INSIGHT

The Dark Relationship Between the Rule of Law and Liberalism. The New ECJ Decision on the Conditionality Regulation

Roila Mavrouli*

Abstract: The recent rule of law crisis is partly due to the inertia of the European institutions regarding the implementation of the mechanism within art. 7 TEU. This is despite the variety of actions that could be taken by the EU regarding maintaining high levels of respect for the rule of law within the EU. Hence it seems that the rule of law crisis has come to stay. The escalation in the rule of law crisis creates a dissonance regarding the way the European Union perceives the rule of law, and points to the ambiguity in terms of content and legal nature. This dissonance adds to the existing tension between the claims of an illiberal constitutional identity and the violation of the rule of law. Illiberalism refers to representative democracies which do not necessarily guarantee fundamental rights and/or the rule of law. The law crisis reached its peak when the introduction of the rule of law Conditionality Regulation was believed to be the solution. The rule of law Conditionality Regulation was subject to an action for annulment introduced by Hungary and Poland and was dismissed by the ECJ in its long-awaited rulings after the case C-156/21 ECLI:EU:C:2022:97 and case C-157/21 ECLI:EU:C:2022:98. Even if the ECJ made it clear that the Regulation is not a substitute nor a reinstatement of the art. 7 TEU procedure, we can only wait to see how the Regulation will be applied. The rule of law violations was linked directly to the allocation of EU budget, and this raises questions about the challenges at stake.

Keywords: rule of law crisis – Conditionality Regulation rule of law – illiberalism – case C-156/21 – case C-157/21 – EU institutions.

I. Introduction

Much has been said and written about the rule of law crisis in Europe.[1] This situation had its origins in early 2015, when Hungary and Slovakia – supported by Poland – refused to

* PostDoc Research Fellow, CNRS (GREGHEC) - HEC Paris, roila.mavrouli@external.hec.fr. This *Insight* is an outcome of the MEDROI research project (ANR-21-CE41-0004-01).

[1] A Magen and L Pech, 'The Rule of Law and the European Union' in C May and A Winchester (eds), *Handbook on the Rule of Law* (Elgar 2018) 235-256; L Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) EuConst 359; L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3-47; C Closa and D Kochenov, 'Reinforcement

ISSN 2499-8249
doi: 10.15166/2499-8249/559

accept the relocation of third-country nationals. This violated the Council Decisions (EU) 2015/1601 and 2015/1523 of 22 September 2015, which established provisional measures in the area of international protection and relocation quotas.[2] The move to annul the above Council Decisions – based on art. 78(3) TFEU which provides for the adoption of provisional measures in emergency situations with a sudden inflow of third-country nationals into certain Member States – seemed to be a solidarity crisis following on from the migration crisis. Subsequently a rule of law crisis manifested itself when Hungary and Poland were brought before the European Court of Justice (ECJ) for cases concerning the independence of the judicial system[3] and national legislation that undermined the primacy of the EU and the EU's core principles.[4]

However, terms such as "democracy", "human rights" or "rule of law" were not included in the original founding treaty of the EC/EU, the European Economic Community (EEC) Treaty signed in Rome in 1957 – something that would subsequently reduce clarity about the situation. Following the ratification of the TEU, the European Commission emphasised that compliance with the rule of law is "the backbone of any modern constitutional democracy" and that adherence to the rule of law is a prerequisite for upholding all rights and obligations deriving from the treaties and from international law.[5] Moreover, since 1992, art. 49 TEU has made respect for the rule of law an eligibility criterion for EU membership, according to the Copenhagen criteria laid down by the Council of Europe.[6]

The increased emphasis on maintaining high standards related to the rule of law contrasts with the ineffectiveness of art. 7 TEU.[7] The new rule of law conditionality measures incorporated in Regulation 2020/2092[8] – drafted to address the ineffectiveness of the art.

of the Rule of Law Oversight in the European Union: Key Options' in W Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation, Modern Studies in European Law* (Hart Bloomsbury 2016) 173-197; D Kochenov and P Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement' (RECONNECT Working Papers 1/2018).

