# Staring into the abyss: a crisis of the rule of law in the EU

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*Abstract*

Acceptance of the meaning, operation and enforcement of the rule of law in the EU by its Member States is critical to the Union's legitimacy. Any perceived or real crisis in the rule of law thus merits careful consideration, yet much existing legal scholarship focuses upon the rule of law for the purposes of accession or promotion of values through the neighbourhood policy. This article instead focuses on how a crisis in the rule of law occurred within the EU and how the intended ambiguity of the rule of law has entrenched this crisis. This article argues that the primary cause of the crisis has been the EU's development of a unique three-way ideation of the rule of law – as a constitutional norm, policy instrument and value – that 'hollowed out' the rule of law from a constitutional principle to an expedient policy tool. The article identifies three significant moments where the EU institutions have entrenched the crisis in the rule of law and how, in the aftermath, the EU has tried to manage the chasm between what it deems as respect for the rule of law and certain Member States' conduct.

## Introduction

The purpose of this article is to examine how the rule of law crisis developed in the EU and to evaluate the institutions' attempts to resolve the crisis. The contribution to scholarship made in this article is that it identifies the EU as the cause of the crisis through its conceptual appropriation of the rule of law, from constitutional norm to expedient policy tool. The article sets out a three part ideation of the rule of law that has been essential in some aspects of the EU's constitutional development, but on the other hand, has weakened the fidelity of certain Member States to the original organising constitutional norm. The article examines the origin and spread of the crisis and analyses the conduct of the EU institutions – specifically focusing on the CJEU, the European Parliament and the Commission – throughout the unfolding events. [1] This article contributes to the wide scholarship on the rule of law in the EU.[2] It

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[1] For reasons of space, the article cannot analyse every twist and turn in this long saga, nor can it comment in depth on every institution nor the actions of each Member State concerned. This has been covered piecemeal in other literature. For example, for a thorough analysis of the Council's woeful inaction in this area, see P Oliver, J Stefanelli, Strengthening the Rule of Law in the EU: The Council's Inaction' (2016) 54 JCMS 107-1084 and the rest of this special edition on the rule of law. Alternatively Pech and Kochenov have covered the day to day events of the Member States extensively in Verfassungsblog.de.

[2] A. J. Menendez, 'The Existential Crisis of the European Union'(2013) 14 GLJ 453-526, L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3-47, D.M Trubek 'Toward a social theory of the law: an essay on the study of law and development' (1972) 82 YLJ 1-50, W. Schroeder (ed) *Strengthening the rule of law in Europe : from a common concept to mechanisms of implementation* (Oxford: Hart 2016), D. Kochenov, L Pech 'Monitoring and

covers the period 2010-2019 and as such aims to provide an overview of some of the interventions germane to the evolution of this crisis.

Whilst much has been written across disciplinary boundaries about particular crises in the EU (the global banking crisis, migration and Brexit[3]) less has been written about the crisis of the rule of law in the EU in relation to the origin of the crisis and the role played by the EU institutions. Troubling events in Member States, I argue, is not the genesis of the crisis; such events have merely exposed pre-existing tensions in the meaning and role of the rule of law within the EU and its institutions. However, recent events offered the opportunity for the EU to re-assert the rule of law as power-limiting constitutional principle which ultimately it has failed to capitalise on.

A crisis in the rule of law is significant for any state or international organisation, but for the EU it is especially perilous. The EU's mission to bring states together based on civilising and liberal values in order to prevent regression into fascism and conflict in Europe is based entirely on respect for the rule of law. Legal constitutionalism is the integrative force of the EU. A perceived or real crisis in the rule of law is thus a weighty concern; it has the potential to spread beyond discrete areas of governance and risks infecting the very heart of the EU project. Yet, legal scholarship on the genesis of the rule of law crisis beyond the activities of particular Member States remains under-developed.[4] This article addresses that gap.

This article argues that a major problem confronting the EU institutions in the rule of law crisis is one of their own making: fracturing the rule of law and emptying it of its meaning as a constitutional norm by the institutions and an inability (or unwillingness) to move back from this now established position.[5] The tools proposed by the EU institutions to combat this crisis are insufficient, repetitive or misplaced; when Member States began to test the

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Enforcement of the Rule of Law in the EU: Rhetoric and Reality'(2015) 11 *European Constitutional Law Review* 512-540, D Kochenov, *EU enlargement and the failure of conditionality : pre-accession conditionality in the fields of democracy and the rule of law* (Netherlands: Wolters Kluwer 2008).

[3] E. Chiti and P. G. Teixeira ''The constitutional implications of the European responses to the financial and public debt crisis' (2013) 50 *CMLR* 683-708, M. Dawson, F. De Witte 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 MLR 817-844, M. A. Wilkinson, 'Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union' (2013) 14 GLJ 527 -560, L. Jakulevičienė 'Migration Related Restrictions by the EU Member States in the Aftermath of the 2015 Refugee "Crisis" In Europe: What Did We Learn?' (2018) 3 *International Comparative Jurisprudence* 222-230, C. Henderson, 'Brexit and International Peace and Security: A Crisis for Crisis Management' in Michael Dougan (ed) *The UK after Brexit: Legal and Policy Challenges* (Intersentia: 2017).

[4] For a doctrinal perspective see 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) 6 *European Constitutional Law Review* 359 -396 and for a different perspective on the origins see A Magen 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54 JCMS 1050-1061.

[5] C. R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) 74 *Difficult Choices* 1-24.

boundaries of how they can behave with respect (or lack thereof) to the rule of law, the EU has been unable to respond meaningfully.[6] Unpicking the origin of the crisis and evaluating the institutions' handling of the crisis so far will help us to frame how (and why) the rule of law crisis seems intransigent. First I analyse the meaning (and role of) the rule of law in the EU, presenting a three-part ideation of the rule of law. For reasons of space I pick out three significant moments in the history of the rule of law crisis, in order to explain how and why we have arrived where we are today. The second half of the article focuses on an evaluation of the European Commission (Commission) and European Parliament's (EP) responses to the crisis.

## 1. Three approaches to the rule of law in the EU: a brief overview[7]

Understanding what is meant by the 'rule of law' is critical to the analysis of whether there is a rule of law crisis in the EU. In jurisprudential and philosophical literature, the notion of the rule of law is notoriously slippery. It is flexible and agile: flexible in that it can accommodate many different interpretations and meanings, and agile in that it can 'move between various sites and to travel smoothly up and down the scale of abstraction'.[8] Scholars of EU external relations and the neighbourhood policy have explored the role and meaning of the EU concept of the rule of law with various different conclusions posited.[9] Whilst there is a strong critique in the literature on the vagueness (and thus legitimacy) of the concept of the rule of law being deployed by the EU in its promotion in the neighbourhood,[10] there are similarly robust assertions that vagueness of the EU's rule of law concept is a necessity and makes possible engagement with neighbouring countries.[11] It is a deliberate choice to keep the rule of law vague and indeed 'defining the rule of law is almost ridiculous'.[12] This latter position reflects that with non-members of the EU, the rule of law is being used in an instrumental and rhetorical fashion (the second and third ideation used in this article) and not as a power

[6] It is outside of the scope of this article to address the question of moral authority, ie *should* the EU be enforcing the rule of law against its Member States and on what basis they claim the moral authority to do so. Others have tackled this question (see eg Muller n 89 below). Rather the article addresses the fact that the EU *is* proclaiming to enforce the rule of law and the article assesses the relative success of this claim.

