter we will show the scale of rule of law decline and argue that the EU fails to respond to the phenomenon in a dissuasive and effective manner, even though it has the tools arsenal to tackle the problem. In chapter 2, the consequences of rule of law backsliding – normalised by EU institutions’ passivity will be explained for mutual recognition-based laws in the field of judicial cooperation between the Member States in criminal matters, with special regard to surrender procedures. It will be argued that neither black letter law, nor the judicial tests developed by the CJEU take due account of fundamental rights threats resulting from rule of law decline. In chapter 3, the most immediate effects on the individual and individual rights will be shown, which have both external and intra-EU consequences. Member States may get into conflict with the European Convention on Human Rights (hereinafter: ECHR) when adhering to EU law, as a recent line of European Court of Human Rights (hereinafter: ECtHR or Strasbourg) case-law shows. At the same time, inside the EU, executing courts may fail to recognise judgments of captured courts and non-courts in order not to become complicit in individual rights violations and not to contradict the

7 In this paper we do not go into the various labels attached to such regimes in the political science literature, such as “hybrid regimes”, or “competitive” or “electoral authoritarianisms”, but will accept the self-proclaimed illiberal nature of government. See Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014, Budapest Beacon, 29 July 2014, translated at <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>.

8 CJEU, case C-791/19, *Commission v. Poland* (Régime disciplinaire des juges), Judgment of 15 July 2021, ECLI:EU:C:2021:596; and case C-204/21, pending.

9 CJEU, case C-564/19, *IS* (Illégalité de l’ordonnance de renvoi), Judgment of 23 November 2021, ECLI:EU:C:2021:949. For an immediate analysis see Bárd, P., 2021, The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS, *VerfBlog*, (<https://verfassungsblog.de/the-sanctity-of-preliminary-references/>, 26. 11. 2021).

ECHR, which in turn may go against their EU law obligations. In the concluding chapter a clear suggestion will be formulated to ease the tension between First Principles and a fundamental rights culture. It will be suggested that mutual trust is suspended with regard to Member States whose governments are the most notorious rule of law violators engaging in systemic dismantling of Article 2 TEU values, until these are restored.

1.1. THE SCALE OF THE PROBLEM

Even though the mentioned Article 2 TEU values including but not limited to the independence of the judiciary had been taken for granted for a long time in the EU, a solid decline started a decade ago in Hungary and other Member States are following suit. By now, the EU is harboring Member States that are no constitutional democracies anymore. Were they to apply for EU membership today, they would not be admitted to the European club. Poland and Hungary are undergoing Article 7(1) procedures designed to determine a clear risk of a serious breach of Article 2 TEU values.¹⁰ According to think tanks, Hungary and Poland are among the top three autocratizing countries.¹¹ Whereas in 2009 both Member States were clustered as liberal democracies, by 2019 Hungary became an electoral autocracy and Poland an electoral democracy.¹² For the first time in the history of EU integration, in 2020 Freedom House stopped placing a Member State, Hungary among the “free countries”.¹³ In many states including Poland and Romania separation of powers has weakened, and international cooperation has decreased.^{14,15}

10 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)); European Commission, 2017, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law COM(2017)835 final.

11 V-Dem Institute, (<https://www.v-dem.net/en/>).

12 V-Dem Institute, 2020, *Autocratization Surges–Resistance Grows, V-Dem Annual Democracy Report*, Gothenburg, V-Dem Institute, p. 16.

13 Freedom House, <https://freedomhouse.org/countries/freedom-world/scores>. Degrading the country with respect to freedom, happened in 2020, but the situation did not change for the better in 2021 either. Maksimov, V., 2011, Hungary Drops in Freedom House Report, *Euractiv*, (https://www.euractiv.com/section/politics/short_news/hungary-drops-in-freedom-house-report/).

14 BTI, The Transformation Index, (<https://www.bti-project.org/en/home.html?&cb=00000>).

15 WJP Rule of Law Index, 2020, (<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>).

No state is immune to individual violations of Article 2 TEU values. However, we must distinguish between sporadic instances of rule of law violations from systemic rule of law decline, such as the well-documented cases of Hungary, and more recently Poland. The governments of these countries introduced processes “through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power entrenching the long-term rule of the dominant party.”¹⁶

1.2. THE EU-RELEVANCE OF RULE OF LAW DECLINE IN A MEMBER STATE AND THE LACK OF DISSUASIVE RESPONSES

The value decline in the EU has manifold consequences. It endangers the very essence of Europe as a community of values, based on democracy, the rule of law, fundamental rights. At the same time also so-called First principles¹⁷ are endangered, which are based on the assumption that all Member States are based on the rule of law and protect fundamental rights and in all Member States independent courts will ensure the application of EU law. Should this not be the case, it will have an impact in many EU fields, but the most immediate effects on the individual and individual rights will be traced in the area of EU criminal justice. In EU criminal law a series of legal instruments are based on the principle of mutual recognition, which again are based on the presumption of mutual trust. Once trust is rebutted, Member States’ judicial authorities will refuse to cooperate and recognise each other’s judgments. As explained above, judicial independence, a significant element of the rule of law and fair trial rights of the individual are two sides of the same coin. Executing courts will fail to recognise judgments of captured courts in order not to become complicit in individual rights violations.

It is therefore existential for the EU to react to rule of law violations and other value deficiencies in the Member States. The EU also possesses a sufficient number of tools to counter these problems. The Copenhagen dilemma, having strong scrutiny before accession, but no dissuasive re-

16 Pech, L., Scheppele, K. L., 2017, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, Vol. 19, pp. 3–47, p. 10. See also Müller, J-W., 2015, Should the EU Protect Democracy and the Rule of Law inside Member States, *European Law Journal*, Vol. 21, No. 2, pp. 141–160.

17 Koncewicz, T. T., The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First Principles in: Szczepanowska-Kozłowska, K. (ed.), 2020, *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin*, Warsaw, C.H. Beck, pp. 223–240.

sponses after, exists on the one hand because these tools have a scattered and patchwork nature and on the other because the institutions and the Member States which are entitled to use the tools they have available are reluctant to do so.¹⁸ Several authors argue that the trend of creating new tools of monitoring and discussion platforms only gives the false semblance that the EU takes steps against rule of law backsliding, whereas in reality they only let illiberal regimes get away with deconstructing any checks on governmental powers.¹⁹

The wide variety of rule of law enforcement tools include Article 7(2)-(3) TEU, which might not be effective due to its high political threshold necessary for the respective procedure to lead to a determination of the existence of a serious and persistent breach of any Article 2 TEU value by a Member State, and to result in legal consequences. But the Commission could certainly make better use of infringement procedures, and rule of law conditionality tools.