[2] See joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* ECLI:EU:C:2017:631.

[3] See case C-824/18 *A.B. and others* ECLI:EU:C:2021:153; case C-791/19 *Commission v Poland* ECLI:EU:C:2021:596; and case C-564/19 *IS* ECLI:EU:C:2021:949.

[4] Polish Constitutional Tribunal of 7 October 2021 n. K 3/21.

[5] Communication COM(2014) 158 final from the Commission to the European Parliament and the Council of 11 march 2014 on a new EU framework to strengthen the Rule of Law.

[6] D Kochenov, 'The Acquis and its Principles: The Enforcement of the "Law" Versus the Enforcement of "Values" in the EU' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2016) 9-27. For the role of the Venice Commission see E Turkut, 'The Venice Commission and Rule of Law Backsliding in Turkey, Poland and Hungary' (27 August 2021) European Convention on Human Rights Law Review 209–240; PP Craig, 'Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy' (2017) UC Irvine Journal of International, Transnational, and Comparative Law 57.

[7] L Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* cit. 128-144.

[8] 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.

7 TUE mechanism in relation to dealing with Hungary and Poland – has refocused attention on the need to establish a theoretical definition of the rule of law, and on the lack of success so far on efforts to preserve the rule of law.[9] The new Regulation, while expected to be a successful tool in strengthening the European construction project, has drawn criticism[10] from various quarters regarding the creation of a causal link between EU financial interests and budget, on the one hand, and rule of law violations on the other. In this regard, Hungary and Poland initiated an action for the annulment of the Regulation, contesting its legal basis and arguing that legal uncertainty would result. On 16 February 2022, the much-anticipated response of the ECJ on the annulment action confirmed the Advocate General's opinion published in December 2021.[11]

II. Escalation in the rule of law crisis: Dissonance in the European Union's perception of the rule of law

Even if the recent escalation in the rule of law crisis touches on different aspects of the rule of law (such as the independence of the judiciary and the primacy of EU law), the lack of a specific and coherent approach to this matter within the EU has been exploited by the likes of Hungary and Poland. These Member States are proposing a new type of democracy – which has been called illiberal democracy – and have tried to incorporate illiberalism as part of their constitutional identity in terms of art. 4(2) TUE. In this matter, the Polish Constitutional Tribunal (CT) Tribunal declared the unconstitutionality of arts 1, 2 and 19 TEU inasmuch as they require that national judges discard the Polish legislation on the organisation of the judiciary in case K 3/21.[12] The Polish constitutional interpretation of the aforementioned articles reanimates the debates focusing on the come-back of the "sovereign" within the Union, on the one hand, and the struggle for European values, on the other.[13] If the Polish CT deploys the idea of self-determination and, ultimately, of

[9] See D Kochenov, 'Article 7: A Commentary on a Much Talked-About "Dead" Provision' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Springer 2021); D Kochenov and L Pech, 'Better Late Than Never? On the European Commission's Rule of Law Framework and its First Activation' (2016) JComMArSt 1062-1074.

[10] See the different approaches and criticism: L Pech, 'No More Excuses: The Court of Justice Greenlights the Rule of Law Conditionality Mechanism' (16 February 2022) Verfassungsblog verfassungsblog.de; see also N Kirst, 'Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?' European Papers (European Forum Insight of 22 April 2021) www.europeanpapers.eu 101-110.

[11] See case C-156/21 *Hungary v European Parliament* ECLI:EU:C:2021:974, opinion of AG Sánchez-Bordona; case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2021:978, opinion of AG Sánchez-Bordona.

[12] Polish Constitutional Tribunal n. K 3/21 cit.

