

ESTADO DE DIREITO, TRIBUNAIS E INDEPENDÊNCIA JUDICIAL:

LUTA PELA SOBREVIVÊNCIA CONTRA O PODER POLÍTICO

RULE OF LAW, THE JUDICIARY AND JUDICIAL INDEPENDENCE:

FIGHTING FOR SURVIVAL AGAINST POLITICAL POWER[[1]](#footnote-1)

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RESUMO:

*Uma das prioridades da União Europeia é a proteção do respeito pelo Estado de direito.*

*Um dos aspectos que se tem revelado um verdadeiro desafio nesta matéria é a independência judicial, que nos últimos anos tem vindo a sofrer retrocessos que a União Europeia só a muito custo tem conseguido travar. De facto, as reformas judiciais levadas a cabo pelos governos de alguns Estados-Membros têm afectado profundamente a independência judicial, ameaçando o princípio da separação de poderes, a própria democracia e a credibilidade do sistema judicial, tornando-o por vezes refém do poder político e alvo da corrupção por parte de interesses económicos vários. Aquelas alterações institucionais são, nalguns casos, contrárias à Constituição, noutros apoiam- se na Lei Fundamental dos Estados membros, em clara violação dos valores fundamentais europeus, obrigando as instituições europeias a ter de tomar posição, em particular o Tribunal de Justiça da União Europeia, que tem vindo a desempenhar um papel crucial nesta matéria.*

*Tratando-se de uma questão atual, relevante e mesmo vital para a própria existência da União Europeia, e que, por ser dinâmica, não se encontra manifestamente esgotada no plano académico, este trabalho pretende apresentar os mecanismos e soluções utilizados pela União Europeia contra alguns dos Estados membros que condicionam a independência judicial e avaliar os resultados da sua aplicação. Através de uma análise crítica desses mecanismos, de uma revisão da literatura mais relevante e das mais recentes decisões do Tribunal de Justiça da União Europeia, e de alguns estudos de caso, pretende-se evidenciar os meios jurídicos, políticos e económicos que têm sido accionados e podem ser decisivos para o sucesso do restabelecimento da independência judicial e do Estado de Direito na União Europeia.*

ABSTRACT:

*One of the European Union’s priorities is to defend and uphold respect for the Rule of Law. In this regard, one of the significant challenges has been maintaining judicial independence, which in recent years has faced setbacks that the EU has only managed to address at great cost.*

*Indeed, certain judicial reforms implemented by Member State governments—particularly those leaning toward autocratic and populist governance—have seriously compromised judicial independence, threatening the principles of separation of powers, human rights, democracy itself, and the credibility of the judiciary. In some instances, the judiciary has been rendered vulnerable to political power, even becoming a target for corruption influenced by various economic interests. These institutional changes are sometimes unconstitutional, while in other cases, they are based on the fundamental laws of Member States but violate core European values, compelling EU institutions to intervene.*

*How, then, can judicial independence be protected from political influence? This is the central question this paper aims to address.*

*Given the importance and relevance of this issue to the EU’s integrity—and because it is a dynamic challenge that extends beyond academia—this work will explore the solutions the European Union has employed in response to Member States that threaten judicial independence and evaluate the effectiveness of these measures. Through the examination of case studies, critical analysis of EU mechanisms, and review of recent decisions from the Court of Justice of the European Union, this paper seeks to highlight the legal, political, and economic tools that can help successfully restore judicial independence and the Rule of Law at a European level.*

PALAVRAS-CHAVE:

União Europeia, Estado de direito, independência judicial, estatuto dos juízes.

KEYWORDS:

European Union, Rule of Law, Judicial Independence, Judges’ *Status.*

1. **Rule of Law as a European Union value**

Article 2 of the Treaty on the European Union (TEU) sets out the values the Union is founded: respect for human dignity, freedom, democracy, equality, respect for human rights, including the rights of persons belonging to minorities, and the Rule of Law. This is our common identity and the cornerstone of our society. A society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men should prevail, as the same provision makes it clear.[[3]](#footnote-3) Ursula von der Leyen refers to a “community of values and laws.”[[4]](#footnote-4)

Although the Treaties do not include a provision offering a definition, the Rule of Law is enshrined in Article 2 as one of the founding values of the Union. «While there is no hierarchy among Union values, respect for the Rule of Law is essential for the protection of the other fundamental values on which the Union is founded, such as freedom, democracy, equality, and respect for human rights. Respect for the Rule of Law is intrinsically linked to respect for democracy and fundamental rights. There can be no democracy and respect for fundamental rights without respect for the Rule of Law and vice versa.»[[5]](#footnote-5) In the words of Koen Lenaerts, president of the Court of Justice of the European Union (CJEU), “integration through the Rule of Law” defines what the European Union today stands for[[6]](#footnote-6).[[7]](#footnote-7)

According to the European Commission, the Rule of Law is a well-established principle, well-defined in its core, which is the same in all Member States.[[8]](#footnote-8) Under the Rule of Law, all public powers, and their officials and agents, should always act within the constraints set out by law, under the values of democracy and fundamental rights, and under the control of independent and impartial courts.[[9]](#footnote-9) The Rule of Law includes, among others, principles such as legality[[10]](#footnote-10); legal certainty[[11]](#footnote-11); prohibition of the arbitrary exercise of executive power[[12]](#footnote-12); equality before the law; effective judicial protection by independent and impartial courts; effective judicial review including respect for fundamental rights; and the separation of powers.[[13]](#footnote-13) [[14]](#footnote-14)

More recently, the European Parliament and the Council assumed the European Commission's definition and incorporated it into Regulation 2020/2092: «The Rule of Law requires that all public powers act within the constraints set out by law, by the values of democracy and the respect for fundamental rights, under the control of independent and impartial courts». It includes, as core elements, the principles of legality implying a transparent, accountable, democratic and pluralistic law-making proceedings; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law.

Acceptance of this definition was not unanimous. The governments of Poland and Hungary particularly contested it. The former argued that the Rule of Law cannot be defined through budgetary regulation, and the latter defended that the Rule of Law is a concept to be defined by each Member State's legal system. Both governments challenged the legality of Regulation 2020/2092.[[15]](#footnote-15)

Rule of Law principles have been codified mostly in primary law, particularly in the Treaty on European Union and in the Charter of Fundamental Rights (Charter), to which Member States are attached, voluntarily and democratically, since they became members of the EU, and are strongly supported by citizens in every Member State[[16]](#footnote-16). The CJEU, through its case law, has played a predominant role in clarifying and developing those principles.

1. **Rule of Law and Judicial Independence**

The concept of the Rule of Law, which is key to Western understanding of liberal democracy, entails several elements[[17]](#footnote-17), including the judicial review of legislative and executive action to ensure the principles of primacy of the constitution and legality.[[18]](#footnote-18)

The CJEU, based on Article 19 (1) TEU, has ruled that, the European Union «is a union based on the Rule of Law in which individual parties have the right to challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act».[[19]](#footnote-19) This possibility is “of the essence of the Rule of Law” in the Union.[[20]](#footnote-20) However, all these guarantees would be pointless without the existence of judicial independence from the executive and legislative powers.[[21]](#footnote-21) Judicial independence is thus one of the key components of the Rule of Law, together with the fundamental right to a fair trial (Article 47 Charter) and the principle of effective judicial protection (Article 19 (1) TEU)[[22]](#footnote-22). As BÁRD points out, judicial independence is the *sine qua non* of separation of powers.[[23]](#footnote-23) The independence of the judicial branch is a foundational value for the proper functioning of a society founded upon the Rule of Law as well as of a society shaped by a constitutional democratic order.[[24]](#footnote-24) TOLLEY sums up the essence of the matter when he states that «[a]n independent and impartial judiciary is essential to the maintenance of a constitutional democracy based on the rule of law».[[25]](#footnote-25)

The CJEU ruled in Associação Sindical dos Juízes Portugueses case that «Article 19 TEU, which gives concrete expression to the value of the Rule of Law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but also to national courts and tribunals. The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4 (3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided by the second subparagraph of Article 19 (1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. The principle of the effective judicial protection of individuals’ rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter.»[[26]](#footnote-26)

MOLITERNO and CUROS[[27]](#footnote-27) identify two common connotations of judicial independence: in one version, independence is about a judge’s inner conscience and his commitment to decide cases – appropriate character and independence of mind; in the second, judicial independence is about structures that try to insulate judges from the influence of state actors – institutional mechanisms of control within the constitutional structure. This second meaning, the subject of the present paper, is also the one used in decisions of the CJEU, European Court of Human Rights (ECtHR), recommendations and opinions of organizations of the European Union and the Council of Europe. For those authors, the judicial system cannot be fully independent if both categories of independence are not satisfied.[[28]](#footnote-28)

Ensuring that the public authorities respect the principle of legality in their actions is thus the competence of the courts. Access to courts and the guarantee of a fair and impartial trial are indispensable for the implementation of the principle of effective judicial protection, of the right to an effective remedy before a court, and to ensure respect for the separation of powers.[[29]](#footnote-29) And a “court” is always to be understood as meaning an “independent court” in the EU legal order.[[30]](#footnote-30) «This means that the exercise of judicial power neither depends on the discretion of the executive nor is influenced by powerful political and economic interests», as TOLLEY rightly underlines, adding that autonomy and discretion are the critical elements that define judicial independence.[[31]](#footnote-31)

1. **Threats to the Rule of Law in the European Union**

The principle of solidarity, mentioned in Articles 2 and 4(3) TEU, one of the fundamental principles of EU law, is based on mutual trust or mutual recognition between the Member States, and is itself based on the commitment of each Member State to observe the terms of Union membership (with the inherent rights and duties, advantages and disadvantages), and to comply with the European values.[[32]](#footnote-32) It implies that the Union and the Member States, in full mutual respect, shall assist each other in carrying out tasks which flow from the Treaties, and that the Member States shall take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties and refrain from any measure which could jeopardize the attainment of the Union's objectives.

However, the entry of the current 27 Member States into the European Union took place in stages (one enlargement after another) and at various times and speeds, to respect the distinct characteristics and needs of each one, which resulted in differentiated integration.

Differentiated integration has focused on legal mechanisms that enable Member States and non-state entities to cooperate flexibly towards an ever-closer Union.[[33]](#footnote-33) Nevertheless, this differentiation eventually led to fragmentation and even to disintegration, to the point of endangering the European Union's principles and values.

As DE WITTE notes, due to differentiation “the contours of the EU legal order have become rather fuzzy,” to the point that the CJEU’s «old ideal of EU legal rules being “fully applicable at the same time and with identical effects over the whole territory of the community” has become unattainable».[[34]](#footnote-34)

Furthermore, a new form of disintegration arises. We are referring to some national resistance in to respect the primacy of the EU law to which the states have expressly committed themselves and which is, moreover, a condition that any state wishing to become a member of the Union must fulfil[[35]](#footnote-35).

