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Editorial

Guest Editorial

We are delighted to publish this special issue on *EU Law and Politics* at *Retskraft*. Having an established legal journal like *Retskraft* that is edited by students and committed to publishing excellent research by students is an achievement our faculty is rightly proud of. This achievement is essential for positioning our faculty as part of an exclusive club of elite law schools around the world.

The greatest contribution to this symposium was made by the students who wrote the articles selected for this issue. The students enrolled in the course 'The Legalization of EU Politics and International Relations' were interested in the idea of exploring the intersection between EU law and politics. In this regard, this course, coordinated by Shai Dothan, Juan A. Mayoral, Mikael Rask Madsen, and Marlene Wind, was a joint-initiative between the Faculty of Law and the Department of Political Science where both legal and political science approaches were integrated.

Our method of teaching that puts emphasis on discussions in class and frequent conversations with the teacher implies that everyone present in the lecture hall contributed to the research produced during the course. We were influenced by our students and they influenced each other. Every student that graduated from the course conducted individual and innovating research and shared their ideas with us in the form of a research assignment. We are grateful to all of them for entrusting us with their thoughts and observations. The articles in this symposium are from the first group of students, taught by Juan. We hope that another symposium issue will be published by *Retskraft* including contributions by students who studied from both of us and were assessed and selected by Shai.

Our gratitude goes to the editing staff at *Retskraft* that produced an impressive volume that we are honored to take part in. They communicated with us throughout the process in a professional and helpful manner and made us feel fortunate to work with them.

This symposium would not have been possible if it wasn't for the Jean Monnet Chair in EU Law & Politics which Juan won and held until his move to the University Carlos III in Madrid where he now holds the Jean Monnet Chair PromethEUs in Interdisciplinary EU governance. Shai took over the Jean Monnet chair in EU Law & Politics and the various research projects and teaching associated with it at the University of Copenhagen Faculty of Law in 2021. Moreover, we are very grateful to professors Mikael Rask Madsen and Marlene Wind as, from the beginning, they enthusiastically supported the promotion and dialogue between Faculties and disciplines.

We were asked not to summarize the contributions in this issue as they are described in the editorial written by *Retskraft* editors. But we still think it is important to reflect on the general themes contained in this volume.

We live in troubled times. Even when the war in Ukraine still seemed unimaginable, the European Union and the world faced a series of challenges that are addressed by the various contributions in this symposium. First came a growing fear from democratic backsliding, then the disastrous prospects of climate change asserted their urgency, until an unexpected global pandemic gave birth to a crisis the likes of which even our grandparents cannot remember. The measures required to fight COVID-19 are easily abused and before the economic and social implications of the pandemic could be determined, Europe was plunged into war.

A book that can give one mental fortitude to address these challenges is *One Hundred Years of Solitude* by Gabriel Garcia Márquez. The book shows how the greatest calamities that can occur in people's life: sickness, war, and the death of loved ones stretch on and on, sometimes for many years. Our younger readers may find this hard to grasp. When one is young, life seems short and fast. Unfortunately, recent years have forced many to mature early and face the sluggish pace of human development in the face of adversity.

The challenges we are facing will not disappear. They will continue to shape our lives and the lives of our children for years and for decades. Through these challenges, we are forced to proceed. As lawyers, with a commitment to values and a careful observation of the minutest procedural details of the law. As political scientists, with an intellectual curiosity disciplined by the strictures of appropriate method. The combination of the two disciplines gives them

incredibly strength to unravel at the same time the most common of news items and the deepest mysteries of human society. This combination has been the center of our teaching and our research and that of our students whose insightful work we proudly present here.

Shai Dothan[*]
Juan A. Mayoral[**]

Editorial

The Editorial Board would like to thank the Jean Monnet Chair in EU Law & Politics (EUPoLex) and the Jean Monnet Chair in Interdisciplinary EU Governance (PromethEUs) for proposing this special issue on *EU Law & Politics*, and all the authors who have contributed articles to it. The article in the present issue cover a broad variety of topics, including political mobilization, the dynamics when two different legal regimes who want to protect their autonomy interact, and the use of emergency legislation. The issue also contains two non-article contributions of relevance to the theme.

The founding of *Retskraft* in 2016 came with an aspiration of fostering a more scientific approach to law, and inquiries into how the law operates and impacts

* Associate Professor of International and Public Law, Jean Monnet Chair in EU Law & Politics, University of Copenhagen Faculty of Law affiliated with iCourts – the Centre of Excellence for International Courts and Study Hub for International Economic Law and Development (SHIELD). PhD, LLM, LLB, Tel Aviv University Faculty of Law. This research is funded by the Danish National Research Foundation Grant no. DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts.
** Ramón y Cajal Researcher & Jean Monnet Chair PromethEUs in Interdisciplinary EU Governance, Carlos III University of Madrid. Global Research fellow at iCourts – the Centre of Excellence for International Courts. PhD, European University Institute.

society.[1] Inherent in this aspiration was an openness toward innovative and interdisciplinary approaches to the study of law.[2]

EU law has historically been a frontrunner in 'law in context' or 'law and'-approaches. For instance, it is generally agreed upon that a purely black letter description of the case law of the Court of Justice of the European Union (CJEU) without an eye to the political context in which it operates and how it has acted as an actor in the process of integration, is insufficient to understand how EU law has and will develop.[3] In addition, according to Madsen, Nicola and Vauchez, in recent years there has been a significant *empirical* turn in the study of EU law and in the CJEU in particular.[4] The largely interdisciplinary contributions of this issue thus form part of both a long-running tradition of law in context scholarship, but perhaps also a more modern trend of avowedly empirical research in EU law. While *Retskraft* is and will remain a journal with a broad scope, welcoming both classic doctrinal scholarship as well as the type of scholarship showcased in this and the previous issue,[5] we hope that contributions like these can show the varied ways of doing legal scholarship.