[13] Editorial, 'Sovereign Within the Union? The Polish Constitutional Tribunal and the Struggle for European Values' (2021) European Papers www.europeanpapers.eu 1117-1121. See also F Martucci, 'La Pologne et le Respect de l'État de Droit: Quelques Réflexions Suscitées par la Décision K 3/21 du Tribunal Constitutionnel Polonais' (15 October 2021) Le club des juristes blog.leclubdesjuristes.com.

essential identity through the K 3/21 ruling, this shows that the EU cannot break free from the constitutional restraints imposed on it by its MS through the treaties. However, this reasoning appears as "a worm which gnaws at the flesh of the process of integration and that could ultimately corrode its very soul".[14] Proof of this can be seen in interpretations of other constitutional courts evidently challenging primacy.[15] Claims of absolute sovereignty from the MS had been abandoned in the past after the *Solange* case in order to avoid producing a systemic inconsistency with the Union's legal order. Interestingly, a claim of absolute sovereignty within the EU – as it seems to be the cake with the above K 3/21 ruling – does not amount for a Polexit. It has already been criticised in this Journal that "by combining the self-referential legitimacy endorsed by the CT with the unfortunate withdrawal clause of art. 50 TEU, Poland could well retain its claim to be sovereign within the Union without having to comply with its fundamental principles and values".

The above mentioned situation has intensified the EU responses seeking remedy to rule of law violations and (re-)establishing primacy. In this respect, the new Regulation mechanism had initially been intended to protect against all rule-of-law violations, as a consequence of growing concerns of the consolidation of illiberal democracy within Hungary and Poland. The Orban regime – which has proclaimed itself to be an illiberal democracy – acknowledges the existence of this form of democracy that differentiates itself from participative, electoral, or representative democracy.[16] However, most legal scholars consider democracy to be liberal by definition and associated with the rule of law.[17] According to a state rule of law approach "if every rule of law is not necessarily a democracy, every democracy must have the rule of law".[18] If states that represent enlightened despotism or moderate government in the sense of Montesquieu can be acknowledged as states under the rule of law, the question arises whether the substance of the EU rule of law criterion, as enshrined in art. 2 TEU, has a clear meaning. Jeremy Waldron points out that the rule of law should not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind, or respect for individual or for human dignity.[19] He states that a non-democratic legal system, based on sexual inequalities, on racial segregation, religious persecution and other denials of human rights may, in principle, conform to the requirements for the rule of law better than legal systems of

[14] Editorial, 'Sovereign Within the Union?' cit.

[15] See the recent judgment of the ECJ of 22 February 2022 with regard to Romania: case C-430/21 *RS* ECLI:EU:C:2022:99. The ECJ once again confirmed the lack of jurisdiction of a national court to examine the conformity with EU law of national legislation found to be constitutional by the constitutional court of the Member State concerned.

[16] For an analysis of illiberal democracies see G Halmai, 'Illiberal Constitutional Theories' (2021) Jus Politicum 135-152.

[17] See F Zakaria, 'The Rise of Illiberal Democracy' (1997) Foreign Affairs 22-43.

[18] M Troper, 'Le Concept d'État de Droit' (1992) Droits 51-63.

[19] J Waldron, 'The Rule of Law and the Role of Courts' (2021) Global Constitutionalism 91-105.

the more liberal Western democracies.[20] This does not mean that such a system will be better than those of Western democracies. It will be an immeasurably worse legal system, but it will excel in the conformity with the rule of law.[21]