However, an issue related to the Rule of Law in just one Member State is enough to impact the Union as a whole and can be considered a dangerous precedent since it undermines trust between Member States and the very principle of solidarity, an instrument for implementing the primacy, unity, and effectiveness of EU law.[[36]](#footnote-36)

That said, we have already witnessed the Union’s fundamental values and principles, including the Rule of Law, being under pressure. And if the Rule of Law is not properly protected in all Member States, the Union’s foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market, will be in danger, what can also impact on the economy, just as effective judicial systems and strong anti-corruption frameworks are crucial for a well-functioning business environment and sound public finances.[[37]](#footnote-37)

In parallel with the financial crisis, which the EU and its Member States have lived through since 2009, the Union has also been confronted on several occasions with a true Rule of Law crisis.[[38]](#footnote-38) The crisis, included, for instance, the *en masse* expulsion in 2010 by the French government of almost 1,000 members of the Roma minority to Romania and Bulgaria; the 2011-12 campaign of Hungarian Prime Minister Viktor Orbán to overcome judicial opposition and bend judicial independence by forcing some ten-percent of Hungarian judges and public prosecutors into early retirement; and the 2012-13 constitutional crisis in Romania, where the government refused to adhere to the judgments of the country’s Supreme Court.[[39]](#footnote-39) More recently, in 2020, the German Constitutional Court directly challenged a judgment of the CJEU on the European Central Bank’s Public Sector Purchase Programme[[40]](#footnote-40). In 2021, the Polish Constitutional Court, challenging the primacy of EU law, issued two rulings, on 14 July and 7 October, considering the provisions of the EU Treaties incompatible with the Polish Constitution, also defying the CJEU case-law[[41]](#footnote-41), and the Romanian Constitutional Court banned lower courts from following a CJEU decision[[42]](#footnote-42).

Some politicians, mostly in Central and Eastern Europe new democracies, where Rule of Law institutions are relatively new, mobilized the founding value of democracy against the Commission’s vision of the Union, arguing that European Institutions want to switch off democratically constituted institutions of Member States[[43]](#footnote-43), and calling on Article 4(2) TEU, which states that the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures.

The COVID-19 pandemic, the war in Ukraine, with no end in sight, and its consequences and the need for emergency regimes, and the resurgence of far-right and populist parties and governments, sometimes with absolute majorities, also represent major challenges for the Rule of Law, both within the European Union and worldwide, at a time when disinformation and cyber-attacks are taking center stage.

The growing trend in Europe towards populist and majoritarian political regimes has favored the creation of an environment hostile to the Rule of Law and the primacy of the Union's fundamental values, particularly those related to the Rule of Law and the EU’s supranational authority. Populism and majoritarianism have contributed to judicial independence backsliding in several ways, especially by undermining the judiciary’s role as a check on executive and legislative power.

Populism often presents politics as a battle between a virtuous, unified population and a corrupt elite, with the judicial system frequently depicted as part of this elite, accused of being out of touch with the people's will. This framing allows populist leaders to justify meddling with the judiciary, claiming it as a necessary step to restore power to the people. Populist leaders frequently aim to politicize the judiciary by either appointing loyal supporters or weakening the position of independent judges. Instead of being seen as an impartial entity, judiciary becomes a tool for advancing political objectives. This approach erodes the impartiality and independence of the judicial system. Additionally, populist leaders often launch direct assaults on the judiciary’s credibility, accusing judges of being corrupt or biased when rulings conflict with the interests of the ruling party. Such actions foster public distrust in the judiciary and serve as justification for implementing reforms that limit its independence. If judicial independence is compromised, courts lose credibility and public trust, which undermines the legitimacy of legal systems and reduces accountability. The media, under populist regimes, often plays a role in shaping the perception of the judiciary. Negative portrayals of the judiciary as part of a corrupt or inefficient establishment can reduce public support for an independent judiciary and make it easier for populist leaders to enact reforms that weaken it.

In majoritarianism, the belief that the majority’s will should dominate can result in the marginalization of opposing voices, including the judiciary. Majoritarian governments may see judicial independence as a barrier to implementing the majority’s wishes, leading them to try to undermine or take control of the judiciary. Governments with a majoritarian system may advocate reforms that grant them the ability to appoint judges or sway court decisions in ways that align with their political objectives, thereby undermining the judiciary’s independence and the separation of powers. In such systems, legislatures can enact laws that curtail the authority of courts, reduce their scope, or modify judicial procedures, weakening the courts’ capacity to function autonomously. Judicial decisions that defend minority rights or enforce constitutional checks on majority power might be portrayed as hindering the majority's will, leading to attempts to delegitimize the judiciary and compel judges to align with the dominant political forces.

Populist and majoritarian governments might resort to court-packing by increasing the number of judges and appointing those aligned with their political views. This practice erodes judicial independence, as the courts become more favorable to the regime in power. Both populism and majoritarianism can undermine the Rule of Law by challenging or disregarding judicial decisions that oppose the executive or legislative agenda. When court rulings are ignored, delegitimized, or attacked, it signals that the judiciary is not an independent institution but rather subservient to political authority. Additionally, rhetoric that frames judicial decisions as being against the will of the people or anti-majoritarian creates a hostile environment for the judiciary, making it more difficult for judges to fulfill their responsibilities without fear of retaliation. In such cases, governments might advocate for legislative or constitutional reforms that weaken judicial independence, such as shortening judges' terms, increasing executive influence in judicial appointments, or undermining the financial autonomy of the judiciary. These reforms can consolidate political dominance over the courts, hindering their ability to serve as a safeguard against potential abuses of power, which is fundamental to judicial independence. A decline in the Rule of Law often comes with increased government control over media, suppression of dissent, and restrictions on free speech and assembly. That is precisely what occurred in Hungary and Poland. Populist governments rely heavily on domestic public support. They can frame EU criticism as foreign interference, bolstering their national credentials. Both the PiS party in Poland and the Fidesz party in Hungary have employed populist rhetoric, presenting themselves as protectors of national sovereignty against the European Union and judicial elites. They claim that judicial reforms are essential to ensure the judiciary reflects the will of the people, as demonstrated through electoral mandates. Those governments, even under democratic frameworks, manage to resist pressures to democratize fully or avoid meaningful reforms by slowly centralizing power while maintaining outward appearances of democracy. This situation generates friction between democratic legitimacy (majority rule) and liberal democracy (the Rule of Law). Erosion of democracy occurs through legal mechanisms. Political systems are manipulated from within, using legislative tools to centralize power, and courts are reformed in a way that consolidates government control while maintaining a veneer of democratic legitimacy.

Populism and majoritarianism contribute to judicial independence backsliding by weakening the judiciary’s role as an independent check on power, politicizing the judiciary, and eroding the Rule of Law. In doing so, these forces create an environment where the judiciary is vulnerable to manipulation by political leaders, undermining its ability to uphold constitutional principles and protect minority rights. This has long-term implications for democratic governance, as it diminishes the separation of powers and weakens the protection of individual rights against state overreach.

That said, it's not hard to see why in recent democracies such as Poland and Hungary, referred to by some as soft democracies, populism and majoritarianism are the great adversaries of the Rule of Law, fundamental rights, including minority rights, freedom of expression, and due process, and democracy itself.

Although there are several cases, when looking over five years, the World Justice Project’s Rule of Law Index showed that Hungary’s and Poland’s respect for the Rule of Law has declined more than in other countries in the region of EU/EFTA/North America.[[44]](#footnote-44) PECH refers to the assessment of the V-DEM Institute that identifies Hungary as the EU’s first electoral autocracy in their 2020 democracy report[[45]](#footnote-45), and Poland as the world’s most autocratizing country in the last decade in their 2021 democracy report[[46]](#footnote-46).[[47]](#footnote-47) BÁRD refers that in the academic literature, Hungary is classified as a “competitive authoritarian regime” and Poland is said to have suffered a political capture of the judiciary and the media, opening the way for unconstrained powers by the executive.[[48]](#footnote-48)

Still according to V-DEM Institute, «[a]mong the union members, Hungary and Poland are among the top autocratizers in the world over the last decade. Hungary turned into an electoral autocracy in 2018. Autocratization is now also affecting Slovenia, which is one of the top autocratizers in the world over the last three years. Croatia, the Czech Republic, and Greece are also newly autocratizing countries».[[49]](#footnote-49)

1. **Threats to judicial independence in Central and Eastern Europe**

4.1 Threats to judicial independence

The courts independence forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the individuals’ rights that derive from EU law will be protected and the values common to the Member States set out in Article 2 TEU, particularly the value of the Rule of Law, will be safeguarded.[[50]](#footnote-50)

Judges must be protected from external intervention or pressure liable to jeopardize their independence. The rules applicable to the judges’ *status* and the performance of their duties must be such as to preclude not only any direct influence, in the form of instructions, but also all types of influence which are more indirect but liable to have an effect on their decisions, and thus preclude a lack of appearance of independence or impartiality likely to prejudice the trust which justice in a democratic society governed by the Rule of Law must inspire in individuals.[[51]](#footnote-51) In fact, more crucial than the impartiality of the system is the appearance of impartiality in the eyes of the individuals who are expected to voluntarily follow the rules because they trust the legal system’s fairness.[[52]](#footnote-52)

Appropriate guarantees of independence and impartiality presuppose rules regarding the composition of the court, the appointment, length of service, and grounds for abstention, rejection, and dismissal of its members, that are such as to dispel any reasonable doubt.[[53]](#footnote-53) The judges’ freedom from all external intervention or pressure also requires irremovability, without consent, unless removal is justified by proportionate, legitimate and compelling objectives[[54]](#footnote-54), and if it doesn’t raise reasonable doubt about the independence of the courts from external factors and their neutrality concerning the interests before them[[55]](#footnote-55). In the same way, the disciplinary regime of judges.[[56]](#footnote-56) With regards to the process of appointing judges, we must underline its importance for the legitimacy and proper functioning of the judiciary in a democratic state governed by the Rule of Law. The independence of a court is judged primarily by the way in which its members are appointed. It represents the cornerstone of the right to a fair trial.[[57]](#footnote-57)

* 1. Threats in Central and Eastern Europe

Judicial independence is thus vital for the fairness of judicial proceedings. Consequently, when reforming their justice systems, Member States must fully respect the requirements set by EU law and the case law of the CJEU.[[58]](#footnote-58)

What has not been happening, particularly in Central and Eastern European Member States, which affects the credibility of judicial systems. Among citizens of those Member States, the perception of judicial independence has decreased. For instance, in Finland, Denmark, Austria, Luxembourg, the Netherlands, and Germany, the level of perceived independence remains particularly high among the public (above 75 %), while in Slovakia, Poland, and Croatia, it remains extremely low (below 30%).[[59]](#footnote-59)

The main concerns relate to the way judges are selected and appointed, the increase or decrease in their salaries, and the disciplinary proceedings that can be applied to them, to prevent them from being subject to external pressure and thus avoid any kind of political control of their decisions.[[60]](#footnote-60) Disciplinary proceedings need to be carried out with the involvement of an independent body and procedures must fully safeguard the rights enshrined in Articles 47 (right to an effective remedy and to a fair trial) and 48 (presumption of innocence and right of defence) of the Charter, in particular the rights of defence, mainly, the right to challenge in court the disciplinary decisions.[[61]](#footnote-61) Which is not always respected. Judges are more independent in some judicial systems than in others.

