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The EU and the Rule of Law – Naïveté or a Grand Design?

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Ideals and Realities of the Contemporary European Union

The European Union probably comes closest among a huge array of other legal-political systems to being a nearly ideal example of a cleavage between the ideals as proclaimed and the reality as practiced, and particularly so in the area of the rule of law – the key subject matter of this book. To start with, the EU is quite special in a number of crucial respects. This special character is in essence quite different from any particularities observed among states *sensu stricto*.[1] Indeed, it goes to the core of the EU's self-image and the account of it in the eyes of others. While the majority of law faculties in Europe teach EU law as constitutional law nowadays, the constitutional nature of the Union, although assumed,[2] is regularly questioned[3] – something one does not observe in the case of the majority of states. Moreover, the actual account of the nature of this contested constitution differs sharply from system to system, as every constitutional system of each of the member states will

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[1] This being said, it is not my intention here to advocate any *sui generis* nature of the Union, which has been persuasively disproved by Robert Schütze: R. Schütze, *From Dual to Cooperative Federalism* (Oxford University Press, 2009).

[2] On the crucial importance of this presumption, see, J. H. H. Weiler and U. R. Haltern, 'The Autonomy of the Community Legal Order – Through the Looking Glass', *Harvard International Law Journal*, 37 (1996), 411, 422. Indeed, 'who cares what it *"really"* is' (at 422, emphasis added).

[3] For the most compelling account, see, P. L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation State* (Oxford University Press, 2010).

have its own explanation of the EU and the role it plays, not necessarily submitting to the narrative of constitutionalism as retold from Brussels and Luxembourg.[4] The differences of perspective in question are far from merely rhetorical, going to the essence of the crucial theoretical foundations instead. Reconciliatory strategies, even the most fashionable ones,[5] like all what was written on 'constitutional pluralism' in the EU in the recent years, are equally contested – often for very good reasons.[6] The same applies to the key particular elements of the law and principles of the EU. It is a democracy[7] – yet not quite, as the objectives of integration are pre-set and uncontestable,[8] turning it into a democracy of means, not the democracy of ends.[9] It offers citizenship,[10] but not quite: the majority of citizens' rights do not depend on this legal status, but rather on other considerations, particularly personal history of the bearer and her personal wealth or an ability to earn.[11] It has the aspiration for justice among its foundations[12] – yet it is not infrequently prone to generate injustice instead.[13] It is based on the rule of law,[14] yet crucial

[4] G. Davies, 'Constitutional Disagreement in Europe and the Search for Legal Pluralism', *Eric Stein Paper* No. 1/2010 (Prague).

[5] M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2013).

[6] G. Letsas, 'Harmonic Law: The Case against Legal Pluralism' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2013).

[7] Democracy is one of the values on which the Union, together with its member states, is said to be built: Art. 2 TEU. See also A. von Bogdandy, 'The Prospect of a European Republic: What European Citizens are Voting On', *Common Market Law Review*, 42 (2005), 913.

[8] G. Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?* (Oxford: Hart Publishing, 2015).

[9] G. Peebles, '"A Very Eden of the Innate Rights of Man"? A Marxist Look at the European Union Treaties and Case Law', *Law and Social Inquiry*, 22 (1998), 581.

[10] K. Lenaerts, '"*Civis europaeus sum*": From the Cross-Border Link to the Status of Citizen of the Union' in P. Cardonnel, A. Rosas and N. Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Oxford: Hart Publishing, 2012).

[11] D. Kochenov, 'Neo-Mediaeval Permutations of Personhood in the European Union' in L. Azoulai, S. Barbou des Places, E. Pataut (eds.), *Persons and Personhood in European Law* (Oxford: Hart Publishing, 2016).

[12] D. Kochenov, 'The Ought of Justice' in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*

[13] S. Douglas Schott, 'Justice, Injustice and the Rule of Law in the EU' in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*; D. Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo' in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*

[14] Case 294/83 *Partie Ecologiste 'Les Verts'* v. *Parliament* [1986] ECR 1339, 23. See also Opinion 1/91 *EEA Agreement* [1991] ECR 6097.

elements of what the rule of law is essentially about are simply not part of the system.[15]

The enumeration of such disconnects can be continued *ad infinitum*. It is beyond any doubt that any legal-political system has an official façade and a day-to-day face. Yet, a growing amount of persuasive scholarly investigation[16] seems to demonstrate with an ever-crystallising clarity that the rift between law and reality in the EU – akin to Soviet constitutionalism, beautiful on paper, questionable at a closer scrutiny – is much broader than what we are used to assume. The critical work in assessing precisely how large this disconnect actually is, is very far from finished. The focus of this chapter in the scheme of things so grand would be disappointing to some, as the chapter only looks at one particular aspect of the rift, one corner of the EU rule of law story, thus supplying but a tiny brick to the edifice of approaching EU law critically.

The claim of the chapter is basic. The Union's vulnerability in the domain of values, including, but not confined to the rule of law,[17] which is more and more coming to light, is caused by a far-reaching systemic problem of the European Union's *design* and also by the modalities of its day-to-day *functioning*, both falling short of upholding the much-restated rule of law ideal for the Union. The two are intimately connected. Both are equally important. They have not been getting equal attention from the scholars and practitioners, however. While the literature has focused on restating EU's presumed rule of law nature,[18] the issue of the enforcement of EU rule of law and other values in the defiant member states, such as Hungary[19] or

[15] G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in a Two-Level System' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*; D. Kochenov, 'EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?', *Yearbook of European Law*, 34 (2015).

[16] Editorial, 'A Critical Turn in European Legal Studies', *Common Market Law Review*, 52 (2015).

[17] For a most comprehensive treatment of EU Rule of Law, see, L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* No. 04/09 (NYU Law School, 2009). For a special 'Eastern-European' perspective, which is particularly important in the context of the on-going developments in the EU, see, J. Přibáň, 'From "Which Rule of Law?" to "The Rule of Which Law?": Post-Communist Experiences of European Legal Integration', *Hague Journal on the Rule of Law*, 1 (2009), 337.

[18] M. L. Fernández Esteban, *The Rule of Law in the European Constitution* (The Hague: Kluwer Law International, 1999); L. Pech, 'The Rule of Law as a Constitutional Principle'; W. Schröder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford: Hart Publishing, 2016).

[19] L. Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary' in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015);

Poland,[20] busy dismantling liberal democratic constitutionalism,[21] it is crucial to realise that Europe's structural constitutional vulnerability stretches far beyond enforcement issues *per se*.[22] Instead, it is rooted in the discrepancies between the EU's proclaimed constitutional structure as we find it in the Treaties and the reality marking the development of EU integration, as outlined above, allowing one to doubt whether the Union is actually abiding by the rule of law.[23] In the light of this structural deficiency, one can argue that the much-analysed systemic deficiency[24] in the area of values and, especially, the rule of law, was bound to emerge sooner or later, whether in Hungary, Poland or elsewhere, as the Union matured.[25] Dealing with it will necessarily require moving beyond preoccupation with enforcement which has engulfed all the recent literature on the subject and reforming the integration project at the core,[26] ensuring that democracy and the rule of law are endowed with a more important role to play in the context of the supranational law of the Union.

M. Bánkuti, G. Halmai and K. L. Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution', *Journal of Democracy*, 23 (2012), 138.

[20] For an overview of destruction of independent constitutional judiciary in Poland, consult excellent syntheses of all the stages of the story by T. T. Koncewicz on the *Verfassungsblog*. See also The Venice Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, Venice, 11 March 2016. Available at http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e

[21] On the types of constitutionalism, see V. Perju, 'Proportionality and Freedom – an Essay on Method in Constitutional Law', *Global Constitutionalism*, 1 (2012). For a broader analysis of the on-going processes, see, e. g., von Bogdandy and Sonnevend (eds.), *Constitutional Crisis*.