It seems that the traditional state's approach of rule of law cannot, and has not, been fully incorporated within the European vision of the rule of law. Even the various EU institutions have slightly different perspectives on the rule of law. For the Commission, the rule of law has a formal as well as a substantive content, including principles of legality, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, judicial review of administrative acts, respect for human rights, non-discrimination, and equality before the law.[22] For the ECJ, the rule of law is related to access to justice before independent and impartial courts. A vigorous disagreement arose between the European Council and the European Parliament. The former requested the Commission delay the application of sanctioning measures until the Commission had developed specific application guidelines. This would enable the Member States to challenge the Regulation at the ECJ. By contrast, the European Parliament asked the Commission to apply the measures immediately, otherwise it would start court proceedings against the Commission under art. 265 TFEU. The European Parliament highlighted what is saw as the critical nature of democratic backsliding, having already published in 2020 a report emphasising the "urgent need [to protect and reinforce] democracy, the rule of law and fundamental rights for all its citizens' and for the EU to 'remain a champion of freedom and justice in Europe and the world".[23]

On the one hand, it would seem that Members of the European Parliament (MEPs) tend to urge the Commission to address the persistent violations of democracy and fundamental rights in the EU – including attacks on media freedom, journalists, and freedom of association and assembly.[24] This reflects a slightly different approach from that of the ECJ and the Commission. On the other hand, the obvious reluctance of the European Council and Council to take action to address the illiberal onslaught would appear to crystalise the final vision of the rule of law, as perceived by EU institutions and the Regulation on the conditionality of the rule of law. From the refusal to vote on the initial stage of the art. 7 proceedings launched against Hungary and Poland to the Commission's adherence to the non-binding European Council (EUCO) conclusions in December 2020[25], it is

[20] *Ibid*.

[21] J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009 2nd) 210-224.

[22] Communication COM(2014) 158 final cit.

[23] Resolution 2020/2072(INL) of the European Parliament of 29 September 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights.

[24] European Parliament, 'Rule of Law: Parliament Prepares to sue Commission for Failure to Act' (10 June 2021) www.europarl.europa.eu.

[25] For a critics of the European Council conclusions see A Alemanno and M Chamon, 'To Save the Rule of Law you Must Apparently Break It' (11 December 2020) Verfassungsblog verfassungsblog.de; see also

acknowledged that there is disagreement regarding what constitutes the rule of law[26] and the critical nature of the application of the Regulation.[27] Contrary to the EUCO conclusions of December 2020, the European Parliament firmly opposed the delay in the application budget conditionality rules and requested the Commission to consult the Parliament before the adoption of the applicable guidelines.

III. The European Union solution to the illiberal crisis: Untangling or entangling rule of law?

The different visions of the EU institutions on how to apply the aforementioned Regulation relate to the absence of a clear conceptualization of the rule of law. This stems somewhat from the fact that the concept is a "polysemic, hotly contested term",[28] at once with a powerful image, with a formulation that "not only posits a pan-European definition of an idea and ideal with ancient roots, and varying interpretations, in the legal traditions of the Member States".[29] Hence, the dual nature of the rule of law – namely its legal-normative weight and susceptibility to conceptual stretching[30] – is at once mediated and untangled by the EU institutions, with this changing due to the underlying controversy over the role the various EU institutions should (or should not) play. However, the concept of rule of law is not only legal but is also political, ideological and historical, hence why a lack of a clear legal definition creates tensions and misinterpretations. In other terms, over the last decade the soared popularity of rule of law was not counterweighted by a conceptualization. Magen notes that the rule of law has been heralded as a panacea for democratic dysfunction and therefore conflict. However, it has also become favoured by policymakers and scholars in a plethora of disciplines such as comparative democratization, development economics, and security and conflict-resolution studies.[31] In the end and amidst a host of deep cleavages, as Tamanaha observes: "there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the "rule of law" is good for everyone".[32]

Editorial, 'Neither Representation nor Values? Or, "Europe's Moment" – Part II' (2020) European Papers www.europeanpapers.eu 1101-1104.

[26] For the rule of law as principle or value see D Kochenov, 'The Acquis and its Principles' cit.

[27] D Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) Journal of European Public Policy 489.

[28] A Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) JComMarSt 1050–1061.

[29] R Gosalbo-Bono, 'The Significance of the Rule of Law and its Implications for the European Union and the United States' (2010) University of Pittsburgh Law Review 229–360.