In Romania, the application of disciplinary sanctions and the role of the Judicial Inspection generate concerns, though draft legislation now in preparation is expected to reform the disciplinary regime. In Croatia, new laws requiring periodic security checks on judges and state attorneys conducted by the National Security Agency raised concerns. In Slovakia, concerns remain as regards the regime of criminal liability of judges for “abuse of law.” In Slovenia, rules governing parliamentary inquiries lack safeguards on the independence of judges and state prosecutors.[[62]](#footnote-62)

Of the several Member States of Central and Eastern Europe where there are concerns about the use of disciplinary proceedings to limit judicial independence, Poland and Hungary are the most worrisome cases and have even been the subject of rulings of the CJEU and the ECtHR[[63]](#footnote-63). Both these countries had strong judicial systems that were considered models for other emerging democracies, until the election of hard-right populist and nationalist governments, and both experienced rapid judicial independence backsliding in the last decade.[[64]](#footnote-64) The methods were different. In Poland, as the ruling party, PiS (Law and Justice), in power since 2015, did not have enough majority to make amendments to the Constitution, it has chosen a different path: statutory changes, court packing, and refusal to comply with court orders. Unlikely, Hungary, where the ruling party since 2010, Fidesz, controlled over two-thirds of the seats in Parliament, a new Constitution was adopted.

At that point, we follow BÁRD when she warns that non-democracies hide Rule of Law infringements behind abusive constitutionalism, to create authoritarian or semi-authoritarian regimes, pointing out the passivity at the EU level. The author adds that the mechanism of constitutional change, «and other legal changes are introduced to serve the particularistic interests of the ruling majority and authorize arbitrary decisions with the effect of turning the Rule of Law into Rule by Law. Instead of limiting government, these constitutional and legislative changes are there to entrench governmental powers and to silence and shrink the space for criticism and civil participation».[[65]](#footnote-65)

* + 1. *Poland*

Poland is an example of a country where judicial independence is lacking.

In June 2015, as the ruling majority (PiS government) did not have a constitutional majority, the Civic Platform government initiated a series of changes in the judicial system, allegedly to eliminate corruption, impunity, and delays in justice.[[66]](#footnote-66) The Constitutional Tribunal was targeted first to ensure that subsequent changes could be enacted with less scrutiny. It began with the amendment of the law that rules the election of the judges of the Constitutional Tribunal. The new rule stated that the Parliament could elect judges months ahead of an actual opening on the court, and it did it before the other judges’ term.[[67]](#footnote-67)

The next step was the politicization of the National Council for the Judiciary[[68]](#footnote-68) and an attempt to take over the personnel and organization of the Supreme Court. In 2017, a law on the Supreme Court increased the number of seats and lowered the retirement age limit from seventy to sixty-five, which meant the end of service for almost forty percent of the judges. The same law created the Disciplinary Chamber (to deal with disciplinary cases of Supreme Court judges and appeals of the disciplinary cases of judges from ordinary courts) and the Extraordinary Control and Public Affairs Chamber that the National Council for the Judiciary filled after the alteration of its member composition.[[69]](#footnote-69)

In December 2019, amendments to the law on the Supreme Court and the law on ordinary courts were approved, allowing disciplinary proceedings against judges that might undermine the principles of the functioning of the authorities of Poland and its constitutional organs.[[70]](#footnote-70)

Ordinary courts have also changed: the retirement age was lowered, having the Justice Minister been given the power to extend a term.[[71]](#footnote-71)

In 2016, the Polish Justice Minister was granted, among others, the power to assign new judges, to authorize transfers and to request disciplinary proceedings against judges, to dismiss the presidents of lower courts and to appoint his own chosen candidates.

The Commission has referred all these modifications to the CJEU for failure to fulfil obligations, and Polish judges have been struggling against executive power, in national and international courts.

That is the case with Waldemar Zurek. Waldemar Zurek is a judge of the Cracow Regional Court. He was also spokesperson for the National Council for the Judiciary, the constitutional body in Poland that used to safeguard the independence of courts and judges. In that capacity, he has been one of the main critics of the changes to the judiciary initiated by the legislative and executive branches of the new government, which came to power in 2015, pointing particularly to the threat to judicial independence.

Zurek challenged at the Polish Supreme Court (Sad Najwyzszy) a resolution of the National Council for the Judiciary, finding there was no need to adjudicate on the action he brought before that body against a decision transferring him, without his consent, from one division to another of the court to which he is assigned as a judge.[[72]](#footnote-72) The court *a quo*, presented at the CJEU a request for a preliminary ruling concerning the interpretation of Articles 2 (EU values), 6(1,3) (recognition of the rights, freedoms and principles set out in the Charter), and 19(1,§º2) (remedies to ensure effective legal protection) TUE, Article 267 (preliminary rulings) of the Treaty on the Functioning of the European Union (TFEU) and Article 47 (right to an effective remedy and to a fair trial) Charter.

In its defence, Poland argues that the organization of the national justice system constitutes a competence reserved exclusively to the Member States and invokes Article 4(2) TEU, which establishes that «[t]he Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (…). It shall respect their essential State functions (…)». The Polish government also points out that the fact that Member States are required to provide effective remedies in the fields covered by EU law does not alter the substance of the principle of conferral or the extent of the European Union’s powers.

In response to this argument, the CJEU invokes the principle of the primacy of EU law and the principle of solidarity, remembering that when exercising their competence, particularly that relating to the enactment of national rules governing the process of appointing judges and subjecting that process to judicial review, the Member States are required to comply with their obligations deriving from EU law. The Treaty on European Union (Article 19) provides for the Member States to establish a system of legal remedies and procedures ensuring individuals their right to effective legal protection in the fields covered by EU law. The principle of the effective judicial protection of individuals rights under EU law, referred to in the above-mentioned article, is an EU general principle, stemming from the constitutional traditions common to the Member States, which has been enshrined in Article 6 (right of access to court) and 13 (right to an effective remedy) ECHR.[[73]](#footnote-73) To ensure that courts can guarantee effective legal protection, it is essential to maintain their independence. That is confirmed by Article 47(2) Charter, which refers to access to an “independent” court as one of the requirements linked to the fundamental right to an effective remedy.[[74]](#footnote-74)

According to the ECtHR[[75]](#footnote-75), the organization of the judicial system, not only the legal basis for the very existence of a tribunal, but also the composition of the bench in each case, should not depend on the discretion of the executive power and should rather be regulated by law emanating from the legislature in compliance with the rules governing its jurisdiction. That complies with the principle of the Rule of Law.

In the same vein, the CJEU held, that an irregularity committed during the appointment of judges within the judicial system entails an infringement of the requirement that a tribunal must be established by law (Article 47 Charter), particularly when that irregularity is of such a kind and such gravity as to create a real risk that other branches of the State, could exercise undue discretion undermining the integrity of the outcome of the appointment process and thus give rise to a reasonable doubt as to the independence and the impartiality of the judge or judges concerned.[[76]](#footnote-76)

These requirements stem from the need to ensure respect for the principles of the Rule of Law and the separation of powers, based on the imperative to preserve the confidence that the judiciary must inspire in individuals and its independence from other powers of the State, particularly concerning the legislative and executive.[[77]](#footnote-77) While the model of checks and balances may vary between Member States according to their legal and constitutional traditions, they all need to be subject to such a system to ensure respect for the Rule of Law and democratic norms.[[78]](#footnote-78)

In that regard, it is important to note that, by settled case law, the principle of the primacy of EU law establishes the pre-eminence of EU law over the law of the Member States. That principle therefore requires all Member State bodies to give full effect to the various EU provisions, and the law of the Member States, including constitutional provisions, may not undermine the effect accorded to those provisions in the territory of those States.[[79]](#footnote-79) Moreover, any national court must disapply any provision of national law which is contrary to a provision of EU law with direct effect in the case pending before it.[[80]](#footnote-80)

Following the decisions of the CJEU on this matter, in particular the decision in the Zurek case, and in an attempt to avoid the application of other sanctions, particularly financial ones, which would be more onerous, Poland committed, in its Recovery and Resilience Plan[[81]](#footnote-81), to undertake reforms of the disciplinary regime regarding judges, to dismantle the Disciplinary Chamber of the Supreme Court, and to create review proceedings for judges affected by decisions of that Chamber. The plan aims to strengthen certain aspects of the independence of the judiciary. In the meantime, despite the rulings of the CJEU, the Disciplinary Chamber continued to decide on cases concerning judges, including suspending them in office. In other words, in the absence of strong political action, no legal action is enough to stop Rule of Law backsliding in Poland.[[82]](#footnote-82)

* + 1. *Hungary*

In Hungary, the government of Prime Minister Viktor Orbán, with a supermajority in Parliament, has strongly attacked judicial independence, with almost no opposition. Unlike in Poland, it began with changes on the constitutional level.[[83]](#footnote-83)

A new constitution, the Fundamental Law of Hungary[[84]](#footnote-84), was adopted in April 2011, and with it a new structure of the judicial system.[[85]](#footnote-85)

The framework of the Constitutional Court was changed to limit its decision-making[[86]](#footnote-86), and its decisions taken before 2012 were repealed.[[87]](#footnote-87) In 2011, the original number of judges had already been increased from eleven to fifteen, with new judges elected by the majority in the National Assembly; their term was extended from nine to twelve years, and the retirement age was abolished. In 2013, eleven of the judges had been nominated by the ruling coalition.[[88]](#footnote-88)

In 2018, a new amendment to the Fundamental Law was adopted, creating administrative courts and stating that the starting point for judges interpreting the law must be an explanatory memorandum attached to legislative proposals, which reduces judicial independence.

The Kúria (Supreme Court) also received a new framework. The age limit of judges was lowered to sixty-two years, which led to a substantial proportion of them leaving.[[89]](#footnote-89) Some of them appealed to the ECtHR. It was the case of András Baka, former President of the Supreme Court and critic of the steps of the government toward the judiciary, who was dismissed from that position when the new Fundamental Law came to force and could not apply for the position since he did not fulfill the requirement of serving at least five years as a judge in Hungary (Baka had been a judge at ECtHR for seventeen years).[[90]](#footnote-90)

The selection and appointment of new judges, as well as the promotion and management of the court budgets and disciplinary matters, have become competencies of the president of the National Judicial Office established by Parliament in 2012, which is a crucial decision-maker in every aspect of the organization of the judicial system.

All those amendments were strongly criticized at a national level, by the judges and the public, and by the European and international community.

But the judicial independence backsliding was not the only infringement conducted by Hungary against EU law and values. Restrictions on the rights of LGBTQI+ persons and migrants, issues related to the anti-corruption framework, the control of non-governmental organizations, academics, and the media were also a concern to the European Union.

