

Guest Editorial

THE PERILS OF DEFENDING THE RULE OF LAW THROUGH DIALOGUE

Article 7 TEU was meant to be a mechanism to safeguard the founding values of the Union, the rule of law among them.

The preventive procedure under Article 7(1) TEU is triggered when one-third of the Member States, the European Parliament or the European Commission senses a ‘clear risk of a serious breach’ of Union values in a member state and decides to act upon it.¹ Currently, there are two procedures underway. The Commission submitted a Reasoned Opinion to the Council regarding Poland in December 2017.² In March 2018 the European Parliament ‘welcomed’ the Commission’s proposal and urged the Council to take ‘swift action’ under Article 7(1).³ More recently, in September 2018 the European Parliament launched into action under Article 7(1) TEU regarding Hungary, adopting a report prepared by MEP Judith Sargentini.⁴ According to an outcome document published in December 2018, the respective governments have made contributions and the ministers have exchanged views in the context of the Article 7(1) TEU proceedings at the General Affairs Council.⁵ Further details of these exchanges have not yet been made available to the general public.

These Article 7(1) TEU procedures concern carefully planned multi-step constitutional reforms, commenced in both countries with the reshaping of the constitutional court, which include measures to suppress political opposition and dissent (through media regulation, limitations on freedom of assembly and the

¹ The actual ‘existence of a serious and persistent breach by a Member State’ triggers a different – sanctioning – procedure under Art. 7(2) TEU.

² COM(2017)835: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

³ European Parliament resolution of 1 March 2018 on the Commission’s decision to activate Art. 7(1) TEU as regards the situation in Poland (2018/2541(RSP)).

⁴ European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

⁵ 15396/18, Outcome of the Council Meeting, 3663rd Council meeting, 11 December 2018.

harassment of civil society), take control of public prosecution, and are crowned by the total overhaul of the judiciary. The ‘rule of law’ has become a convenient shorthand to refer to a wide array of threats to fundamental human rights and constitutional democracy in these countries – and, ultimately in the Union.⁶ While the rule of law frame is a sensible approach, because it gives a constitutional veneer to the issues raised, it is certainly not the only plausible option.

In the early infringement actions in 2012, the Commission tried to tackle problematic Hungarian measures through secondary EU law. The forced early retirement of Hungarian judges was treated as age discrimination under Council Directive 2000/78/EC.⁷ In contrast, in Autumn 2018 the Commission presented the European Court of Justice with its objections to the recent reform of the Polish Supreme Court, complete with forcing sitting judges into early retirement and giving the President of the Republic discretionary powers over their fate, as a threat to judicial independence under Article 19(1) TEU and Article 47 of the Charter.⁸ When the European Court of Justice confirmed its interim injunction in the case, it did so in order to protect the interests of ‘both the European Union and the Member State’ in a case that involved ‘fundamental questions of EU law’.⁹ That sounds like a matter of constitutional significance.

While observers keep urging European actors to draw some red lines to protect the rule of law,¹⁰ European constitutional actors prefer to engage in a dialogue about the rule of law with the offending member states. Such dialogues are premised on voluntary compliance by the member states.¹¹ In practice, however, the dialogue framework permits strategic national actors to exploit the gap between legal and political processes¹² to their own benefit: they scout and map the lines European actors are not able (or willing) to cross in order to defend the Union’s founding values. This editorial exposes the hidden premises and pitfalls of the dialogue approach, hopefully inspiring the guardians of the rule of law to change course and follow up their polite words with deeds that make a difference.

⁶L. Besselink, ‘Talking about European Democracy’ 13(2) *EuConst* (2017) p. 207 (Editorial).

⁷Case C-286/12, *Commission v Hungary*, Commission’s Application.

⁸Case C-619/18, *Commission v Poland*.

⁹C-619/18 R, *Commission v Poland*, ECLI:EU:C:2018:910 (interim order II), § 25.

¹⁰See e.g. A. von Bogdandy *et al.*, ‘A Potential Constitutional Moment for the European Rule of Law: The Importance of Red Lines’, 55 *CMLR* (2018) p. 983.

¹¹C. Closa, ‘The Politics of Guarding the Treaties: Commission Scrutiny of Rule of Law Compliance’, *Journal of European Public Policy* (2018), DOI:10.1080/13501763.2018.1477822.

¹²See esp. M. Blauberger and R.D. Kelemen, ‘Can Courts Rescue National Democracy? Judicial Safeguards Against Democratic Backsliding in the EU’, 24(3) *European Journal of Public Policy* (2017) p. 321; U. Sedelmeier, ‘Political Safeguards Against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure’, 24(3) *European Journal of Public Policy* (2017) p. 337.