[30] A Magen, 'Cracks in the Foundations' cit. 1051.

[31] *Ibid*.

[32] B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004) 1.

Nonetheless, if the rule of law "is good for everyone",[33] how can the illiberal onslaught of several member states within the EU be explained? The rule of law became uniquely vulnerable to conceptual over-stretching, thus emphasising its highly "ideological" or "political" nature and essence. The dissonance in visions of the rule of law is not the only point of criticism of the EU reaction to the crisis but has become the centre of controversy regarding the creation of an effective guardrail of democratic backsliding. The 2020/2092 rule of law Conditionality Regulation, drafted in 2018, was originally designed to sanction all rule of law violations by means of conditionality measures. However, a strong objection from Member States – as well as the European Council declaration – on the evident link between rule of law violations and financial interests and/or the EU budget appeared to limit the application of the Regulation. Bearing in mind that the two co-legislators (the Parliament and the Council) had different perspectives on what would ultimately become Regulation 2020/2092, the mechanism now enables EU institutions to withhold funds from a Member State after a breach of rule of law principles that "sufficiently directly" affect the EU's budget or its financial interests according to the Regulation's arts 4[34] and 6[35]. However, the Parliament sought to use the budget to protect the rule of law. Whereas the Council wanted to use respect for the requirements of the rule of law as a means to protect the EU budget. Furthermore, the Parliament argued for a broad application of the Regulation, whereas the Council wanted to limit its application, requiring a direct link between breaches of the rule of law and specific negative effects on the EU budget.

The criticisms levelled against the Regulation reveal the concern that the compromises made for the European Council to reach its conclusions will jeopardise the successful implementation of the Regulation. Enabling Hungary and Poland to threaten European values in exchange for avoiding holding up the European budget and Recovery Fund can be regarded as protecting the EU budget and not of the rule of law. For some legal scholars, the Regulation is not a victory for the rule of law;[36] while for others, the Regulation transforms the rule of law into a trade-off for the EU budget.[37]

[33] *Ibid*.

[34] Art. 4(1) of the Regulation 2020/2092 cit. states the conditions for the adoption of measures: "1. Appropriate measures shall be taken where it is established in accordance with Article 6 that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way".

[35] Art. 6(1) of the Regulation 2020/2092 cit. provides elements regarding the procedure: "1. Where the Commission finds that it has reasonable grounds to consider that the conditions set out in Article 4 are fulfilled, it shall, unless it considers that other procedures set out in Union legislation would allow it to protect the Union budget more effectively, send a written notification to the Member State concerned, setting out the factual elements and specific grounds on which it based its findings. The Commission shall inform the European Parliament and the Council without delay of such notification and its contents".

[36] KL Scheppele, L Pech and S Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law' (13 December 2020) Verfassungsblog verfassungsblog.de.

[37] L Fromont and A Van Wayenberge, 'Trading Rule of Law for Recovery? The New EU Strategy in the post-Covid Era' (forthcoming 2022) ELJ.

The purported disentanglement of the concept of rule of law by the EU institutions through the Regulation proves, in fact, to be rather an entanglement by its very nature. This is why the challenge of the above Regulation before the ECJ was keenly watched, as the issues at stake are not only relevant for the European polity as such, but also for the future of public law and democracy.

IV. The decision of the European Court of Justice and the new rule of law perspective conditioned upon a sound financial management