1. **Mechanisms for protecting the Rule of Law and judicial independence**

The Rule of Law ensures that Member States and their citizens can work together in a spirit of mutual trust. Trust in public institutions, including in the justice system, is crucial for the smooth functioning of democratic societies. There is no democracy without the Rule of Law[[91]](#footnote-91) and judicial independence.

But how can judicial independence be protected from politicians’ influence?

First, through the non-interference of the other powers of the State, especially the executive, in the organization and functioning of the judiciary. To this end, it is essential that the existence of independent bodies such as the Councils for the Judiciary as recognized in the case law of the CJEU. The CJEU has recognized that a Council for the Judiciary can constitute a safeguard for judicial independence provided that such a body is sufficiently independent from the executive and legislative powers and from the body to which it is submitting its opinion. Also, such a Council for the Judiciary should be provided with financial resources to function in an effective way and fulfil its mandates.[[92]](#footnote-92) They can act as a buffer between the judiciary and the other branches of power in matters such as the appointment and career of judges, as well as their role in the management of the justice system.[[93]](#footnote-93) These councils already exist in most Member States, but in many, they do not meet the required standards of independence. Therefore, the Commission has been highly active in issuing guidelines, communications, and recommendations on the subject, and has even taken recourse to the CJEU when necessary.

Secondly, it is time that the EU and its institutions take serious, assertive, and rapid action on this issue, by strongly punishing the Member States that repeatedly and deliberately undermine judicial independence and respect for the Rule of Law.

5.1. EU legal and institutional mechanisms

The role of the CJEU has been crucial in upholding the principles of the Rule of Law. National courts may (in some cases, they are even obliged) submit to the CJEU a preliminary ruling (Article 267 TEU) on the interpretation of provisions of European Union law. These judgments of the CJEU are binding not only on the courts which referred to a preliminary ruling but also on other courts as far as they lay down the interpretation of the provisions in question. Failure to comply with them is considered a breach of EU law that may give rise to infringement proceedings. The CJEU has ruled against Poland on several occasions regarding its judicial reforms, including decisions on the Disciplinary Chamber of Judges, forcing Poland to suspend it and amend laws.[[94]](#footnote-94) While the CJEU’s ruling is binding, enforcing it remains a challenge when national governments resist compliance. The CJEU also imposed financial penalties on Poland for non-compliance. And has similarly ruled against Hungary.[[95]](#footnote-95) However, the CJEU alone cannot solve the problem, although its efforts to do so are commendable.

The European Parliament can adopt resolutions expressing concerns and demanding action against Rule of Law violations. It has passed multiple resolutions condemning the actions of Poland and Hungary. While symbolic, these resolutions add political weight and pressure, encouraging the European Commission and Council to act. And, though not legally binding, these resolutions influence public opinion and signal the strong stance of the EU institutions on protecting democratic values.

The European Parliament emphasized that it is the duty of the Commission as “guardian of the Treaties” to ensure their application and of other pieces of EU laws, and the Commission must “abide by law, *dura lex sed lex*.”[[96]](#footnote-96) However, the Commission has been managing this issue with tongs. It certainly has tools, legal and political ones, at its disposal to use against violations of judicial independence and the Rule of Law. Such as the use of infringement proceedings or the application of financial penalties for non-respect of a judgment rendered at the end of an infringement proceeding (Article 260 TUE).

The European Commission (like the other Member States) may bring Treaty infringement proceedings against Member States which it considers to be in breach of the Rule of Law principles if they are directly enshrined in the Treaties, according to Article 258 TUE. That kind of proceeding ensures that EU law is correctly applied and respected at a national level. The European Commission has launched multiple infringement procedures against Hungary and Poland over reforms that threaten judicial independence, including Poland's disciplinary system for judges and Hungary's constitutional and media reforms. Poland has been ordered to suspend certain parts of its judicial reforms, but the enforcement and adherence to these directives have been slow.

Or others like the Rule of Law framework, the Rule of Law mechanism, the Cooperation and Verification Mechanism, the Conditionality Mechanism, the Common Provisions Regulation, the European Semester, and the EU Justice Scoreboard, which can be used to monitor and ensure respect for judicial independence and the Rule of Law by non-compliant Member States.

In 2014, the European Commission adopted the Rule of Law framework[[97]](#footnote-97) to prevent escalation and address, through a structured dialogue, emerging and systemic threats to the Rule of Law in EU countries, to avoid having to resort to the mechanisms of Article 7 TEU. The framework comprises three stages: the Commission assessment, the Commission recommendation, and the monitoring of the EU country’s follow-up to the Commission’s recommendation. If no solution is found, Article 7 TEU is the last resort. This framework was activated for the first time in 2016, with Poland.

To promote and safeguard the Rule of Law in the framework of the Treaties, the Council decided in December 2014 to hold the Annual Rule of Law dialogues, among all Member States within the Council, based on the principles of objectivity, non-discrimination and equal treatment of all Member States, conducted on a non-partisan and evidence-based approach, emphasizing that such an approach will be without prejudice to the principle of conferred competences, as well as the respect of national identities of Member States.[[98]](#footnote-98) The European Rule of Law mechanism provides a process for an annual dialogue between the Commission, the Council, and the European Parliament together with Member States as well as national parliaments, civil society, and other stakeholders on the Rule of Law. Its objective is to stimulate inter-institutional roles. The Rule of Law Report and the preparatory work with Member States takes place annually as part of the mechanism and will serve as a basis for discussions in the EU, as well as to prevent problems from emerging or deepening further.

Adopted in 2006 to oversee Bulgaria and Romania, as a temporary mechanism, the Cooperation and Verification Mechanism was set up to monitor the countries’ progress in addressing specific benchmarks in *inter alia* the area of judicial reform, corruption, and the fight against organized crime[[99]](#footnote-99). The mechanism does not provide any sanctions in case of lack of progress.

The Conditionality Regulation mechanism is used in case of breaches of the principles of the Rule of Law, which affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.[[100]](#footnote-100) While this mechanism is primarily financial, it directly links EU funds to compliance with the Rule of Law standards.

The Common Provisions Regulation envisages the suspension of payment from EU funds “if there is a serious deficiency in the effective functioning of the management and control system of the operational programme.” [[101]](#footnote-101) That said, it requires all Member States to put in place effective mechanisms to ensure the programmes supported by the Common Provisions Regulation and their implementation comply with the Charter of Fundamental Rights, as a precondition for related expenditure to be reimbursed. It is considered a powerful financial incentive for compliance and a stronger deterrent compared to other mechanisms. In 2022, the European Commission proposed cutting funding to Hungary under this mechanism, citing concerns over corruption and the Rule of Law. In this case, negotiations have been ongoing, but the possibility of losing EU funds has spurred some changes, albeit limited. In 2023, the Commission withheld € 35 billion in post-pandemic recovery funds until Poland addresses judicial independence issues, leading to some reforms by the Polish government. Poland’s new government, under Donald Tusk, pledged to reform the judiciary to regain EU funds.

The European Semester is a process resulting in country-specific recommendations on macroeconomic and structural issues, including justice systems and anti-corruption.[[102]](#footnote-102) Viewed as an example of soft law instruments implementing EU primary law provisions, it has increasingly become more intensely occupied with issues relating to national judiciaries and judicial independence.

The EU Justice Scoreboard[[103]](#footnote-103): The EU Justice Scoreboard is a comparative information tool that aims to assist the EU and Member States to improve the independence, quality, and effectiveness of national justice systems. It is one of the tools in the EU’s Rule of Law toolbox used by the Commission to monitor justice reforms undertaken by Member States and one of the sources of information for the Rule of Law Report. It functions as an early warning tool for the Rule of Law backsliding.

The same way, the mechanism of Article 7 TEU, frequently referred to as the nuclear option, particularly no. 2, allows the EU to sanction Member States for violating fundamental values. Already used against Poland (2017)[[104]](#footnote-104) and Hungary (2018)[[105]](#footnote-105), this mechanism, which may have as a consequence the suspension of membership rights of State Members, has stalled because both countries have mutually protected each other by blocking further steps.[[106]](#footnote-106) Effectively, as it requires unanimous consent from all EU Member States (excluding the one in question) to impose sanctions, this makes its full implementation politically difficult. Hungary and Poland have been using their veto power strategically in the European Council to block sanctions or financial repercussions. They often form informal alliances with other illiberal governments, making it difficult for the EU to adopt decisive actions. This is also one of the reasons why the Commission, until the end of 2022, has avoided taking more drastic measures. Not only to avoid being accused of interfering in the internal affairs of States, but also because it is aware that non-compliant Member States can paralyze the adoption of measures, on budgetary matters, which are vital for the Union, especially in those cases where unanimity is required.[[107]](#footnote-107)

However, having understood that Hungary had already exceeded all limits, by the end of 2022, the Commission decided to toughen up its action against this country. In fact, over more than a decade in power, Prime Minister Viktor Órban has had many bitter confrontations with the EU and the European Commission over Hungary's restrictions on the rights of homosexuals and migrants, as well as for strengthening state control over non-governmental organizations, academics, the media, and the courts. Finally, Budapest’s arm-wrestle between Budapest and EU over Rule of Law issues and the attacks on judicial independence were “the straw that broke the camel's back”, leading to the flow of EU funds to Hungary being reduced in 2023, what was considered by Hungary an undesirable move, given the ongoing economic contraction and inflation, which hit a new high in March at 25.2 % year-on-year.[[108]](#footnote-108)

The Rule of Law conditionality mechanism, adopted in 2020 by the European Council, allows, as seen before, the EU to suspend funding to a member state if it finds it is backsliding on democracy and the Rule of Law, giving it a more effective instrument against the conservative governments of Hungary and Poland.

In autumn 2022, the European Commission proposed to suspend part of EU funding to Hungary: 65% of the regional funds for the years 2021-2027 which amounts to € 7,5 billion[[109]](#footnote-109), and in December 2022, the Council of the European Union and the European Commission finally decided to freeze and tied to conditions Hungary’s access to those billions of euros of EU funds due to concerns over Rule of Law and human rights problems.[[110]](#footnote-110)

Trying to reverse the situation, Hungary agreed to unblock several crucial EU decisions that require unanimity among EU Member States that it had strategically voted against (such as the Ukraine support package, arms to Ukraine[[111]](#footnote-111), the International Tax Deal, or Sweden's entry into NATO).[[112]](#footnote-112) In exchange, less EU funds were frozen: just 55% (€ 6,3 billion). It was still a huge amount for Hungary, representing over 3% of the annual economic output of the country.[[113]](#footnote-113)

Hungary’s Recovery and Resilience Plan (RRP) for € 5,8 billion was the last approved by the European Commission, and was finally approved by the Council, on 12 December 2022, with the condition that Budapest implements reforms to increase judicial independence and tackle corruption (as on the regional funds). A new set of measures was added to the original plan, containing 38 measures with 111 milestones and targets. Of these, 27 milestones are referred to as “super milestones”, without which no payment under the RRP will be allowed. Four of those concern the judiciary. One of the expected judicial reforms requires the Hungarian government to remove the possibility for public authorities to challenge final judicial decisions at the Constitutional Court.