Speaking of variety, this issue of *Retskraft* introduces a new section of the journal, entitled 'Varia'. Acknowledging that legal journals may from time to time publish material which cannot be subsumed under the category of articles or

[1] 'Editorial' (2017) 1(1) Retskraft – Copenhagen Journal of Legal Studies 1, 3. See also 'Editorial' (2021) 5(1) Retskraft – Copenhagen Journal of Legal Studies 1, 3–4.

[2] 'Editorial' (2017) (n 1); 'Editorial' (2021) (n 1) 4. Danish legal scholarship appears to be heading towards a similar openness. See, eg, Mikkel Jarle Christensen and others (eds), *De juridiske metoder – Ti bud* (Hans Reitzels Forlag 2021) and similar works which are under production. But cf Henrik Udsen, 'Hvordan sikrer vi en fortsat stærk retsdogmatisk forskning?' in Caroline Heide-Jørgensen, Ingrid Lund-Andersen and Jesper Lau Hansen (eds), *Festskrift til Linda Nielsen* (Djøf Forlag 2022).

[3] Ulla Neergaad and Marlene Wind, 'Studying the EU in Legal and Political Sciences Scholarship' in Ruth Nielsen and Ulla Neergaard (eds), *European Legal Method: In a Multi-Level EU Legal Order* (DJØF Publishing 2012).

[4] Mikael Rask Madsen, Fernanda G Nicola and Antoine Vauchez, 'From Methodological Shifts to EU Law's Embeddedness' in Mikael Rask Madsen, Fernanda Nicola and Antoine Vacuhez (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (CUP 2022) 4–7.

[5] (2021) 5(1) Retskraft – Copenhagen Journal of Legal Studies 7–128.

responses to articles, this section will contain a variety of content to be decided at the discretion of the Editorial Board. Relevant material could be, e.g., empirical material of use to students, interesting lectures, case notes etc. Because of the fact that we still want articles to be the main focus of the journal, the entries of the Varia section will generally be shorter, and while proposed contributions to the section are welcome, one should generally expect that even relevant high-quality contributions may be rejected to preserve space for articles in the journal.

In this issue, the Varia section contains two pieces of relevance to the theme of the special issue. The first is an interview (in Danish) with Lars Bay Larsen, conducted by Christoffer de Neergaard as part of his LL.M.-thesis at the University of Copenhagen. Bay Larsen has been a judge at the European Court of Justice (ECJ) since 2006, and before that was a judge at the Danish Supreme Court (DSC) from 2003–2006. The interview concerns the creation of new law by courts, specifically the DSC, and provides an interesting insight into the question from someone who has served both on a national court which is generally seen as reticent to create new law, and an inter- or supranational court which is well-known for its teleological and evolutive interpretation of the EU treaties.

The second entry is a presentation given by Bogdan Jędrys, judge at the Krakow Regional Court, on the rule of law backsliding taking place in Poland. The presentation was given at an event at the Danish Parliament on 6 December 2021 entitled 'Retsstaten under pres' (the *rechtsstaat* under pressure), which was arranged by the legal policy think tank Forsete and the union of Danish jurists and economists Djøf. The presentation is both of high relevance to the special issue theme of EU Law & Politics, but also of general interest to the international legal community, and especially the legal community of the EU member states, in one of which *Retskraft* is published.

We hope both entries into the new section will be of interest to our readership.

Finally, some housekeeping. *Retskraft* has changed its style guide to no longer mandate the use of the Oxford Standard for the Citation of Legal Authorities (OSCOLA), instead only mandating that any footnote-based style is used. This

has been motivated by the fact that OSCOLA was never designed with Danish, Swedish or Norwegian legal scholarship in mind, and that it was unneccessary added work for both the authors and editors to modify all citations in an article during the editing process. Authors are of course still free to use OSCOLA if they so desire.

Additionally, the Editorial Board would like to acknowledge the fact that this issue has taken a long time to reach publication. The original Call for Papers deadline for the issue was in September 2020, and the issue is being released in the summer of 2022. The reason for the delay was the concurrent work on the previous issue, which meant delaying the processing of articles for this issue by some time. We have made changes to the workflow of future issues, including changing from a special issue to a symposium format for future themed sections,[6] and changing how articles are processed, to avoid similar delays in future issues. We thank the authors of the articles in the present issue for their patience.

The present issue contains three articles, covering a variety of issues in the area of EU Law & Politics.

First, Katharina Sophie Ingebrand investigates whether communicated changing societal demands in the area of climate change are taken up by policymakers and translate into legislation on the EU level.

Second, Letisia Cioaric investigates the ECJ's rejection of the proposed EU accession to the European Convention on Human Rights in the infamous Opinion 2/13 from 2014, and how it may be motivated by a desire by the ECJ to maintain its interpretive monopoly over EU law.

Third, Sascha Lassen and Vibe Milthers look at emergency legislation and its relationship to the rule of law, using COVID-related emergency legislation in Hungary as a focus, and discussing this development as part of a larger trajectory within the EU.

We thank the authors for their contributions and hope that you enjoy reading the issue.

[6] 'Editorial' (2021) (n 1) 5.

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The Politicization of Climate Change and its Institutional Effects on the European Union

Katharina Sophie Ingebrand*

The discourse around climate change, its potential threats, and how to effectively tackle it have commanded a lot of media attention in recent years. At the same time, we observe major institutional adaptions of the European Union (EU) climate policy, such as the European Green Deal. Are these reforms institutional responses to a politicization of climate change?

This paper aims to analyze if, and to what extend communicated changing societal demands are taken up by policymakers and translate into legislation on the EU level. EU climate action is divided into three timeframes and analyzed alongside data, conducted from the official Eurobarometer reports and the official Aarhus Convention implementation reports.

In conclusion, opportunity structures and social mobilization of EU citizens have fostered the politicization of the topic. The EU's legislative competence in this policy field has increased tremendously since the beginning of the 21st century. However, the implementation of EU action plans still relies on the national level. Therefore, involving the mobilized and informed public into the national decision-making process is inevitable for both legitimizing stricter national legislation in line with EU law and challenging governmental failure in implementing the same.