[22] On the latter see, e.g. the contributions in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law*; A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values* (Oxford University Press, 2017 (forthcoming)); von Bogdandy and Sonnevend (eds.), *Constitutional Crisis*; J.-W. Müller, 'Safeguarding Democracy inside the EU: Brussels and the Future of Liberal Order', *Working Paper* No. 3 (Washington DC: Transatlantic Academy, 2013).

[23] G. Palombella, 'The Rule of Law and its Core' in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Oxford: Hart Publishing, 2009); G. Palombella, 'Beyond Legality – before Democracy: Rule of Law Caveats in a Two-Level System' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

[24] A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', *Common Market Law Review*, 51 (2014), 59.

[25] See, for a broad discussion, Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*

[26] For a much more critical restatement of this particular argument, see D. Kochenov, 'EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?'; J. H. H. Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

As the legal framework of EU law stands today, the rule of law, alongside democracy and human rights protection, is one of the values shared between the Union and the member states.[27] The provision aimed at ensuring that this indeed is the case is Article 7 TEU, which allows for the introduction of political sanctions against the member states that are suspected of breaching the values or that seem to be coming close to breaching the values.[28] This provision has been much criticised in the literature as not 'legal' enough and containing thresholds too high for the activation of political sanctions aimed at bringing deviant states into compliance.[29] This criticism, alongside the relatively problematic history of *ad hoc* sanctions against the member states perceived to be in breach,[30] prompted scholars and the institutions to come up with alternative routes for values enforcement. Especially, the stance of the Commission is interesting in this context: instead of deploying Article 7 TEU (as one of the possible initiators of the procedure contained therein), the institution opted for the introduction of a new, non-binding, 'pre-Article 7' procedure.[31] Replacing the solution of the outstanding problems with the introduction of new legal instruments did not work, however: instead of improving the

[27] Art. 2 TEU.

[28] For a detailed analysis of this provision, see C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in C. Closa and D. Kochenov (eds.), *Reinforcing the Rule of Law*; L. F. M. Besselink, 'The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives' in Jakab and Kochenov (eds.), *The Enforcement of EU Law*.

[29] W. Sadurski, 'Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider', *Columbia Journal of European Law*, 16 (2010), 385; Besselink, 'The Bite, the Bark and the Howl'; B. Bugarič, 'Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Closa and Kochenov (eds.), *Reinforcing the Rule of Law*.

[30] E.g., G. N. Toggenburg, 'La crisi austriaca: delicati equilibrismi sospesi tra molte dimensioni' (2001) Diritto pubblico comparato ed europeo, 735; Sadurski, 'Adding Bite to a Bark'; K. Lachmayer, 'Questioning the Basic Values – Hungary and Jörg Haider' in Jakab and Kochenov (eds.), *The Enforcement of EU Law*.

[31] European Commission, 'A New EU Framework to Strengthen the Rule of Law', Strasbourg, 11 March 2014, COM(2014) 158 final. The Legal Service of the Council was very critical of the proposal and concluded the following: '[T]he new EU framework for the Rule of Law as set out in the Commission's communication is not compatible with the principle of conferral which governs the competences of the institutions of the Union': Council of the European Union, Opinion of the Legal Service 10296/14, of 14 May 2014, para. 28. See D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality', *European Constitutional Law Review* (2015), for a detailed account why, legally speaking, the Council Legal Service's position on the Commission's pre-Article 7 is unsound. This issue will also be touched upon below.

climate of compliance, the new procedure in fact makes the use of Article 7 TEU impossible in the current circumstances. This means that the Commission's recent activation of the 'pre-Article 7' procedure against Poland is a low, rather than high point in the fight against backsliding on the rule of law among EU member states.[32]

Although numerous scholarly propositions have been made as to how to deal with the rule of law deficiencies in the EU to circumvent the perceived difficulties of Article 7 deployment (these are normally formulated in general terms, but, usually for good reasons, have specific member state(s) in mind),[33] the depth of the problem seems to be defying easy solutions,[34] implying the need to move *beyond* enforcement-dominated thinking in our analysis. Besides, solving the outstanding issues also implies pondering on which institution would be better placed to deal with the rule of law shortcomings. Only keeping our options open with regard to the possible actor to bring about change, as well as moving beyond enforcement as such, then constitutes the correct backdrop against which to assess the European Commission's pre-Article 7 procedure,[35] as well as numerous scholarly proposals and the Council's own rule of law dialogue:[36] all that is being done does not go deep enough at all, trying to solve only the enforcement problem, whereas the real issue spans as far as the very nature of the Union in Europe.

[32] D. Kochenov and L. Pech, 'Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation', *Journal of Common Market Studies* 54(5) (2016), 1062.

[33] For a detailed analysis of all the key proposals on the table, P. Bárd, S. Carrera, E. Guild and D. Kochenov, 'An EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights: Assessing the Need and Possibilities for the Establishment of an EU Scoreboard on Democracy, the Rule of Law and Fundamental Rights', European Parliament, Research Paper PE 579328 European Added Value Unit EPRS, April 2016; J.-W. Müller, 'The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States', *Revista de Estudios Políticos*, 165 (2014). K. L. Scheppele, 'The Case for Systemic Infringement Actions' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*. See also von Bogdandy and Sonnevend (eds.), *Constitutional Crisis*; D. Kochenov, 'On Policing Article 2 TEU Compliance – Reverse *Solange* and Systemic Infringements Analyzed', *Polish Yearbook of International Law*, XXXIII (2014), 145.

[34] Palombella, 'Beyond Legality – before Democracy'.

[35] For an analysis, see Kochenov and Pech, 'Monitoring and Enforcement'.

[36] Council of the EU, press release no. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, pp. 20–1. Cf. P. Oliver and J. Stefanelli, 'Strengthening the Rule of Law in the EU: The Council's Inaction', *Journal of Common Market Studies* 54(5) (2016), 1075.

The European Union is based on the principle of conferral,[37] i.e. the powers not transferred to the EU remain with the member states.[38] This is where first fundamental legal problems with the values of the Union arise: the values, the rule of law included, have never been delegated to the Union and thus fall outside of the material scope of Union law, called the '*acquis* of the Union' in legal eurospeak.[39] As a result, the legal position of values is not quite the same as 'ordinary' *acquis* of the European Union. This contribution states that the difference between the two – i.e. the values and the *acquis* ('the law') – is not confined to that of the scope of possible intervention on the part of the EU, but obviously covers the *substance* of the rules in question. The latter is infinitely clearer, once the letter and the spirit of the *acquis* is at stake as opposed to the 'values'. This holds true even for the pre-accession context, where the institutions, most notably the Commission, made an important and markedly unsuccessful attempt to bridge this divide.[40] There is a third difference between the two: values are infinitely more difficult to enforce (as well as to breach, one would presume) than the 'law': what is relatively easy and straightforward with the latter, is – still – an unchartered terrain with the former, which explains the excessive focus on the enforcement aspects of the practical operation of values in the literature today.