Articles 258 and 260 TFEU provide for Commission-initiated infringement procedures. These are currently heavily underused in the enforcement of the rule of law.²⁰ As we have argued elsewhere,²¹ for Article 258 infringement procedures to be truly effective, the European Commission shall frame rule of law problems as such; shall act promptly and not waste time during the first phase of the process, while a Member State openly violates the rule of law; interim measures should be used to put an

18 Pech, L. *et al.*, 2019, Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid. RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, *Reflection Paper*, No. 1.

19 Tool creation however seems to be unjustified: “rather than acting decisively using existing tools in a mutually reinforcing and forceful way, there seems to always be a persistent temptation to blame the instruments available to either justify their non-activation, or their timid use”. Pech, L., Wójcik, A., 2018, “A Bad Workman Always Blames His Tools”: an Interview with Laurent Pech, *VerfBlog*, (<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>, 28. 5. 2018). R. Daniel Kelemen also makes this point rather forcefully, when he compares the EU to “a home repair DIYer who constantly goes to the hardware store to buy new tools, rather than actually getting started on projects with the tools he has”. He sees this phenomenon not only unnecessary, but as a cheap excuse for inaction. See UCL European Institute, 2020, Curing the Virus of Autocracy in Europe: Q+A with Daniel Kelemen, *UCL Europe Blog*, (<https://ucluropeblog.com/2020/12/07/curing-the-virus-of-autocracy-in-europe-qa-with-daniel-kelemen/>, 7. 12. 2020).

20 Pech, L., 2021, Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas, *RECONNECT Policy Brief*, pp. 8–11, (https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf).

21 Bárd, P., Śledzińska-Simon, A., 2019, Rule of Law Infringement Procedures – A Proposal to Extend the EU’s Rule of Law Toolbox, *CEPS Papers in Liberty and Security in Europe*, No. 9.

immediate halt to rule of law infringements that can culminate in serious and irreversible harm; and the CJEU shall automatically prioritize and accelerate infringement cases with a rule of law element. Also, the Commission could bundle cases, and point to the systemic nature of various problems.²² Finally, in line with Article 260, once a violation of Article 2 TEU is determined by the CJEU, the Commission should closely scrutinise and carefully assess whether the Member State in question took the necessary measures to comply with the judgment, and if not, it should bring the case before the Court, specifying the amount of the lump sum or penalty payment to be paid by the Member State.

Also, several studies show at the power of the purse *vis-à-vis* rulers that engage in rule of law backsliding.²³ In line with Regulation (EU) No 1303/2013, the Commission could suspend European Structural and Investment Funds where a Member State does not uphold the rule of law.²⁴ The institutions could have made a more frequent use of the above law, but for future cases, now there is a more comprehensive conditionality regulation in force: a Regulation on the protection of the Union's budget in case of generalized rule of law deficiencies in the Member States, which may lead to suspend or reduce payments to that country from the EU budget and may prohibit to enter into new legal commitments (hereinafter: Conditionality Regulation).²⁵ According to the text adopted, rule of

- 22 Scheppele, K. L., Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures, in: Closa, C., Kochenov, D. (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP, p. 105.
- 23 Halmai, G., 2018, The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States, *EUI Department of Law Research Paper*, No. 6; Bugarič, B., 2014, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, *LEQS Paper*, No. 79; Closa, C., Kochenov, D., Weiler, J. H. H., 2014, Reinforcing Rule of Law Oversight in the European Union, *Robert Schuman Centre for Advanced Studies Research Paper*, No. 25.
- 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 and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, *OJ L* 347, 20. 12. 2013, Article 142(1)(A). Butler, I., 2018, *Two proposals to promote and protect European values through the Multiannual Financial Framework: Conditionality of EU funds and a financial instrument to support NGOs*, Civil Liberties Union for Europe, (<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>). Kelemen, R. D., Scheppele, K. L., 2018, How to Stop Funding Autocracy in the EU, *VerfBlog*, (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>), 10. 9. 2018).
- 25 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* 4331, 22. 12. 2020, pp. 1–10.

law breaches will be sanctioned if they affect or seriously risk affecting the Union budget or EU's financial interests in a sufficiently direct way.²⁶ Several compromises led to the final version of the Regulation, but even so, once it entered into force, two Member States attacked it in front of the CJEU.²⁷ The European Parliament in a Resolution²⁸ emphasized that it is the duty of the Commission to ensure the application of the Treaties and other pieces of EU laws including the Conditionality Regulation, and that the Commission must “abide by law, *dura lex sed lex*”, and not wait for the outcome of the CJEU challenge before triggering the new instrument.^{29,30} But the Commission failed to act, therefore the European Parliament ultimately filed an action against the Commission in line with Article 265 TFEU.³¹ So again, even though the new instrument is promising in the medium term, its failure of its timely use shows an openness to give in to rule of law violators, and an unwillingness on behalf of at least certain institutions to make prompt use of a new instrument that was allegedly more needed than ever.

2. MUTUAL TRUST, MUTUAL RECOGNITION, AND JUDICIAL TESTS TO SUSPEND THEM

Rule of law decline, including violations of judicial independence have a particular effect on the relation between judges at the various levels of the EU's system of multi-level constitutionalism, especially on the cooperation between domestic courts in the area of freedom, security and justice (hereinafter: AFSJ). The principle of mutual trust assumes that, however different criminal and criminal procedural laws across EU member states are, all persons will get a fair trial by an independent judiciary complying with minimum standards of fundamental rights and procedural

26 Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020) – Conclusions, Brussels, EUCO 10/20, 21 July 2020.

27 CJEU, cases C-156/21, *Hungary v. Parliament and Council*, 26 March 2021, pending; C-157/21 *Hungary v. Parliament and Council*, 26 March 2021, pending.

28 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) OJ C 445, 29.10.2021, pp. 15–17.

29 *Ibid.*, point 6.

30 For an academic account of the reasons for which the Conditionality Regulation could be triggered see Scheppele, K. L., Kelemen, R. D., Morijn, J., 2021, *The EU Commission has to Cut Funding to Hungary: The Legal Case, Report*, Brussels, Greens/EFA Group, European Parliament, (https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf, 7. 7. 2021).

31 CJEU, case C-657/21, *Parliament v. Commission*, lodged on 29 October 2021, pending.

guarantees at all times, wherever they are in the EU. This optimistic starting point is backed up by the mentioned black-letter law of Article 2 TEU, the text of the Charter of Fundamental Rights, a series of secondary laws on criminal procedure, and standards on detention conditions. But it has also been reconfirmed by the CJEU on multiple occasions.³²

In Opinion 2/13³³ the CJEU reiterated how crucial mutual trust was; in fact it was deemed to be of such essential importance that it appeared as one of the reasons why EU accession to the ECHR was not warranted. The CJEU stated that EU Member States are required to presume that fundamental rights have been observed by other Member States, and trust may only be suspended in exceptional circumstances. This case-law is recurring in the CJEU's jurisprudence up to this day, as shown in the following.