* M.Sc. Student of Political Science at the University of Copenhagen specialized in European Politics.

1. Introduction

Few other issues command as much attention as climate change does. Climate change and the global impacts on the world population are now omnipresent in public debates. as there is worldwide public and scientific demand to tackle this problem collectively.

The EU leads by example and is making significant effort in engaging in environmental protection and tackling climate change. EU climate and environmental policy is consistent with international agreements within the UN framework. Policymakers on all governance levels are faced with growing popular discontent and public protest. The issue is politically visible, omnipresent and therefore ,politicized.

There are divergent viewpoints on the politicization of the topic and its impacts on policymaking: is politicization itself allowing for democratic participation[1], leading to outstanding reforms or fostering populist backlash?

Simon Hix calls recurrent political conflicts in the political system of the EU inevitable and relevant for social acceptance of 'Europe'.[2] Stefano Bartolini claims political conflicts will jeopardize the functionality of the system and encourage the emergence of populist movements.[3] Pepermans and Maeseele indicate climate change was not just a '[t]hreat multiplier' but multiplying both agreement and disagreement[4], as the debate provides ground for recurrent ideological debates between countries and parties.[5]

This paper takes up a positive view of the impacts of a politicization of climate change. Actions taken on the EU- and UN level are based on evidence

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[1] Thomas Risse, *A Community of Europeans? Transnational Identities and Public Spheres* (Cornell University Press 2010); Michael Zürn, 'Politicization Compared: At National, European, and Global Levels' (2019) 26 JEPP 977.

[2] cf Michael Zürn, 'Politisierung als Konzept der Internationalen Beziehungen' in Michael Zürn and Matthias Ecker-Ehrhardt (eds), *Die Politisierung der Weltpolitik. Umkämpfte Internationale Organisationen* (2nd edn, Suhrkamp 2013) 7, 25.

[3] ibid.

[4] Yves Pepermans and Pieter Maeseele, 'The Politicization of Climate Change: Problem or Solution?' (2016) 7 WIRES Climate Change 478.

[5] ibid.

provided by natural scientists, who act as 'honest brokers'.[6] Prioritizing climate change is based on common ground.[7] A potential politicization that might have influenced the EU to adapt its actions in this policy field is hence perceived as positive.

In the following, the theoretical framework and the development of the EU environmental and climate legislation are presented and analyzed.

2. Theory - The concept of politicization

This paper is based on the theoretical approach 'Politicization as a concept of International Relations[8]', developed by Michael Zürn; used to analyze the politicization of climate change and to trace the changing public opinion back to changes in the EU climate and environmental law.[9] To underline Zürn's argumentsand, to specify the reasons for the politicization of the EU in general and actors responding to politicization, the theoretical framework is enlarged by EU-specific considerations.

2.1 Definition and conceptualization of politicization

A *politicization* entails the public demand for, or the transport of a decision or institution into the political arena.[10] Iris Young specifies '… activities in which people organize collectively to regulate or transform some aspects of their shared social condition, along with the communicative activities in which they try to persuade one another to join such collective actions or decide what directions they wish to take'.[11] A politicization requires decisions of collective importance to be made by partly autonomously institutions that are granted considerable discretion.[12]

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[6] Roger A Jr Pielke, *The Honest Broker: Making Sense of Science in Policy and Politics* (CUP 2007).

[7] cf Daniel Sarewitz, 'Does Climate Change Knowledge Really Matter?' (2011) 2 WIREs Climate Change 475.

[8] German original: 'Politisierung als Konzept der Internationalen Beziehungen'.

[9] Zürn, 'Politisierung als Konzept der Internationalen Beziehungen' (n 2) 11.

[10] ibid 13; Zürn, 'Politicization Compared: At National, European, and Global Levels' (n 1) 977.

[11] cf Zürn, 'Politisierung als Konzept der Internationalen Beziehungen' (n 2) 13.

[12] ibid 30.

These assumptions are implicitly based on the *theory of social differentiation.* According to this theory, social subsystems compete for decision-making competences, ultimately assigning the actor and level most suitable to make the decision.[13]

The political arena is perceived superordinate, producing binding decisions and acting as a forum for public debates on the good and correctness of both the decision-making process and the decision itself.[14] The public is the 'gatekeeper' between the legislative power and the civil society. The political arena constitutes a sphere of communication, accessible by the wide public. It is exploited and shaped by interactions between politicians, experts, journalists, and members of the civil society.[15] A politicization occurs when a problem or a controversial decision (and the discussion of how to handle it) is taken out of the social subsystem and into the public sphere.[16] The attempt to assign the decision-making competence from the national to the international level is a politicization, too. In the EU context, this is perceived to pave the way for changes.[17]

2.2 Social mobilization and opportunity structures

Social mobilization and opportunity structures activate individuals to form and engage in networks. Social mobilization is eased due to:

1. Reduced transaction costs for information: Internet and cheap flights eased the economic exchange and communication all over the world. This is a necessary condition to build international networks and to get in touch with Environmental NGOs (ENGOs).
2. Global educational expansion and skill revolution enable more citizens to critically review politics and, to capture the relevance of universal morals and norms.[18]

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[13] Zürn, 'Politisierung als Konzept der Internationalen Beziehungen' (n 2) 13.
[14] ibid 16.
[15] ibid 17.
[16] ibid.
[17] Edoardo Bressanelli, Christel Koop and Christine Reh, 'EU Actors Under Pressure: Politicisation and Depoliticisation as Strategic Responses' (2020) 27 JEPP 329, 330.
[18] Zürn, 'Politisierung als Konzept der Internationalen Beziehungen' (n 2) 30.

Individuals being informed and mobilized can critically question status quo.[19] Opportunity structures enable citizens to actively engage within ENGOs and institutions: there is media attention to natural hazards, international conferences etc.

To measure a politicization, Michael Zürn provides three indicators along three levels:

1. *Micro level*: individuals and data about their voting behavior and personal engagement
2. *Meso level*: in which political arenas are NGOs and IGs organized? Do we see more organized protests transnationally?
3. *Macro-level*: which questions are publicly processed? Are the organizations and institutions opening for citizens?