The starting point of this contribution is thus the triple difference between the law and values of European integration: legal scope, substance and enforceability. Looking at one of the three in separation from the other two will most likely be a meaningless exercise. To demonstrate how futile separate consideration of each of the three elements is most likely to be, the Commission's pre-Article 7 procedure deployed against Poland in January 2016, as well as, to a much lesser extent, the Council's rule of law dialogue is analysed. A much more fundamental problem plaguing the EU, whether we are to notice it or not, is the elephant in the room here: once the 'values' emerge as ephemeral – and thus inoperable, legally speaking at least, – at the three levels mentioned above, what is then the basis of the 'law'? This question, which is very far from being rhetorical, is worthy of a most

[37] Art. 5(1) TEU. [38] Art. 5(2) TEU.

[39] C. Delcourt, 'The *Acquis* Communautaire: Has the Concept Had Its Day?', *Common Market Law Review*, 38 (2001), 829.

[40] D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Field of Democracy and the Rule of Law* (The Hague: Kluwer Law International, 2008).

serious consideration, but will not make the centre of attention of this chapter.[41]

This contribution is dedicated, firstly, to the assessment of the systemic deficiencies which inform the rule of law problems on the EU's side, demonstrating that the problem we are facing actually lies, to a great degree (while not exclusively, of course), *outside* of Poland, Hungary or Romania,[42] i.e. in the realm of the European Union as such: the supranational *acquis*. I then approach the Commission's 'pre-Article 7' procedure critically, putting it in the context of the deficiencies, which the main bulk of this chapter outlines. To be clear: these are the EU-level, as opposed to the member-state-level deficiencies. The pre-Article 7 procedure is chosen since it provides a clear example of how the institutions can come up with answers that are most likely unworkable, simply by asking the wrong questions, questions that ignore an important part of the substance of the problem we are facing. The activation of the procedure thus only adds to the gravity of the problem instead of helping to find a solution. The conclusions drawn as a result of this brief investigation are worrisome: a much more serious reform of the Union seems to be required than the humble proposals which have been put forward so far.

EU Rule of Law: Design and Functioning at Different Levels

It is not for nothing that when one thinks about the EU, democracy or human rights protection would be the last thing to come to mind,[43] lagging as it is far behind bananas, sugar,[44] motorcycle trailers[45] or the prohibition to deport foreign prostitutes as long as they are not a burden on a social security system and contribute their hard work honestly to the host society.[46] This is because democracy and the rule of law are *not* EU's

[41] For more on this and related questions, see, A. Williams, *The Ethos of Europe: Values, Law and Justice in EU Law* (Cambridge, 2009); and Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*

[42] For an excellent assessment of the situation in this country, see, V. Perju, 'The Romanian Double Executive and the 2012 Constitutional Crisis', *International Journal of Constitutional Law*, 13 (2015), 246.

[43] See further, A. Williams, *Human Rights: A Study in Irony* (Oxford University Press, 2004).

[44] E.g. A. Albi, 'From Banana Saga to a Sugar Saga and Beyond', *Common Market Law Review*, 47 (2010), 791.

[45] E.g., S. Enchelmaier, 'Moped Trailers, Michelson & Roos, Gysbrechts: The ECJ's Case Law on Goods Keeps on Moving', *Yearbook of European Law*, 29 (2010), 190.

[46] E.g. L. W. Gormley, 'Free Movement of Workers and Social Security: As the Waitress Said to the Bishop', *European Law Review*, 7 (1982), 399.

founding ideas, or, paraphrasing Joseph Weiler, not in the EU's 'DNA',[47] constant rhetorical adherence to both notwithstanding. In the context of the division of powers between the EU and the member states as interpreted at the moment, they are thus left seemingly entirely to the member states to care about.[48] The EU can thus do little when basic foundations of constitutionalism are disturbed in one or more member states. More problematically still, the Union's own adherence to the values it professes is not beyond doubt. This is a serious design flaw, which was probably difficult to anticipate from the very beginning: the issue only became problematic as a result of a certain path that the Union followed throughout its history: emerging as a dynamic federal constitutional system and digesting more and more competences. This meant that values turned from an image-related luxury item into an indispensable element of the legal-political climate in the EU.[49]

By and large the rearticulation of the Union from an ordinary treaty organisation into a constitutional system was not accompanied by a sufficient upgrade of the role played by the core values it is said to build upon. These do not inform the day-to-day functioning of EU law, either internally[50] or externally.[51] Let us not forget that the promotion of its values, including the rule of law, is an obligation lying on the Union in accordance with the Treaties.[52] Indeed, unless we take the Commission's

[47] J. H. H. Weiler, 'The Schuman Declaration as a Manifesto of Political Messianism' in J. Dickson and P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law* (Oxford University Press, 2012).

[48] The issue underlined by the Council Legal Service in its Opinion on the Commission's pre-Article 7 procedure.

[49] Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*. See also K. Lenaerts and K. Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States', *American Journal of Comparative Law*, 54 (2006), 1; J-C. Piris, 'L'Union européenne: vers une nouvelle forme de fédéralisme?', *Revue trimestrielle de droit européenne*, 41 (2004), 23.

[50] J. H. H. Weiler, 'Europa: "Nous coalisons des Etats nous n'unissons pas des hommes"' in M. Cartabia and A. Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo* (Bologna: Il Mulino, 2009), p. 51; Williams, *The Ethos of Europe*.

[51] For critical engagements, see, M. Cremona, 'Values in EU Foreign Policy' in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart Publishing, 2011), p. 275; P. Leino and R. Petrov, 'Between "Common Values" and Competing Universals', *European Law Journal*, 15 (2009), 654.

[52] Art. 3(5) TEU. See, also, L. Pech, 'Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law' in D. Kochenov and F. Amtenbrink (eds.), *The European Union's Shaping of the International Legal Order* (Cambridge University Press, 2013), p. 108.

scribbles for granted, the EU's steering of countless issues directly related to the values at hand is more problematic than not. The EU is not about the values Article 2 TEU preaches, which any student of EU law and politics will readily confirm.[53] The EU's very self-definition is not about human rights, the rule of law or democracy.[54] EU law functions differently: there is a whole other set of principles which actually matter and are held dear: supremacy, direct effect and autonomy are the key trio coming to mind.[55] Operating together, they can set aside both national constitutional – and international human rights[56] and UN law constraints.[57] In the current crisis-rich environment,[58] the Union frequently stars as part of the problem, rather than part of the solution. The Union will need to change.

Such a change will, at least partially, mean a return to the promise of EU integration made in the days of the Union's inception.[59] A *fédération*

[53] The crucial argument in this vein has been made, most powerfully, by Andrew Williams: A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', *Oxford Journal of Legal Studies*, 29 (2009), 549. See, also, J. H. H. Weiler's unpublished paper 'On the Distinction between Values and Virtues in the Process of European Integration'.

[54] See, most recently, Opinion 2/13 (*ECHR Accession II*) [2014] ECLI:EU:C:2014:2454: para. 170, which states that the fundamental rights in the EU are 'interpret[ed] [. . .] within the framework of the structure and objectives of the EU'.

[55] Procedural principles cannot possibly replace the lack of substantive attention to the core values encompassed by Art. 2 TEU, including the Rule of Law, threatening to cause justice deficit of the Union: D. Kochenov, G. de Búrca and A. Williams (eds.), *Europe's Justice Deficit?* Cf., D. Halberstam, '"It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105; and P. Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?', *Fordham International Law Journal*, 38 (2015), 955; D. Kochenov, 'Citizenship without Respect', *Jean Monnet Working Paper* (NYU Law School) No. 08/10, 2010.

[56] Opinion 2/13 (*ECHR Accession II*) [2014] ECLI:EU:C:2014:2454; Kochenov, 'EU Law without the Rule of Law'.

[57] On the *Kadi* saga, see, G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*', *Harvard International Law Journal*, 51 (2010), 1. See also, of course, C-584/10 *Kadi II* [2013] ECLI:EU:C:2013:518.