[7] This section will necessarily deal with complex literature on the rule of law in an overview since complete immersion in this topic cannot be covered in a single article. For an in-depth discussion see C. May and A. Winchester (eds) *Handbook on the rule of law* (Cheltenham: Edward Elgar 2018).

[8] This refers to 'justice' as a concept but is equally applicable to the rule of law: N. Walker 'Justice in and of the European Union' in *Europe's Justice Deficit* eds D. Kochenow, G. de Búrca, A. Williams (Oxford: Hart Publishing 2015). This flexibility has been explored in literature on the neighbourhood policy, eg n 9.

[9] Olga Burlyuk 'Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood' (2015) 53 JCMS 509-523.

[10] Paivi Leino and R Petrov 'Between Common Values and Competing Universals: The promotion of the EU's Common Values through the European Neighbourhood Policy' (2009) 24 ELJ 329-384.

[11] Olga Burlyuk 'Variation in EU External Policies' n 9.

[12] Ibid p 512.

limiting constitutional norm; in and of itself, this speaks to its purpose and use, even by the absence of a definition. This scholarship makes a powerful critique of the EU spreading its values through appropriation of the rule of law concept, but fundamentally does not help us further with an analysis of the meaning of the rule of law for the EU and its Member States.

Three broad approaches to conceptualising the rule of law in the EU are identified here. First, the rule of law as a power-limiting norm; it acts as a constitutional principle that limits the use of arbitrary public power, upholding separation of powers and respect for an independent judiciary. This is foundational to the establishment of a democracy.[13] Second, the rule of law as a tool of integration; it is used as a functional policy tool to ensure adherence to EU policies. Its purpose is to ensure obeyance to a set of policies which are cast as *necessary and constitutive policies of the polity*. Third, the rule of law as a 'value'; it is a fluid and flexible notion, as described by EU institutions and texts that reference democracy and human rights. This third element is distinctive from the second; it is the morally persuasive argument and politicisation of the rule of law (*we are the good people / polity / club because we respect the rule of law*). It is concerned with association of a polity with classic western liberal values such as tolerance and pluralism. This is the language of identity.

We can find references to the rule of law as a constitutional norm in the Council of Europe's monitoring body for the Rule of Law, the Venice Commission. The Commission defines the rule of law as comprising: legality (including a transparent, accountable and democratic process for enacting law); legal certainty; prohibition of arbitrariness; access to justice before independent and impartial courts. This is the classic public law understanding – the rule of law first and foremost as a power-limiting principle. As a simple principle the rule of law connotes legality; a basic tenet of government according to law and the absence of arbitrary power – a patently 'thin' version.[14] It can refer to the quality of the legal system and principles of law making within a state, the independence of the judiciary, and comprises 'objective' principles such as clarity, certainty and so on.[15] The Venice Commission also includes respect for human rights; non-discrimination and equality before the law in its definition.[16] This version is substantive in nature including within its remit an appreciation of fundamental rights, but these rights also operate for the purpose of limiting the exercise of

[13] It also legitimises the public power being used. In this crisis certain Member States have attempted to cast these principles – rule of law and democracy – in competition with one another and that ultimately democracy rather than the rule of (EU) law should prevail. This is of course a complete misunderstanding of the rule as law as a fundamental constitutive element of any democracy.
[14] A. V. Dicey, 'The Law of the Constitution: Lectures Introductory to the Study of the Law of the Constitution' Vol. 1 of Oxford Edition of Dicey (eds) J.W.F. Allison (Oxford: OUP 2013).
[15] J. Raz, 'The Rule of Law and its Virtue' (1977) 93 LQR 195-211.
[16] European Commission for Democracy Through Law (Venice Commission), Report on the Rule of Law Study No 512/2009, CDL-AD(2011)003rev, 10.

public power over individuals as well as serving an 'identity' purpose.[17] The rule of law can embrace a specific rights-based perspective,[18] including those built on particular international human rights treaty obligations.[19]

The second perspective on the rule of law in the EU is that it is more than just a mechanism of control of public power; instead it is seen as fundamental to the integrationist agenda.[20] The EU's evolution by integration through law provides the glue that holds together the basic functioning of the Union since otherwise there is little to compel Member State compliance. The EU is fundamentally a system of law, by law: obedience to the law (especially by state actors and the courts) is paramount in order to achieve the *policy goals* enacted at Union level.[21] The central principles of supremacy of EU law, direct effect, the preliminary rulings procedure and the infringement process are used by the Court of Justice of European Union (CJEU) to ensure EU policy is efficiently distributed and adhered to.[22] Other laws and norms must be subjugated to the basic tenet of EU primacy. Here the rule of law is a policy tool; its function is instrumental rather than constitutional and normative.

The third approach to the rule of law is found in the EU texts where it is framed as a value. According to Art 2 TEU it is a founding *value* of the European Union:

> 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights…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.'

The treaties set the rule of law alongside other 'values' such as democracy and equality and interlock the rule of law with the concept of respect for human rights, perhaps establishing a Dworkinian[23] understanding of the rule of law at its 'thickest' parameters. Alternatively the treaties may be articulating these concepts as separate but linked: perhaps here the rule of law connotes only the more formalist version (legality) which necessitate the mention of human

[17] T. R. S. Allan, *Law*, *Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford: OUP 1994), T. R. S. Allan 'Interpretation, Injustice, and Integrity' (2015) 36 *Oxford Journal of Legal Studies* 58-82, P. Craig 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467-487.
[18] R. Dworkin, *Taking rights seriously* (Mass: Harvard University Press 1978), R. Dworkin 'Rights as Trumps' in A. Kavanagh, J. Oberdiek (eds) *Arguing about Law* (London: Routledge 2013) 335.
[19] T. Bingham *The Rule of Law* (UK: Penguin 2011)
[20] S. A Scheingold, *The rule of law in European integration: The path of the Schuman Plan* (Quid Pro Books 2013), G. Majone, *Rethinking the union of Europe post-crisis: has integration gone too far?* (Cambridge: CUP 2014), G. Majone, 'From Regulatory State to a Democratic Default' (2014) 52 JCMS 1216-1223 *Symposium: Conventional Wisdoms Under Challenge – Reviewing the EU's Democratic Deficit in Times of Crisis* (eds) M. Blauberger, S. Puntscher Riekmann, D. Wydra.
[21] R. D. Keleman *Eurolegalism* (Mass.: Harvard University Press 2011).
[22] See generally P. Craig, G. de Búrca *EU Law Text Cases and Materials* (6th Ed Oxford: OUP 2015).
[23] Dworkin n 18.

rights separately.[24] Endorsing the rule of law as a value rather than a principle may be considered merely an 'unfortunate rephrasing' of the treaty text (which previously had the word 'principle').[25] However, a principle denotes a higher rule, a guide of acceptable conduct, which underpins the associated values (democracy, tolerance, pluralism etc.) whereas a value is something that is ostensibly of morality, and morality denotes choice, variation, an individual or societal construct. No longer an *a priori* principle that underscores all Member State constitutional traditions, a value imports indeterminacy and invites the possibility of contestation. If we are to understand the rule of law as a hierarchical norm to which all else bends, this downgrading of its status situating it alongside other values is of primary importance when we come to consider the various emerging practices within Member States, some of which pit democracy against the 'value' of the rule of law.