Dialogue: the preferred format for safeguarding the rule of law

Although activation of Article 7 TEU can ultimately result in the suspension of membership rights, the aim of these political mechanisms is not to punish member states but rather to neutralise threats to the rule of law.

It was in this spirit that the Commission introduced its *Rule of Law Framework* in March 2014,¹³ casting itself in the role of an objective and independent referee that would steer member states away ‘from adopting any irreversible measure’ through reasoned opinions. This new, complementary mechanism is based on cooperation between equal member states and is animated by the principle (or duty?) of sincere cooperation (Article 4(3) TEU).

In response, the Legal Service of the Council initially opined that the only solution that was not *ultra vires* to the Treaties had to be in the form of a peer review mechanism.¹⁴ Then, in December 2014, the Council decided to establish its own rule of law safeguarding mechanism in the form of an annual peer-to-peer dialogue on the rule of law.¹⁵ This move was explained as the Council’s ‘poorly disguised attempt’ to prevent the Commission from activating its own pre-Article 7 procedure.¹⁶ Compared to the Council’s approach, the Commission’s framework sounds robust.¹⁷

Outside the European Union, amicable dialogue is also the *modus operandi* of the Venice Commission in the Council of Europe.¹⁸ Usually, the Venice Commission is approached by the member state that wishes to undertake constitutional reforms (and not by the Parliamentary Assembly or the Secretary General), and the same member state follows the advisory opinion it receives at its own discretion.

The European Commission’s new dialogue mechanism for safeguarding the rule of law was activated for the first time, in respect of Poland, in January 2016. In the Commission’s own summary of events:

¹³ Communication from the Commission of 11 March 2014, A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final.

¹⁴ See Opinion of the [Council’s] Legal Service on the Commission’s Communication on a new EU Framework to strengthen the Rule of Law, 10296/14, 27 May 2014.

¹⁵ See < data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en/pdf >, visited 12 February 2019.

¹⁶ D. Kochenov and L. Pech, ‘Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality’, 11 *EuConst* (2015) p. 512 at p. 533-534.

¹⁷ On the impact of the continuing tension between the Commission and the Council, and especially the Commission’s anticipation of the Council’s lack of support, see Closa, *supra* n. 11.

¹⁸ For a critical account more generally, see M. de Visser, ‘A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform’, 63 *AJCL* (2015) p. 963.

'The Commission has issued a Rule of Law Opinion and three Rule of Law Recommendations. It has exchanged more than 25 letters with the Polish authorities on this matter. A number of meetings and contacts between the Commission and the Polish authorities also took place, both in Warsaw and in Brussels, and the Commission has always made clear that it stood ready to pursue a constructive dialogue and has repeatedly invited the Polish authorities for further meetings to that end. ... [W]ithin a period of two years more than 13 consecutive laws have been adopted affecting the entire structure of the justice system in Poland; the Constitutional Tribunal, the Supreme Court, the ordinary courts, the National Council for the Judiciary, the prosecution service and the National School of Judiciary'.¹⁹

This experience ultimately prompted the Commission to activate Article 7(1) TEU against Poland in December 2017.²⁰ By that time the Polish government had finished packing the Constitutional Tribunal and taming the National Council of the Judiciary. Next in line were the ordinary judiciary and the Supreme Court.

Also, by December 2017 the Polish government was in conversation with the Venice Commission about the judicial reform. Concerning the reform of the Polish Supreme Court, the Venice Commission warned that 'some elements of the reform have a striking resemblance with the institutions which existed in the Soviet Union and its satellites'.²¹ This was clearly in response to President Duda, who had explained to the Venice Commission that the measures were necessary to improve judicial efficiency and to finally cleanse the judiciary of its Communist heritage.²²

These exchanges did not prevent the Polish government from passing a new law on the Supreme Court that entered into force in April 2018. An amendment to this law put forward in the summer of 2018 lowered the retirement age of Supreme Court judges from 70 to 65 years for men and 60 for women.²³ This meant that 27 of the 72 judges of the Supreme Court would have had to leave immediately, including the First President of the Supreme Court. Judges who

¹⁹ Commission action on the Rule of Law in Poland: Questions & Answers, IP/17/5367, 20 December 2017.

²⁰ COM(2017)835: Proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law.

²¹ CDL-AD(2017)031, Opinion No. 904 / 2017, 11 December 2017, para. 89.

²² CDL-REF(2017)052add-e, Poland - Explanatory Memorandum to the Presidential Draft Act amending the Act on the Supreme Court.