Scene 1: Judicial “reform”

In a series of cases in relation to the framework decision on the European Arrest Warrant,³⁴ which foresees a simplified and expedited extradition within the AFSJ, the CJEU insisted that mutual trust as such must not be suspended, until the sanctioning prong of Article 7 TEU has not been applied – something which has never happened in EU history. It allowed domestic courts however, to deny surrender requests on fundamental rights grounds on a case-by-case basis. First in *Aranyosi and Căldăraru* with regard to prison conditions,³⁵ later in the *LM* case with regard to the right to a fair trial,³⁶ the CJEU developed a test on how to proceed in cases where the executing authority has doubts as to fundamental rights in the issuing country. Accordingly, as a first step, the executing judicial authority must assess whether the issuing state suffers

32 Starting with Case, C-294/83, *Les Verts*, EU:C:1986:166, where the CJEU held that neither EU institutions nor the Member States are above the law. A whole new case-law emerged on judicial independence since the Case C-64/16 *Associação Sindical dos Juizes Portugueses* (Portuguese Judges) of 27 February 2018, EU:C:2018:117. For an excellent comprehensive summary see Pech, L., Kochenov, D., 2021, 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, *SIEPS*, No. 3, (https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf?).

33 Court of Justice of the European Union, Opinion 2/13 of 18 December 2014, ECLI:EU:C:2014:2454, para. 192.

34 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ L* 190, 18. 7. 2002, pp. 1–20.

35 Joined Cases C-404/15 and C-659/15 PPU – *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198, para. 81.

36 Case C-216/18 PPU *LM* Minister for Justice and Equality (Deficiencies in the system of justice), 25 July 2018, ECLI:EU:C:2018:586, para. 70.

from general deficiencies. When doing so, it must consider objective, reliable, specific and properly updated information. Once a systemic problem with regard to Article 2 TEU values is determined, judges have to move to the second, individual prong of the test, and the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the person concerned by a European Arrest Warrant, will be exposed to a real risk of a human rights violation.³⁷ This prong of the test is extremely burdensome for the individual, because it is close to impossible for them to prove how they would be affected by systemic problems in a Member State. We have long disagreed with the second prong of the test and suggested an alternative. “Once the first step of the test is satisfied, the onus should shift to the stronger party, *i.e.* the state accused of rule of law violations, in light of the bedrock of the principle of a fair trial [...]”³⁸ The insistence of the CJEU that the executing and issuing courts acquire engage in a ‘dialogue’ about the issuing state’s human rights situation may make sense with regard to prison conditions. But it is absurd to make a court engage in a discussion about its own independence.

Scene 2: The muzzle law

In the meantime matters in Poland have gone from bad to worse since the judgment in *LM* had been rendered, even by the CJEU’s own account. Luxembourg denounced various elements of the Polish judicial ‘reforms’, from prematurely retiring judges to the muzzle law. In light of the latter, the International Legal Aid Chamber (IRK) of the Amsterdam District Court invited the CJEU to allow surrenders to be suspended in general, and not only on a case-by-case basis, given that the muzzle law is applicable to, and thus potentially has a chilling effect on every single judge in Poland. But in *Openbaar Ministerie*³⁹ the CJEU refused to distinguish the case in light of the new circumstances (the muzzle

37 See Ballegooij, W. van, Bárd, P., 2016, Mutual Recognition and Individual Rights, Did the Court Get It Right?, *New Journal of European Criminal Law*, Vol. 7, No. 4, pp. 439–464; Bárd, P., Ballegooij, W. van, 2018, Judicial Independence as a Pre-condition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*, *New Journal of European Criminal Law*, Vol. 9, No. 3, pp. 353–365.

38 Ballegooij, W. van, Bárd, P., 2018, The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU, *VerfBlog*, (<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, 29. 7. 2018). In detail see Bárd, P., Ballegooij, W. van, 2018, pp. 353–365.

39 Case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire émise)* *L and P*, 17 December 2020, ECLI:EU:C:2020:1033, para. 52.

law) and upheld the test it developed in *LM*. According to the judgment, systemic rule of law problems should still not automatically lead to the suspension of mutual trust in general. In the view of the CJEU, an opposite conclusion would contradict previous case-law which made general suspension of the Framework Decision on the European Arrest Warrant dependent on successfully invoking the sanctioning arm of Article 7 TEU.⁴⁰ According to the CJEU, systemic or generalised deficiencies concerning the independence of the judiciary of the issuing state, “does not necessarily affect every decision that the courts of that Member State may be led to adopt in each particular case”.⁴¹ Even in light of *LM* and *Openbaar Ministerie*, in theory, national courts retain a room of maneuver to refuse surrenders, but it is extremely difficult to prove the individual concern, especially in light of the fact that the primary source for determining such an individual concern is the very court, whose independence is in doubt.

*Scene 3: Questioning supremacy and an EU understanding of judicial independence*⁴²

On 7 October 2021 the Polish Constitutional Court delivered its judgment in case K3/21, holding that the basic foundations of EU law, such as the principle of primacy of EU law over domestic laws, and the EU understanding of judicial independence, were contrary to the Polish Constitution.⁴³ On 24 November 2021 in case 6/21 it found Article 6(1) ECHR also incompatible with the Polish Constitution, at least “insofar as it comprises the European Court of Human Rights’ review of the legality of the process of electing judges to the Constitutional Tribunal”.⁴⁴ The judgments can only be understood as an attempt to constitutionally rubber-stamp the restructuring of the Polish judiciary, which severely undermines judicial independence. One may wonder what legal consequences can be attached to judgments of a court, which – or at least a panel of

40 *Ibid.*, para. 59.

41 *Ibid.*, paras. 41–42.

42 Arguments in this subchapter were presented in Bárd, P., Bodnar, A., 2021, The End of an Era. The Polish Constitutional Court’s judgment on the primacy of EU law and its effects on mutual trust, *CEPS Policy Insights*, No 15.