Opening is understood as communication process in which persons (not generally entitled to participate in decision-making) are given the opportunity to directly or indirectly exert influence by adding knowledge, expressing preferences, and giving informed feedback.[20] Concrete examples of citizen participation are (online) citizen- and stakeholder consultations.[21]

The question is: how can we connect these changing societal demands and institutional responses?

3. Institutional framework and actors

At the EU level, particularly non-majoritarian institutions (Commission, European Central Bank), originally designed to be insulated from public opinion and domestic electoral cycles, are heavily influenced by public opinion. They

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[19] Jürgen Habermas, 'Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik' in Peter Niesen and Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik* (Suhrkamp 2007) 427, 430.

[20] Jörg Radtke and Ortwin Renn, 'Partizipation und bürgerschaftliches Engagement in der Energiewende' in Jörg Radtke and Weert Canzler (eds), *Energiewende* (Springer 2019) 283, 293.

[21] Ortwin Renn, 'Bürgerbeteiligung in der Klimapolitik: Erfahrungen, Grenzen und Aussichten' (2020) 33 Forschungsjournal Soziale Bewegungen 125, 135 f.

respond to bottom-up functional- as well as political pressures.[22] In the case of environmental and climate protection in the EU, the active participation of citizens and communication between the public and policymakers is inevitable, since such far-reaching policy interventions must be legitimized in the political arena and, given that, policymakers are representing the people's will.[23]

The Commission, as the agenda setter, is involved in the following: the policymaking process, initiating new legislation, monitoring, and evaluating the progress made by the Member States (MS). Even though the EU has gained legislative power in the field of environmental action to develop a comprehensive legal framework, climate change falls under the concurrent legislation with shared legislative competence between MS and EU. Since Directives are the instrument of choice in EU environmental legislation, the MS shall adjust their national legislation, but are granted more flexibility in the process of implementation itself.[24]

A politicization could result in an institutional opening for the public. More access rights could contribute to MS complying to EU standards and laws in the future. This paper will therefore focus on whether the public gets informed and consulted in the decision-making process within the field of environmental protection and climate change mitigation.

4. Analysis

The indicators for measuring the extent of a politicization will be adjusted and applied to the case of climate action at the EU level.

[22] Bressanelli, Koop and Reh (n 17) 331; Frank Schimmelfennig, 'Politicisation Management in the European Union' (2020) 27 JEPP 342, 343 f.
[23] Renn (n 21) 125.
[24] Andreas Hofmann, 'Left to Interest Groups? On the Prospects for Enforcing Environmental Law in the European Union' (2019) 28 Environmental Politics 342, 342; Tanja Börzel and Aron Buzogány, 'Compliance with EU Environmental Law. The Iceberg is Melting' (2019) 28 Environmental Politics 315, 315.

4.1 EU climate action 1999-2009

4.1.1 2020 Climate and Energy Package

In late 2007, the '2020 climate and energy package' was introduced. The program enacted into legislation in 2009 and set out the EU's climate goals for 2020:[25]

- Reducing greenhouse gas emissions by 20% (compared to 1990)
- Increasing the share of renewable energy by 20%
- Improving energy efficiency by 20%

To meet these goals, the EU is engaging in severe issue-related areas, such as emission trading and reduction of emissions in the MS. The EU has established an 'Emission trading system' (ETS). Around 45% of all EU greenhouse gas emissions are covered by the ETS.[26]

To cover the remaining 55% of greenhouse gas emissions (e.g. housing, agriculture, waste, transport without aviation), binding national emission reduction targets were set within the framework of the Effort Sharing Decision (ESD)[27] in the form of individual annual emission allocations (AEAs)[28]. Each country is obligated to report its emissions to be monitored by the Commission. The ESD provides the MS with some 'flexibility' in the way of implementation. This flexibility might encourage States in reaching the goal and cooperating, whilst providing some loopholes for richer countries. Within the State, overachievements can be carried over to any year up to 2020 to compensate any possible underachievement.[29] Between the States, the ESD allows transfer of

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[25] European Commission, '2020 Climate and Energy Package' (European Commission 2020) <https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 2 August 2020.

[26] European Commission, '2020 Climate and Energy Package' (n 25).

[27] Decision 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/136 (ESD).

[28] Ranging from a 20% cut for the richest EU members to a max. 20% increase for the least wealthy states.

[29] ESD, article 3 IV.

AEAs by e.g. selling part of the one nation's AEA for a given year between 2013-2019 to another MS.[30]

Under the Renewable Energy Directive[31], EU MS have to comply with proportional, binding, national targets.[32] The Directive provides so-called 'cooperation mechanisms': statistical transfers, joint projects and joint support schemes, acknowledging the differences in willingness and ability of the MS and indicating that cooperation can contribute to achieving common goals.[33] In the case of statistical transfers, the amount of renewable energy is deducted from one country's progress table and added to another country's balance.[34]

Achieving the goals of the 2020 package should foster the EU's energy security by detaching dependency on energy imports. In the long run, the EU is aiming for a European Energy Union. The focus on green growth will create new jobs and make Europe more competitive.[35] This first comprehensive Climate and Energy Package established joint strategies and goals, and provided, without question, ground for a deeper integration and harmonization of EU climate policies.

To shed light on the public's influence on the development of climate policy in the EU in accordance with Zürn's considerations. The indicators on the three levels are analyzed in the following.

Interplay between institutional adaptations and public demands will be analyzed by applying the three indicators to measure politicization to the present case of EU climate action. The data is derived from the Eurobarometer surveys, Aarhus Convention implementation reports, and general information is provided by the EU. Analyzing and comparing the Eurobarometer survey data appears to be useful, since the European institutions have published regular public opinion surveys since 1973. These surveys measure, in detail, the opinion

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[30] ESD, article 3 V.

[31] Council Directive (EC) 2009/28 of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

[32] 10% Malta–49% Sweden increasing the share of renewables in their energy consumption by 2020.