²³ R. Grzeszczak and I.P. Karolewski, 'The Rule of Law Crisis in Poland: A New Chapter', *Verfassungsblog*, 8 August 2018, <verfassungsblog.de/the-rule-of-law-crisis-in-poland-a-new-chapter/>, visited 12 February 2019.

wished to serve on needed to seek individual exemptions from the President of the republic.²⁴

All this happened while the Article 7(1) TEU process was already underway before the Council, although in a somewhat dormant state. The Commission then tackled the amendment in a separate infringement action, not long after the Polish Supreme Court itself turned to the European Court of Justice with a courageous, although most unusual, preliminary ruling request on its own fate, while also suspending the application of the law.²⁵ On 26 September 2018, the President of the European Court of Justice ordered an expedited procedure in this case.²⁶ Then, on 2 October 2018, the Commission requested an interim injunction in the infringement case.²⁷ In response, the Minister of Justice indicated Poland's willingness to obey the injunction.²⁸

This appears to have been part of a calculated political strategy to manipulate the European dialogue. Shortly after the Commission's request for an interim injunction on 21 October 2018, PiS was headed into local elections with an electorate estimated to be 70% in support of EU membership. The conciliatory note from the Minister of Justice was addressed to the European Court of Justice and the Commission as much as to Polish voters.

It later became clear that Poland was committed to defying the European constitutional actors at every possible step. Poland objected to the Commission's request for an expedited procedure, referring to its right of defence.²⁹ On 16 November 2018, the President of the European Court of Justice refused that request.³⁰ While on 21 November 2018 it appeared that the Polish government was ready to retreat, as it had tabled legislation to reinstate retired Supreme Court judges,³¹ President Duda was in no rush to sign the bill into law. He finally did so

²⁴ W. Sadurski, 'Polish Chief Justice of the Supreme Court Under Pressure: What Now?', *Verfassungsblog*, 5 July 2018, <verfassungsblog.de/polish-chief-justice-of-the-supreme-court-under-pressure-what-now/>, visited 12 February 2019. More broadly on the impact of the Polish judicial reforms, see P. Buras and G. Knaus, 'Where the Law Ends: the Collapse of the Rule of Law in Poland – And What to Do', 29 May 2018, at <www.batory.org.pl/upload/files/Programy%20operacyjnej/Forum%20Idei/ESI-ideaForum_Batory%20-%20Poland%20and%20the%20end%20of%20the%20Rule%20of%20Law.pdf>, visited 12 February 2019.

²⁵ Case C-522/18, *DS v Zakład Ubezpieczeń Społecznych*.

²⁶ *Ibid*, ECLI:EU:C:2018:786.

²⁷ Case C-619/18 R, *Commission v Poland*, ECLI:EU:C:2018:852.(interim order I).

²⁸ See <euobserver.com/justice/143169>.

²⁹ Case C-619/18 R, *Commission v Poland*, ECLI:EU:C:2018:910 (interim order II), § 17.

³⁰ *Ibid* (interim order II).

³¹ See <www.thenews.pl/1/9/Artykul/393123,Poland%E2%80%99s-ruling-conservatives-move-to-reinstate-Supreme-Court-judges>, visited 12 February 2019.

on 17 December 2018,³² shortly after the European Court of Justice rejected Poland's appeal against the interim injunction.³³ In a somewhat predictable sideshow, the Hungarian government intervened alongside Poland's appeal in the case.

In a detailed and tightly reasoned order, the European Court of Justice said that the discretionary powers allowing the President of the Polish Republic to decide whether to retain Supreme Court judges on the bench after they had reached the mandatory retirement age created an opportunity to exert external pressure on the judiciary.³⁴ This potential put the fair trial rights under Article 19(1) and Article 47 of the Charter at such risk that an interim injunction was warranted. The fundamentals of Union law came into the picture because the independence of national courts is crucial for both the operation of the preliminary reference mechanism (Article 267 TFEU) and judicial cooperation in the Union.³⁵ In explaining the need for rapid judicial intervention, the order carefully weighed the risks and threats of potential violations of EU law. One factor in favour of the injunction was the Polish government's lack of willingness to respond to the Commission's earlier requests concerning the law.³⁶

In light of these developments, the decision handed down on 20 December 2018 by the European Court of Human Rights in *JB and Others v Hungary* deserves special attention.³⁷ In that case, the European Court of Human Rights found inadmissible the complaints of dozens of judges and prosecutors who faced early retirement as a result of Hungary's recent judicial reforms. The Court found that the applicants had failed to establish with proper precision the severity of the impact this legislative measure had on their private lives, as protected under Article 8. The test used by the European Court of Human Rights to establish the impact of interference in one's professional life as an aspect of private life was established in September 2018 in *Denisov v Ukraine*.³⁸ This is most curious, as the applicants had complained about violation of their right to property (Article 1, Protocol No. 1, in conjunction with Article 14) and procedural rights (Articles 6 and 13).³⁹ The Court used its power as the 'master of the characterization' to consider the

³² See < www.nytimes.com/2018/12/17/world/europe/poland-supreme-court.html >, visited 12 February 2019.