43 Polish Constitutional Court, judgment K3/21, 7 October 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

44 Polish Constitutional Court, judgment K6/21, 24 November 2021, (<https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojciem-sad-obejmuje-trybunal-konstytucyjny>).

which – had earlier been declared to be a non-court by the ECtHR.⁴⁵ But most importantly for our discussion, Polish Constitutional Court ruling made clearer than ever that the presumption of mutual trust *vis-a-vis* Poland is unjustified. Poland departed from the European understanding of the rule of law and judicial independence, and every single judge in the country is to follow this reading. The *LM* test is no longer viable; its second prong of checking whether an individual court or a specific judge was still independent in the anti-constitutional setting is meaningless. The era of case-by-case scrutiny of judicial independence in the individual cases should therefore be declared over. The CJEU will have ample opportunities to make this finding, as several domestic courts have pending preliminary references with regard to the *LM* test, by the Irish Supreme Court,⁴⁶ and the Amsterdam District Court.⁴⁷

3. WHAT IS AT STAKE?

3.1. CLASHES BETWEEN THE ECHR AND EU LAW

Thus far a scrupulous mutual respect characterised the relationship between the ECHR and EU law, dictated by the Strasbourg and Luxembourg courts. To give an objective picture, we should also highlight that the relation between the two courts was also burdened with envy about the jurisdictional divisions. As the judiciary of a relatively young organization in constant struggle with establishing legitimacy over its members having a much longer tradition and well-established sovereignty, the CJEU always insisted on autonomy of EU law and its self-proclaimed status as the final arbiter of this autonomous legal system. The EU system and its ultimate guardian, the CJEU are probably too recent creations and their sovereignty might be too weak to be subjected to external powers. What nation states can afford is seemingly not (yet) a tolerable external over-

45 ECtHR, *XERO FLOR w POLSCE sp. z o.o. v. Poland*, no. 4907/18, Judgment of 7 May 2021. For a concise summary see Grabowska-Moroz, B., 2021, Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v. Poland, *Strasbourg Observers*, (<https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/>, 15. 9. 2021).

46 CJEU, case C-480/21, Reference for a preliminary ruling from the Supreme Court (Ireland) made on 3 August 2021 – *W O, J L v. Minister for Justice and Equality*.

47 CJEU, case C-562/21 PPU, Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) made on 14 September 2021 – *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*; Case C-563/21 PPU, Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) made on 14 September 2021 – *Openbaar Ministerie (Tribunal établi par la loi dans l'État membre d'émission)*.

view for the EU. Or at least this is one reading of Opinion 2/13 essentially vetoing EU accession to the ECHR. Other than that, the CJEU has always followed the Convention and the attached case-law in order to strengthen its legitimacy, and especially its legitimacy in human rights matters.

Formally, as a direct consequence of Opinion 2/13, the EU never acceded to the ECHR despite a legal obligation to do so enshrined in Article 6(2) TEU.⁴⁸ But Article 6(3) TEU states that the fundamental rights as they are enshrined in the ECHR are general principles of EU law. Article 52(3) of the Charter of Fundamental Rights also lays down relevant rules on the relation between the two legal systems: Charter rights that correspond to rights guaranteed under the ECHR shall be afforded at least the same meaning and scope as by the ECHR. The explanations to the Charter, extend this correspondence to the ECtHR case-law as well.⁴⁹ Even though the explanations are strictly speaking not binding, they must be given “due regard” by domestic and EU courts.⁵⁰

Simultaneously, the ECtHR did everything not to enter into an open conflict with EU law. The heightened sensitivity on the ECtHR's side can be explained by the soft enforcement mechanism of the Strasbourg system ultimately depending on the consensus of the contracting parties. The EU, *i.e.* the entity that was at least partially responsible for certain ECHR violations, is not a party to the Convention thus far and therefore could not be made directly liable for ECHR breaches. Instead, only Member States could be condemned, whereas in certain cases Member States find themselves between a rock and a hard place: being obliged to follow pieces of EU law and not having any room of manoeuvre to implement them. Had the Strasbourg court made Member States liable for complying with their EU law obligations, it would have engaged in a direct conflict with the Union. The Strasbourg court therefore instead, while ultimately upholding the theoretical possibility of making Member States liable for ECHR violations resulting exclusively from following their EU obligations, exercised deference in these instances. In order to justify that deference, the ECtHR came up with the *Bosphorus*-test.⁵¹ For the past 15 years the ECtHR has presumed that ECHR obligations are not violated when Member States implement EU law, given that the protection of fundamental

48 Cf. CJEU, case *Åkerberg Fransson*, 7 May 2013, C-617/10, ECLI:EU:C:2013:105, para. 44: the ECHR “does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law.”

49 Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), Art. 52.

50 Art. 52(7) Charter; Art. 6(1) TEU.

51 ECtHR, *Bosphorus v. Ireland*, no. 45036/98, Judgment of 30 June 2006.

rights afforded by the EU was in principle equivalent to that of the Convention system.⁵² Certain conditions need to be satisfied for the *Bosphorus*-presumption to kick in. First, it applies, if the Member State had no discretionary power under EU law when applying EU law. Secondly, the full potential of the EU's supervisory mechanism must have been exhausted, so that in essence the CJEU was given an opportunity to have a say on the human rights element of an EU law related controversy, before it reaches Strasbourg.

The *Bosphorus*-presumption is rebuttable, even if the threshold is high. The equivalency in human rights protection is rebutted only in the case of manifest deficiency. Despite the difficulty in reaching the manifest deficiency test, it starts showing its teeth in mutual recognition cases. In other words, the CJEU insistence on automatic recognition not paying due regard to human rights so long that the ECtHR had to step in, and do away with its cautiously guarded deferential stance.⁵³

Avotiņš v. Latvia,⁵⁴ concerning the interpretation and application of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, was the first case where the ECtHR laid down important principles with regard to the relation between mutual recognition and the right to a fair trial. The ECHR acknowledged the importance of the principle of mutual recognition for the EU legal order, and came to the conclusion that the conditions for the *Bosphorus*-presumption to apply were met, but at the same time, it made clear that mutual trust must have its limits. The ECtHR was “mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. [...] Nevertheless, the methods used to create that area must not infringe the fundamental rights of the persons affected by the resulting mechanisms, as indeed confirmed by Article 67 § 1 of the TFEU.”⁵⁵ The ECtHR at this point made a reference to Opinion 2/13, where the CJEU held that when implementing EU law, Member States may be required to presume that fundamental

52 See in particular ECtHR, *Michaud v. France*, no. 12323/11, Judgment of 6 December 2012.

53 For the CJEU's engagement with the case law of the ECtHR in asylum cases and a comparison between clashes in asylum and criminal cases see the excellent assessment of Krommendijk, J., Vries, G. de, 2021, Do Luxembourg and Strasbourg Trust Each Other? The CJEU's engagement with the jurisprudence of the ECtHR in AFSJ cases concerning mutual trust since 2017, presented at the *ECPR General Conference*, 3 September, manuscript on file with the author.