[33] European Commission (n 25).

[34] ibid.

[35] ibid.

of citizens' perceptions and expectations on EU action in a variety of issue areas.[36] The implementation reports will provide further oversight over institutional opening and citizen participation in the EU.

4.1.2 Micro-level analysis 1999-2009

A stringent micro-level analysis, in accordance with Zürn, would entail analyzing the EU citizen's voting behavior, pointing out their perception of and trust in the EU.

The only EU institution elected by Europeans is the European Parliament (EP). The overall distribution of seats between 1990 and 2019 does not reveal any significant increase in favor of green parties.[37] Still, it is imperative to note that – except for the right-wing populist party Identity Group (ID) – all parties in the present EP attach importance to environmental protection, independent from their political ideology. This shows that environmental claims are omnipresent.

4.1.2.1 Perception of and trust in the EU

In 2002, a third of Europeans saw the EU as 'the best level for taking decisions about protecting the environment';[38] about a third preferred stricter regulations and demand more environmental awareness.[39] This had changed in 2007: 67% of respondents prefer environmental protection decisions to be made jointly within the EU rather than by national governments (28%); 82% perceive harmonized European environmental legislation as necessary for effective action; 80% agree the EU should assist third state countries in adapting to higher environmental standards, and; 78% would even accept increased EU-funding

[36] 'Eurobarometer' (*European Parliament*, 2021) <https://www.europarl.europa.eu/at-your-service/en/be-heard/eurobarometer> accessed 4 May 2021.

[37] cf European Parliament, '2019 European Election Results' (European Parliament 2019) <https://europarl.europa.eu/election-results-2019/en/tools/widget-country/2019-2024/> accessed 2 August 2020.

[38] European Opinion Research Group, 'The Attitudes of Europeans Towards the Environment (Eurobarometer)' (EORG 2002) 58, 24.

[39] ibid.

for environmental protection.[40] The demand to transport a political decision from the national level to the transnational level can be concluded to be a politicization of the issue.

4.1.2.2 Individual engagement

The results show that the highest influence on respondents' quality of life in 2007 are environment (80%) and economic factors (84%).[41] They generally favor an active 'green' attitude, however, because of unseen urgency, this does not automatically translate into activism and environmental-friendly behavior; own actions depend on a wider societal solidarity. In 2002, 65% of the respondents claim that their efforts will only have an impact if others also try. Only 12% share a 'purely altruistic attitude'.[42] At the other extreme, 10% acknowledge a rather pessimistic 'wait-and-see' attitude, not even trying because it does not have any impact if others do not try.[43] Even in 2007 Europeans barely see their consumption habits as part of the problem and are not willing to adjust their lifestyles.[44] This might be correlated to the extent to change which EU citizens feel informed about, and are aware of environmental topics and their long-term-impacts. This will be examined within the macro-level analysis.

4.1.3 Meso-level analysis 1999-2009

In accordance with Zürn, a major implicatory for a politicization on the meso-level is in which political arenas ENGOs are organized and command public attention.

The Eurobarometer report in 2002 provides evidence of growing environmental protest, originally arising in the industrialized countries of northern Europe spilling-over to southern Europe. The reason could be a rise in

[40] European Commission, 'Attitudes of European Citizens Towards the Environment' (Summary Special Eurobarometer 295, 2008) 9.
[41] ibid 3.
[42] European Opinion Research Group (n 38).
[43] ibid.
[44] European Commission, 'Attitudes of European Citizens Towards the Environment' (n 40).

the standard of living but a fall in the quality of life (damage to the environment, etc.) through production and concerns about its externalities.[45]

Regarding the environment, Europeans especially show trust in environmental protection associations and scientists; whereas, businesses are observed as least trustworthy (1% approval).[46] ENGOs can foster 'output legitimacy' by providing technical expertise and ensure 'input legitimacy' by mobilizing public support for EU policies and policy proposals.[47]

Besides the European Environmental Bureau (EEB), other recognized ENGOs, such as Friends of the Earth (FoE), Greenpeace, Worldwide Fund for Nature (WWF) and Climate Action Network (CAN) are settled in Brussels to influence EU politics more effectively.[48] CAN Europe developed into a large and important network, bringing together 130 member organizations from more than 25 MS by 2009.[49] The EEB, FoE, Greenpeace and WWF remain central players since they cover a wide range of EU environmental issues (including climate change) and represent many members/supporters.[50]

Wurzel and Connelly (2010) show that Brussels-based ENGOs tend to coordinate their interests and to cooperate.[51] The reasons for doing so are:

1. most European offices lack financial resources and staff;
2. ENGO's might be heterogeneous but still have similar goals;
3. on the EU level, like-minded ENGOs do not compete for support and media attention whereas they do on the national level and;
4. the chance of influencing the actions of EU institutional actors aiming at increasing the EU's political legitimacy increases.[52]

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[45] European Opinion Research Group (n 38) 12.
[46] ibid 4.
[47] Rüdiger KW Wurzel and James Connelly, 'The European Union as a Leader in International Climate Change
Politics' (Routledge 2010) 214, 215.
[48] ibid 215.
[49] ibid 214.
[50] ibid
[51] ibid
[52] ibid 215.

ENGOs do not just aim to influence policy outputs, but to set the agenda and spread awareness among citizens, 'thereby … altering voter's preferences regarding the actions politicians should take to combat it'.[53]

To put it in a nutshell: ENGOs are informing the wider public and successfully doing so on the European level working as allies. Unsurprisingly, the MS perceive ENGOs as being leaders in terms of environmental education.[54]

4.1.4 Macro-level analysis 1999-2009

On the macro-level, the analysis aims to reveal which questions are publicly processed and if the institutions are opening for citizen participation.