³³ Case C-619/18 R, *Commission v Poland*, ECLI:EU:C:2018:1021 (interim order III).

³⁴ *Ibid.*, § 56.

³⁵ *Ibid.*, §§ 65-67.

³⁶ *Ibid.*, §§ 83-84.

³⁷ ECtHR 20 December 2018, Case No. 45434/12, *JB and Others v Hungary* (inadmissible). Judge Spano acted as an ad hoc judge, replacing the judges elected in respect of Hungary, who both recused themselves while the case was pending before the Court.

³⁸ ECtHR [GC] 25 September 2018, Case No. 76639/11, *Denisov v Ukraine*.

³⁹ *JB and Others v Hungary*, § 45.

applications under Article 8,⁴⁰ ultimately finding them inadmissible on a ground that the applicants themselves had not invoked.

It is striking that in *JB and Others* the European Court of Human Rights did not address the applicants' contention that legal rules prescribing their early retirement (i.e. the source of their complaint) had constituted 'a serious attack against the independence of the Hungarian judiciary as a whole'.⁴¹ Instead, the Court repeated several times that the current regulation of judicial and prosecutorial retirement had been shaped in the course of a dialogue with the Constitutional Court, the Venice Commission, the European Court of Justice and the European Commission.⁴² The Act of Parliament passed in 2013 as a result of this dialogue contained terms of compensation as well as transitional provisions, thus formally adhering to the requirement of legal certainty. The European Court of Human Rights elected not to take a closer look: it instead deferred to the European Commission's assessment of the challenged law in an infringement procedure.⁴³ Thus, the outcome of political dialogue in the EU had replaced judicial scrutiny in Strasbourg.

The decision in *JB and Others* is symptomatic of the European Court of Human Rights's procedural approach (or process-based review, in Judge Spano's terminology).⁴⁴ Inspired by the principle of subsidiarity, the Court shifts its attention away from the substance of claims, focusing instead on the manner (process) in which a measure was adopted. This is meant to reinforce the democratic decision-making processes in the member states. Regrettably, this approach does not take into account that democratic decision-making processes are regularly and strategically misused in Hungary, often to target particular individuals in an effort to thwart dissent. Previously, the European Court of Human Rights was willing to find that the strategic misuse of constitutional bodies and (seemingly) democratic decision-making-processes resulted in the violation of Convention rights.⁴⁵ The *JB and Others* decision clearly abandons this path.

⁴⁰ Ibid, § 46.

⁴¹ Ibid, § 113.

⁴² Ibid, §§ 31, 40, 81, 92, 101.

⁴³ Ibid, §§ 40, 92.

⁴⁴ Robert Spano, 'The Future of the European Court of Human Rights: Subsidiarity, Process-based Review and the Rule of Law', 18 *Human Rights Law Review* (2018) p. 473.

⁴⁵ ECtHR 23 June 2016, Application No. 20261/12, *Baka v Hungary*; ECtHR 16 September 2014, Application No. 42461/13, *Karácsony and Others v Hungary*; ECtHR 8 April 2014, Application Nos. 0945/11, 23611/12, 26998/12 et al., *Magyar Keresztény Mennonita Egyház and Others v Hungary*.

Dialogue on the rule of law: mission impossible?

As the Sargentini report on the situation of the rule of law in Hungary and the European Court of Human Rights' recent decision in *JB and Others v Hungary* illustrate, Europe's rule of law dialogues are deeply intertwined. Despite certain promising developments (such as the European Court of Justice's last order in the Polish Supreme Court's case), the dialogic approach preferred by European constitutional actors poses a serious methodological challenge for confirming a threat to or a violation of the rule of law.

Drawing on the language of Article 7(1) TEU, the dialogue envisioned by the Commission's 2014 proposal aims to tackle systemic threats to the Union's founding values, among which the rule of law. When it came to explaining what a 'systemic' threat might look like, the Commission first pointed to threats affecting the foundations of a member state's constitutional architecture (such as the separation of powers) or to widespread practices of public authorities. Thereupon it turned – in a footnote – to the Committee of Ministers in the Council of Europe and their 2004 resolution on the enforcement of European Court of Human Rights judgments addressing systemic problems.⁴⁶ Apart from noting that a systemic threat is different from a series of individual violations and that a systemic threat cannot be ascertained without drawing connections between unrelated individual incidents, the Commission did not (or could not) say anything more.

It is already hard enough to take this leap – from diverse individual incidents to a general pattern or phenomenon – through the maze of gradually unfolding public law reforms, which themselves are often extremely technical and make little inherent sense. This difficulty is further exacerbated by the fact that, under the 2014 rule of law framework, the Commission is meant to undertake a threat or risk assessment, a prognosis of the cumulative effects and potential consequences of numerous legal rules and other actions undertaken or planned by a national government. As such, much of this analysis relies on predictions about the future based on incomplete information about multiple, seemingly unrelated, moving parts.