On 18 January 2023, the Hungarian government published and submitted for public consultation a draft law on the judiciary. The amendments are essential to fulfil the super milestones set by the EU, so that Hungary could access frozen EU funds. Nevertheless, compliance with the super milestones was still insufficient under the reform measures undertaken by Hungary.

In fact, according to Hungarian civil society organizations (Amnesty International Hungary, the Eötvös Károly Institute, the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee, K-Monitor and Transparency International Hungary…[[114]](#footnote-114)), up until the end of March 2023, the government had not yet taken adequate steps to fully address the Rule of Law and human rights concerns raised by the European Union.[[115]](#footnote-115) Numerous issues related to judicial independence but also to the anti-corruption framework, the predictability, quality, and transparency of law-making, the rights of refugees and asylum-seekers, academic freedom, and the rights of LGBTQI+ persons remain unresolved. Swift measures were necessary in all these areas to ensure that the country and its citizens are granted access to the EU funds.

* 1. Domestic Political Resistance

Domestic political resistance, mainly the activity of opposition parties and the movements of civil society, is also important in fighting the Rule of Law backsliding. Political parties, journalists, legal experts, and activists have mobilized protests and legal challenges against the government's reforms.

Opposition parties in Hungary and Poland have played a crucial role in resisting judicial constraints, often leveraging parliamentary debates, public campaigns, and alliances with European institutions. However, their effectiveness has been limited by electoral disadvantages, government control over state media, and political fragmentation.

On the other hand, pro-democracy movements and non-governmental organizations (NGOs) have actively protested judicial reforms. In Poland, mass protests, such as those organized by the Committee for the Defence of Democracy (KOD), have demonstrated widespread public opposition. Hungarian civil society, despite government restrictions on foreign-funded NGOs, has mobilized against judicial interference through awareness campaigns and international advocacy.

Judges’ associations, bar councils, and legal scholars have also been vocal in denouncing judicial erosion. The judiciary itself (judges and legal associations) has openly challenged governmental interference. In Poland, the Supreme Court and the National Council of the Judiciary have challenged government measures at the CJEU. In Hungary, lawyers, bar associations, and former judges have criticized government overreach, though repression limits their capacity to organize resistance.

Despite robust efforts, domestic resistance faces significant obstacles: the state capture of institutions, being an example, the government's control over media, courts, and law enforcement reduces the impact of opposition voices; legal repression (laws restricting protests, NGO operations, and judicial independence undermine the effectiveness of resistance); public polarization meaning that divisive rhetoric and nationalist narratives weaken solidarity among citizens and opposition groups; and limited international leverage (even if EU interventions offer some support, domestic actors often struggle to translate external pressure into internal political change).

Domestic political resistance to judicial constraints in Hungary and Poland remains resilient but faces severe structural and legal impediments. While opposition parties, civil society organizations, and legal professionals continue to challenge backsliding, their success is constrained by government control over key institutions. The future of judicial independence in these countries will largely depend on sustained domestic mobilization and international support for democratic governance.

* 1. External Pressure and International Bodies

Bilateral pressure from other EU Member States, as well as global powers such as the United States (US), can serve as a deterrent against further democratic backsliding.

This includes diplomatic efforts, public statements condemning the situation, and the threat of economic sanctions. For instance, in 2022, the US imposed visa bans on some Hungarian officials accused of undermining democracy, and the Biden administration publicly criticized judicial interference in both Poland and Hungary. The US repeatedly criticized democratic backsliding in Poland and Hungary, with diplomatic pressure being applied. Likewise, the Organization for Security and Co-Operation in Europe (OSCE) has raised concerns about judicial independence in both those countries, issuing reports and recommendations to mitigate the situation.

The Council of Europe, the Venice Commission, and the ECtHR have voiced concerns about Rule of Law violations and have taken steps to hold Member States accountable. However, the enforcement of their decisions remains limited.

The Venice Commission has issued multiple opinions condemning judicial reforms, strengthening the EU’s legal arguments, and reinforcing EU and ECHR rulings. This advisory body provides expert legal opinions on constitutional matters, including judicial independence and Rule of Law issues. Poland and Hungary have been subject to reviews and critiques from the Venice Commission, which have drawn international attention to the deterioration of the Rule of Law.

The ECtHR also recognized that judicial independence was in danger in Hungary and Poland. Hungary dismissed its Supreme Court president early due to his criticism of judicial reforms. As seen before, the ECtHR ruled this violated judicial independence (Baka v. Hungary, 2016). And it also ruled against judicial reforms that allowed political interference in judicial appointments and that Poland’s Disciplinary Chamber was unlawfully established, violating the right to a fair trial (Reczkowicz v. Poland, 2021).

1. **Closing Remarks**

The backsliding of the Rule of Law and judicial independence in Europe represents a significant challenge to the region’s democratic stability. In what concerns Central and Eastern Europe, some Member States have already made efforts to strengthen the independence of judicial councils. It is the case of Croatia, where the process for appointing the Supreme Court President was concluded and the procedure governing the selection procedure was amended to avoid a potential future deadlock[[116]](#footnote-116); in the Czech Republic, amended legislation aims to set up a transparent and uniform system of recruitment and selection of judges and court presidents.[[117]](#footnote-117)

However, the situation remains worrying in relation to other states such as Slovenia[[118]](#footnote-118), Romania[[119]](#footnote-119) or Bulgaria where there are increasing concerns related to the functioning of the Supreme Judicial Council and a need to address its composition and to the absence of regular competition for judicial appointments to higher positions, combined with an extensive use of secondments[[120]](#footnote-120); in Slovakia, the Judicial Council has taken up new tasks following the Constitutional reform, while concerns remain over the regime for dismissal of its members; in Lithuania, the appointment of the President of the Supreme Court is pending since September 2019, as the law does not foresee deadlines for the respective selection procedure and confers discretion to the President of the Republic as to the timing of selection procedures for the Supreme Court; in Latvia, the rejection by Parliament of a candidate to the position of Supreme Court judge was marked by controversies regarding possible undue political influence.

The importance of strong governments in Eastern Europe has come to the forefront with the war in Ukraine. As countries that border Ukraine, the actions and rhetoric taken by the governments of Poland and Hungary are permanently under scrutiny and the absence of strong opposition from the EU leaves it in a weak position.[[121]](#footnote-121) Similarly, Member States in general have remained silent on the crisis of the Rule of Law in the European Union. But, as PECH and SCHEPPELE warn, Member States need to wake to the fact that the actions of Hungary’s Orbán and Poland’s Kaczynski provide a model that can easily spread to other EU countries led by populists with autocratic ambitions, representing serious threats to liberal constitutional democracy[[122]](#footnote-122). «Unfortunately, populism is on the rise, and it will be a challenge for democracies in the near future. It will also assess the strength of the system of the Rule of Law, including the robustness of the EU Member States’ judiciaries. However, populism is not the exclusive prerogative of newcomers».[[123]](#footnote-123) It has also been challenged in old democracies such as France, Italy, and the Netherlands, among others.

Since 2023, several Member States have endeavored to strengthen judicial independence. Hungary was one of them, conducting a legislative reform that strengthened the competences of the National Council of the Judiciary. The same happened in Poland under Donald Tusk's new government. Countries like Spain, Estonia, and the Netherlands are also preparing specific reforms to strengthen the structure of their Judicial Council. In other countries, such as Greece, Ireland, Germany, or Poland, among others, efforts are being made to improve the way judges are appointed and promoted, to minimize the involvement of political power in this process.[[124]](#footnote-124)

On the other hand, the CJEU has established that states cannot use disciplinary proceedings to try to exert pressure and control over judges. Disciplinary proceedings against judges must be conducted by independent bodies that guarantee them the possibility of defence and respect for the Charter of Fundamental Rights, with the possibility of appealing against the sanctions imposed. Poland has already introduced changes in this direction. This is, of course, a work in progress, and it is only gradually, under pressure from the European institutions, that the Member States are realizing the reforms necessary for true judicial independence that contribute to a solid culture of the Rule of Law.

The Rule of Law has indeed been high on the EU agenda, and promoting and safeguarding it is one of the main concerns of the Commission, which is responsible for ensuring respect for EU values and law.

To this end, the independence, efficiency, and quality of national courts are crucial, particularly since they must ensure respect for the Rule of Law. We must not forget that national courts are the primary enforcers of EU law. As such, the independence of those courts and their proper functioning are essential for the confidence of citizens and businesses in the public administration, for the functioning of the single market and the legal order of the European Union, and even its foreign policy. The Rule of Law is a key guiding principle for the EU's action beyond its borders.

While there are multiple mechanisms in place to combat Rule of Law and judicial independence backsliding, as it happens in Poland and Hungary, their effectiveness is often limited by political dynamics within the EU and resistance from the respective governments. Effectively, political fragmentation and resistance from Member States hinder the effectiveness of EU measures. Financial leverage, such as the EU Conditionality Regulation, appears to be one of the more promising tools, but consistent pressure from both EU institutions and international actors remains essential to curbing further democratic erosion.

That said, the European Union cannot take it for granted. And it cannot remain based on the Rule of Law if the Member States themselves do not respect it. That is why it is expected that the European Union can unite to react promptly, forcefully, and dissuasively when confronted with internal threats against its founding values.

In conclusion, fighting the Rule of Law backsliding requires a multifaceted approach involving legal action, political pressure, and strengthening democratic norms both domestically and at the EU level.

The EU has established mechanisms to enforce the Rule of Law standards, but their effectiveness depends on political will, the unity of Member States, and civil society resistance within the affected countries. This requires the existence of robust institutional frameworks, active civil societies, and international solidarity to resist the erosion of democratic principles and maintain the independence of the judiciary.

The European Union and other international institutions must continue to address these issues through legal, political, and financial means to safeguard the core values of liberal democracy.

In summary, our findings indicate that the Rule of Law and judicial independence are critically endangered mainly in the illiberal democracies such as Hungary and Poland. This study identifies effective mechanisms to counteract the backsliding of these fundamental principles, providing a crucial framework for addressing similar challenges across the European Union. A comprehensive analysis of CJEU and ECtHR case law highlights the systemic threats posed by political interference and legislative reforms. The significance of these findings extends beyond theoretical implications, offering strategies for reinforcing judicial independence and upholding democratic values. By identifying mechanisms such as enhanced EU oversight, conditional funding, and strategic litigation, this study may provide actionable insights that can inform policy decisions and guide international cooperation efforts. These strategies are essential for safeguarding the judiciary from political encroachments and ensuring the integrity of democratic institutions.