[58] Three equally important facets of the current crisis can be outlined: values, justice, and economic and monetary. On the crisis of values, see e.g., Williams, 'Taking Values Seriously' and Weiler, 'On the Distinction'. On the crisis of justice: Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?* On the economic side of the crisis, see e.g., A. Menéndez, 'The Existential Crisis of the European Union', *German Law Journal*, 14 (2013), 453; M. Adams, F. Fabbrini and P. Larouche (eds.), *The Constitutionalisation of European Budgetary Constraints* (Oxford: Hart Publishing, 2014).

[59] On the key aspects of dynamics of EU's legal history see, B. Davies and M. Rasmussen, 'Towards a New History of European Law', *Contemporary European History*, 21 (2012), 305.

européenne (the one mentioned in the Schuman Declaration) to be brought about via the creation of the internal market, stood for a line of developments significantly more far-reaching than the idea of economic integration as such. The former is value based – while the latter probably is not (at least not based on the values of Article 2), as Andrew Williams explained in his seminal work.[60]

Not the whole story was negative, though. Although the Union's ambition has gradually been scaled down to the market – call it a hijacking of the ends by the means[61] – *de facto* the Union started playing, mostly through negative integration, the role of the promoter of liberal and tolerant nationhood, as rightly characterised by Will Kymlicka – promoting a very clear idea of constitutionalism based on proportionality, tolerance and the taming of nationalism.[62] Besides, at the core of the Union there lay basic mutual respect among the member states: the Union would be impossible, should they obstruct the principle of mutual recognition.[63] This came down to frowning upon the ideology of 'thick' national identities, however glorified in some schoolbooks. The ultimate result is that the EU, subconsciously as it were, emerged as a promoter of *one* particular type of constitutionalism,[64] which is based on the rule of law understood through national democracy and the culture of justification implying human rights protection and strong judicial review. To be a member state of the EU in the context of these developments came to signify one thing – when approached from a systemic point of state-organisation at least: to stick to this particular type of constitutionalism, which is now reflected in Article 2 TEU and which also represents the most important condition to be fulfilled before joining the EU, as hinted at in Article 49 TEU.[65]

[60] Williams, *The Ethos of Europe*.

[61] D. Kochenov, 'The Citizenship Paradigm', *Cambridge Yearbook of European Legal Studies*, 15 (2013), 196.

[62] W. Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice' in S. Benhabib, *Another Cosmopolitanism* (Oxford University Press, 2006), p. 134. See also G. Davies, 'Humiliation of the State as a Constitutional Tactic' in F. Amtenbrink and P. van den Bergh (eds.), *The Constitutional Integrity of the European Union* (The Hague: T.M.C. Asser Press, 2010).

[63] M. Poiares Maduro, 'So Close Yet So Far: The Paradoxes of Mutual Recognition', *Journal of European Public Policy*, 14 (2007); V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From automatic inter-State Cooperation to the Slow Emergence of the Individual', 31 (2012) *Yearbook of European Law*, 319.

[64] Perju, 'Proportionality and Freedom – an Essay on Method in Constitutional Law', *Global Constitutionalism*, 334.

[65] See e.g., D. Kochenov, *EU Enlargement and the Failure of Conditionality*, ch. 2.

The EU thus emerged as a vehicle of a negative market-based approach to the 'values' question, for which it is rightly criticised, e.g. by Alexander Somek and Andrew Williams, among numerous others.[66] Clearly, creating a market and questioning the state is not sufficient as a basis for a mature constitutional system, potentially creating a justice void at the supranational level[67] – and perpetuating the Union's inability to help the member states labouring hard to inflict a justice void on themselves, either through an outright embrace of Putin-style 'illiberal democracy', recently proclaimed as an ideal to strive for by the Hungarian Prime Minister Orbán,[68] an attack on the judiciary and the media, as in contemporary Poland,[69] or through failing to build a well-ordered and functioning modern state, as it the case in Greece[70] or Romania,[71] for instance. Outright defiance is thus not required to fall out of adherence to Article 2 TEU aspirations.

Moving beyond Article 7 TEU, which has been analysed in the literature in overwhelming detail (much of this analysis convincingly questioning the provision's effectiveness),[72] ordinary enforcement mechanisms designed to ensure that EU law works well in the member states – most notably, Articles 258, 259 and 260 TFEU – are always at our disposal. There is a very important problem here, however – it is too easy to expect of these provisions more than what they can deliver.

Even if it is presumed that violations of Article 2 TEU can be subject to the aforementioned procedures alongside with Article 7 TEU[73] – indeed, the very existence of Article 7 TEU clearly testifies to the intention of the drafters of the Treaty to ensure that Article 2 TEU is an enforceable legal provision, not merely a declaration – the fact that Article 2 law is somewhat different from the rest of the *acquis* is impossible to hide. The same

[66] E.g., A. Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique' in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*

[67] S. Douglas-Scott, 'Justice, Injustice and the Rule of Law in the EU' in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?*, p. 51.

[68] For the full text of the speech, see, *The Budapest Beacon*, 27 July 2014, available at: http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/10592.

[69] Cf. Venice Commission, Report of 11 March 2016.

[70] M. Ioannidis, 'The Greek Case' in Jakab and Kochenov (eds.), *The Enforcement of EU Law.*

[71] Perju, 'The Romanian Double Executive', 246.

[72] E.g., B. Bugarič, 'Protecting Democracy inside the EU: on Article 7 TEU and the Hungarian Turn to Authoritarianism' in Closa and Kochenov (eds.), *Reinforcing the Rule of Law*; Besselink, 'The Bite, the Bark and the Howl'. See also, most importantly, Sadurski, 'Adding Bite to a Bark', 385.

[73] C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means'.

applies to the violations: Article 2 TEU violations are not the same as ordinary *acquis* violations. Such differences are particularly acute in the in the context of one specific type of chronically non-compliant states, where, like in Hungary or Poland, non-compliance is *ideological* and cannot be explained with a reference to the lacking capacity, 'simple' corruption and outright sloppiness[74] – arguments one might deploy in the context of some South-East European countries, like Romania or Greece. Where chronic non-compliance is ideological, Article 260 TFEU becomes the *crux* of the whole story, as simple restatements of the breach under Article 258 TFEU (or Article 259 TFEU, for that matter)[75] will presumably not be enough.[76] The question of the effectiveness of fining against member states that have made an ideological choice favouring non-compliance is likely to remain open.

The fact thus seems to be that the EU not only suffers from inability to approach the values question, thus supplying a legitimate answer concerning what it stands for beyond the market – or a procedure to come up with such an answer by itself. It also lacks any ability to enforce the values as mentioned in Article 2 TEU in legal terms. The limitations of both Article 7 TEU and of the standard enforcement procedures in this context are quite straightforward, as the infringement procedures are profiled as confined to the scope of EU law *sensu stricto*, which makes it difficult to deploy them to protect the values viewed by many as outside of such scope,[77] while Article 7 TEU has simply never been applied, probably due to the high minimal thresholds to be reached for its activation.[78]

For many decades the Union has been consistently denying the very possibility that any Article 2 TEU problems could ever arise, presenting itself as solely working within the paradigm of the internal market, which

[74] R. Uitz, 'Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', *I-CON*, 13 (2015), 279.

[75] See e.g., D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool', *The Hague Journal of the Rule of Law*, 7 (2015), 153.

[76] On the main deficiencies of the system, see, most importantly, B. Jack, 'Article 260(2) TFEU: An Effective Judicial Procedure for the Enforcement of Judgments?', *European Law Journal*, 19 (2013), 420; P. Wennerås, 'Sanctions against Member States under Article 260 TFEU: Alive, but not Kicking?', *Common Market Law Review*, 49 (2012), 145.