In March 2018, the Irish High Court presented the European Court of Justice with an unexpected opportunity to demonstrate how to conduct a threat assessment with respect to an extradition request under a European Arrest Warrant.⁴⁷ The Irish court turned to the European Court of Justice, as it was reluctant to return a Polish national facing drug charges to his native Poland: recent reforms to the judiciary had profoundly compromised fair trial rights and judicial independence in Poland to the point that 'Poland shows a significant

⁴⁶ At p. 7, fn 18.

⁴⁷ *Minister for Justice and Equality v Artur Celmer*, 2013 295 EXT; 2014 8 EXT; 2017 291 EXT.

disregard for what is recognized in the TEU as an important common value of the EU and its Member States' (§ 129). It was this judicial reform that prompted the Commission to trigger Article 7(1) TEU against Poland in December 2017.

Detailing the systemic deficiencies that compromised the independence of the Polish judiciary, the Irish court sought to rely on the European Commission's Reasoned Proposal launching the Article 7(1) TEU process.⁴⁸ Hopes ran particularly high⁴⁹ when, in February 2018, in the Portuguese case *AJSP*,⁵⁰ the European Court of Justice had established an obligation for the member states to guarantee and respect judicial independence based on Article 19(1) TEU read in conjunction with Article 2 TEU, with reference to 'mutual trust between the member states' and by reason of the principle of sincere cooperation set forth in Article 4(3) TEU.⁵¹ This appeared to be a fine moment to finally draw one of those red lines.

That is not exactly what the European Court of Justice did, however.⁵² After reinforcing the premise, established in *AJSP*, that the member states have the duty to protect and respect judicial independence,⁵³ the Court of Justice confirmed that a real risk of breach of the fundamental right to an independent tribunal is an acceptable reason for refusing to give effect to an European Arrest Warrant under Article 1(3) of Framework Decision 2002/584,⁵⁴ provided that a real risk can be ascertained by the national court in the individual case.⁵⁵ The Court of Justice thus returned to the path introduced in *Aranyosi and Căldăraru*.⁵⁶ The Court made it the task of the national court to inquire into and determine whether a person faces a risk of suffering a violation of his or her fundamental rights after extradition by operationalising the requirement of mutual trust: the assessment is expected to take the form of a dialogue between the national courts and should involve, if necessary, other national authorities in the state that issued the extradition

⁴⁸ For the Irish judge, it was secondary as to whether the European Council followed up on the Commission's Reasoned Proposal in the political decision making procedure under Art. 7 TEU (*see paras. 115-116*).

⁴⁹ *See e.g.* L. Pech and S. Platon, 'Rule of Law backsliding in the EU: The Court of Justice to the rescue? Some thoughts on the ECJ ruling in *Associação Sindical dos Juizes Portugueses*', *EU Law Analysis*, 13 March 2018, <eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>, visited 12 February 2018.

⁵⁰ ECJ (Grand Chamber) 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Conta*.

⁵¹ *Ibid.*, esp. paras. 27, 30, 32, 34.

⁵² ECJ (Grand Chamber) 25 July 2018, Case C-216/18 PPU, *Minister of Justice v LM*.

⁵³ *Ibid.*, §§ 49-54

⁵⁴ *Ibid.*, § 59.

⁵⁵ *Ibid.*, § 60.

⁵⁶ *Ibid.*, § 60, referring to ECJ 5 April 2016, Case C-404/15, C-659/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*.

request.⁵⁷ The Court of Justice did not attempt to undertake this risk assessment itself.⁵⁸

Thus, the European Court of Justice put the Irish High Court in an unenviable position: it had to make its own assessment of the impact of the Polish judicial reform – including the potential threats presented by the new disciplinary powers – on a particular individual, to be decided in a particular case pending before a particular court. In November 2018, the High Court ruled that the applicant could not establish that he would face a real risk of flagrant denial of justice.⁵⁹

Reasons for serious concern: shaky foundations and emerging practices

Beyond those uncertain legal foundations

Putting aside the methodological difficulties encountered in establishing a threat of systemic violation of the rule of law, European constitutional actors addressing such domestic actions must also tackle objections to the legal basis of their interventions. These challenges have not ceased, despite numerous accounts suggesting solid legal grounds for legal as well as political response.⁶⁰ In practice, the procedural framework continues to be fraught with caution, deference, and hesitation as well as institutional competition between European actors.⁶¹

A close reading of key public documents concerning the EU's rule of law conundrum leads to a curious if disconcerting discovery. Although the rule of law is invariably referred to as a fundamental, common or shared principle as well as a

⁵⁷ *Minister of Justice v LM*, *supra* n. 52, § 77-79.