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*-Autocratization Turns Viral. Democracy Report 2021*, March 2021,

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1. This work corresponds to the presentation with the same title that was made at the VI International Congress of the Ibero-American Network of Legal Studies 1812 (U. Lusíada, Lisbon, June 2025) and is an update of a study that has not yet been published and which has been given the title “Rule of Law and Judicial Power: The Experience of the European Union”. [↑](#footnote-ref-1)
2. Assistant Professor at the Law Faculty of Lusíada University, in Oporto, Portugal. Researcher of CEJEIA - Centre for Legal, Economic, International and Environmental Studies. E-mail: cas@por.ulusiada.pt [↑](#footnote-ref-2)
3. Article 2 is considered a source of binding legal norms. PECH, L., «A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law», *European Constitutional Law Review*, Vol. 6, 2010, p. 366; KOCHENOV, D. V., «The Acquis and Its Principles: The Enforcement of the Law versus the Enforcement of Values in the EU», JAKAB, A. and KOCHENOV, D. V. (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017; ITZCOVICH, G., «On the Legal Enforcement of Values. The Importance of the Institutional Context» in JAKAB, A. and KOCHENOV, D. V. (Eds.), *The Enforcement*, *op.cit*.; SCHROEDER, W., «The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?», in VON BOGDANDY, A., et *al.* (Eds), *Defending Checks and Balances in EU Member States*, Springer 2021. [↑](#footnote-ref-3)
4. State of de Union 2021, <https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2021_en>. In the words of Koen Lenaerts, president of the CJEU, “integration through the Rule of Law defines what the European Union today stands for. [↑](#footnote-ref-4)
5. Recital 6 of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16.12 on a general regime of conditionality for the protection of the Union budget. [↑](#footnote-ref-5)
6. LENAERTS, K., «New horizons for the Rule of Law within the EU», German Law Journal, German Law Journal, Volume 21, Special Issue 1: 20 Challenges in the EU in 2020, January 2020, pp. 29 – 34. [↑](#footnote-ref-6)
7. Note that the concept of the Rule of Law is far from peaceful, as Laurent Pech explains in «The Rule of Law as a Well-Established and Well-Defined Principle of EU Law», *Hague Journal on the Rule of Law*, published online 28 June 2022. Nevertheless, this author argues that the Rule of Law is “a well-established constitutional principle of EU law which is furthermore well-defined not least because of the Court of Justice’s extensive case law and the European Commission's definitional codification efforts in the past decade.” [↑](#footnote-ref-7)
8. COM(2019) 343 final, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strengthening the Rule of Law within the Union. A blueprint for action*, 17.07.2019 [↑](#footnote-ref-8)
9. COM(2019) 163 final, Communication from the Commission to the European Parliament, the European Council, and the Council*, Further strengthening the Rule of Law within the Union*, 03.04.2019, and COM(2020) 580 final, 2020 Rule of Law Report. The Rule of Law situation in the European Union. See JANSE, R., «Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement», *International Journal of Constitutional Law*, Volume 17, Issue 1, January 2019, pp. 43-65. [↑](#footnote-ref-9)
10. Implying a transparent, accountable, democratic, and pluralistic process for enacting laws. COM(2014) 158 final, Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, 11.03.2014. The principle of legality corresponds to the idea of a government limited by law (to reduce the arbitrariness of officials’ decisions) and whose officials must act following the existing legal framework. [↑](#footnote-ref-10)
11. Requiring that “rules are clear and predictable and cannot be retrospectively changed.” COM(2014) 158 final, *cit.* [↑](#footnote-ref-11)
12. Involving respect for private spheres of people’s lives and “protection against arbitrary and disproportionate intervention.” COM(2014) 158 final, *cit.* [↑](#footnote-ref-12)
13. COM(2014) 158 final, *cit.* [↑](#footnote-ref-13)
14. The European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR) have recognized these principles. COM(2014) 158 final, *cit.*, Annex, and recent case law of the CJEU, Cases C-64/16, Associação Sindical dos Juízes Portugueses *v.* Tribunal de Contas; C 216/18 PPU, LM, case C-619/18, Commission v Poland (order of 17 December 2018) and C-156/21, where the Court of Justice stated that the principles of Rule of Law have their source in common values which are also recognized and applied by the Member States in their legal systems (p. 236-237). [↑](#footnote-ref-14)
15. C-156/21 e C-157/21. Hungary and Poland brought the cases (actions for annulment) after the EU invoked Regulation 2020/2092 (rule-of-law conditionality mechanism), tying EU funds to respect for judicial independence and the Rule of Law. The CJEU ruled that Member States can be deprived of EU funding when they fail to meet democratic standards. Reasoning that the financial interests of the Union depended on respect for independent courts and the Rule of Law across the bloc, the CJEU ruled against Poland and Hungary. See TOLLEY, M. C., The Protection of Judicial Independence in Europe: The Roles of the European Court of Human Rights and the Court of Justice of The European Union. [↑](#footnote-ref-15)
16. Special Eurobarometer 517 Report on the Future of Europe, 25.01.2022, p. 33: the EU’s respect for the Rule of Law, democracy and human rights was considered the EU’s main asset by 27% of the respondents. Economic, industrial, and trading power have reached 25%. [↑](#footnote-ref-16)
17. First, it is the idea of government limited by law (principle of legality). Limited government is considered a crucial element to reducing the arbitrariness of “officials” decisions. A second element requires that laws must be laid down in advance, they must be general, and they must be publicly available. A third element is the Rule of Law requirement for access to an independent and unbiased judiciary. MANKO, R., *Protecting the Rule of Law in the EU. Existing mechanisms and possible improvements*, European Parliamentary Research Service, November 2019,

[https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS\_BRI(2019)642280\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI%282019%29642280_EN.pdf) [↑](#footnote-ref-17)
18. MOLITERNO, J. and CUROS, P., «Recent Attacks on Judicial Independence: The Vulgar, the Systemic, and the Insidious», *German Law Journal* (2021), 22, pp. 1159-1191. [↑](#footnote-ref-18)
19. Case C-64/16, Associação Sindical dos Juízes Portugueses, p. 31. [↑](#footnote-ref-19)
20. Case C-72/15, Rosneft, p. 73. [↑](#footnote-ref-20)
21. MANKO, R., *European Court of Justice case-law on judicial independence*, European Parliamentary Research Service, July 2021,

https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696173/EPRS\_BRI(2021)696173\_EN.pdf [↑](#footnote-ref-21)
22. MANKO, R., *Council of Europe standards on judicial independence*, European Parliamentary Research Service, May 2021, https://www.europarl.europa.eu/thinktank/en/document/EPRS\_BRI(2021)690623 [↑](#footnote-ref-22)
23. BÁRD, P., «In courts we trust, or should we? Judicial independence as the precondition for the effectiveness of EU law», *European Law Journal*, 2022, pp. 1-26. [↑](#footnote-ref-23)
24. MASTRACCI, M., «Judicial Independence: European Standards, ECtHR Criteria and the Reshuffling Plan of the Judiciary Bodies in Poland», *Athens Journal of Law*, vol. 5, issue 3, pp. 323-350. [↑](#footnote-ref-24)
25. TOLLEY, M. C., *cit*. [↑](#footnote-ref-25)
26. Case C-64/16, Associação Sindical dos Juízes Portugueses, p. 32, 34 and 35. [↑](#footnote-ref-26)
27. MOLITERNO, J. and CUROS, P., *cit.* [↑](#footnote-ref-27)
28. «Judicial independence can also be defined as the ability of judges to make their decisions without interference or fear of retribution by other powers (BURBANK, S., «What do We Mean by Judicial Independence?», *Ohio State Law Journal*, vol. 64, no. 1, 2003, pp. 323-340). This is important, because it allows for “judges free of congressional and executive control [to] be in a position to determine whether the assertion of power against citizens is consistent with law” (BATOR, P., «The Constitution as an Architecture: Legislative and Administrative Courts under Article III», *Indiana Law Journal*, vol. 65, no. 2, Article 2, 1990, pp. 233-275). For a country to have effective separation of powers, judges must be free from worrying about the short-term desires of elected officials (KAUFMAN, I., «The Essence of Judicial Independence», *Columbia Law Review*, vol. 80, o. 4, May 1980, pp. 671-701)». FREEBERG, J., «Don’t Judge Me: Declining Judicial Independence in Hungary and Poland», *WWU Honors College Senior Projects*. 601, 2022. [↑](#footnote-ref-28)
29. Article 19 TEU, Article 47 Charter. COM(2022) 500 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2022 Rule of Law Report. The Rule of Law situation in the European Union, 13.07.2022. In case C-64/16, Associação Sindical dos Juízes Portugueses, 27 February 2018, p. 44, the CJEU distinguishes external independence which it considers equivalent to protecting the judicial branch from other branches of power and ensures the absence of any hierarchical constraint or subordination to any other body, from internal independence, which is linked to impartiality. [↑](#footnote-ref-29)
30. LENAERTS, K., The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence, introductory lecture given by the President of the Court of Justice of the European Union during the scientific conference "Application of the European law in jurisprudence,” Supreme Administrative Court of Poland, 19 March 2018. [↑](#footnote-ref-30)
31. TOLLEY, M. C., *cit*. In the same sense, Peter H. Russel also defines judicial independence as «the autonomy of judges, both individually and collectively, from other individuals and institutions and the willingness of judges to exercise their autonomy by exercising power over powerful individuals and legislative and executive agencies of government». See «Towards a General Theory of Judicial Independence», in RUSSEL, P.H. and O’BRIEN, D.M., *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World*, Charlottesville, VA, University Press of Virginia, 2001, pp. 1 ss. [↑](#footnote-ref-31)
32. Cases C-156/21, Hungary *v.* Parliament and Council and C-158/21, Poland *v.* Parliament and Council, p. 129. See recital 5 of Regulation (EU, Euratom) 2020/2092, *cit.*: «Once a candidate country becomes a Member State, it joins a legal structure that is based on the fundamental premiss that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognized and, therefore, that the law of the Union that implements them will be respected. The laws and practices of Member States should continue to comply with the common values on which the Union is founded». [↑](#footnote-ref-32)
33. UITZ, R., The Rule of Law in the EU: Crisis – Differentiation – Conditionality, Bridge Network – Working Paper 20, April 2022; PIROZZI, N. and BONOMI, M., «Governing Differentiation and Integration in the European Union: Patterns, Effectiveness ang Legitimacy», *The International Spectator,* 57:1, 2022. [↑](#footnote-ref-33)
34. UITZ, R., *cit*. DE WITTE, B., «Variable Geometry and Differentiation as Structural Features of the Legal Order», in DE WITTE, B. *et al.* (Eds), *Between Flexibility and Disintegration*, Edward Elgar, 2017. [↑](#footnote-ref-34)
35. Article 49 TEU: «Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union». [↑](#footnote-ref-35)
36. BÁRD, P., *cit*. [↑](#footnote-ref-36)
37. UITZ, R., *cit*. [↑](#footnote-ref-37)
38. Viviane Reding, Vice President of the European Commission and EU Justice Commissioner, ‘The EU and the Rule of Law – What next?’ Speech, 4 September 2013,