In the EU treaties characterisation of the rule of law as a value and the CJEU's tendency to view it as a tool of integration[26], the EU has imported unnecessary trouble into the use of this fundamental concept. It has travelled a great distance from the widely understood concept of the rule of law as an overarching constitutional power limiting principle to something more relativistic. It is argued that this 'triptych' ideation of the rule of law is the beginning of the crisis in the EU.

**2. Three events that shaped the rule of law discourse**

There have been some significant moments in the constitutional history of the EU, both political and legal, that appeared to shape the rule of law doctrine. Starting with the legal moments of note, the *Solange* case law from the German Constitutional Court that challenged the EU's supremacy regarding fundamental rights protection is one such example.[27] The initial rejection of accession to the European Convention on Human Rights in the 1990s[28] was another early warning sign about potential rule of law issues that was glossed over by a typical exercise of legal technicality. The Haider affair, where Austria elected a far-right party to operate in a coalition government, was perhaps the most prescient example of political

[24]Pech n 4.
[25] Pech n 4 p 362.
[26] There is a vast canon of literature on the European Integration theory and the role of the court from Rasmussen to Weiler and beyond. A summary of the earlier cannon can be found in A. Burley, W. Mattli 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 41 International Organization 47-76, K. Alter, *The European Court's political power: selected essays* (Oxford: OUP 2009). A recent exploration of this in relation to the rule of law can be found in L. Hooghe, G. Marks 'Grand theories of European integration in the twenty-first century' (2019) 26 JEPP 1113-1133.
[27] The Solange affair, Judgment of 29 May 1974, 37 Entscheidungen des Bundesverfassungerichts 271, Judgment of 22 October 1986, 73 Entscheidungen des Bundesverfassungerichts 339.
[28] Hereinafter the ECHR or Convention. Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:1996:140.

challenges to the prevailing liberal democratic settlement.[29] These individual 'moments' were not considered to be evidence of a crisis in the rule of law, but understandable growing pains for a burgeoning *sui generis* legal order; kinks in the fabric that would work themselves out over time. However, these moments highlight the dominant instrumentalist approach to the rule of law, built around political intervention or supremacy, that is all too familiar in more recent times.

*3.1 The CJEU: unravelling the (power limiting) constitutional norm to a power extending instrument*

The CJEU has played a pivotal role in carving out the meaning of the rule of law in the EU: it has advanced the rule of law in an instrumentalist fashion, using it to advance policy, in three ways. First, the CJEU uses the rule of law as its inspiration for developing its 'general principles' that reflect the common tradition of Member States in order to bridge existing gaps in the law which would be a barrier to advancing policy, where no specific treaty principle exists.[30] We can find principles associated with the rule of law in the jurisprudence, such as legality,[31] legal certainty,[32] prohibition of arbitrariness,[33] and respect for fundamental rights created in this fashion.[34] Second, (and also a general principle) the CJEU is concerned with ensuring the effective judicial review of measures and decisions taken by institutions and Member States, in the sense that the CJEU's own competence to review such measures and decisions should be protected.[35] The CJEU declares this to be inextricable from respect for the rule of law in the constitutional sense (the regulation of public power, legality and absence of arbitrariness) but this functional usage is instead a mere policy device, blurring these distinct concepts of the rule of law. The starting point of this approach in the case law is the judgment of *Les Verts*,[36] concerning an annulment action against a measure of the European Parliament where the EU was said to be:

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[29] CRISMART 'The 14' and the Sanctions Against Austria'. http://www.fhs.se/Documents/Externwebben/forskning/centrumbildningar/Crismart/Forskning/Fallbanken/EU_AND_1.PDF (unless stated otherwise all URLs last accessed 4 March 2019).

[30] K. Lenaerts, J. A. Gutiérrez-Fons 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 CMLR 1629-1669.

[31] Case C-496/99 P, *Commission v CAS Succhi di Frutta* ECLI:EU:C:2004:236, 63.

[32] Joined cases 212 to 217/80 *Amministrazione delle finanze dello Stato v Salumi* ECLI:EU:C:1981:270, 10.

[33] Joined cases 46/87 and 227/88 *Hoechst v Commission* ECLI:EU:C:1982:425, 19.

[34] Case C-583/11 *P Inuit Tapiriit Kanatami and Others v Parliament and Council* ECLI:EU:C:2013:625, 91; Case C-550/09 *E and F* ECLI:EU:C:2010:382, 44; Case C-50/00 *P Unión de Pequeños Agricultores* ECLI:EU:C:2002:462.

[35] S Drake, 'Scope of Courage and the principle of "individual liability" for damages: Further development of the principle of effective judicial protection by the Court of Justice' (2006) 31 EL Rev 841-864, A. Arnull, 'The principle of effective judicial protection in EU law: an unruly horse?' (2011) 36 EL Rev 51-70.

[36] Case 294/83 *Parti écologiste "Les Verts" v European Parliament* ECLI:EU:C:1988:94.

> 'based on the rule of law *inasmuch as* neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty'. (my emphasis)

Third, the CJEU is concerned with provision of effective judicial protection of individual rights derived from EU law, and has championed the right to an effective remedy (again a common tradition) sourced from Article 13 ECHR and now Article 47[37] European Union Charter of Fundamental Rights.[38] The CJEU has nonetheless been repeatedly charged with not 'taking rights seriously' and has an undistinguished record of favouring internal market imperatives in the face of fundamental rights violations.[39] Occasional high points, for example the Kadi litigation saga which concerned the freezing of Mr Kadi's assets and the absence of adequate redress, are not premised on an unacceptable attack on the rule of law as a constitutional norm. Fundamental rights protection here is in the guise of the Court asserting the autonomy of the EU legal order over and above the United Nations.[40] The CJEU uses the 'values' version of the rule of law to camouflage the capture of the rule of law as a device for asserting supremacy.[41]

The CJEU's approach to the rule of law is as follows: the CJEU protects and advances its own power, occasionally in the guise of the 'autonomy of EU law'; autonomy of the CJEU, otherwise known as the EU legal order; and as a defence against Member States' Constitutional Court challenges on fundamental rights protection.[42] There is a profound distance between the CJEU's approach to the rule of law and the constitutional power-limiting doctrine. The notion of primacy of EU law contains within it some automatic understanding that the law must be obeyed, but this invocation has a *functional*, or occasionally, value driven purpose. This jurisprudential agility has contributed to a rule of law crisis in the EU for it has imported the possibility of contestation over the meaning of the rule of law for its membership – from power-limiting, to power extension.

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[37] C-370/12 *Thomas Pringle v Government of Ireland* ECLI:EU:C:2012:756 , C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105. The latest significant case on Article 19 and effective judicial protection (Portuguese Judges case) is dealt with in the final section of the article.

[38] European Union Charter of Fundamental Rights (2000/C 364/01) hereinafter the EUCFR or the Charter.

[39] J. Weiler, N. J. S. Lockhart, '"Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence–part II' (1995) 32 CMLR 579-627.

[40] C-402 and 415/05 Kadi and Al Barakaat International Foundation v Council and Commission ECLI:EU:C:2008:461, N. Türküler Isiksel, 'Fundamental rights in the EU after Kadi and Al Barakaat' (2010) 16 ELJ 551-577, G. De Burca, 'The EU, the European Court of Justice and the international legal order after Kadi' (2009) 51 *Harvard International Law Journal* 1-49.

[41] There are of course many cases on effective judicial protection and the salient most recent cases in relation to the rule of law are C-64/16 (Portuguese Judges Case) and C-619/18 Commission v Poland which are discussed in the final section.