[77] But see, crucially, K. L. Scheppele, 'The Case for Systemic Infringement Actions' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*; C. Hillion, 'Overseeing the Rule of Law in the EU'.

[78] Sadurski, 'Adding Bite to a Bark'.

denies serious treatment of the majority of the values and principles listed in Article 2 TEU. It is only in the context of the preparation of the Eastern enlargement that a fascinating situation arose, when the EU *de facto* ended up seemingly enforcing its foundational values through the pre-accession conditionality policy – to highly questionable results. The Failure of Conditionality in the fields of democracy and the rule of law, which I analysed elsewhere,[79] now stands overwhelmingly proven by, *inter alia*, the Hungarian developments.

The Union is thus generally powerless with regard to the *enforcement* of values and, more importantly, also their *content*. In fact, the very fact that we are now concerned with enforcing them seriously amounts to nothing else but conceding that the presumption that all the member states form a level playing field in terms of rule of law etc. – i.e. the fact that all of them actually adhere to the specific type of constitutionalism the EU set out to promote – does not always hold. This is something the European Court of Human Rights (ECt.HR) has already clearly hinted at in *M.S.S. v. Belgium and Greece*.[80] Acknowledging this alongside EU's obvious powerlessness as far as values are concerned is a potentially explosive combination in the Union built on member state equality and the principle of mutual recognition. In a situation where the core values are not respected by Hungary, for instance, we are not dealing with a member state revolting, for one reason or another, against a binding norm of European law. At the level of values, we are dealing with a *principally different member state*, with the Belarusianisation of the EU from the inside.[81]

Once the values of Article 2 EU are not observed, the essential presumptions behind the core of the Union no longer hold, which undermines the very essence of the integration exercise: mutual recognition becomes an untenable fiction, which the member states, nevertheless, are bound by EU law to adhere to: this is the core of what the autonomy of EU law stands for, as confirmed by the Court in the infamous Opinion 2/13.[82] Autonomy

[79] Kochenov, *EU Enlargement and the Failure of Conditionality*.

[80] *MSS v. Belgium and Greece* [2011] Application No. 30696/09. ECtHR reconfirmed its position in *Tarakhel v. Switzerland* [2014] Application No. 29217/12, dealing with the same issue and restating that the ECJ's 'systemic' standard articulated in *N.S. and others* (C-411/11 ECLI:EU:C:2011:865) and restated in *Abdullahi v. Bundesasylamt* (C-294/12 ECLI:EU:C:2013:813) is unacceptable under the ECHR.

[81] U. Belavusau, 'Case C-286/12 *Commission v. Hungary*', *Common Market Law Review*, 50 (2013), 1145.

[82] This point has been forcefully restated in the ECJ's Opinion 2/13 (*ECHR Accession II*) [2014] ECLI:EU:C:2014:2454. See, e.g., para. 192.

considerations in the context of EU law are usually prone to prevail over human rights and other values – including the rule of law – cherished in the national constitutional systems of the member states. Indeed, it would probably not be incorrect to argue that this would be the shortest possible summary of Opinion 2/13, which, in turn, summarised EU law as it stands. The consequences for the rule of law are drastic: all the principles invoked by the ECJ to justify giving EU law the upper hand in Opinion 2/13 are procedural, while the problems which the reliance on the ECHR is there to solve are substantive. Curing substantive deficiencies of the EU legal order with the remedies confined to autonomy and direct effect is a logical flaw plaguing the EU legal system, a condition that puzzles most renowned commentators.[83] One cannot quarrel about the roses when the forests are burning. To agree with Eleanor Sharpston and Daniel Sarmiento, 'in the balance between individual rights and primacy, the Court in Opinion 2/13 has fairly clearly sided with the latter. The losers under Opinion 2/13 are not the member states of the signatory States of the Council of Europe, but the individual citizens of the European Union'.[84] This is so, one must add, not only because of the potential reduction of the level of human rights protection. Rather, it is due to the fact that the EU, as Opinion 2/13 made clear, boasts an overwhelming potential to undermine the rule of law at the national level and this potential impact is not an empty threat.[85]

The question, then, is how to ensure that the EU's own vision of the rule of law – of which mutual trust without checking the substance of the Member States' adherence to values is an inherent part– does not undermine (or even destroy) adherence to the principle of the rule of law in the member states, which are, in fact, compliant with the values listed in Article 2 TEU.[86]

Clearly, horizontal *Solange* – i.e. allowing the member states to check each other's adherence to the values of Article 2 TEU and the *acquis* with the use of their own national system of courts and other institutions – if ever implemented, means nothing else but the end of all that we cherish in the Union, all its imperfections notwithstanding.[87] The legal fiction of

[83] E.g., Eeckhout, 'Opinion 2/13'; Halberstam, 'It's the Autonomy, Stupid'.

[84] E. Sharpston and D. Sarmiento, 'European Citizenship and Its New Union: Time to Move On?' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press, 2017 (forthcoming)).

[85] See, further, Kochenov, 'EU Law without the Rule of Law?'.

[86] For a detailed discussion of this dilemma, see, ibid.

[87] But see, I. Canor, 'My Brother's Keeper? Horizontal *Solange*: "An Ever Close Distrust among the Peoples of Europe"', *Common Market Law Review*, 50 (2013).

'all the member states are good enough' is absolutely worth fighting for. But the only way to do it, it seems, consists in incorporating the values of Article 2 TEU in full into the realm of EU's *acquis*, thus rethinking our understanding of the scope of EU law and also approaching the difficult questions of the substance of values and of their effective enforcement.[88]

Attempts to Solve the Outstanding Problems: A Critique

The acute need to change the approach to values enforcement in the context where all the legal-political tools at hand are most likely unworkable drove the Commission, the guardian of the Treaties, to come up with the 'pre-Article 7' procedure.[89] In a nutshell, it comes down to outlining the steps that the Commission needs to take before it uses the right, which it enjoys under the Treaties, to activate Article 7 TEU. Before the Commission triggers the procedure it would thus engage in a productive dialogue with the member state suspected of falling short of complying with the rule of law requirements of Article 2 TEU. The design and the recent activation of the procedure against Poland has not contributed to solving the problems at hand.

Three crucial considerations inform the Commission's procedure. Firstly, it is equally applicable to all the member states without any discrimination, notwithstanding the fact that it is not based on any general monitoring across the board. Secondly, the proposal is *de facto* and also *de jure*, not decoupled from Article 7 TEU: it simply paves the way up to the Commission's use of its right, as set in the same provision, to trigger the procedure described therein. In other words, in a way it simply formalizes the preparatory steps that the Commission takes before Article 7 TEU is deployed. Thirdly, the proposed procedure is not to be deployed to the detriment of the standard, pre-existing enforcement procedures, which remain at the Commission's disposal.

What the Commission introduced is thus a minimal addition to the *acquis*. This saves the pre-Article 7 procedure from accusations that it is *ultra vires* in nature, as potentially defying the principle of conferral of Article 5(1) TEU – the point made by the Council Legal Service.[90] Although sensible at the first glance, the reference to conferral is probably less sound than what the legal service would like to claim, as the

[88] See, in the same vein, the contributions in von Bogdandy and Sonnevend, *Constitutional Crisis*.
[89] For a detailed analysis, see, Kochenov and Pech, 'Monitoring and Enforcement'.
[90] Opinion of the legal service of the Council.

procedure established by the Commission is, once again, but a part of what Article 7 TEU quite clearly implies, if not demands. The Commission can trigger the application of that provision and the pre-Article 7 procedure is simply an explanation of how the Commission plans to go about this. The consequences of this are clear: whatever the Commission might recommend or find is not binding on the member state, which is singled out as potentially non-compliant. The apparently soft nature is not the most fundamental flaw of the Commission's procedure, however. As demonstrated below, there are at least three crucial considerations which make the proposed procedure most likely useless in the medium- to long-term perspective. This being said, it would be difficult to deny that in the current legal-political climate in the EU it would be rather difficult to expect more of the Commission, so even a slightest move is a worthy addition to the existing palette of dysfunctional procedures at the Union's disposal.