As expected, Hungary and Poland have contested the legal basis of the Regulation, arguing that it cannot be applied in terms of art. 322 TFEU. More specifically, they have put forward the rule of law entanglement mentioned previously by stating that the EU legislature, in a Regulation adopted pursuant to art. 322(1)(a) TFEU, can neither define the concept of "the rule of law" nor determine the criteria for establishing breaches of the constituent principles of that concept.[38] According to the actions for annulment, the EU legislature cannot specify for every one of the principles of the rule of law the means by which the objectives may be achieved. However, the obligation for the Member States to observe those principles is limited to the need to guarantee their essence in view of the differences as regards their national identities.[39] They have also alleged the incompatibility of the Regulation with art. 7 TEU and the breach of the principle of legal certainty. The Advocate General's opinion on the annulment of the regulation 2092/2021 by Hungary and Poland confirms the legal basis of the Regulation as being art. 322 TFEU. The ECJ has confirmed the Advocate General's opinion that the purpose of the Regulation is to create a specific mechanism to ensure proper management of the EU budget, and that it does not intend to protect the rule of law by means of a sanction mechanism similar to that in art. 7 TEU.[40] The ECJ's decision confirms the creation of a financial conditionality instrument to safeguard that value of the EU which needs to be demonstrated by a sufficiently direct link between the breach of the rule of law and the implementation of the budget. Therefore, it does not apply to all breaches of the rule of law, but only to those that are directly linked to the implementation of the EU budget.

Having defined the field of application of the Regulation, both its purpose and content form a financial rule within the meaning of article 322(1)(a) TFEU, which is an appropriate legal basis. The ECJ recalls the Advocate General's opinion that the Regulation is

[38] Case C-157/21 *Poland v European Parliament and Council* ECLI:EU:C:2022:98 para. 67.

[39] *Ibid*. para. 68.

[40] *Ibid*. para. 131: "As regards recital 14 of the contested regulation, while that recital states that the mechanism provided for by that regulation 'complements' the instruments that promote the rule of law and its application, it specifies that that mechanism does so 'by protecting the Union budget against breaches of the principles of the rule of law affecting its sound financial management or the protection of the financial interests of the Union". See also *Hungary v European Parliament* cit. para.117.

compatible with art. 7 TEU. The latter does not preclude the use of instruments to offer such protection, other than those provided for in that article, on condition that their essential characteristics differ from those of the protection guaranteed by art. 7 TEU.[41] The Advocate General takes the view that art. 7 TEU would not authorise the EU legislature to introduce another similar mechanism – albeit with less extensive substantive and procedural requirements – which had the same objective of protecting the rule of law and which applied similar sanctions.[42] It goes without saying that financial conditionality and budgetary implementation instruments exist in various areas of EU law, rather than the mechanism in art. 7 TEU. Moreover, unlike the Regulation, art. 7 TEU requires the existence of a serious and persistent breach of any of the values of the European Union, not just that of the rule of law. For that reason, the limitation of the ECJ's jurisdiction under art. 269 TFEU in relation to art. 7 TEU is not applicable to the Regulation, which remains subject to the full review of legality, as provided for in art. 263 TFEU.

The ECJ confirms that the Regulation includes seven legal principles,[43] which must be interpreted with regard to the other EU values and principles enshrined in art. 2 of the TEU. Moreover, art. 3 of the Regulation sets out an indicative list of breaches of the principles of the rule of law, while art. 4(2) contains an indicative list of areas where breaches of the principles of the rule of law may arise. In this regard, the ECJ's approach coincides with the Commission's vision of the rule of law.

The decision of the ECJ confirms and recalls the Advocate General's opinion. The alignment of the ECJ with the opinion of the Advocate General is not surprising as the limited field of application of the Regulation clarifies its legal basis, grounded in art. 322 TFEU. Furthermore, the ECJ recognizes the limited scope of the horizontal conditionality mechanism applied solely to situations which are relevant to the sound financial management of the Union budget, or to the protection of the financial interests of the Union. The ECJ rejected the allegations that the principles enshrined in art. 2 TEU are of a purely political nature, and that an assessment of whether they have been respected cannot be

[41] See *Poland v European Parliament and Council* cit. paras 206-207: "In that regard, first, it should be stated that the EU legislature cannot establish, without infringing Article 7 TEU, a procedure parallel to that laid down by that provision, having, in essence, the same subject matter, pursuing the same objective and allowing the adoption of identical measures, while providing for the involvement of different institutions or for different material and procedural conditions from those laid down by that provision. However, it is permissible for the EU legislature, where it has a legal basis for doing so, to establish, in an act of secondary legislation, other procedures relating to the values contained in Article 2 TEU, which include the rule of law, provided that those procedures are different, in terms of both their aim and their subject matter, from the procedure laid down in Article 7". See *Hungary v European Parliament* cit. paras 167-168.