[42] In particular from the German Constitutional Court, eg the Solange affair n 27.

*3.2 The rejection of accession to the ECHR – legal fault-lines exposed*

Much like comedy, in politics, timing is everything. The CJEU's rejection (and its reasons for rejection) of accession to the Convention can be conceptualised as the breaking of any legitimate claim to understanding the importance of the rule of law as a power-limiting, or indeed even a value promoting, constitutional norm. The *timing* of this rejection, amongst the escalating crisis in Hungary and pre-dating the events in Poland, speaks volumes about the political deafness of the institutions. The ECHR represents *the* common understanding amongst the Member States of what the rule of law is. The rejection of the rule of law by its ultimate guardian in the EU is singularly the most exposing event in recent times. The CJEU employs reasoning that highlights how the rule of law has been unpicked as hierarchical constitutional norm whose objective is the control of power to which all institutions (EU and Member State alike) must bow.[43] It is not just the (thick) rule of law with its protection of human rights norms that is under pressure here, but also the thinnest conception (legality): that the CJEU (and the EU) should be bound by the law.

As noted earlier, the CJEU introduced the Convention into its case law as a defence against potential encroachment of domestic constitutional courts over its supremacy in the field of fundamental rights.[44] In that sense, the Convention has been part and parcel of the scripture of fundamental rights protection insofar as it is acknowledged as a 'common constitutional tradition' of Member States. The Convention provides occasional inspiration for interpretation of rights and is dutifully acknowledged as being a ghost text of the Charter (though not superior to it). This was a classic functionalist use of the rule of law. It ensured fundamental rights interpretation always remained in the CJEU's control. The first tacit challenge to this came in Opinion 2/94[45] where the Court was able to reject accession to the ECHR on a technical legal issue: the (then EC) did not have a legal personality. Few fundamentals had to be confronted. Crisis averted.

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[43] For a more detailed clause by clause evaluation see D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 GLJ 105-146, C. Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession After Opinion 2/13' (2015) 16 GLJ 147-168, S. Ø. Johansen, 'The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences' (2015) 16 GLJ 169-178, A. Lazowski and R. A. Wessel, 'When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR' (2015) 16 GLJ 179-212, and the early blogpost reactions eg S. Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' U.K. Const. L. Blog (24th December 2014) available at http://ukconstitutionallaw.org, S. Peers, 'The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection', EU Law and Analysis Blog (18 December 2014) http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html.

[44] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* ECLI:EU:C:1970:114.

[45] Opinion 2/94 n 28.

In the CJEU's Opinion 2/13 however, the consequences of accession could no longer be avoided: here was a rule of law conflict *par excellence*. It came in the midst of escalating tensions over Hungary reformatting its constitutional court. Some reasonably rational and identifiable problems[46], picked up by AG Kokott in her opinion,[47] are evident. Specifically, clauses that threatened the CJEU's sole jurisdiction to interpret EU law – the 'co-respondent mechanism'[48] and the 'prior involvement procedure'[49] – are difficult but not insurmountable issues. More fundamental is the ECtHR's jurisdiction over the Common Foreign and Security Policy which the CJEU did not have. The ECtHR would become the superior Court. The CJEU's hollowing out of the rule of law as a hierarchical norm was painted in stark colours when it confronted the direct clash between the *EU policy* of mutual trust[50] – not a value set out in Article 2 – and the conflicting asylum rights found in the case law of the ECtHR. Furthermore the CJEU cannot accept the possibility of Member States maintaining higher standards of human rights protection in the implementation of EU law than those guaranteed by the Charter. This stands in direct opposition to Article 53 ECHR which allows for higher human rights standards by Member Stares. These are intractable problems for CJEU because they conflict with CJEU's version of the rule of law: that the rule of law is instrumental and its role is to ensure the primacy of EU law and the primacy of the CJEU.

In 2013 Hungary was three years into the destruction of the constitution, with little in the way of censure from the EU. Accession to the ECHR was a valuable opportunity to reinforce the rule of law as a power-limiting constitutional principle, *especially* in the face of events within the Member States. The Commission acknowledges that the rulings of the ECtHR 'significantly contribut[ed] to the definition, promotion and strengthening of the rule of law and have underlined the close relationship between the rule of law and democratic society'.[51] Accession to the Convention had other benefits of course – resolving the occasional conflict brought about between the overlapping jurisdictions of the EU and Council of Europe[52] since different interpretations of fundamental rights by two different judiciaries with two different

[46] Halberstam n 43.
[47] View of Advocate General Kokott 23 June 2014 ECLI:EU:C:2014:2475
[48] Opinion 2/13, 215.
[49] Above, 236.
[50] For example in the 'Dublin' Asylum system in various EU Regulations. M. Schwarz, ' Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2018) 24 ELJ 124-141, A. Efrat, 'Assessing mutual trust among EU members: evidence from the European Arrest Warrant' (2019) 26 JEPP 656-675 M Weller, 'Mutual trust: in search of the future of European Union private international law' (2015) 11 JPIL 61-102.
[51] Commission Communication ' Further strengthening the Rule of Law within the Union: State of play and possible next steps' COM(2019) 163 final p 7.
[52] P. Craig 'EU Accession to the ECHR: Competence, Procedure and Substance' *Oxford Legal Studies Research Article* (4/2014).

'missions' had proved problematic from a rule of law perspective. [53] Ultimately, accession to the Convention would have *forced a change* in perspective from the CJEU which dogmatically pursues it vision of CJEU primacy over all other concerns. However, rejection of accession instead solidified this crisis; it indicates that the rule of law can be traded away in the name of power.

The Opinion has rendered accession to the ECHR problematic[54] in the medium term, and the EP legislative tracker, rather aptly, describes the accession process as 'derailed'. So far there has been silence *vis a vis* the most difficult issues of jurisdiction over CFSP and the principle of mutual trust which of course engage the contested instrumental use of the rule of law as mechanism of policy delivery. Peers[55] argues that accession to the Convention on the CJEU's own terms would further undermine rights protection across the EU because the CJEU would contaminate the ECtHR's jurisprudence with its toxic approach to human rights protection, and arguably, the same can be said of the rule of law. Enabling the CJEU to hijack the notion of the rule of law on its own terms (again) is to respond to a fire with gasoline.

*3.3. Political fault lines exposed: Hungary and Poland*[56]

In Hungary observance of the rule of law had been under attack since 2010.[57] Legally, it began with contentious changes to the Hungarian Constitution (amended numerous times under Orban) and the adoption of the 'Fundamental Law', which amongst other things, threatens the independence of the judiciary and is considered by the EU and the Venice Commission to violate the rule of law in its basic constitutional function ensuring a separation of power between branches of the state.[58] Whether it is the sacking of an inconvenient judiciary or statements which promote the concept of the 'illiberal' democracy as consistent

[53] *Matthews v United Kingdom* (1999) 28 EHRR 361 (ECHR), C. Costello 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87-130.

[54] Council of the European Union (Presidency), 'EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms' 7812/15, Brussels 9 April 2015. Council of the European Union (Presidency) 'Technical Written Contribution from Commission Services' Brussels 14 April 2015 DS 1216/15.

[55] S. Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' (2015) 16 GLJ 213-222.

[56] The constitutional contestation of the rule of law between the EU and these states are the focus on this article, however, arguably this is not where it began. Beginning in France in 2010, there was mass expulsion of the Roma. Presented by France as an attempt to remove illegal camps, it transpired that internal memos described the policy as specifically targeting ethnic groups. This program was adopted in contravention of basic free movement laws (the Free Movement Directive which France had failed to implement) and anti-discrimination provisions in the treaties. It was the first assault on the rule of law in the austerity period. No penalities of any kind were enforced on France.