⁵⁸ Contrast e.g. with ECJ 14 March 2017, Case C-157/15, *Achbita v G4S Solutions NV*: '36: ... although it is ultimately for the national court, which has sole jurisdiction to assess the facts and to determine whether and to what extent the internal rule at issue in the main proceedings meets those requirements, *the Court of Justice, which is called on to provide answers that are of use to the national court*, may provide guidance, [...], in order to enable the national court to give judgment in the particular case pending before it' (emphasis added).

⁵⁹ *Minister for Justice and Equality v Celmer (No 5)* [2018] IEHC 639.

⁶⁰ See e.g. K.L. Scheppele, 'What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions', *Verfassungsblog*, November 2013, <verfassungsblog.de/wp-content/uploads/2013/11/scheppele-systemic-infringement-action-brussels-version.pdf>, visited 12 February 2019; J.-W. Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?', 21 *ELJ* (2015) p. 141; C. Hillion, 'Overseeing the Rule of Law in the European Union: Legal Mandate and Means', SIEPS, European Policy Analysis 2016/1.

⁶¹ K.L. Scheppele et al., 'Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism', *Verfassungsblog*, 12 November 2018, <verfassungsblog.de/never-missing-an-opportunity-to-miss-an-opportunity-the-council-legal-service-opinion-on-the-commissions-eu-budget-related-rule-of-law-mechanism/>, visited 12 February 2019.

value, the EU does not subscribe to the rule of law as an institutional ideal.⁶² Instead, the rule of law is used by EU institutions as a tool to protect the autonomy of the EU legal order. To do so, the European Court of Justice uses a formalistic conception of the rule of law, one which equates the rule of law with legality in the sense of compliance with the EU's own legal rules.⁶³ Consequently, it is hard to say what the rule of law exactly stands for in the EU.

This may come as a rude awakening to those who expected to discover, upon close study of the Union's endless struggles with its illiberal member states, that the contents of the rule of law were considered to be a founding value. This might come as even more of a shock to those who fully expected the Union institutions to draw a red line. In fact, further inquiry suggests that the EU is pretty content to promote the rule of law in its external relations without assigning it much content.⁶⁴ In the EU's external relations, the rule of law is a useful conversational device for promoting cooperation (but not confrontation).⁶⁵

For the time being, we are left with a dialogue on the rule of law prompted by an objective and reasoned threat assessment. The conduct of such a dialogue is premised on the willingly sincere and loyal cooperation of the member states (Article 4(3) TEU), respecting the equality of the member states (Article 4(2) TEU). The duty of loyalty combined with the principle of sincere cooperation may amount to a perfectly fine structural principle to guide the EU's operation in its external relations,⁶⁶ and may even affect the normative framework of differentiated integration,⁶⁷ yet it is admittedly built on murky normative foundations.⁶⁸ As such, its utility for becoming a foundation for defending the rule of law is at least dubious. Not to mention that it is unclear what the concept of mutual trust – as championed by the European Court of Justice in the European Arrest Warrant cases – adds to the duty of loyalty and sincere cooperation, and thus, ultimately, to the operation of a mechanism intended to safeguard the rule of law in the EU.

Emerging practices

As the Polish and Hungarian examples amply demonstrate, national governments undermining the rule of law are strategic actors playing the long game (although

⁶² D Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', *Yearbook of European Law* (2015) p. 1.

⁶³ Ibid.

⁶⁴ O. Burlyk, 'An Ambitious Failure: Conceptualizing the EU Approach to Rule of Law Promotion (in Ukraine)', 6 *Hague Journal of the Rule of Law* (2014) p. 26 at p. 28.

⁶⁵ Ibid, p. 31.

⁶⁶ M. Cremona, 'Structural Principles and the Role in EU External Relations Law', in M. Cremona, (ed.) *Structural Principles in EU External Relations Law* (Hart 2018) p. 21.

⁶⁷ A. Miglio, 'Differentiated Integration and the Principle of Loyalty', 14 *EuConst* (2018) p. 475.

⁶⁸ M. Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press 2014) Ch. 1.

they only remain safe so long as they are re-elected). This presents a serious challenge to the proponents of the dialogue format for safeguarding the rule of law, a challenge that far exceeds merely ascertaining the sincerity of such national actors when they respond to European constitutional actors. Whether they are sincere about trying to comply with European minimum standards or are merely feigning cooperation, these actors ultimately use European frameworks and processes for their own political purposes to build illiberal democracies inside the EU.

The dialogue format, by dint of its very features, enables offending member states to stall and strategise the process to their own benefit while fending off firm requests for adjustment. While European constitutional actors claim symbolic or strategic gains, offending national actors find other legal solutions to achieve their political ends.