54 ECtHR *Avotiņš v. Latvia*, no. 17502/07, Judgment of 23 May 2016.

55 *Avotiņš v. Latvia*, paras. 113–114.

rights have been observed by all other Member States, meaning that “save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.⁵⁶ Limiting fundamental rights review to exceptional cases, the ECtHR continued, “could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient.”⁵⁷ In *Avotiņš* the ECtHR thus made clear that the EU does not simply rubber-stamp Member States’ review of other Member States’ legal systems including a check of their fair trials guarantees. Instead Member States as contracting parties to the ECHR continue to be bound by Strasbourg standards and the ECtHR will review whether the fundamental rights review in intra-EU matters satisfied the expectations in the framework of the Council of Europe.

In later cases, albeit the ECtHR held that the mutual recognition mechanism should not be applied automatically and mechanically to the detriment of fundamental rights,⁵⁸ with regard to fair trial rights, the ECtHR was satisfied with an executing state checking only whether a flagrant denial of a fair trial in the requesting country may occur, which is a rather high test.⁵⁹

With regard to prison conditions, the ECtHR held – for the first time in history – that the *Bosphorus*-presumption was rebutted. In *Bivolaru and Moldovan v. France*⁶⁰ a Member State was condemned for not paying due regard to its ECHR obligations and violated Article 3 ECHR when surrendering the Applicant Moldovan to Romania, where there was a real risk of inadequate detention conditions.⁶¹

Should the CJEU push for a test that does not sufficiently ensure fair trials rights, and we have argued above that the *LM*-test is not compat-

56 Court of Justice of the European Union, Opinion 2/13, of 18 December 2014, ECLI:EU:C:2014:2454, para. 49.

57 *Avotiņš v. Latvia*, para. 114.

58 ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, Judgment of 9 July 2019, para. 24.

59 See the inadmissibility decision in ECtHR, *Stapleton v. Ireland*, no. 56588/07, Judgment of 4 May 2010, paras. 25–27; ECtHR, *Pirozzi v. Belgium*, no. 21055/11, Judgment of 17 April 2018, para. 71.

60 ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgment of 25 March 2021.

61 On the difference between the outcome of the cases of the two Applicants, which “can primarily be attributed to the thoroughness of the review conducted by the French court”, which was thorough *Bivolaru*, and insufficient in *Moldovan*. See Krommendijk, J., Vries, G. de, 2021.

ible with fundamental rights, more Strasbourg condemnations can be expected. Such a situation is even more likely to occur, since the Polish Constitutional Tribunal questions the supremacy principle, which will now have to be in theory followed by all ordinary courts. Placing member states between a rock and a hard place, where they are forced to choose between their EU law and ECHR obligations may lead to disregard and non-enforcement of Strasbourg judgments, which again – given the soft nature of the Strasbourg mechanism, which to a large extent depends on the voluntary compliance of states – may have devastating consequences for European human rights. Taking into consideration the potential damage done to the multi-layered European system of fundamental rights protection, mutual recognition-based laws must be suspended with regard to countries that are rule of law violators until values are restored.

3.2. EU FIRST PRINCIPLES *VERSUS* EU VALUES

In one way or another rule of law decline in one state destroys the very foundation of EU law. Some governments are packing their constitutional courts with judges loyal to the government, and at the same time cut back the powers of that very same court. In Hungary, institutional changes allow the violation of the independence of the judiciary, the nominating practices of the President of the Judicial Office, *ad hominem* legislation to fire and hire the Presidents of the Supreme Court, or the system of case allocation, which has a high risk of arbitrary assignment of cases. This will result in non-independent courts deciding cases including the ones with a cross-border element.⁶² The threat of disciplinary proceedings will result in a climate of fear and self-censorship of judges who will not comply with their rights and sometimes even obligation to turn to the CJEU for clarification if the meaning of a certain piece of EU law is unclear, which will jeopardize “the effectiveness of the cooperation between the Court and the national court and tribunals established by the preliminary ruling mechanism.”⁶³

62 Belov, M. (ed.), 2019, *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven International Publishing. See in particular the chapters by Tanasescu, S., 2019, Can Constitutional Courts Become Populist?; Gárdos-Orosz, F., 2019, Challenges to Constitutional Adjudication in Hungary after 2010 and Szente, Z., 2019, Subverting Judicial Independence in the New Authoritarian Regimes: Comparing Polish and Hungarian Judicial Reforms.

63 Case C-614/14, *Atanas Ognyanov*, 5 July 2016, ECLI:EU:C:2016:514, para. 25. See also Case C-8/19 PPU *RH* 12 February 2019, ECLI:EU:C:2019:110. However, in a similar case, *Miasto Łowicz* the CJEU declined to go into the merits and declared the reference to be inadmissible for the lack of necessity. According to the judgment the questions referred to the CJEU are of a general nature, and do not concern an

Once constitutional courts are captured, governments will make a strategic use of them so as to defend the autocratic constitutional order and any specific measure against any EU or national ‘resistance’. Captured courts can become very helpful from the autocrats’ viewpoint to fight off external criticism and intervention, especially that from the EU, and give a veneer of legality to any government policy destroying national checks and balances.⁶⁴ They may question the principle of primacy in general, like in the case of the Polish Constitutional Tribunal, or with regard to specific laws and CJEU judgments, as suggested by the Hungarian Minister of Justice in her motion to the Hungarian Constitutional Court.⁶⁵

Whatever technique is used to destroy judicial independence, and whichever path captured courts take to justify and rubber stamp violations of the rule of law, the value decline and especially judicial capture, dissolves the trust that is the basis of mutual recognition-based instruments, thus the underlying idea behind a whole set of EU laws will vanish. Once a Member State’s judiciary suffers from systemic governmental attacks on judicial independence, mutual trust must be declared to be terminated, at least until the rule of law is restored. Such a declaration should preferably take place via political EU institutions. A negative assessment of the rule of law health status in a given member state (based for example of the Commission’s Annual Rule of Law Reports⁶⁶ or any other monitoring tool) should lead not only to sanctions, but also to the suspension of legal instruments based on the presumption that EU member countries adhere to Article 2 TEU values. Revoking trust and suspending mutual recognition-based legal instruments in general, even temporarily, is a drastic step, and so far EU institutions are apparently not prepared to take it – although such academic suggestions⁶⁷ have been taken over by political actors as

interpretation of EU law which would be needed for the resolution of the original disputes. Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, 26 March 2020, ECLI:EU:C:2020:234. See also CJEU, case C-564/19, *IS* (Illégalité de l’ordonnance de renvoi), Judgment of 23 November 2021, ECLI:EU:C:2021:949.