[57] Financial Times, 'Orban's threat to democratic values' March 3 2013. http://www.ft.com/cms/s/0/d7af7dbe-859b-11e2-bed4-00144feabdc0.html#axzz3aV76Asc9

[58] Opinion on Act CLI of 2011 on the Constitutional Court of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012) CDL-AD(2012)009.

with the values of the EU,[59] there appears to be no end to the litany of measures being introduced in Hungary that offend even the thinnest conception of the rule of law as a power limiting principle which keeps the executive branch of government from becoming tyrannical. Repeated adaptations of fundamental constitutional structures which affect the rule of law and separation of powers are becoming routine; weakening of the constitutional court, data protection agencies and the Hungarian Parliament; attacks on independence of the judiciary, the widespread undermining of any independent media, and electoral reform; and attacks on the rights and protections of minority groups and freedom of religion have been recognised as systematic undermining of EU 'values'.[60] The glacial response of EU institutions to this conduct (explored in Section 2) merely emboldened Poland to up the ante.

In 2015, five years on from a distinct lack of action against Hungary, the Polish government began is campaign of reformatting the judicial architecture of the country, starting with the Constitutional Tribunal before moving on to the ordinary courts and Supreme Court. The aims of these reforms are to remove the independence of the judiciary, a basic constitutional requirement of the rule of law in a state. The reforms forced out around 1/3 of sitting judges in the Supreme Court through a new early retirement age so that they could be replaced with party loyalists, ensured by reforming the National Council of the Judiciary which appoints judges.[61]

**4. The institutional response: entrenchment**

This section gives a brief overview of some actions and reactions of, primarily, the Commission and Parliament to the events taking place in Hungary and Poland. It considers what steps were available to the institutions, including existing and new mechanisms, and how these have been utilised to combat the rule of law crisis. Throughout this evaluation we can see how the triptych ideation of the rule of law – constitutional norm, policy instrument and value – is deployed by the EU institutions and how this approach has led to entrenchment, not progress. The timeline below encapsulates the main political and legal responses, with the boxes shaded in grey highlighting related events that have shaped the institutions' responses.

*4.1 Existing mechanisms: Article 7 TEU and Article 258 TFEU*

[59] EU Observer 'Orban wants to build an illiberal state' 28 July 2014 https://euobserver.com/political/125128.

[60] The Rui Tavares Report, European Parliament, 'on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))' 25 June 2013) provides a thorough catalogue of systematic assaults on the rule of law.

[61] CDL-AD(2016)001-e Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

The EU possesses formal mechanisms to deal with a breach of the rule of law. Depending upon the nature of the breach, the EU may resort to the Article 7 TEU procedure[62] to address transgressions of EU values laid out in Article 2 TEU, or alternatively, to infringement proceedings where substantive breaches of law have occurred. Together with the 'Copenhagen Criteria', which is meant to ensure candidate States seeking membership respect the values of the EU, these preventative mechanisms are designed to minimize the risk of a rule of law crisis.[63]

The Article 7 procedure requires a 'reasoned proposal' from a third of the Member States, by the European Parliament or Commission. It enables the Council of Ministers[64] to determine whether there is a 'clear risk of a serious breach by a Member State of the values contained in Article 2 TEU'. The Council is required to hear representations from the Member State in question. In addition, the European Council[65] can determine the existence of a 'serious and persistent breach' of the same values, after inviting the Member State to submit its observations. If the European Council *unanimously* determines a breach has occurred, the Council of Ministers may decide to suspend certain rights deriving from the treaties including voting rights of that Member State in Council. This process is not equivalent to ejecting a Member State from the Union (there is no such provision) but a mechanism that enables the EU to caution and counsel Member States in relation to breach of Article 2. The intention is to bring them back into line by continued supervision of their behaviour. Only *in extremis* would 'suspension of rights derived from the treaties' be resorted to and then only for as long as it took the Member State to respect the values in Article 2.

Article 7 was strengthened in response to the EU's first brush with an affront against the rule of law with the aforementioned Haider Affair in the 1990s[66], ostensibly the first threat to the Union's core values. The prospect of election of a far right party (operating in a coalition) was enough to prompt the remaining 14 Member States into swift diplomatic action without actually invoking Article 7. In response to events in Hungary from 2010 onwards, unhelpfully,

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[62] Introduced into the Treaty of Nice after the notorious 'Haider Affair' which in retrospect looks tame, although it prompted unanimous and swift condemnation: see the report by CRISMART 'The 14' n 29.
[63] C. Hillion, *The Copenhagen criteria and their progeny' EU enlargement* (Oxford: Hart Publishing 2004).
[64] With consent of the European Parliament and majority of four-fifths of Council.
[65] Acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament.
[66] A. Brändström, F. Bynander, P. 't Hart, 'Governing by Looking Back: Historical Analogies and Crisis Management' (2004) 82 *Public Administration* 191–210, C. Leconte, 'The Fragility of the EU as a 'Community of Values': Lessons from the Haider Affair' (2005) 28 *West European Politics* 620-649, S. Larsson and J. Lundgren *The Sanctions Against Austria: Crisis Decision Making in the European Union* (Stockholm: Elanders Gotab 2005).

Article 7 was immediately characterised by President Barroso as the 'nuclear' option[67], a label that has resolutely informed subsequent debate on the possibility (or lack) of recourse against unsuitable Member State behaviour. Article 7 is merely a dialogue that will (probably) not lead to a sanction – not very nuclear.

The other formal mechanism for sanctioning Member State behaviour is Article 258 TEU. The Commission's role as guardian of the treaties enables it to bring infringement proceedings against Member States for violation of their obligations. The Commission has claimed that the values in Article 2 cannot be enforced via this mechanism, because failure to fulfil obligations has to be 'within the scope of EU law'.[68] There is no legal precedent to support this claim, and for example, the Commission has taken infringement proceedings against Member States where they have failed in the duty of loyal cooperation (Article 4 (3) TEU) which is not a substantive EU law provision either.[69] The Commission *chose* to interpret Article 2 as being beyond the scope of Article 258 TFEU.

This self-limiting interpretation of what it cannot do under Article 258 TFEU does not relieve the Commission of its duty as guardian of the treaties (including its values) and it does not preclude the Commission from engaging in the soft diplomacy that occurs at the start of the infringement process.[70] This is not part of the infringement process in technical legal terms and it is protected from CJEU scrutiny; the Member State concerned would be prevented from challenging such a process. Before undesirable conduct becomes routine, the Commission steps in to bring Member States back into line. As part of this administrative negotiation the Commission engages in a dialogue with the Member State, and as a result the Commission conducts an *objective and thorough* assessment of the situation, respecting the *equal treatment* of all Member States and indicating *concrete actions* that would resolve the problem and then continued *monitoring* of the situation occurs. There are several echoes of Article 7 in the Article 258 process, with similar procedural steps and soft political negotiation as part and parcel of the institutional approach. The flaw is not the design of the system, but the lack of political will to operate it, particularly in the early days between 2010

[67] José Manuel Barroso 'State of the Union 2012 Address' Speech available at http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm.
[68] Commissioner and First Vice President Frans Timmermans 'The European Union and the Rule of Law - Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015' https://ec.europa.eu/commission/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en.
[69] M. Smith *Centralised enforcement, legitimacy and good governance in the EU* (London: Routledge 2009) ch 2,4.
[70] R. Rawlings, 'Engaged Elites: Citizen Action and Institutional Attitudes in Commission Enforcement' (2000) 6 *European Law Journal* 4-28.

and 2012. This reluctance to engage these mechanisms would signal to other Member States that Hungary's actions, and those like it, would not be punished.