4.1.4.1 Publicly processed questions

According to the Eurobarometer survey from 2002, the problems linked to industrial safety (e.g. pollution of the seas, coasts, rivers, lakes) worry European citizens most. In these areas we observe an increase in public attention ranking from 10-21 percentage points (pp) (Table 1). Some topics have caught more media attention than others: They are either popular because people are already aware of, or very specific issues with an extremely high profile in the media[55] (climate change, destruction of the ozone layer). 'Natural disasters', 'air pollution', 'climate change', 'urban problems', and 'destruction of the ozone layer' are environmental concerns about which Europeans feel 'very well' or 'fairly well informed' (more than 50%) in 2002.[56]

In 2007, EU citizens were most concerned about global environmental issues, including climate change (57%), pollution of water (42%), and air (40%). There is demand for information and transparency in terms of environmental issues: merely 5% of the respondents claim to be very well-informed, about 50% to be well-informed. Alarmingly 42% of Europeans feel insufficiently informed about environmental issues in 2007.[57]

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[53] ibid.

[54] The United Nations Economic Commission for Europe, 'Synthesis Report on the Status of Implementation of the Convention' (UNECE 2008) 4, 9 n 38.

[55] European Opinion Research Group (n 38).

[56] ibid.

[57] European Commission, 'Attitudes of European Citizens Towards the Environment' (n 40) 4.

Table 1: Share of environmental concerns 1999

Propositions	**1999**	**2002**	**Discrepancy**
Air pollution	35	44	+9
Natural disasters	22	43	+21
Pollution of the seas and coasts	32	42	+10
Pollution of rivers and lakes	27	42	+15
The progressive elimination of tropical rain forests	39	41	+3
The extinction of animals and plant species	27	37	+10
Industrial waste management	35	37	+2
Urban problems (traffic, public transport, green spaces, etc.)	23	21	-2
Hunting and shooting	15	17	+2
Damage caused by tourism	10	17	+7
Source: European Opinion Research Group (n 38) 13			

Lack of information and transparency has an impact on the individual's behavior. In the present case, the lack of information in environmental regards goes hand in hand with the (un)willingness of citizens to change their behavior, as it appears not that urgent.

4.1.4.2 Institutional opening

In the aftermath of the Maastricht referendum, the Union's democratic and civic ambition was extended, and provisions on European citizenship were given.[58] To establish a more inclusive governance framework, allowing participation, the 'Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters'[59], known as 'Aarhus Convention', was negotiated within the scope of the UN Economic Commission for Europe in 1998. The Convention aimed at involving, consulting, and

[58] Bressanelli, Koop and Reh (n 17) 332.

[59] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (opened for signature 22 December 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention).

informing the 'Public'[60] in terms of EU environmental- and climate action, and at giving citizens access rights to the CJEU.

The EU and its MS ratified the Aarhus Convention only seven years later, in 2005. What seems contradictory at first sight, is just part of a 'legal tradition of the EU'.[61]International instruments, such as the Aarhus Convention, are ratified after the national laws and regulations have already been introduced to implement such international treaties. To implement the Aarhus Convention's provisions on the EU as well as on the national level[62] before even ratifying the international treaty, the Commission introduced corresponding Directives.

In 2003, the Directive on public access to environmental information[63] and the Directive on public participation in planning processes, [64] respectively were passed and entered into force.[65] So, the MS were legally bound to implement those Directives. To further bind the EU institutions, these two Directives were combined and incorporated into a Regulation, the so-called 'Aarhus Regulation' which entered in force in September 2006 and into application in July 2007.[66]

Even though the level of information, as the Eurobarometer from 2007 indicates, is not optimal yet, there seem to be positive developments in terms of institutional opening in the EU. As the mandatory 2008 Aarhus Convention implementation report indicates, the MS are making efforts to transpose the

[60] Public = natural and legal persons, their associations, organizations, and groups (incl. ENGOs) (Aarhus Convention, art. 2 IV-V).

[61] United Nations Economic Commission for Europe, 'Synthesis Report on the implementation of the Convention' (UNECE 2005) 18, 4.

[62] Börzel and Buzogány (n 24) 317.

[63] Council Directive (EC) 2003/4 of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L41/26.

[64] Council Directive (EC) 2003/35 of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

[65] cf Hofmann (n 24) 351.

[66] Council Regulation (EC)1367/2006 of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/1.

relevant legal provisions by amending their national legislation.[67] This leads to an advanced level of implementation with regard to access to information and to public participation in decision-making in the EU.[68] Also, many EU countries started including ENGOs in environmental decision-making bodies, working groups or advisory bodies for national and international forums.[69] Some MS e.g. indicated that they engage in organizing consultations major environmental stakeholder, such as civil society organizations at the national level. Furthermore, many MS reported they would strengthen existing information offices and open more to establish 'points of contact' between institutions, citizens, and ENGOs.[70]

It will be interesting to see whether the implementation reports of the following years reveal further improvement in the implementation of the Aarhus Convention. This would be the case if citizens and ENGOs likewise were better informed and frequently consulted.

4.2 EU climate action 2009-2014

4.2.1 2030 Climate and Energy Framework

In 2014 the European Council adopted the framework that sets out the following strategy and targets for 2030:[71]

- Reducing greenhouse gas emissions by at least 40% (from 1990 levels)
- Increase the share of renewable energy to at least 27%
- Improving energy efficiency by at least 27%

MS should adopt integrated national energy and climate plans (NECPs) and corresponding long-term strategies for the period 2021-2030. A common approach for 2030 provides regulatory certainty for investors and eases coordinated EU action. Progress towards a low-carbon economy and an Energy Union is to be achieved to supply affordable and secure energy for Europeans

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[67] United Nations Economic Commission for Europe (n 54) 6 n 24.

[68] ibid 6 n 30.

[69] ibid 9 n 39.

[70] ibid 12 n 57.

[71] Commission, 'A policy framework for climate and energy in the period from 2020-2030' COM (2014) 15 final.

through detaching from dependency on energy imports. Besides stressing economic and job prospects, it will provide health benefits.[72]

4.2.2 Micro-level analysis 2009-2014

4.2.2.1 Perception of and trust in the EU

Unlike in earlier years, there has been a significant rise in Europeans agreeing on national governments to primary having the duty to pass environmental and climate policies (48%); while, in 2013, 41% think the responsibility lies with business and industry (41%) or the EU (39%).[73] This can be perceived as trying to re-politicize the issue by evading the discourse from the supranational level.