(<http://europa.eu/rapid/pressrelease\_SPEECH-13-677\_en.htm>) [↑](#footnote-ref-38)
39. MAGEN, A. and PECH, L., «The Rule of Law and the European Union», The Handbook on the Rule of Law, Chapter 14, Elgar, 2018, pp. 235-256. [↑](#footnote-ref-39)
40. Following formal commitments by the German government recognizing the primacy of EU law, the Commission closed the infringement procedure. [↑](#footnote-ref-40)
41. In Poland, the Constitutional Court has expressly challenged the primacy of EU law and considered certain provisions of the European Treaties as unconstitutional. This led the Commission to open an infringement procedure. [↑](#footnote-ref-41)
42. The CJEU ruled that national courts should not be prevented by a risk of disciplinary sanctions from disapplying decisions of the Constitutional Court which are contrary to EU law and that EU law precludes any national rule or practice that would give rise to disciplinary liability for national judges’ failure to comply with such decisions. Joined cases C-357/19, C -379/19, C-547/19, C-811/19, and C-840/19, Euro Box Promotion e.a., 21 December 2021, and C-430/21, RS, 22 February 2022. [↑](#footnote-ref-42)
43. UITZ, R., *cit*. [↑](#footnote-ref-43)
44. The bottom countries in the EU/EFTA/North America grouping are Poland, the Slovak Republic, Romania, Croatia, Greece, Bulgaria, and Hungary. <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2024.pdf> [↑](#footnote-ref-44)
45. V-Dem Institute, *Autocratization Surges – Resistance Grows. Democracy Report 2020*, pp. 4 and 13. [↑](#footnote-ref-45)
46. V-Dem Institute, *Autocratization Turns Viral. Democracy Report 2021*, March 2021, p. 19. [↑](#footnote-ref-46)
47. PECH, L., 2022, *cit*. [↑](#footnote-ref-47)
48. BÁRD, P., *cit.* [↑](#footnote-ref-48)
49. PECH, L., 2022, *cit.;* V-Dem Institute, *Autocratization Changing Nature. Democracy Report 2022,* March 2022, p. 25. [↑](#footnote-ref-49)
50. Cases C-487/19, *cit.*, p. 108, C‑896/19, *cit.*, p. 51 and C‑791/19, Commission *v.* Poland (Disciplinary regime for judges), 15 July 2021, p. 58. [↑](#footnote-ref-50)
51. Cases C-487/19, p. 110 and joined cases C‑83/19, C‑127/19, C‑195/19, C‑291/19, C‑355/19 and C‑397/19, *cit.*, p.97. [↑](#footnote-ref-51)
52. MOLITERNO, J. and CUROS, P., *cit*. This is what Martin Shapiro calls a “independence-accountability problem.” See, from the author, «Judicial Independence: New Challenges in Established Nations», *Indiana Journal of Global Legal Studies*, 20 no. 1 (2013): 253-277. [↑](#footnote-ref-52)
53. Cases C-487/19, p. 109 and C‑896/19, *cit.*, p. 53. [↑](#footnote-ref-53)
54. Cases C-487/19, p. 111 and C‑192/18, Commission *v.* Poland, 5 November 2019, p. 112. [↑](#footnote-ref-54)
55. Transfers without consent of a judge to another division or court, or are capable of undermining the principles of the irremovability of judges and judicial independence, as far as they may constitute a way of exercising control over the content of judicial decisions because they are liable not only to affect the scope of the activities allocated to judges and the handling of cases entrusted to them, but also to have significant consequences on their life and career and, thus, to have effects similar to those of a disciplinary sanction. On the other hand, it is widely accepted that judges may be dismissed if they are deemed unfit for carrying out their duties on account of incapacity or a serious breach of their obligations, provided the appropriate procedures are followed (Cases C-487/19, p. 112-115 and C‑192/18, *cit.*, p. 113-115). [↑](#footnote-ref-55)
56. Rules which define both conduct amounting to disciplinary offences and the applicable penalties, providing for the involvement of an independent body under a procedure which fully safeguards the rights enshrined in Articles 47 and 48 Charter, in particular the rights of the defence, and lay down the possibility of bringing legal proceedings challenging the disciplinary bodies’ decisions constitute a set of guarantees that are considered essential for safeguarding the independence of the judiciary (Cases C-487/19, p. 113 and C‑83/19, C‑127/19, C‑195/19, C‑291/19, C‑355/19 and C‑397/19, *cit.*, p. 198 and C‑791/19, *cit.*, p. ). The ECtHR has also ruled along the same lines, underlining the importance of procedural safeguards and the possibility of a judicial remedy concerning decisions affecting the careers of judges, including their *status*, and in particular decisions to transfer them without their consent, to ensure that their independence is not compromised by undue external influences, thus guaranteeing the independence of the judiciary concerning other powers (see, to that effect, ECtHR, 9 March 2021, Bilgen *v.* Turkey, §§  63 and 96 and 1 December 2020, Ástráðsson *v.* Iceland, §§  231 and 233). [↑](#footnote-ref-56)
57. In that sense, ECtHR, Ástráðsson *v.* Iceland, *cit.*, §§º 227 and 232, and case C-487/19, p. 126. [↑](#footnote-ref-57)
58. *Ibidem*. Cases C-824/18, *cit.*, p. 117, 119 and 123. [↑](#footnote-ref-58)
59. The 2022 EU Justice Scoreboard, 19 May 2022, figures 50 and 52, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\_en [↑](#footnote-ref-59)
60. MOLITERNO, J. and CUROS, P., *cit*. [↑](#footnote-ref-60)
61. Case C-216/18, LM, 25 July 2018, p. 67. [↑](#footnote-ref-61)
62. COM(2022) 500 final, *cit*. [↑](#footnote-ref-62)
63. Unfortunately, the efforts by the CJEU and the ECtHR to mitigate threats to judicial independence have not been enough to put an end to the Rule of Law crisis. [↑](#footnote-ref-63)
64. FREEBERG, J., *cit.* [↑](#footnote-ref-64)
65. BÁRD, P. *cit*. BÁRD concludes by saying that «[o]ne hand, illiberal democracies have tried to disguise their strong political will, pernicious strategies and fake narratives under the letter of the law, while on the other hand, the EU executive and legislative branches of hidden their political impassiveness, if not weakness, behind a plethora of soft and allegedly law tools». [↑](#footnote-ref-65)
66. SADURSKI, W., «How Democracy Dies (in Poland): A Case Study of an Anti-Constitutional Populist Backsliding», *Revista Forumul Judecatorilor*, vol. 2018, no. 1, pp. 104-178. [↑](#footnote-ref-66)
67. SADURSKI, W., *cit*; KOVÁCS, K. and SCHEPPELE, K., «The Fragility of an Independent Judiciary: Lessons from Hungary and Poland – and the European Union», *Communist and Post-Communist Studies*, vol. 51, no. 3, 2018, pp.189-200. [↑](#footnote-ref-67)
68. Krajowa Rada Sadownictwa (KRS), in polish. Before 2017, seventeen out of twenty-five members of the KRS were chosen from within the judiciary, but after 2017, twenty-three out of twenty-five members were selected by the political branches of power. As the KRS is supposed to safeguard the independence of courts and judges, the takeover of this body is essential to seeking control over the judiciary. Due to that, the European Network of Councils for the Judiciary (ENCJ) suspended the KRS in September 2018. MOLITERNO, J. and CUROS, P., *cit*. [↑](#footnote-ref-68)
69. Venice Commission (the European Commission on Democracy through Law of the Council of Europe) Opinion no. 977/2020, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI>; (2020)002-e. MOLITERNO, J. and CUROS, P., *cit*. See case C-619/18, Commission *v.* Republic of Poland, 24 June 2019, and joined cases C‑585/18, C‑624/18 and C‑625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019. [↑](#footnote-ref-69)
70. MOLITERNO, J. and CUROS, P., *cit*., FREEBERG, J., *cit*. [↑](#footnote-ref-70)
71. Venice Commission Opinion no. 977/2020, *cit*. Case C-192/18, European Commission  Republic of Poland, 5 November 2019. [↑](#footnote-ref-71)
72. Case C-487/19 CJEU. Mr. Zurek also presented a request to ECtHR (application no. 39650/18) that found, on 16 June 2022, that his right of access to a court had been breached, as well as his freedom of expression. For more detailed information, see <https://advokatnidenik.cz/wp-content/uploads/Judgment-Zurek-v.-Poland-Polish-authorities-attempted-to-silence-well-known-judge.pdf> [↑](#footnote-ref-72)
73. Cases C-487/19, p. 102 and C-83/19, C- 127/19, C-195/19, C-291/19, C-355/19 e C-397/19, *cit.*, p. 190. [↑](#footnote-ref-73)
74. That provision must, therefore, be taken into consideration to interpret Article 19(1) TEU (C‑896/19, Repubblika, 20 April 2021, p. 45). The second paragraph of Article 47 Charter corresponds to Article 6(1) ECHR (right of access to court). The CJEU must, therefore, ensure that its interpretation of the second paragraph of Article 47 Charter safeguards a level of protection which does not fall below the level of protection established in Article 6(1) ECHR, as interpreted by the ECtHR (C‑38/18, Gambino and Hyka, 29 July 2019, p. 39). [↑](#footnote-ref-74)
75. See *supra* note 58. [↑](#footnote-ref-75)
76. See, to that effect, cases C‑542/18 RX-II and C‑543/18 RX-II, Review Simpson and HG *v.* Council and Commission, 26 March 2020, p. 75. In this respect, the CJEU decided, in case C-896/19, *cit.*, that the second subparagraph of Article 19(1) TEU must be interpreted as not precluding national provisions which confer on the Prime Minister of the Member State concerned a decisive power in the process for appointing members of the judiciary, while providing for the involvement, in that process, of an independent body responsible for, *inter alia*, assessing candidates for judicial office and giving an opinion to that Prime Minister. [↑](#footnote-ref-76)
77. Joined cases C‑585/18, C‑624/18 and C‑625/18, *cit.*, p. 133-138; A. B. and Others, p. 122-125; and C‑791/19, *cit.*, p. 97-100. Already in case C-477/16, the Court of Justice stated that the judiciary must be distinguished, under the principle of the separation of powers which characterizes the operation of the Rule of Law, from the executive (p. 36). [↑](#footnote-ref-77)
78. COM(2022) 500 final, *cit*. [↑](#footnote-ref-78)
79. Case C- 487/19, *cit.*, p. 156-157 and joined C‑83/19, C‑127/19, C‑195/19, C‑291/19, C‑355/19 and C‑397/19, *cit.*, p. 244-245. [↑](#footnote-ref-79)
80. Joined cases C-83/19, C 127/19, C 195/19, C 291/19, C 355/19 and case C 397/19, *cit.*, p. 248. [↑](#footnote-ref-80)
81. The European Commission has assured that national Recovery and Resilience Plans include justice reforms and investments in several Member States. [↑](#footnote-ref-81)
82. BÁRD, P., *cit.* [↑](#footnote-ref-82)
83. BÁRD, P. and PECH, L. *How to build and Consolidate a Party Free Pseudo Democracy by Constitutional Means in Three Steps: The “Hungarian Model,”* Reconnect Working Paper, 1, 2019. [↑](#footnote-ref-83)
84. SZENTE, *et al*., «The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court», *Challenges and Pitfalls in Recent Hungarian Constitutional Development: Discussing the New Fundamental Law of Hunga*ry, L’Harmattan, Paris, 2015, pp. 183-208. [↑](#footnote-ref-84)
85. This Constitution featured strongly partisan, nationalistic, and religious rhetoric in addition to giving distinct advantages to Fidesz in future elections. FREEBERG, J., *cit*. BOZÓKI, A. «Occupy the State. The Orbán Regime in Hungary», *Debatte: Journal of Contemporary Central and Eastern Europe*, vol. 19, issue 3, 2011, pp. 649-663. [↑](#footnote-ref-85)
86. For instance, the power of judicial review of financial laws was removed from the Constitutional Court. HALMAI, G., «Dismantling Constitutional Review in Hungary», Rivista di Diritti Comparati, no. 1, 2019, pp. 31-47. [↑](#footnote-ref-86)
87. SZENTE, *et al*., *cit*. [↑](#footnote-ref-87)
88. MOLITERNO, J. and CUROS, P., *cit*. [↑](#footnote-ref-88)
89. Case C-286/12, Commission *v.* Hungary, 6 November 2012. The CJEU declared that adopting a national scheme requiring compulsory retirement of judges, prosecutors, and notaries at the age of 62, which gives rise to a difference in treatment on grounds of age, is not proportionate as regards the objectives pursued. [↑](#footnote-ref-89)
90. Baka v. Hungary, app. no. 20261/12, 23 June 2016. *Ib*. [↑](#footnote-ref-90)
91. *Ib*. COM(2019) 163 final, *cit*. [↑](#footnote-ref-91)
92. Cases C-824/18, *cit.*, p. 123-125, C-791/19, *cit.*, p. 98-108, C-896/19, *cit.*, p. 66, C-824/18, *cit.*, p. 66 and 124 -125, and joined cases C-585/18, C- 624/18 and C-625/18, *cit.*, p. 137-138. [↑](#footnote-ref-92)
93. COM(2022) 500 final, *cit*. [↑](#footnote-ref-93)
94. *V.g*. C-619/18: The CJEU ruled that lowering the retirement age for Supreme Court judges violated EU law by undermining judicial independence. Poland was forced to reinstate judges who had been forced into early retirement. C-791/19: The CJEU ruled that Poland’s Disciplinary Chamber allowed political interference in the judiciary. Poland initially ignored the ruling, leading to daily fines of € 1 million from October 2021 until compliance in 2023. [↑](#footnote-ref-94)
95. *V.g.* C-286/12: Hungary lowered the retirement age for judges from 70 to 62, forcing over 200 judges into retirement. The CJEU ruled this violated EU anti-discrimination laws, forcing Hungary to compensate affected judges. C-718/17: The CJEU ruled that Hungary’s restrictions on judges referring cases to the CJEU violated EU law. [↑](#footnote-ref-95)
96. BÁRD, P., *cit*. [↑](#footnote-ref-96)
97. See COM(2014) 158 final, Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, March 2014, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52014DC0158>. [↑](#footnote-ref-97)
98. See https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism\_en