*4.2 'New' mechanisms of soft political dialogue*

When attacks on the rule of law in Hungary became ever more blatant by 2012, eventually, the Commission launched infringement proceedings for the wholesale replacement of the judiciary through forced retirement (age discrimination), but not specifically for an attack on the rule of law or the values in Article 2.[71] The crisis was being talked down, and low key solutions were preferred. Only the EP would act against Hungary with resolutions in June and December 2015, and May 2017. Eventually it would be EP, not the guardian of the treaties that would act decisively and vote to trigger Article 7(1) in September 2018.

**Figure 1**

**Timeline for Hungary and Poland and the rule of law 2010-2019**

| Hungary | | Poland | |
|---|---|---|---|
| Election of Fidesz – amends to constitution | 2010 | | |
| EP Resolution | Mar 2011 | | |
| Commission issues FL regarding judges case | Jan 2012 | | |
| EP Resolution | Feb 2012 | | |
| Commission Art 258 Case to Court | June 2012 | | |
| Article 258 Case (Judges / workers) judgment C286/12 | Nov 2012 | | |
| EP Resolution | Jul 2013 | | |
| CJEU Rejects accession to ECHR | Dec 2013 | Dec 2013 | CJEU Rejects accession to ECHR |
| 2014 Rule of Law Framework | Mar 2014 | Mar 2014 | 2014 Rule of Law Framework |
| EP Resolution | Jun 2015 | Oct 2015 | PiS reelected majority government |
| EP Resolution | Dec 2015 | Dec 2015 | Letters of concern from Commission to Poland |
| | | Jan 2016 | Rule of Law framework dialogue opened |
| | | Apr 2016 | EP Resolution |
| | | Jul 2016 | RoL recommend. 1 |
| | | Sep 2016 | EP Resolution |
| | | Dec 2016 | RoL recommend. 2 |
| EP Resolution | May 2017 | Jul 2017 | Article 258 Case (19/157) |
| | | Jul 2017 | RoL recommend. 3 |
| | | Nov 2017 | EP Resolution |
| | | Nov 2017 | Polish Forest Case – Financial penalties for interim measures |
| | | Nov 2017 | RoL recommend. 4 |

[71] C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687. See U. Belavusau 'On Age Discrimination and Beating Dead Dogs: Commission v. Hungary' (2013) 50 CMLR 1145-1160.

| | |
|---|---|
| Portuguese Judges cases opens the door for Art 19 | Feb 18 |
| | |
| Draft Regulation on withholding funds from non-compliant states | May 2018 |
| EP votes to trigger Article 7 (1) | Sep 2018 |
| Hungary launches challenge to EP Resolution in ECJ | Sep 2018 |
| | |
| | |
| EP backs draft Regulation on funds | Jan 2019 |
| | |
| New Rule of Law Framework Doc from Commission | April 2019 |
| | |

| | |
|---|---|
| Dec 2017 | Article 7(1) TFEU triggered by Commission |
| Feb 2018 | Portuguese Judges cases opens the door for Art 19 |
| Mar 2018 | EP supports Article 7(1) |
| May 2018 | Draft Regulation on withholding funds from non-compliant states |
| | |
| Oct 2018 | Interim measures case against Poland on Judges (exp) |
| Oct 2018 | UK court Lis et al v Poland Regional Court: EAW case |
| Dec 2018 | IM granted against Poland |
| Jan 2019 | EP backs draft Regulation on funds |
| Feb 2019 | Council states there has been 'positive' action from Poland |
| | |
| June 2019 | Case 619/18 Art 258/19 Poland loses Supreme Court Judges case |

Instead of tackling the crisis in Hungary with mechanisms already available to it, the Commission introduced a bespoke soft law framework in March 2014 for dealing with breaches of the rule of law via a Communication.[72] This comes just three months after the damaging Opinion 2/13. The Communication begins with some remarks about the nature of the rule of law and, if used correctly, was a valuable opportunity to re-establish the rule of law as a hierarchical constitutional norm. A positive start recalls the rule of law as a founding principle 'stemming from the common constitutional traditions of all the Member States of the EU' and identifies the source of rule of law in various EU documents.[73] It notes the link between democracy, fundamental rights and the rule of law and specifically mentions the Preamble to the European Convention (the common constitutional tradition), underscoring the idea of the rule of law as an *a priori* constitutional norm.

Unfortunately the Commission then repeats old mistakes. The Commission espouses some questionable associations, and justifications, for the rule of law as an important *value (we are the good people)*, first amongst which is the *policy* of 'mutual trust' and the necessity of mutual trust in the functioning of the area of freedom, security and justice. The Commission at this point departs from the power-limiting principle of the rule of law, and elides the rule of law as a moral value and identity with the rule of law that is instrumental in delivering the

[72] Commission Communication 'A New Framework to strengthen the Rule of Law' CORRIGENDUM COM(2014) 158 final.
[73] Article 3 TEU, Preambles to the Treaty and the EUCFR, and Article 49 noting it is a precondition of membership of the EU.

policy of mutual trust and FSJ. Here, the policy of mutual trust and AFSJ are the morally good policies that the rule of law protects. The framework reflects the same mistakes made by the CJEU in Opinion 2/13; identifying the purpose of the rule of law being to shore up a policy area of the Union, rather than something fundamental to which all policy areas should bend. Although the framework is meant to contribute to a 'debate that is key to our idea of Europe'[74] it is doubtful that framing the rule of law as servant rather than master of a particular policy area is a fruitful way forward.[75] What is worse is that this ideation, in this context, was particularly unnecessary; it was not the time or place to elide Hungary's disregard of the migration policies with its policies to destroy its own judiciary.

The Commission described the framework as an 'effective and timely response' to threats to the rule of law. The three stage process comprises (a) *dialogue* (b) *assessment of the situation* and *Commission recommendations* and (c) *monitoring* the Member State's response. If this seems familiar, it is because this replicates what happens under the Article 258 administrative phase, and directly repeats the steps contained in Article 7. Others have analysed this step-by-step process in more detail elsewhere.[76] For the purposes of this analysis three brief points will be made. First, the conceptualisation of the rule of law in the Communication is limited and problematic. It appears significantly different from a principle in either the thin or thick sense of the rule of law, and reaffirms the chasm at the centre of the rule of law– a rift reinforced by the CJEU as architect in chief. Second, it purports to deal with breaches of a 'systemic nature' which recalls judgements handed down by the CJEU in relation to infringement proceedings under Article 258.[77] Article 7 (2) already deals with 'serious and persistent' breaches, and in any case, at the point of such disregard for the rule of law, the time for soft frameworks and silent diplomacy has long passed. Third, the framework copies the soft political techniques already envisaged by Article 7 (reasoned opinions after the state has submitted its views) and Article 258 TFEU (reasoned opinion after a state has submitted its views). Rather than an effective response, events were to show that the framework has proved not just pointless, but actively damaging to the EU.