A reason for this might be that ETS is not driving investments in low-carbon technologies as expected. Unless the required sustainable technologies are in place, setting the EU goals to e.g. increase the share of renewable energies too high, would be politically infeasible. Rather, more ambitious national policies might fungate as 'best practices' which can cushion the shortcomings of the ETS[74] and provide ground for future EU legislation. Correspondingly, in 2013, 92% thought it was important for their government to provide support for improving energy efficiency, with around half (51%) saying that it is 'very important' for their government to do so.[75] 90% of the respondents place importance on their government to set targets to increase the amount of renewable energy used by 2030, with 49% saying the target is 'very important'.[76]

Energy safety also played a role in 2013: 70% agreed that reducing fossil fuel imports from outside the EU could provide the EU with economic benefits, 26% say they 'totally agree'.[77] This is emphasized in the aim of the EU to create an Energy Union.

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[72] ibid.

[73] European Commission, 'Climate Change Report' (Special Eurobarometer 409, 2014) 2.

[74] ibid 2 f.

[75] ibid 6.

[76] European Commission, 'Climate Change' (Summary Special Eurobarometer 435, 2015) 6.

[77] ibid.

4.2.2.2 Individual engagement

49% of respondents are aware of having acted to fight climate change in 2015, but when they were prompted with a list of specific actions, even 93% of them claim to have been acting.[78]

Table 2: Individual actions taken over time

Individual actions	2007 (in %)	2013 (in %)	Discrepancy (in pp)
Separating and recycling waste	59	69	+10
Buying fewer disposable items	30	51	+21
Buying seasonal and regional	21	36	+15
Selecting energy-efficient household appliances	17	34	+17
Using environmentally friendly transportation	28	28	0
Source: Own illustration, based on European Commission, 'Attitudes of European citizens towards the environment' (n 40); European Commission, 'Climate change' (n 76)			

Despite not using more environmental-friendly transportation, awareness and willingness to personally contribute has increased tremendously between 2007 and 2013. Most significant is that fewer disposable items, such as plastic bags, were bought (+21 pp), followed by choosing household appliances by energy efficiency (+17 pp). In 2013, 36% of the respondents claimed to rather buy seasonal and regional (+15 pp). While 59% of all respondents have already separated and recycled their household waste in 2007, this number has increased by ten pp, lifting it up to 69%.

In contrast to the findings accounting for the prior period (1999-2009), Europeans have become more aware of the disastrous consequences of climate change and are therefore willing to personally engage and to some extent, adapt their behavior in favor of the climate.

[78] European Commission, 'Climate Change' (n 76) 10.

4.2.3 Meso-level analysis 2009-2014

Working on multiple levels, ENGOs continue to educate the public in terms of the environment. Thus, they have become an active part of 'the political dialogue held on current legislative projects, especially at EU level, including regarding the development of programs and policies in the environmental sector'[79], as EU countries reported. This shows once again the power and the importance of ENGOs for environmental and climate policy to deliver. They are among the most important stakeholders in this issue area.

4.2.4 Macro-level analysis 2009-2014

4.2.4.1 Institutional opening

The Aarhus Convention Implementation Report of 2011 provides relevant information:

'Almost all Parties followed the guidance, asserting that they involved the public at an early stage through consultations …'[80] Therefore, publishing updated versions of MS's previous reports and opening it for public commenting or organizing e.g. public hearings as a forum to discuss the draft of the most recent national report with concerned citizens and other stakeholders became common practice in most EU countries.[81]

Several MS even actively informed ENGOs about the consultation and attached a questionnaire inviting their comments and proposals on which issues shall be discussed in detail.[82]

In many countries the public had the opportunity to directly send an e-mail to their national ministry of environment stating their point of view and their concerns.[83] Thus, ENGOs get direct access, not only to environmental action of the government, but more importantly, to the relevant institution on the national level.

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[79] United Nations Economic Commission for Europe, 'Synthesis Report on the Implementation of the Convention' (UNECE 2011) 7, 9 n 44.

[80] ibid 7 n 14.

[81] United Nations Economic Commission for Europe (n 79) 7 n 14.

[82] ibid.

[83] ibid 8 n 15.

EU countries thus reported 'providing information to the public and public authorities about proposed and existing activities, which may significantly affect the environment'.[84]

This provision of information helps dissolving former lack of transparency. Whereas ENGOs still play a significant role in raising awareness and mobilizing the public, the state takes part of this 'educational duty'. By acting more transparent and opening national institutions for public discourse, sustainable change is more likely.

To sum up the prior findings: the public is more actively involved in, and informed about national climate action. Thus, climate change-awareness rises and people acknowledge effective action. Still, the original targets set, in 2014, for 2030, were only minor adaptations of the 2020 action plan. Merely the goal to reduce greenhouse gas emissions by up to 40% is an ambitious goal. Binding legislation on the EU level shall not only be politically but also technically feasible. Especially in the face of a financial crisis, slowing down, not only investments in general, but particularly investments in sustainable technologies, could not have been more ambitious.

4.3 EU climate action 2014-2020

The IPCC report from 2014 (published 2016) empathizes the need for strong and urgent actions to reduce greenhouse gas emissions that otherwise will have dangerous and irreversible impacts in the future.[85]

4.3.1 Green Deal and European Climate Law

Taking the evidence, provided by the 'honest broker' IPPC into account, the targets for renewables and energy efficiency for 2021-2030 were revised upwards in 2018 to

(1) move the EU towards a climate-neutral economy and to;
(2) implement duties under the Paris Agreement.

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[84] ibid 14 n 78.

[85] Intergovernmental Panel on Climate Change (IPCC), 'Climate Change 2014 Mitigation of Climate Fifth Assessment Report (Summary for Policymakers)' (2014). <www.ipcc.ch/site/assets/uploads/2018/02/ipcc_wg3_ar5_summary-for-policymakers.pdf> accessed 31 July 2020.