The first evaluation of this tool took place in 2019 when the Council found that the dialogue could be “stronger, more result-oriented and better structured.” See <https://data.consilium.europa.eu/doc/document/ST-16936-2014-INIT/en/pdf>. And UITZ, R., «The Perils of Defending the Rule of Law Through Dialogue», *European Constitutional Law Review*, 2019/15, pp. 1-16; BÁRD, P., «The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary», *MTA Law Working Papers* 2022/4, available at <https://jog.tk.hu/mtalwp/the-crisis-of-the-rule-of-law-democracy-and-fundamental-rights-in-hungary>]; KOMANOVICS, A., «Hungary and the Luxembourg Court: the CJEU’s Role in the Rule of Law Battlefield», *EU and Comparative Law Issues and Challenges Series*, Issue 6, 2022, pp. 122-157, available at https://hrcak.srce.hr/ojs/index.php/eclic/article/view/22413/11940. [↑](#footnote-ref-98)
99. Commission Decisions 2006/928/EC and 2006/929/EC of 13.12. and See, PECH. L., 2022, *cit*. See also https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/assistance-bulgaria-and-romania-under-cvm/cooperation-and-verification-mechanism-bulgaria-and-romania\_en [↑](#footnote-ref-99)
100. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16.12 on a general regime of conditionality for the protection of the financial interest and the budget of the European Union, which links EU funding with Member States' compliance. [↑](#footnote-ref-100)
101. Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.” [↑](#footnote-ref-101)
102. See https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester\_en. PECH. L., 2022, *cit*. [↑](#footnote-ref-102)
103. COM(2013) 160 final, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The EU Justice Scoreboard. A tool to promote effective justice and growth*, 27.3.2013. (see note 96). [↑](#footnote-ref-103)
104. The European Commission activated Article 7(1) TEU against Poland due to concerns over de judicial reforms introduced by the ruling PiS party, which increased government influence over courts. This included lowering the retirement age of Supreme Court judges (forcing the removal of critical judges) and creating a Disciplinary Chamber with government-appointed judges to punish independent judges. [↑](#footnote-ref-104)
105. The European Parliament voted to trigger Article 7 against Hungary over Rule of Law concerns, particularly, the political control over courts through government-friendly appointments and the erosion of media and academic freedom, which affects judicial independence. [↑](#footnote-ref-105)
106. Article 7 TEU was introduced in the Amsterdam Treaty to address serious breaches of the Rule of Law, with dialogue and sanctions. It is the last resort to ensure that an EU country complies with EU values enshrined in Article 2 TEU. It allows the relevant EU institutions to act in situations where there is a clear risk of a serious breach by a Member State of values referred to in Article 2 - preventive mechanism (1), or where there is a serious and persistent breach of these values – sanctions mechanism (2). The Member State concerned can be sanctioned through the suspension of membership rights. [↑](#footnote-ref-106)
107. Laurent PECH and Kim Lane SCHEPPELE (“Illiberalism Within: Rule of Law Backsliding in the EU.” Cambridge Yearbook of European Legal Studies 19, 2017, 3-47) call on the EU institutions to «use all of the tools at their disposal. The Commission must revive and reframe its use of the infringement procedure (…) [and] to vigorously press the European Council and the Council to unequivocally support its efforts in establishing unambiguous deadlines and instructions when the Rule of Law Framework has been invoked. The European Parliament could have triggered Article 7 if it had worked toward establishing the two-thirds vote it would take to do so. But that could only be done if partisan politics were put aside so that powerful parties such as the European People’s Party did not shield their member governments from the consequences of violating EU basic values. Even the Court of Justice must recognize that the EU faces new challenges that call for adjustment of existing doctrine created in better times». [↑](#footnote-ref-107)
108. Hungary joined the European Union in 2004 and since then, the country remained a net beneficiary of EU structural aid until 2022, when budgetary funds were withdrawn by Brussels due to Rule of Law issues. In 2021, the country contributed €1.7 billion to the EU budget and received €6 billion. Most of the structural assistance is dedicated to "cohesion, resilience and values". Cfr. <https://gisreportsonline.com/r/hungary-eu-divide/> [↑](#footnote-ref-108)
109. 20% of all EU funds frozen for Hungary under the current seven-year budget frame. [↑](#footnote-ref-109)
110. Hungary and Poland are the only EU members lagging in obtaining the recovery funds, which the European Commission has blocked over accusations that their nationalist governments undermine democracy and the Rule of Law. [↑](#footnote-ref-110)
111. Hungary has refused to provide any military equipment to Ukraine to help it fight against the Russian invasion. [↑](#footnote-ref-111)
112. It still might block sanctions against Russia, further financial assistance for Ukraine, or the revision of the EU budget. [↑](#footnote-ref-112)
113. Hungary’s Gross Domestic Product (GDP) in 2021 was € 182.8 billion. [↑](#footnote-ref-113)
114. The Hungarian civil society plays a significant role in monitoring the Hungarian government's progress to comply with the EU conditions. [↑](#footnote-ref-114)
115. Out of the 27 super milestones, 13 have been achieved, 7 have been achieved only partly, and 7 have not been achieved. Out of the 20 “ordinary” milestones and targets that were due by the end of the first quarter of 2023, the latest, 8 have been achieved, 9 have been achieved only partly, and 3 have not been achieved. Out of the four areas of concern identified about the operational programmes and the Charter of Fundamental Rights, none have been addressed. [↑](#footnote-ref-115)
116. However, regarding judicial independency, the Commission recommended Croatia to: reconsider the newly introduced periodic security checks conducted by the National Security Agency on all judges and state attorneys by ensuring their integrity based on other existing mechanisms, considering European standards on judicial independence and autonomy of prosecutors and the opinion of the Venice Commission. Annex to COM(2022) 500 final. [↑](#footnote-ref-116)
117. Like other Member States such as Ireland, Luxembourg, Italy, and Cyprus. [↑](#footnote-ref-117)
118. In addition to recalling the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system, it is recommended that Slovenia ensure that rules on parliamentary inquiries contain adequate safeguards for the independence of judges and state prosecutors, considering European standards on judicial independence. Annex of COM(2022) 500 final, *cit*. [↑](#footnote-ref-118)
119. In addition to recalling the commitments made under the National Recovery and Resilience Plan relating to certain aspects of the justice system, the anti-corruption framework and the legislative process and the recommendations under the Cooperation and Verification Mechanism, it is recommended to Romania to ensure that the revision of the Justice Laws reinforces safeguards for judicial independence, including to reform the disciplinary regime for magistrates. Annex of COM(2022) 500 final, *cit*. [↑](#footnote-ref-119)
120. Concerning judicial independency, the Commission recommended Bulgaria to: ensure timely ordinary competitions for promotion to avoid long-term secondment of judges to fill in vacant positions, taking into account European standards on secondment of judges; advance with the legislative amendments aiming at improving the functioning of the Inspectorate to the Supreme Judicial Council and avoiding the risk of political influence, in particular by involving judicial bodies in the selection of its members; and take steps to adapt the composition of the Supreme Judicial Council, taking into account European standards on Councils for the Judiciary. Annex to COM(2022) 500 final, *cit*. [↑](#footnote-ref-120)
121. FREEBERG, J., *cit*. [↑](#footnote-ref-121)
122. PECH, L. and SCHEPPELE, K., «Illiberalism Within: Rule of Law Backsliding in the EU», *Cambridge Yearbook of European Legal Studies*, 19, 2017, pp. 3-47. [↑](#footnote-ref-122)
123. SANZ-CABALLERO, S., «Justice as the key component of the Rule of Law: the state of play in Europe», Europske vrijednosti KB.indb, 61, p. 73. [↑](#footnote-ref-123)
124. EUROPEAN COMMISSION, 2024 Rule of Law Report, COM(2024) 800 final. [↑](#footnote-ref-124)