[42] *Poland v European Parliament and Council* cit. paras 206-207 and *Hungary v European Parliament* cit. paras 167-168.

[43] Legality, which implies a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.

the subject of a strictly legal analysis. Nevertheless, the ECJ was still reluctant to proceed to any general theorisation of the rule of law. However, a number of cases in the past have clearly demonstrated that the role of the ECJ in structuring the European project and integration was crucial, with various jurisprudential inputs being made in relation to primacy with the *Van Gend en Loos* case, the rule of law with the *Les Verts* case, and fundamental rights with the *Solange* case. The ECJ managed anyhow to put forward the concept of an EU identity containing the values of art. 2 TEU.[44] These values according to the ECJ have been identified and are shared by the Member States. As these values define the very identity of the European Union as a common legal order, the European Union must be able to defend them.[45]

V. Conclusion

Notwithstanding the dismissal of the action of annulment, a general reflection is needed on the rule of law as a value, and illiberalism as a counter-value. If the various concerns regarding the rise of authoritarian democracies does not cease to overwhelm the public debate within the European polity, it is because of the clash of antinomic and opposite values. Wilkinson has argued that a broader geopolitical disequilibrium – due to tensions between market integration, constitutionalism, and democracy[46] – accounts for the emergence of three crises (economic, migration, and rule of law) over the past fifteen years. In this sense, "Law's empire" will continue to be attacked by illiberal law. The rule of law orthodoxy provides a new ideological buttress to economic efficiency and entrepreneurial activity as a *raison d'être* for law itself.[47] In this sense, if the rule of law is designed to minimise the danger created by the law itself, as Joseph Raz has stated, then the illiberal values of a Member State are a specific assault on liberalism and its proponents, which represent the omnipotence of law's empire.

If the objective of the Regulation, as originally proposed, was to make the distribution of EU funds conditional upon compliance with the rule of law in order to avoid providing support for autocratic democracies, this objective can no longer be achieved. Freedom House has identified Poland[48] as a semi-consolidated democracy and Hungary as a hybrid or quasi-authoritarian regime.[49] It is interesting to note that economic sanctions as

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

[45] *Ibid*.; case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 145.

[46] MA Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) ELJ 327.

[47] See J Raz, *The Authority of Law* cit. 224. He says: "Thus the [R]ule of [L]aw is a negative virtue [...] the evil which is avoided is evil which could only have been caused by the law itself".

[48] See also, F Martucci, 'La Pologne et le respect de l'État de droit' cit.

[49] MC Pontoreau, 'De la Constitution invisible à la Constitution évanescente. La loi fondamentale de la Hongrie à la lumière des expériences européennes' in P Bon, P Cruz Villalón and H Alcaraz (eds), *Mélanges en l'honneur de Pierre Bon* (Dalloz 2014) 404-418; G Halmai, 'Illiberal Constitutional Theories' cit.

part of punitive measures are part of the new legal order as a result of the outlawing of war by the Kellogg-Briand Pact.[50] If the solution to this problem in the 1940s would have been war against such countries, today the solution is primarily economic sanctions.[51] However, this policy results in the creation of a hierarchy of values, such as the rule of law and monetary policy. Some legal scholars have argued that monetary policy – supposedly a depoliticised issue – has now become repoliticised.[52] From the same perspective, if the European Central Bank (ECB) assumed the role of government and became deeply involved in country-specific rescue programmes[53] during the financial crisis of 2018, creating problems relating to the concept of democracy within the countries concerned, then history is repeating itself in respect of the rule of law.