First, the Commission refuses to utilise the mechanism against Hungary. Meanwhile, events in Poland were deteriorating: PiS were re-elected in 2015 with a majority and were about to embark on widescale destruction of its judiciary and separation of powers in Poland. Only in

[74] Communication n 72, 1
[75] Communication n 72, 2
[76] D. Kochenov and L. Pech, 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction' *EUI Working Articles* RSCAS (24/2015).
[77] P. Wennerås,'A new dawn for Commission enforcement under Articles 226 and 228 EC: General and persistent (gap) infringements, lump sums and penalty payments' (2006) 43 CMLR 31-62.

May 2016 with respect to Poland's steady attempt to reformat the Constitutional Court and remove its legal authority to question decisions of the government did the Commission reticently engage the framework, and, notably without success. The Commission issued a rule of law opinion that Poland repudiated and refused to comply with.[78] Consequently, the Commission issued a further rule of law opinion (not a possibility foreseen in the framework itself) to which Poland responded in equally combative terms.[79] Two more opinions were to follow, only to be ignored. Eventually, the Commission threatened to launch infringement proceedings in relation to age and gender discrimination (forced retirement of judges),[80] which it eventually did in July 2017. By December 2017, emboldened by several interdictions from the CJEU in other, on the surface, unrelated cases but in reality tactical moves by the CJEU aware of the threat to its authority,[81] the Commission triggered Article 7(1). In other words, the 'new' soft framework has been entirely ineffective, or only as effective as other strong political statements from the Commission would have been outside any particular pre-existing mechanism. The effect has simply been to elongate this process and embolden other Member States to follow suit. The irony of the Commission's recent statement that 'many rule of law problems are time-sensitive and the longer they take to resolve, the greater the risk of entrenchment and damage to the EU'[82] cannot be overstated.

*4.3 Recasting the rule of law as a constitutional norm: the EP*

In contrast to the Commission, which continues to elide the three versions of the rule of law, Parliament is able to articulate the importance of the rule of law as a cultural norm or belief, and identify that events in Hungary and Poland is anathema to the EU's liberalising raison d' être. Where the Commission for a long time, and Council still appears to 'see no evil' and certainly no systemic threat to the values, Parliament's reports presented a very different picture. [83] The EP was the only institution to formally call for action against Hungary through resolutions in March 2011, February 2012, July 2013, June 2015, December 2015, May 2017 before finally voting to trigger Article 7 in September 2018. It has been just as active against Poland, with Resolutions in April 2016, September 2016, November 2017 and backing the

[78] European Commission Press Release 'Commission adopts Rule of Law Opinion on the situation in Poland' 1 June http://europa.eu/rapid/press-release_IP-16-2015_en.htm, EU Observer ' Poland rejects Commission's 'interferences' on rule of law' https://euobserver.com/institutional/135716.
[79] European Commission Press Release 'Rule of Law: Commission discusses latest developments and issues complementary Recommendation to Poland' 21 December 2016.
[80] Commission recommendation regarding the rule of law in Poland complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146 C(2017) 5320 final. 26.7.2017.
[81] Case C-619/18 Commission v Poland judgment, Case C-441/17 R Commission v Poland [2017] ECLI:EU:C:2017:877, Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas ECLI:EU:C:2018:117
[82] Commission Communication 'Further strengthening the rule of law' n 51.
[83] The Rui Traveres report, n 60. See also Report of the European Parliament on the situation of fundamental rights in the European Union (2012) (2013/2078(INI)) 27 January 2014.

Commission's decision to trigger Article 7 against Poland in March 2018. Across this timeline, there have been multiple cross-party initiatives, not based on empty rhetoric but an attempt to nail the agile notion of the rule of law into something that can be operationalized, measured and enforced in a concrete and meaningful mechanism. Importantly Parliament is attempting to both reassert the constitutional power-limiting nature of the rule of law which extends beyond the protection of the CJEU's own jurisdiction, or the promotion of particular policy initiatives which subjugate the rule of law. Although many reports and resolutions have been adopted on the EU's core values, for reasons of space this article will concentrate on one that appears a fair aggregation of ideas and has moved from a policy document to a Resolution.

The EU Democratic Governance Pact (EUDGP) was the first iteration of a proposal to renew focus on uncovering, monitoring and taking action against Member States who breach the Union's values.[84] The EP confronts what the Commission and CJEU refuse to acknowledge, and provides a bridge back to understanding, and combatting, the genesis of the rule of law crisis in the Union.

> 'The EU cannot be credible, cannot have moral authority in the world, if it is unable to uphold its own standards. Democratic governance, the rule of law and fundamental rights are not secondary to single market rules or budget discipline… It is no coincidence that the values of the European Union are mentioned in Article 2 of the Treaty, before all other aims of the EU. European values are given the highest importance in the Treaties…'[85]

Too much agility in a concept, being continually stretched to mean whatever seems expedient, only serves to leave the rule of law open to abuse.

The EUDGP proposes five key steps to safeguard the principles of democracy, the rule of law and fundamental rights: (1) Use of the Charter in conjunction with Article 2 as a basis for infringement proceedings against Member States; (2) Accession to the Convention as a matter of urgency to protect citizens from EU institutions that breach fundamental rights; (3) the Commission, Council and EP should ensure perform a fundamental rights check on each policy/legislation (mainstreaming); (4) A scoreboard system to track Member State

[84] An initiative of the ALDE political group in the European Parliament. The EU Democratic Governance Pact found at https://d66.nl/content/uploads/sites/2/2015/01/ALDE-Democratic-Governance.pdf which eventually became the somewhat amended 'European Parliament Resolution of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights' P8_TA(2018)0456.
[85] EUDGP, 2-3.

compliance with values;[86] (5) A European Semester for Democratic Governance, Rule of Law and Fundamental Rights which would include a binding mechanism initiated by the Commission, or on a recommendation of the Fundamental Rights Agency (FRA)[87], that would allow for gradual but increasingly serious response to violations before invocation of Article 7.[88]

The EUDGP's proposals confront the EU's own failings in the promotion of policies above fundamental values of the Union. Its solutions embed democracy, rule of law and fundamental rights throughout the policy making process. An increased visibility of these principles via the European Semester, and proposals that attempt to tap into the wide range of expertise currently available (including the FRA), are all positive steps. It avoids the familiar EU trope of creating yet another body with less mandate than the Commission to protect the rule of law.[89] Although one may raise a cynical eye at the suggestion of yet another Scoreboard, it may be true that what gets measured, gets done. The proposals make some progress towards combatting the complacent thinking that has crept in: that no EU state would behave in a way that undermines the rule of law; Copenhagen criteria will protect us from rogue states; the rule of law is mainly predicated on mutual trust and the CJEU's competence to review.

*4.4. Recent developments: the court strikes back (but does not change tack)*

Whilst the institutions (save Parliament) remained largely silent on Hungary, it has been a different story for Poland. The CJEU has chosen not to redefine its approach to the rule of law, but through some creative interpretation, has brought the issue of independent judges into the jurisdiction of EU law through some curious manoeuvring in relation to Article 19 TEU: a classic power extension and instrumentalism via the invocation of the rule of law move by the CJEU. In July 2017 the Commission launched an Article 258 case against Poland for breach of Article 19 (which on plain reading only talks about the CJEU itself) as being comprised of 'members whose independence is beyond doubt' and 157 TFEU (non-discrimination).[90] In

[86] In response there is a justice scoreboard. This covers rule of law related issues: http://ec.europa.eu/justice/effective-justice/scoreboard/.
[87] The Fundamental Rights Agency has provided information to the European Parliament on this issues 'FRA Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information' Opinion 2/2016 as well as its ongoing project 'EU Fundamental Rights Information System'https://fra.europa.eu/en/project/2018/eu-fundamental-rights-information-system for tracking EU values.
[88] For detail see C. Closa, D. Kochenov, (eds) *Reinforcing Rule of Law Oversight in the European Union* (Cambridge: CUP 2016).
[89] A suggestion of J. W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141–160.
[90] Case C-619/18 Commission v Poland ECLI: EU:C: 2019:531.