64 Bárd, P., Pech, L., 2019, How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The ‘Hungarian Model’, *RECONNECT Working Paper*, No. 4, (<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>).

65 See the motion of 25 February 2021, questioning the compatibility of the CJEU Case C-808/18 with the Hungarian Fundamental Law, (public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/\$FILE/X_477_0_2021_indítvány_anonim.pdf).

66 2021 Rule of Law Report, (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en).

67 Bárd, P., Śledzińska-Simon, A., 2019, p. 6.

well.⁶⁸ So, the CJEU is forced into performing the job political institutions should take accountability for. It is apparent from the above analysis and the CJEU's insistence on the *LM*-test that Luxembourg is unwilling to take over the role of other EU institutions – not least because of a fear that a declaration of total judicial capture in Poland would mean that all Polish courts are non-courts for the sake of EU law, and thus they would be deprived of sending preliminary references to the CJEU. This in turn does not sufficiently consider the devastating consequences of a systemic rule of law decline for the individual. In the absence of EU institutions' willingness to generally suspend trust, such a general suspension of mutual trust could be declared by member states' courts. This would risk the fragmentation of EU law, which is suboptimal, but still better than forcing national courts to perform the *LM* test on a case-by-case basis and – because of the difficulty of satisfying its second prong – potentially become complicit in individual rights violations, beyond creating a direct conflict with the ECHR as explained in the preceding chapter. In order to avoid any similar future debate about executing courts' powers to sufficiently consider human rights exception to mutual recognition-based instruments, the Framework Decision on the European Arrest Warrant should preferably be amended and any mutual recognition-based law adopted in the future should incorporate human rights as a ground for refusal. The Framework Decision on the European Investigation Order,⁶⁹ enabling the exchange of evidence and mutual legal assistance between EU member states' authorities, serves as a good practice in this regard, and should be mainstreamed. The European Investigation Order provides irrefutable proof that “[m]utual recognition and fundamental rights/proportionality exceptions are not a contradiction in terms. They can go like hands holding one another in the EU legal system.^[70] [...] The EIO ‘benchmark’ in EU criminal justice cooperation should therefore be streamlined across the board of European legal acts in the same domain.”⁷¹

68 European Parliament, 2020, *Report on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, 29 September 2020, 2020/2072(INL), Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Michal Šimečka.

69 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *OJ L* 130, 1. 5. 2014, pp. 1–36.

70 Ballegooij, W. van, 2015, *The Nature of Mutual Recognition in European Law: Reexamining the Notion from an Individual Rights Perspective with a View to its Further Development in the Criminal Justice Area*, Maastricht, Intersentia.

71 Carrera, S., Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach in: Bárd, P., 2015, *The European Arrest Warrant in Hungary*, Budapest, OKRI, p. 133.

4. CONCLUSION

Rule of law is a value *per se*, and is thus worthy of protection. But beyond that, a state's departure from European consensus on rule of law standards will have additional detrimental consequences for EU law specifically. If Members of the European Parliament were voted in unfairly in a country where elections are not clean and where voters have no access to information to make informed choices, this will delegitimize the EU's decision-making mechanism and all legal instruments adopted. Another problem occurs when rule of law violations are becoming contagious, which will inevitably happen if EU institutions and democratic Member States fail to respond to backsliding. Furthermore, once the values of Article 2 TEU are not respected, the essential presumptions behind the core of the Union do not hold any more. The single market and an investment-friendly environment may equally be jeopardized. But as shown on the above pages, the effects of rule of law backsliding, attacks on judicial independence and the related decline in fundamental rights will most prominently result in negative consequences in the field of cross-border judicial cooperation in criminal matters. Criminal cases are canaries in the coal mine,⁷² where the consequences of rule of law backsliding show first: rebuttal of the presumption of trust in criminal cases will have inevitable consequences for individual rights. Due to the nature of criminal law, recognition of judgments rendered by non-independent courts will automatically result in a Member State becoming complicit in fair trial rights violations of the suspect. This again will lead to condemnations by the Strasbourg court, not only of the state of the captured court trying someone, or the state not ensuring prison conditions in line with the prohibition of inhuman treatment and punishment, but also the executing state cooperating with human rights violators. In order to prevent Strasbourg judgments holding Member States responsible for violating the ECHR and in general becoming complicit in human rights violations, democratic states' courts may resist EU law obligations flowing from mutual recognition based laws, and thereby question not only mutual trust, but also the primacy of EU law on fundamental rights grounds. Therefore, it is of existential importance for the EU to reconcile values with First Principles, or in other words, attach consequences to values deficiencies for the domain of mutual recognition-based law, and openly acknowledge the end of the era of mutual trust and suspend mutual recognition-based laws *vis-à-vis* countries violating Article 2 TEU values, until the rule of law is restored.

72 I am grateful to R. Daniel Kelemen for making this point when cooperating in relation to an actual surrender case. See also Kelemen, R. D., 2019, Is differentiation possible in rule of law?, *Comparative European Politics*, Vol. 17, pp. 246–260.

BIBLIOGRAPHY

1. Ballegooij, W. van, Bárd, P., 2016, Mutual Recognition and Individual Rights, Did the Court Get It Right?, *New Journal of European Criminal Law*, Vol. 7, No. 4.
2. Ballegooij, W. van, 2015, *The Nature of Mutual Recognition in European Law: Re-examining the Notion from an Individual Rights Perspective with a View to Its Further Development in the Criminal Justice Area*, Maastricht, Intersentia.
3. Bárd, P., Bodnar, A., 2021, The End of an Era. The Polish Constitutional Court's Judgment on the Primacy of EU Law and Its Effects on Mutual Trust, *CEPS Policy Insights*, 15.
4. Bárd, P., Śledzińska-Simon, A., 2019, Rule of Law Infringement Procedures – A Proposal to Extend the EU's Rule of Law Toolbox, *CEPS Papers in Liberty and Security in Europe*, 9.
5. Bárd, P., Ballegooij, W. van, 2018, Judicial Independence as a Pre-condition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*, *New Journal of European Criminal Law*, Vol. 9, No. 3.
6. Bárd, P. et. al., 2016, *An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights*, Brussels, CEPS.
7. Bayer, J. et. al., 2019, *Disinformation and Propaganda – Impact on the Functioning of the Rule of Law in the EU and its Member States*, Brussels, European Parliament, Policy Department C, Citizens' Rights and Constitutional Affairs.
8. Belov, M. (ed.), *The Role of Courts in Contemporary Legal Orders*, The Hague, Eleven International Publishing.
9. Bugarić, B., 2014, Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge, *LEQS Paper*, 79.
10. Carrera, S., Building a Common EU Justice Area: Reinforcing Trust and a Rights of Suspects-Centric Approach in: Bárd, P., 2015, *The European Arrest Warrant in Hungary*, Budapest, OKRI.
11. Carrera, S., Guild, E., Hernanz, N., 2013, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU, Towards an EU Copenhagen Mechanism*, Brussels, CEPS.
12. Closa, C., Kochenov, D., Weiler, J. H. H., 2014, Reinforcing Rule of Law Oversight in the European Union, *Robert Schuman Centre for Advanced Studies Research Paper*, 25.
13. Halmai, G., 2018, The Possibility and Desirability of Economic Sanction: Rule of Law Conditionality Requirements against Illiberal EU Member States, *EUI Department of Law Research Paper*, 6.
14. Hassemer, W., 2004, Strafrecht in einem europäischen Verfassungsvertrag, *Zeitschrift für die gesamte Strafrechtswissenschaft*, Vol. 116, No. 2.
15. Kelemen, R. D., 2019, Is Differentiation Possible in Rule of Law?, *Comparative European Politics*, Vol. 17, pp. 246–260.
16. Konciewicz, T. T., The Existential Jurisprudence of the Court of Justice of the European Union. An essay on the judicial incrementalism in defence of European First Principles in: Szczepanowska-Kozłowska, K. (ed.), 2020, *Profesor Marek Safjan znany i nieznan. Księga jubileuszowa z okazji siedemdziesiątych urodzin*, Warsaw, C. H. Beck.