In other words, if the rule of law criterion made its appearance in the last thirty years, the economic conditions of states that could affect their becoming members of the EU already existed prior to that. Budgetary control had to be implemented in the case of every new EU accession. If rescue programmes have become another means of conditionality sanctioning rule of law violations, the solution may not be as suitable as it sounds with regard to the rise of illiberal democracies. If conditionality measures during the economic crisis were necessary for the preservation of monetary policy and the future of the eurozone, the challenge today is more profound. Responding to ideological illiberal threats by means of economic sanctions will only temporarily alleviate the problem; and will not erase it. Sociologists have illuminated the philosophical theorisation of illiberal democracies in a way that demonstrates that illiberalism is a vicious critique of liberalism, with the latter penetrating and politicising society at an increasing rate.[54] The illiberal rush to justify a populist approach to law and constitutionalism[55] will not be stopped by the economic sanctions provided in the Regulation; on the contrary, such sanctions will probably nourish reactionary populist movements in Europe.

The use of monetary leverage was already used before the Regulation by fining Poland one million euros per day for its failure to abide by the interim measures ordered on 14 July 2021.[56] Despite the symbolic fine of unmatched magnitude, Poland found its way out and did not resume compliance with the European obligations. As already stated in this journal's Editorial, monetary sanctions and economic coercion are rarely convincing enough in persuading a State to change its overall political course.[57] An alternative

[50] OA Hathaway and SJ Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017) X-XVII.

[51] *Ibid*.

[52] MA Wilkinson Authoritarian, 'Liberalism in the European Constitutional Imagination' cit.

[53] *Ibid*.

[54] P Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism' (2019) EuConst 519-543.

[55] *Ibid*.

[56] Case C-204/21 R *European Commission v Republic of Poland* ECLI:EU:C:2021:878.

[57] Editorial, 'Sovereign Within the Union?' cit.

solution – which is not precluded by art. 344 TFEU – would be individual or collective actions against Poland brought by Member States before the ECtHR or by lodging communications before the Human Rights Committee set up by the International Covenant on Civil and Political Rights of 1966. In this way, the "sovereign" Member States would remedy the weakness of the institutional procedures designed to ensure the implementation of the values of the Union.[58]

Undoubtedly, the ECJ has also a role to play as it has already done in the past where decisions were made which were not clearly defined from the text of the treaties. However, the path dependency[59] of the ECJ shows that, institutionally, the European Commission adopts a position first which the ECJ later affirms.[60] However, if the European integration process fails, this will not happen because of a powerful protection of fundamental rights, but for purely economic reasons or because of illiberal constitutionalism within some Member States.[61] The above cases were a chance for the ECJ to consider or reconsider the position of the Commission in regard to the scope of the Regulation, and maybe bring the European Parliament's position to bear considering that the Commission was not obliged to align with the EUCO's conclusions. We are looking forward to see how the ECJ will interpret the first "sufficiently direct" link of rule of law violations with the EU budget and/or EU interests. There is nonetheless one element that permits an optimistic perception of the application of the rule of law Conditionality Regulation. The violation is not linked to a specific programme but to the sound management of the budget in general.

[58] For this alternative suggestion see *ibid*.

[59] For the term "path dependency" see DC North, *Institutions, institutional change and economic performance* (Cambridge University Press 1990) 92-104. See also AK Mangold, 'Democratic Legitimacy of EU law: Two Proposals to Strengthen Democracy in the European Union' in J Van der Walt and J Ellsworth (eds), *Constitutional Sovereignty and Social Solidarity in Europe* (Nomos 2015) 165-192.

[60] A Jakab, 'Application of the EU Charter of Fundamental Rights by National Courts in Purely Domestic Cases' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values* cit. 261.

[61] *Ibid*. 262.