While it is possible to criticise the Commission's proposal from the strictly legal point of view as the Council Legal Service has done, focusing, in particular, on the clarity (or the lack thereof) of the outline of the scope of EU law in the context of Article 2 TEU potential deployment, this contribution will adopt a different approach: effectiveness, also saying a couple of words about the sloppiness of the practical application of the new procedure in the context of the Commission's action against Poland. Indeed, how effective the proposed procedure is likely to be in solving the outstanding problems of the EU in the area of values enforcement is potentially as important as a legalistic dissection of it is.

Activation

What became abundantly clear following the new procedure's activation against Poland is that not only is it unhelpful, but it also undermines the deployment of Article 7 TEU proper.[91] The Commission made three strategic mistakes in dealing with Poland, which make Article 7 TEU much more difficult to use, thus undermining an already problematic instrument.

Firstly, activating the Pre-Article 7 Procedure implies that the Commission is not convinced that the situation is bad enough to warrant at least the shaming stage of Article 7, i.e. 7(1) TEU. From what we

[91] Kochenov and Pech, 'Better Late than Never?'

observe in Poland, this assessment of the Commission is most likely wrong.[92] So the activation of the mechanism only leads to the loss of time.

Secondly, activating the Pre-Article 7 Procedure instantaneously crippled Article 7, since now the 'pre-' step would rightly be regarded by any backsliding member state as necessary, making Article 7 TEU, which is complex enough to deploy already, even more difficult to use.

Lastly, activating the Pre-Article 7 Procedure in the current circumstances makes the deployment of the 'biting' part of Article 7, i.e. 7(3) TEU impossible. Since unanimity is required by 7(2) TEU, which is a necessary condition for moving on to the sanctioning part of 7(3) TEU, and given that Mr Orbán will make sure that there is no unanimity – a constellation which was all too easy to predict – starting the Pre-Article 7 Procedure against Poland alone without Hungary means that the Commission is *not* minded to actually use all the legal tools at its disposal. These mistakes allow questioning whether the Commission's PR move was actually meant to make a difference. The potential effectiveness of Article 7 TEU stands instantly undermined by the deployment of the procedure, which the Commission designed with an aim to help the activation of this article in the first place. The sloppiness of the first activation aside, it is worth looking at the legal nature and the potential effectiveness of the new procedure *sensu stricto*.

Criticism of the legal basis

Let us start with a word about the Council Legal Service's unhelpful reading of the limits to EU's powers. There can be no dispute that the values of Article 2 TEU do not make part of the traditional *acquis sensu stricto*, indeed, this is the key problem of the Union in the area of value enforcement, as has been argued also above – this, all the normative grounds for the Union intervention on behalf of the values notwithstanding.[93] To adopt an approach which is too inflexible in restating this, however, hardly helps anyone in an atmosphere where changing the Treaties to bring about a different legal reality is, no doubt, impossible: unanimity is of course required, and Hungary, Poland and other potentially problematic states cannot be expected, rationally speaking, to throw their weight behind a meaningful values-enforcement reform.

[92] See, Venice Commission, Report on Poland of 11 March 2016.

[93] C. Closa, 'Reinforcing the Rule of Law: Normative Arguments, Institutional Proposals and Procedural Limitations' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

Having said this, numerous examples of sound logical constructions come to mind, which could clearly be deployed to back what the Commission introduced. The most important example from the history of EU law which could inform our thinking is the embrace of human rights by the supranational legal system in Europe. Something that has not been within the realm of EU law – remember *Stork*,[94] where the ECJ refused to take fundamental rights into consideration on the grounds that the EU does not have such competence – entered this realm and stayed.[95] It is easy to explain why: EU law would not be operational without human rights – and this is not simply to exaggerate the importance of *Solange* threats from the *Bundesverfassungsguericht* and *Corte Costituzionale*:[96] any *effet utile* hopes could be laid to rest without, just as the crucial transformation that turned the EU from an atypical international organization into a constitutional system.[97]

Approached in this sense, the rule of law (the member state level included) does not seem to be in any way different: can EU law exist without? As long as it cannot – and this answer cannot provoke much debate – the power to police the rule of law also in the member states is to be assumed – exactly what happened with the human rights story. Note that we are not speaking about inventing a wheel here, just about a repetition of a necessary step, well-tested in the past. The crucial difference consists in the fact that step no. 1 has been taken under pressure from the national courts, ready for *ideological* non-compliance for the reasons of respecting the law and the values of the legal systems they were entrusted to protect, which are now reflected in Article 2 TEU, while step no. 2 is to be taken under pressure from equally ideological non-compliance, but rooted, as opposed to the first step, in the failure to respect the law and values on which the Union and all its member states are built. The fact that one context of non-compliance was 'positive' while the second context is no doubt 'negative' cannot possibly change the nature of non-compliance with the values (and the law, for that matter), or diminish the EU's eagerness and desire to solve the outstanding problems, which emerge as a result.

[94] Case 1/58, *Stork v High Authority* [1959] ECR 17.

[95] For details, see, P. Alston (ed.), *EU Law and Human Rights* (Oxford University Press, 1999).

[96] See B. Davies, *Resisting the European Court of Justice* (Cambridge University Press, 2012).

[97] J. H. H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, 100 (1991). See also his *The Constitution for Europe* (Cambridge University Press, 1998) and J. H. H. Weiler and G. de Búrca (eds.), *The Worlds of European Constitutionalism* (Cambridge University Press, 2011).

Plentiful sources of turning values into a somewhat more binding part of the law of the Union could be outlined. By claiming that the Commission does not have the competence to elaborate on how it plans to defend the rule of law in the EU by applying Article 7 TEU, the legal service of the Council is wrong in approaching the rule of law – which is the air any legal system breathes – as a luxury, which its *own law* seemingly prevents the EU from acquiring. Such an approach should be dismissed outright as lacking in coherence and potentially dangerous for both levels of law in the EU: the supranational and the national too, given the EU's essential conditioning – in all what it does – on entertaining and fostering the presumption that there is something akin to an equal level of compliance with the values all around the Union. In the atmosphere where *the presumption – not the compliance* – is policed with the use of EU law under the banner of EU rule of law, the Council Legal Service's position is irresponsible.

Turning to other analogies from which the EU can rightly draw inspiration in these difficult times, the pre-accession context is also to be named. The story of the pre-accession monitoring of democracy, the rule of law and other values is overwhelmingly telling. This is so not because of how dysfunctional the monitoring was. Indeed, it landed us with all the countries we now criticize as non-compliant with Article 2 TEU in the Union in the first place, while the Commission's regular reports were applauding compliance with what was then Article 6(1) TEU (as it then was) among all the new member-states-to-be, failing to ensure maturation of the institutions and lasting continuity of the change achieved. The Commission unquestionably enjoyed the competence to police Article 2 TEU matters, since Article 49 TEU then (and also now) requires to ensure that the new member states are fully compliant with the EU's values, not merely those elements thereof, which happen to fall within the scope of the *acquis*, since then – remember Weiler's DNA argument – we would not have *any* checks of compliance with democracy or the rule of law at all in the context of the pre-accession.