17. Krommendijk J., Vries, G. de, 2021, Do Luxembourg and Strasbourg Trust Each Other? The CJEU's engagement with the jurisprudence of the ECtHR in AFSJ cases concerning mutual trust since 2017, presented at the *ECPR General Conference*, 3 September.
18. Müller, J-W., 2015, Should the EU Protect Democracy and the Rule of Law inside Member States, *European Law Journal*, Vol. 21, No. 2.
19. Pech, L. *et al.*, 2019, Strengthening the Rule of Law Within the European Union: Diagnoses, Recommendations, and What to Avoid. RECONNECT – *Reconciling Europe with its Citizens through Democracy and Rule of Law*, Reflection Paper No. 1.
20. Pech, L., Scheppele, K. L., 2017, Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, Vol. 19.
21. Scheppele, K. L., Enforcing the Basic Principles of EU Law through Systemic Infringement Procedures, in: Closa, C., Kochenov, D. (eds.), 2016, *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, CUP.
22. Sikk, A., 2020, *BTI 2020, Trouble at the Top, Regional Report East-Central and Southeast Europe*, Gütersloh, Bertelsman Stiftung.
23. V-Dem Institute, 2020, *Autocratization Surges—Resistance Grows, V-Dem Annual Democracy Report*, Gothenburg, V-Dem Institute.

LEGAL ACTS

1. Treaty on the European Union, OJ C 326, 26.10.2012, pp. 47–390.
2. Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407.
3. 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) OJ C 445, 29.10.2021, pp. 15–17.
4. 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 433L, 22. 12. 2020, pp. 1–10.
5. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1. 5. 2014, pp. 1–36.
6. 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, OJ L 347, 20. 12. 2013.
7. 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18. 7. 2002, pp. 1–20.

CASE LAW

1. ECtHR, *XERO FLOR w POLSCE sp. z o.o. v. Poland*, no. 4907/18, 7 May 2021.
2. ECtHR, *Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, Judgment of 25 March 2021.
3. ECtHR, *Romeo Castaño v. Belgium*, no. 8351/17, Judgment of 9 July 2019.
4. ECtHR, *Pirozzi v. Belgium*, no. 21055/11, Judgment of 17 April 2018.
5. ECtHR *Avotiņš v. Latvia*, no. 17502/07, Judgment of 23 May 2016.
6. ECtHR, *Michaud v. France*, no. 12323/11, Judgment of 6 December 2012.
7. ECtHR, *Stapleton v. Ireland*, no. 56588/07, Judgment of 4 May 2010.
8. ECtHR, *Bosphorus v. Ireland*, no. 45036/98, Judgment of 30 June 2006.
9. CJEU, case C-657/21, *Parliament v. Commission*, pending.
10. CJEU, case C-204/21, *Commission v. Poland*, pending.
11. CJEU, case C-156/21, *Hungary v. Parliament and Council*, 26 March 2021, pending.
12. CJEU, case C-157/21 *Hungary v. Parliament and Council*, 26 March 2021, pending.
13. CJEU, case C-791/19, *Commission v. Poland* (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596.
14. CJEU, case C-354/20 PPU *Openbaar Ministerie (Indépendance de l'autorité judiciaire émission) L and P*, 17 December 2020, ECLI:EU:C:2020:1033.
15. CJEU, case C-66/18, *Commission v. Hungary* (Higher Education), 6 October 2020, ECLI:EU:C:2020:792.
16. CJEU, joined cases C-558/18 and C-563/18 *Miasto Łowicz*, 26 March 2020, ECLI:EU:C:2020:234.
17. CJEU, case C-8/19 PPU *RH*, 12 February 2019, ECLI:EU:C:2019:110.
18. CJEU, case C-216/18 PPU *LM Minister for Justice and Equality* (Deficiencies in the system of justice), 25 July 2018, ECLI:EU:C:2018:586.
19. CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses* (Portuguese Judges) 27 February 2018, EU:C:2018:117.
20. CJEU, case C-614/14, *Atanas Ognyanov*, 5 July 2016, ECLI:EU:C:2016:514.
21. CJEU, joined cases C-404/15 and C-659/15 PPU – *Aranyosi and Căldăraru*, 5 April 2016, ECLI:EU:C:2016:198.
22. CJEU, case *Åkerberg Fransson*, 7 May 2013, C-617/10, ECLI:EU:C:2013:105.
23. CJEU, case C-294/83, *Les Verts*, 23 April 1986, EU:C:1986:166.
24. Hungarian Constitutional Court, motion of 25 February 2021, pending, [public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/\\$-FILE/X_477_0_2021_inditvány_anonim.pdf](https://public.mkab.hu/dev/dontesek.nsf/0/1dad915853cbc33ac1258709005bb1a1/$-FILE/X_477_0_2021_inditvány_anonim.pdf).
25. Polish Constitutional Court, judgment K6/21, 24 November 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11709-art-6-ust-1-zd-1-konwencji-o-ochronie-praw-czlowieka-i-podstawowych-wolnosci-w-zakresie-w-jakim-pojeciem-sad-obejmuje-trybunal-konstytucyjny>.
26. Polish Constitutional Court, judgment K3/21, 7 October 2021, <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej>.