One must assume that, in the summer of 2018, the Polish government was well aware that the forced early retirement of Supreme Court judges was a blatant violation of EU law: this is exactly what the European Court of Justice found regarding a similar Hungarian measure in 2012.⁶⁹ Thus, when the Polish government added the early-retirement requirement to its judicial reform package – seemingly as an afterthought – it was essentially making a move that it knew it would have to retract at some point. And it ultimately did so in a manner that served the Polish government's interests best. From the European Commission's perspective this read as a success: after an endless string of communications and a fruitless Article 7(1) TEU process, a simple, old-fashioned infringement action bore fruit. This was a pyrrhic victory, however. Poland withdrew a measure that it had known from the outset to be in violation of European law. At the same time, the Polish government could be sure that the ongoing dialogue was unlikely to result in reinstatement of the *status quo ante* that had preceded the reform of the Polish judiciary, or at least of the Supreme Court. The government of Poland could now safely move on to the next phase of its plan to build an illiberal regime.

Furthermore, the dialogue format enables national actors to ascertain the perimeters of European supervision. In addition to showing them which types of measures are considered off-limits, the dialogue provides offending governments with a sense of when and why European actors might not be able or willing to take action. This learning curve, orchestrated by European constitutional actors, enables national governments to Europe-proof their illiberal constitutional designs without risking the drama of open confrontation.

By the time the Hungarian government had been re-elected for a third consecutive term in the spring of 2018, it displayed a certain degree of confidence that there was little European constitutional actors could do to prevent it from adopting measures for which no European minimum standard could be

⁶⁹ ECJ 6 November 2012, Case C-286/12, *Commission v Hungary*.

ascertained as far as the European Court of Human Rights or the Venice Commission were concerned. The amendment of the higher education law (often tagged as ‘lex CEU’⁷⁰) illustrates this point. Academic freedom is an individual right (derived from the freedom of expression), but its institutional dimensions are murky at best.⁷¹ The Venice Commission’s opinion on lex CEU first and foremost tackled the manner in which the bill had been adopted.⁷² Although the EU offers generous education, research and mobility funding to universities, this does not equate to protection for academic freedom as such, nor is it a source of further, unwritten Union competences. Indeed, it is telling that in the Commission’s latest communication on the infringement process (December 2017), the law as modified in the course of the dialogue phase of the infringement procedure was found to violate the freedom to provide services (Article 56 TFEU) and the freedom of establishment (Article 49 TFEU). Although academic freedom, the right to education, and the freedom to conduct a business – as provided by the Charter of Fundamental Rights of the European Union (Articles 13, 14, 16) – are mentioned in the Commission’s press release,⁷³ the subject matter of the pending case is listed in the European Court of Justice’s database as ‘freedom of establishment’.⁷⁴

The Hungarian government builds equally well on lessons from comparative constitutional law: solutions that many member states have implemented (in one iteration or another) are easy to sell and hard to challenge in a dialogic format. The Seventh Amendment of the Fundamental Law adopted in June 2018 established a new administrative judiciary, complete with its own Supreme Administrative Court (*Közigazgatási Felsőbíróság*) alongside the *Kúria*.⁷⁵ The Seventh Amendment essentially permits establishing and staffing a new pillar of the judiciary, free from the appellate supervision of the *Kúria*. Doing so will certainly require a reallocation of judicial jurisdiction, potentially further diminishing the role of the *Kúria* as a constitutional check on the other political branches.

In late 2018, Parliament passed legislation enabling the formation of a newly minted administrative judiciary, in addition to granting the Minister of Justice

⁷⁰ Act no 25 of 2017, amending Act no 204 of 2011 on National Higher Education.

⁷¹ See ECtHR 27 May 2014, Application Nos. 346/04 and 39779/04, *Mustafa Erdogan v Turkey*, joint concurring opinion Judges Sajó, Vucinic, and Kuris.

⁷² CDL-AD(2017)022, Opinion 891/2017, 9 October 2017.

⁷³ Commission refers Hungary to the European Court of Justice of the EU over the Higher Education Law, 7 December 2017, < europa.eu/rapid/press-release_IP-17-5004_en.htm >, visited 12 February 2019.

⁷⁴ Case C-66/18, *Commission v Hungary*.

⁷⁵ Fundamental Law, Art. 25(3), as amended.

strong powers of control over that same administrative judiciary.⁷⁶ These legal rules would appear to be Europe-proof: many European countries have separate administrative courts and the Hungarian bill allegedly attempts a return to a historic model of administrative justice. Meticulous transitional provisions permit ample time for establishing this new wing of the judiciary.⁷⁷ There is limited room for European supervision of the transfer of election or procurement cases between various domestic courts, especially when this occurs by means of large-scale judicial reform. The Hungarian government is mindful of the discretion it has in this respect. In the spirit of European constitutional dialogue, the Minister of Justice did request the Venice Commission's opinion of the bill, although the law was passed before the Venice Commission had a chance to respond.