What is of crucial importance, such a competence was then enjoyed by the Union institutions for the first time in the EU's history. The use of the competence thus acquired led to a gradual forming a quasi-*acquis* on values, which can be vaguely distilled from the pre-accession monitoring documents.[98] While critics would no doubt point to the

[98] For an attempt, see e.g., D. Kochenov, 'Behind the Copenhagen Façade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration online Papers*, 8(10) (2004).

important differences which exist between the 'internal' and the 'external' realms of the *acquis* in the competences field, what empowered the Commission to act in the realm of what is now Article 2 TEU, treating this provision as directly enforceable law, was a request from the European Council at Copenhagen in 1993 and the pre-accession reorientation of the Europe agreements,[99] i.e. a strong political decision and the rethinking of the law in force. No change of primary law was deemed to be required. Still now Article 49 TEU does not expressly mention either the principle of conditionality or the fact that the classical standard limitations of the scope of EU law do not apply to the pre-accession context, which this provision (very) vaguely regulates.

Both the example of the introduction of human rights protection into the edifice of EU law by the ECJ and the attempt to endow the values of what is now Article 2 TEU with substance by the Commission clearly testify to the plasticity of EU law, when the very *effet utile*, if not the survival of this legal system, is at stake. More examples could be given to support this point:[100] like the human brain, the EU legal system is flexible enough to ensure effective functioning against all odds. When push comes to shove and the legal system experiences a series of important shocks at its very base there is no room for excluding systemic legal arguments based on the considerations of the functionality of the law: the Commission definitely has all the competence in the world to run its pre-Article 7 procedure. In light of the above, the procedure is not only legal, but also possibly logical, once one moves beyond the activation problems. Yet, this picture is misleading.

[99] K. Inglis, 'The *Europe Agreements* Compared in the Light of Their Pre-Accession Reorientation', *Common Market Law Review*, 37 (2000), 1173.

[100] Especially the concept of the 'essence of rights' comes to mind, emerging from EU citizenship law and other fields: M. van den Brink, 'The Origins and the Potential Effects of the Substance of Rights Test' in Kochenov (ed.), *EU Citizenship and Federalism;* D. Kochenov, 'A Real European Citizenship; a New Jurisdiction Test; a Novel Chapter in the Development of the Union in Europe', *Columbia Journal of European Law*, 18 (2011), 56. For a clear proposal to apply this particular aspect of EU law's plasticity to the solution of Article 2 TEU enforcement problems, see, most importantly, A. von Bogdandy, C. Antpöller and M. Ioannidis, 'Enforcing European Values' in Jakab and Kochenov (eds.), *The Enforcement of EU Law*, as well as the earlier emanations of Professor von Bogdandy's proposal in the references. See also J. Croon-Gestefeld, 'Reverse Solange – Union Citizenship as a Detour on the Route to European Rights Protection against National Infringements' in Kochenov (ed.), *EU Citizenship*.

Effectiveness Considerations

The effectiveness of the procedure is fundamentally questionable. The change to be brought about as a result of the pre-Article 7 procedure's implementation will most likely be incapable of reverting the politics of consistent rule of law non-compliance in 'ideologically different' member states undergoing Belarusianisation. An emphasis on at least three aspects of the likely deficiency of pre-Article 7 can be made, in the light of the crucial deficiencies that the Union suffers from, as outlined above. As has been demonstrated, the EU does not actually have any *acquis* on values (outside of the pre-accession framework, which failed to produce sound results precisely in the values field); the EU does not have tools to formulate such *acquis*; the enforcement of values is lacking; the effectiveness of the current enforcement mechanisms – in particular the fines and lump-sums deployed against ideologically non-compliant member states – is inadequate in the values-enforcement field. Consequently, should the EU be serious about solving the outstanding issues with the operation of the rule of law, the key elements to consider should reach beyond mere enforcement to include the following aspects:

(a) the substance of values
(b) the procedure to alter the *acquis* on values and unquestionably extend the scope of EU law to cover the systemic departures from what Article 2 TEU presupposes
(c) elaboration of sound enforcement procedures in the sphere of Article 2 TEU *distinct* from what Articles 258 and 260 TFEU offer

Regrettably – but entirely not surprisingly – the pre-Article 7 procedure falls short of taking into account all the three elements outlined above, while also ignoring the context of simultaneous dealing with several problematic member states, rather than one, ruling out any effective deployment of Article 7 TEU, instead of helping its effectiveness. Moreover, beyond the point that the effectiveness of the mechanism can be questioned, it is quite arbitrary in terms of defining the values' substance, it does *not* extend the *acquis* to cover the values and it contains *no* enforcement procedures besides a threat to trigger Article 7 TEU, which, even if made credible, is now unfeasible in practice and is highly unlikely to be effective when applied to a principled illiberal government, non-compliant by virtue of consciously made ideological choices. It is not surprising, since it has at its foundation a picture of the EU which is already too optimistic to allow a clear outline of the outstanding

problems. The main reason why the new procedure invoked against Poland, as well as the general scholarly trend of focusing uniquely on compliance, is too weak to be functional is, then, that it steers past all three indispensable issues to be tackled, should the enforcement of Article 2 TEU become a reality.

To Conclude

In light of the above, several observations are in order, once the work aiming at designing a new mechanism commences. EU values, as reflected in Article 2 TEU, objectively speaking, are not (and have never been) part of the *acquis*. This is precisely why the Copenhagen political criteria on democracy, the rule of law and human rights protection were formulated in the first place, roughly 20 years ago. The ECJ's attempts to deal *inter alia* with human rights and the rule of law as though these were part of the ordinary *acquis* are far from sufficient: the rule of law is turning into a purely procedural consideration of basic legality. In one example, paying compensation to the judges – what Orbán's government has done in Hungary following the Commission's win against the country in front of the ECJ – replaces the need to not destroy the independence of the courts.[101] Worse still, nods in the direction of the European Court of Human Rights, even in the most outrageous cases, are frequent and usually unhelpful, as the principles of the two legal systems often differ.[102] Take the case of *McCarthy* for instance, where the ECJ clarified that EU law could not help an EU citizen to prevent her husband, who was also the only bread-winner in a family in which one of the children was disabled and needed constant care, from being deported, because the mother was not working and was on social assistance, and thus unable to benefit from EU law, *de facto* punishing her for the disability of her child, that punishment taking the form of the destruction of her family.[103] As Gareth Davies has clearly demonstrated, the nods in the direction of the ECt.HR are futile and half-hearted.[104] The ECJ opens to question the very foundations of what

[101] K. L. Scheppele, 'Constitutional Coups and Judicial Review: How Transnational Institutions Can Strengthen Peak Courts at Times of Crisis (with Special Reference to Hungary)' *Transnational Law & Contemporary Problems*, 23 (2014), 51.

[102] G. Davies, 'A Right to Stay at Home: A Basis for Expanding European Family Rights' in D. Kochenov (ed.), *EU Citizenship and Federalism*.

[103] N. Nic Shuibhne, '(Some of) The Kids Are All Right: Comment on *McCarthy* and *Dereci*', *Common Market Law Review*, 49 (2012), 349.

[104] Davies, 'A Right to Stay at Home'.