November 2017, in the *Polish Forest Case*, the CJEU granted interim measures against Poland for (potential, not proven) breach of environmental law, announcing for the first time that financial penalties, through analogy with Article 260 TFEU could be awarded against a state for breach of an interim measures order.[91] In February 2018, the CJEU continues its terra nova explorations when it delivers a judgment in the *Portuguese Judges* case, ostensibly about austerity measures, which confirmed that Article 19 does in fact extend to Member State judiciaries.[92] The writing is on the wall for Poland. In May 2018 the pressure is extended: the Commission drafts a regulation which will enable the EU to withhold funds from its multiannual framework programmes from states who are breaching the values in Article 2.[93] By now the contagion had spread and was beginning to undermine the crucial 'mutual trust' between states – a UK judgment gave rise to the possibility that suspects may make a case not to be extradited to Poland due to the possible imperilment of a fair trial as a consequence of the destruction of the Polish judiciary.[94] In October 2018, an interim measures case against Poland on the basis of the Article 258 judicial independence case was launched, expedited without Poland being able to present their case in defence, and in December 2018 the ECJ issued an order that Poland had to immediately suspend the offending law relating to the judiciary until the Article 258 case had been heard.[95] Poland agreed. In January 2019, the EP approves the draft regulation on withholding funds. Hitting Poland (and Hungary) in the wallet, rather than changing the Court and Commission's approach to the rule of law, does not fundamentally deal with the problem. This new pragmatism merely obfuscates the issue.

In April 2019 the Commission launched a new Communication on the rule of law. In it the rule of law is still inextricably linked with mutual trust, as well as the functioning of the internal market, but now also the delivery of 'sound public finances'. This addition lays the groundwork for the new Regulation on the multiannual financial framework which will deduct monies from states that violate the rule of law. It defines the rule of law in the same triptych ideation – constitutional norm, instrumental policy device, and value. It goes on to say enforcement rests on a 'common understanding of the rule of law' yet clearly there seems to be some distance between its own definition and how it is interpreted by Member States or indeed the Venice Commission. The Commission acknowledges that despite several mechanisms at its disposal 'progress by Council [on Article 7]… could have been more

[91] Case C-441/17 R Commission v Poland [2017] ECLI:EU:C:2017:877.
[92] Case C-64/16 Associação Sindical dos Juízes Portugueses v Tribunal de Contas ECLI:EU:C:2018:117.
[93] Commission Proposal for a Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States COM (2108) 324.
[94] Lis et al v Regional Court in Warsaw, Poland [2018] EWHC 2848 (Admin).
[95] Case C-619/18 R Commission v Poland ECLI:EU:C:2018:1021.

meaningful'.[96] Action by the Court under the guise of 'effective judicial protection' is given a special mention and Article 19, hitherto in the hinterland, takes pride of place in the fight against subversion of the rule of law: instrumentalism at its best. On reflecting on its experience so far the Commission expounds the importance of 'recognising the warning signs' which, alas, it failed to do for far too long. Accordingly 'there are advantages in immediate steps, proportionate to the gravity of the problem and with a lower threshold than action in the framework of Article 7 TEU'. It does not elucidate what these steps might be and we must be hopeful it is something other than the entirely ineffective rule of law framework. Its strategy on the rule of law going forward rests on 'promotion', 'prevention' and 'response'. It is difficult to see how this differs from its strategy in the past. Taken as a whole this document seems to suggest that if Member States and their citizens (and civil society) really knew what the rule of law stood for, all would be better (promotion). I would argue if the EU really knew what the rule of law stood for, that would be a magnificent start.

All eyes now turn to Council, who have prevaricated for quite some time, meeting in General Council to discuss Article 7(1) three times and so far, doing nothing. The ill advised delays over dealing with Hungary has essentially insulated both Hungary and Poland from consequences under Article 7 (2). Article 7 (2) requires unanimity (save the offending Member State) and by not acting against Hungary when there was only one state breaching the rule of law the Council has (willingly or otherwise) hamstrung itself since Poland and Hungary have now stated that they will prevent any vote against the other Member State in Council. Had the EU acted earlier, and decisively against Hungary, it is arguable that Poland (at that point still in compliance with EU law) may well have voted with other Member States and understanding the consequences of such action, the Article 7 procedure against Poland may have been averted.

[96] Commission Communication 'Strengthening the rule of law' n 51 p 3.

**Conclusions: traversing the abyss from crisis to recovery**

The EU is currently staring into the abyss: in seeking to understand what has created this rule of law crisis, it might not like what stares back. It is easy to point the finger of blame at specific Member States, blaming austerity, migration crises and far right ideology, but this is a superficial analysis of how we have arrived at this point. For sure the Member States are not blameless.[97] However, the EU has fractured the rule of law until it has the three very distinct meanings presented here – constitutional norm, policy tool and value – and in the name of convenience (or power extension), attempted to elide these concepts or collapse them into a unique and EU specific version of the rule of law to be wheeled out depending on the circumstance. At the same time it seeks to impose the specific constitutional power limiting version of the rule of law on Member States that the EU perceives to be a threat to Article 2 'values' or implementation of EU law policies. This Janus-faced censure leaves the EU vulnerable to accusations of hypocrisy and indifferent responses from Member States, as evidenced in Poland's refuting of the rule of law framework opinions and Hungary's continued intransigence.

The question remains, what can the EU do about the crisis moving forward? The first crucial step is to take some responsibility for creating this crisis. Travelling the profound distance back toward an understanding of the rule of law as a power limiting principle that also applies to the EU institutions as well as Member States will not be easy, but it is especially hard if the Commission and CJEU continue to assert the rule of law as, on the one hand, an instrumental policy tool and on the other, a value that represents the kind of club that the EU wishes to be. The opportunity to re-assert the power limiting principle of the rule of law is ever present with the problem of accession to the Convention awaiting resolution: here is the opportunity for the EU to declare it too can be bound by the rule of law (that it does not control or create). Kicking difficult rule of law questions into the long grass, a classic EU tactic in the face of crisis, has patently failed. The new moves to tie together respect for the rule of law and the deployment of the multiannual financial framework is yet more instrumentalism. The EU cannot break free of the crisis if it continues this destructive behaviour. The Council now faces its moment of truth and its opinions on Article 7(1) are (still) pending after three meetings: the omens are not good.

EU scholarship has surprisingly neglected the fragmented approach to the rule of law in the EU outside its application to the accession states and the neighbourhood policy, and although the narrative of crisis is seldom far from discussion of the EU, these concepts have rarely

[97] A lack of space prevents analysis of the Member States' behaviour and how they have exploited the lack of EU coherence on this matter.

been connected. Although Brexit continues to absorb much scholarly attention, the EU will go on with or without the UK. The far bigger threat to the EU's survival is the slow death of the liberalising values that has been the project's raison d'être through the unpicking of the EU legal architecture that should be based on respect for and an observance of the rule of law as a constitutional principle dedicated to acting as a brake on power extensions by powerful actors, both within and without the EU institutions.