INTERNET SOURCES

1. 2021 Rule of Law Report, (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2021-rule-law-report/2021-rule-law-report-communication-and-country-chapters_en, last visited: 19. 11. 2021).
2. Ballegooij, W. van, Bárd, P., 2018, The CJEU in the Celmer case: One Step Forward, Two Steps Back for Upholding the Rule of Law Within the EU, *VerfBlog*, (<https://verfassungsblog.de/the-cjeu-in-the-celmer-case-one-step-forward-two-steps-back-for-upholding-the-rule-of-law-within-the-eu/>, last visited: 19. 11. 2021).
3. Bárd, P., 2021, The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS, *VerfBlog*, (<https://verfassungsblog.de/the-sanctity-of-preliminary-references/>, 26. 11. 2021).
4. Bárd, P., Pech, L., 2019, How to Build and Consolidate a Partly Free Pseudo Democracy by Constitutional Means in Three Steps: The ‘Hungarian Model’, *RECONNECT Working Paper*, No. 4, (<https://reconnect-europe.eu/wp-content/uploads/2019/10/RECONNECT-WP4-final.pdf>, last visited: 19. 11. 2021).
5. BTI 2020 Infographics, (<https://www.bti-project.org/en/press.html>, last visited: 19. 11. 2021).
6. BTI, The Transformation Index, (<https://www.bti-project.org/en/home.html?&cb=00000>, last visited: 19. 11. 2021).
7. Butler, I., 2018, *Two Proposals to Promote and Protect European Values through the Multiannual Financial Framework: Conditionality of EU funds and a Financial Instrument to Support NGOs*, Civil Liberties Union for Europe, (<https://drive.google.com/file/d/1UG4PIg7tObjUoK9tBKq3IdqCT-eB5iM9/view>, last visited: 19. 11. 2021).
8. Freedom House, (<https://freedomhouse.org/countries/freedom-world/scores>, 19. 11. 2021, last visited: 19. 11. 2021).
9. Grabowska-Moroz, B., 2021, Strasbourg Court Entered the Rule of Law Battlefield – Xero Flor v. Poland, *Strasbourg Observers*, (<https://strasbourgobservers.com/2021/09/15/strasbourg-court-entered-the-rule-of-law-battlefield-xero-flor-v-poland/>, last visited: 19. 11. 2021).
10. Kelemen, R. D., Scheppele, K. L., 2018, How to Stop Funding Autocracy in the EU, *VerfBlog*, (<https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/>, last visited: 19. 11. 2021).
11. Makszimov, V., 2011, Hungary Drops in Freedom House report, *Euractiv*, (https://www.euractiv.com/section/politics/short_news/hungary-drops-in-freedom-house-report/, last visited: 19. 11. 2021).
12. Pech, L., 2021, Written submission in response to the Rule of Law call by the Joint Committee on European Union Affairs of the Houses of the Oireachtas, *RECONNECT Policy Brief*, (https://reconnect-europe.eu/wp-content/uploads/2021/01/Policy-brief-LP-written-submission-in-response-to-the-call-22JAN21_update.pdf, last visited: 19. 11. 2021).
13. Pech, L., Kochenov, D., 2021, 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, *SIEPS*, No. 3, (https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf?, last visited: 19. 11. 2021).
14. Pech, L., Wójcik, A., 2018, “A Bad Workman Always Blames His Tools”: an Interview with Laurent Pech, *VerfBlog*, (<https://verfassungsblog.de/a-bad-workman-always-blames-his-tools-an-interview-with-laurent-pech/>, last visited: 19. 11. 2021).
 15. Scheppele, K. L., Kelemen, R. D., Morijn, J., 2021, *The EU Commission has to Cut Funding to Hungary: The Legal Case, Report*, Brussels, Greens/EFA Group, European Parliament, (https://danielfreund.eu/wp-content/uploads/2021/07/220707_RoLCR_Report_digital.pdf, last visited: 19. 11. 2021).
 16. The speech by Michael Ignatieff, Professor and then Rector and President of the Central European University chased out of Hungary by the government in the middle of the legal and political turmoil around the university’s presence in the country, (https://www.youtube.com/watch?v=FoMd_Bxn5rg&feature=youtu.be&fbclid=IwAR2uHR_3m4w5DbB1ndIBRbvYHfHT_eIB9_V9kaaXvfi7_X16d-DYclajnDEg, last visited: 19. 11. 2021).
 17. UCL European Institute, 2020, Curing the virus of autocracy in Europe: Q+A with Daniel Kelemen, *UCL Europe Blog*, <https://ucluropeblog.com/2020/12/07/curing-the-virus-of-autocracy-in-europe-qa-with-daniel-kelemen/>, last visited: 19. 11. 2021).
 18. V-Dem Institute, (<https://www.v-dem.net/en/>, last visited: 19. 11. 2021).
 19. Viktor Orbán, Speech at Băile Tuşnad (Tusnádfürdő), (<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592>, last visited: 19. 11. 2021).
 20. WJP Rule of Law Index 2020, (<https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2020>, last visited: 19. 11. 2021).

KANARINCI U RUDNIKU UGLJA: URUŠAVANJE VLADAVINE PRAVA I UZAJAMNO POVERENJE

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APSTRAKT

Urušavanje vrednosti u Evropskoj uniji ima višestruke posledice. Ono ugrožava samu suštinu Evrope kao zajednice vrednosti. Istovremeno, ono ugrožava i pravna načela kao što je uzajamno priznavanje sudskih odluka zasnovano na uzajamnom poverenju koje počiva na pretpostavci da sve države članice pružaju zaštitu vladavini prava i osnovnih sloboda. Jednom kada se to poverenje naruši, pravosudni organi država članica počće da odbijaju da saraduju i uzajamno priznaju presude, kako ne bi postali saučesnici u kršenju individualnih prava i kako ne bi povredili Evropsku konvenciju za zaštitu ljudskih prava i osnovnih sloboda. Ovaj rad zastupa stav da pravo EU mora da dozvoli takav razvoj događaja i omogući suspenziju

pretpostavke uzajamnog poverenja ne samo u pojedinačnim slučajevima, kao što se danas dešava u praksi, već uopšte kada su u pitanju države članice u kojim je urušen sistem vladavine prava, kako bi se dala podrška kulturi zaštite osnovnih prava EU i ekvivalentnosti prava EU sa režimom ljudskih prava iz navedene konvencije.

Ključne reči: vladavina prava, nezavisnost sudstva, ljudska prava, prava na pravično suđenje, uzajamno poverenje, uzajamno priznavanje, pravo EU, evropski nalog za hapšenje, Evropska konvencija o ljudskim pravima, „Bosforska pretpostavka”.

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