EU law stands for. Where to find justice in the maze of a purely legalistic engagement with crucially important problems, usually reformulated as internal market governance issues, is thus a burning question.[105] In the context when the *acquis* is not about the values,[106] the EU at times emerges as a potent cause of injustice.[107]

In this general context, when the *acquis* and values are not synonymous, particularly the application of the Copenhagen criteria in the context of the recent enlargement rounds, there is a lesson of caution to be learned: the Commission has emerged as an institution which, when given all the responsibility for judging the preparedness of the new member states for accession, values compliance outside the scope of the *acquis* included, failed the exercise.[108] Here, to the void of substance also was added the lack of capability to generate such a substance, the lack of virtually any limitations emerging from the scope of the law – as discussed above – notwithstanding. Besides illustrating the EU's in-built limitations with regard to its ability to generate the substance of Article 2 TEU rules, the pre-accession context also sets off the alarm bell on in terms of institutional capacity: the Commission is probably not the best actor to entrust with the internal monitoring of member states' compliance with Article 2 TEU. It is highly unlikely that the

[105] For further analysis, see the contributions in Kochenov, de Búrca and Williams (eds.), *Europe's Justice Deficit?* Cf. D. Kochenov, 'On Tiles and Pillars: EU Citizenship as a Federal Denominator' in D. Kochenov (ed.), *EU Citizenship and Federalism: The Role of Rights*.

[106] Williams, *The Ethos of Europe*. For a general assessment of the *acquis* to uncover the ideology it reproduces and the biases in the knowledge it favours and blesses, see M. Bartl, 'Internal Market Rationality, Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political', *European Law Journal* (2015). See also, for a broader account, P. Agha, 'The Empire of Principle'.

[107] The Charter of Fundamental Rights emerges as a particularly cynical document in this regard: excluded from the scope of Article 2 TEU by virtue of the Charter's *ratione materiae* limitation clause in Article 51 CFR, it thus only applied to the *acquis sensu stricto*: part of the problem, rather than part of the solution. For a persuasive account of the Charter as a way to limit the reach of EU human rights obligations, see A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', *Common Market Law Review*, 42 (2005), 367; for a lament that the Charter is never used by the Commission in infringement actions, see A. Łazowski, 'Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings', *ERA Forum*, 14 (2013), 573. For a far-reaching proposal to revolutionize the current practice of the application of the Charter in the area of Article 2 TEU values through judicial activism, see A. Jakab, 'The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

[108] Kochenov, *EU Enlargement and the Failure of Conditionality*.

Commission's approach will radically change, raising a number of questions concerning who should be doing this job.

This is a fascinating question. The Copenhagen Commission proposed by Jan-Werner Müller, which is supposed to unite the wise men and women from a number of the member states commanding absolute respect and be endowed with some enforcement powers, as well as the potential to give binding advice to EU institutions, is definitely a workable idea[109] – even given the failure of the Copenhagen criteria, as enforced by the Commission, made obvious by the very fact that we are discussing Hungary, Poland and other states formerly fully subjected to the extensive pre-accession Copenhagen criteria-inspired scrutiny at this point. Acting on the assumption that the very ethos of the Copenhagen Commission would be radically different from that of the current Commission, Müller's proposal is worthy of most serious consideration. Of crucial importance here is the understanding that the formulation of the substance of values should not be outsourced, which would be the case if the Venice Commission, for instance,[110] were asked to do the job. The drawback of asking the Council of Europe to do something for the EU is obvious: it amounts to *outsourcing key constitutional issues*. This being said, it is also necessary to keep in mind that, given the overarching character of the values and principles established by Article 2 TEU, it is highly unlikely that the provision can be read as a sign of EU specificity, let alone uniqueness. The crucial symbolic value of being in charge of the proclaimed core of EU's constitutional system is worth the defying of outsourcing calls, however.

The solving of outstanding value problems should be done with care, gently. However imperfect, the EU is functioning well, boasting an obvious added value. Any new tools aimed at enforcement of Article 2 TEU compliance should thus unquestionably respect the key premise of European integration: EU federalism. Federalism's importance is twofold: it is a guarantee of preservation of diversity and a guarantee of preservation of liberty. Article 2 TEU should not be used as a pretext for a power-grab – even if this happens unintentionally. The risks are clear: the EU, with all its deficiencies, is not really very dangerous at the moment from the point of view of liberty and freedom (whatever the position one holds on Greek bailouts) only because it is constantly kept in

[109] J.-W. Müller, 'For a Copenhagen Commission: The Case Restated' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

[110] K. Tuori, 'From Copenhagen to Venice' in Closa and Kochenov (eds.), *Reinforcing Rule of Law*.

check, whether we like it or not. In this context, putting an emphasis on the Charter of Fundamental Rights for instance, is highly problematic: general applicability of the Charter – something in favour of which Vice-President Reding (as she then was) used to argue – is likely to create more problems than it would solve: decentralized judicial review is not a panacea when the value core of the system is flimsy and often irrelevant at the moment when key decisions are taken.

Whichever mechanism is put in place to remedy the current problems, it is necessary to look at such mechanism's likelihood of effectiveness, keeping both the member states and EU citizens in mind. In this sense it is clear that copying the expulsion procedure of the Council of Europe (CoE) is not an option: rather than a way to improve the situation, it would amount to little besides making clear that the EU is powerless: by expelling a member state the EU would simply contribute to freezing a *status quo*, instead of taking responsibility to improve the situation on the ground. Moreover, expulsion of a member state would also ignore the interests of the EU citizens with regard to the nationality of the expelled state.[111] It is thus wonderful that Article 7 TEU is milder than its CoE Statute counterpart,[112] especially after the Commission undermined it through the activation of the pre-Article 7 procedure.[113] One should be equally realistic about the effectiveness of financial sanctions. Clearly, when nothing other than a regime change is required in order to comply, a member state will be happy to pay.[114] Moreover, shaming is not likely to work either. The amounts of fines are never unbearable (especially for a captured state). Besides, the 'ability to pay' is one of the criteria used by the ECJ in its case law on determining the amounts of fines and lump sums for the defiant member states to pay. The implications of this are far-reaching: it does not matter how the substance of Article 2 TEU values is established (by courts, the Commission, the Copenhagen Commission, the Venice Commission etc.) – enforcement is still a problem in the end if fines are not effective and kicking a member

[111] For more on this option, see B. Blagoyev, 'Expulsion of a Member State from the EU after Lisbon: Political Threat or a Legal Reality', *Tilburg Law Review*, 16 (2011), 191.

[112] Art. 8 of the Statute of the Council of Europe.

[113] Kochenov and Pech, 'Better Late than Never?'

[114] See, for the analysis of similar issues in the context of EU external relations law: N. Tocci, 'Can the EU Promote Democracy and Human Rights through the ENP? The Case for Refocusing on the Rule of Law' in M. Cremona and G. Meloni (eds.), 'The European Neighbourhood Policy: A Framework for Modernisation?', *EUI Working Paper* Law 2007/21, 23, at 29.

state out (thus seemingly eliminating the problem) is not an option. A better solution is needed.

The most mature answer to the outstanding problems should necessarily involve not only the reform of the enforcement mechanisms, but *the reform of the Union as such*, as the supranational law should be made more aware of the values it is obliged by the Treaties to respect and also, crucially, is obliged to aspire to protect at the national level and also at the supranational level. Instead of hiding behind the veil of procedural purity banners of autonomy, supremacy and the like, EU law should embrace the *rule of law* as an institutional ideal,[115] which implies, *inter alia*, eventual substantive limitations on the *acquis* of the Union, as well as taking Article 2 TEU values to heart in the context of the day-to-day functioning of the Union, elevating those values above the instrumentalism marking them today.

[115] Cf., G. Palombella, *È possibile la legalità globale?* (Bologna: Il Mulino, 2012).