The design feature of the new administrative judiciary that is most likely to raise concerns in Europe is the supervisory role given to the Minister of Justice, especially over judicial appointments. The new administrative bench will be selected from the ranks of the judiciary as well as from various positions in the civil service. Thus, the new law signals to all Hungarian judges that they are disposable and interchangeable with civil servants. The ones who get to stay do so at the grace of the political discretion of the architects of the judicial reform and – in the case of the new administrative courts – the Minister of Justice.

In its recent order in the Polish Supreme Court's retirement saga, the European Court of Justice indicated that the mere potential for external pressure on the judiciary presents a threat to judicial independence so grave that it warrants the issuance of an interim injunction. An injunction was indeed issued in an infringement procedure brought by the Commission. In contrast, the Court of Justice's judgments in the recent Irish-Polish European Arrest Warrant case suggest that the threat of a compromised judiciary (e.g. due to overzealously applied disciplinary powers) will be extremely hard to establish in an individual case. The gap between individual claims and systemic harms is also well illustrated by the European Court of Human Rights' recent *JB* decision.

Without European courts able (and willing) to look at such individual applications in their broader context, European political processes – whether before the Commission or the Parliament – will lose an important source of insight and a point of reference. In domestic political contexts in which democratic decision-making processes are compromised and dissent is systematically suppressed, individual applications of this kind survive as a rare means of raising constitutional objections against the acts of national governments. When European courts elect to ignore the broader context of such

⁷⁶ Act No. CXXX of 2018.

⁷⁷ Act No. CXXXI of 2018.

individual claims, the European dialogue on threats, especially systemic threats, attacking the rule of law becomes even more symbolic.

CONCLUSION

2018 was a year of seemingly unceasing dialogue on the rule of law. The dialogue format was dubious from the start: it is premised on cooperation, it is preventive in nature and it is ultimately based on an assessment of systemic threats. In the aftermath of the reasoned opinions of the Commission and the Parliament pondering those threats, and now that Article 7(1) TEU processes are in full swing against Poland and Hungary, the discussion remains safely shielded from public view by the formalistic summaries issued after General Affairs Council meetings. The most potent tool to defend the rule of law in the EU is an infringement action by the Commission – in the select few cases where this actually happens, and especially when it fits the offending member state's overall political agenda. When individuals turn to European courts, their cases get swallowed up by the whirlpool of inter-institutional dialogue, with no end in sight. The pattern is dispiriting: while political actors rely on judicial proclamations to establish patterns of systemic threats to the rule of law, courts have recently started to insist that the parties before them provide evidence of the individual impact of the systemic threats. In the spirit of dialogue, nobody seems to be willing to put a halt to systemic violations.

In its current form, Europe's dialogues on the rule of law inform offending national governments on how to compromise the constitutional safeguards associated with the rule of law without triggering European sanctions. This should not be understood to imply that the actions of offending member states are then compatible with the rule of law. It only means that those standing guard at the perimeter are not ready (or willing) to call out the violators. With every national election that results in an illiberal, populist, anti-European political force gaining access to power, the new officeholders profit from easily imported constitutional recipes that have been Europe-proofed in the course of dialogues on the rule of law. Eight years into this conundrum, it is time for the European constitutional actors to reflect on their own role in enabling the rise of illiberal constitutional actors across Europe through dialogues on the rule of law.

EPILOGUE

'Taking into account the determination of several member states and alternative proposals from other union institutions, Hungary's careful participation in expert level negotiations should be considered as a means to secure access to information on

the details of preparation of the proposals, and also because this way our country *will be able to dismiss the alternatives proposed by the EP and the Commission more authentically*.⁷⁸

‘As long as Fidesz remains a part of the EPP, however difficult that may be, there is a chance to argue over these positions in a dialogue. And we would deprive ourselves of this opportunity if we were to separate’.⁷⁹

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⁷⁸ Excerpt from an internal memorandum outlining the Hungarian government’s strategies to respond to EU rule of law monitoring, as revealed by a news website on 29 January 2019, *see* <24.hu/belfold/2019/01/29/orban-viktor-sargentini-jelentes-7-cikkely/>, visited 12 February 2019 (in Hungarian, emphasis in the original).

⁷⁹ Interview by Annegret Kramp-Karrenbauer, the new leader of Germany’s CDU party, 8 February 2019, at <www.politico.eu/article/german-conservative-cdu-leader-annegret-kramp-karrenbauer-europe-must-adapt-to-survive-christian-democratic-union/>, visited 12 February 2019.

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