In late 2018, after having conducted extensive analysis and stakeholder consultation, the Commission published its strategic vision on climate neutrality, which stipulates the public discussion in the following months.[86] To underline the commitment, the European Green Deal was passed in late 2019. The EU's future commitment goes far beyond former actions: by 2050, Europe aims to become the first climate-neutral continent.[87]

To reach the goal, the following policy initiatives will be taken:

- European Climate Law '… to ensure that all EU policies contribute to this goal and that all sectors of the economy and society engage proportionally'.[88]
- European Climate Pact to foster engagement among citizens from all parts of society.

Based on a comprehensive impact assessment, as well as on analysis of the NECPs, and stakeholder contributions, the Commission will propose a new EU ambition to foster a reduction of greenhouse gas emissions by 2030.[89]

4.3.2 Micro-level analysis 2014-2020

4.3.2.1 Perception of, and trust in the EU

The more active role decisions on the national level play is displayed in the Eurobarometer in 2015: National governments are perceived to be responsible for addressing climate change (42% approval), followed by businesses and industry (35%) on par with the EU (35%).[90] There is a shift of responsibilities: whereas, every fourth European felt personally responsible in 2013; in 2015, only 19% felt alike. The remaining 6pp were 'transferred' to the share of respondentsl perceived to be a collective duty.[91]

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[86] European Commission, 'EU Climate Action and the European Green Deal' 2020) <https://ec.europa.eu/clima/policies/eu-climate-action_en> accessed 02. August 2020.

[87] ibid.

[88] European Commission (n 86).

[89] ibid.

[90] European Commission, 'Climate Change' (n 76).

[91] ibid.

In 2015, more than 9 out of 10 respondents, from all over Europe, agreed on the policymaker's consideration that using energy more efficiently will boost the economy and create more jobs in Europe.[92]

The aim to ensure energy security and build an EU Energy Union in the future is deeply supported among citizens. In 2015, 65% of the respondents found that reducing fossil fuel imports from third countries can increase the security of the EU's energy supplies.[93] The consensus grew stronger, until 2019; now, 72% of respondents agree on this.[94]

4.3.2.2 Individual engagement

Table 3: Individual engagement between 2007-2019

Individual actions	2007 (in %)	2013 (in %)	2015 (in %)	2019 (in %)
Separating and recycling waste	59	69	74	75
Buying fewer disposable items	30	51	57	62
Buying seasonal and regional	21	36	49	No data available
Selecting energy-efficient household appliances	17	34	42	48
Using environmentally friendly transportation	28	28	36	37

Source: Own illustration, based on Source: Own illustration, based on European Commission, 'Attitudes of European citizens towards the environment' (n 40); European Commission, 'Climate Change Report' (n 73); European Commission, 'Climate Change' (n 92); European Commission, 'Climate change' (n 76)

We observe increased awareness until 2019, along with incorporating climate-friendly behavior and conscious consumption habits. This marks an

[92] European Commission, 'Climate Change' (Summary Special Eurobarometer 490, 2019) 12.
[93] ibid 15.
[94] European Commission, 'Climate Change' (n 76) 4.

important difference in the Europeans' behavior. As Table 3 shows, this especially accounts when it comes to buying fewer disposable items, eating regional and seasonal products, or selecting energy-efficient household appliances. Europeans seem to have realized the power of their own actions.

4.3.3 Meso-level analysis 2014-2020

Besides being actively consulted and informed about environmental matters, the ENGOs managed to further establish their position, e.g. by networking and collaborating on the EU level. By now the CAN-Europe network consists of over 140 member organizations in 35 European countries, representing about 1700 NGOs and more than 40 million citizens.[95] Starting in the 1980s, the most important and popular ENGOs were established in Brussels. Additionally, throughout the last two years, a grassroots democratic organization of pupils and students, the Fridays for Future (FFF), gained immense media attention: publicly blaming EU officials for polluting the planet and putting economic development before sustainability.

FFF's main goal is to make climate protection a policy priority. Besides striking every Friday in cities around Europe, the young activists, just like many other ENGOS and climate networks, use social media platforms to spread their message to morally pressure policymakers and mobilize the younger generation.[96] Greta Thunberg and her fellow strikers created the hashtag #FridaysForFuture to spread their message on Social Media.[97]

FFF does not only play an important role in mobilizing young people in Europe, but acts worldwide: on the 15th of November .2019, FFF called for a global climate strike. Around 1.8 million participants responded worldwide to this call: not only pupils and students, FFF was also supported by regional, national, and international support organizations, including 'Scientists for Future' and 'Parents for Future'. FFF aims to spread awareness and has organized camps and seminars. During the COVID-19 pandemic FFF also held online-

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[95] CAN Europe, 'Members' (2020) <www.caneurope.org/member-directory?force=1> accessed 31 July 2020.

[96] Fridays for Future Europe, 'Who we are' (FFF-EU, 2020) <https://fridaysforfuture.org/what-we-do/who-we-are/> accessed 6 September 2020.

[97] ibid.

strikes webinars with climate scientists and politicians.[98] Between the 5th – 9th August 2019, 450 FFF-delegates from 38 European country federations held the 'Smile for Future' summit in Lausanne, Switzerland. Their corresponding Lausanne Climate Declaration states: 'What happens in the next months and years will determine how the future of humankind will look like. Our collective extinction is a scarily realistic outcome'.[99] Greta Thunberg was a speaker at the World Climate Summit, where she accused governments of risking the younger generation's future by acting selfish and only acting economically motivated.

4.3.4 Macro-level analysis 2014-2020

4.3.4.1 Publicly processed questions

In 2015, 91% of respondents claimed that climate change is a serious problem; 69% even considered climate change to be 'very serious'.[100] In 2019, awareness had grown: 93% of the Europeans thought of climate change as a serious problem, of which 79% viewed climate change to be 'very serious'.[101] There seems to be similar consensus among the respondents: fighting climate change will only be effective if *all* countries participate and cooperate.[102]

4.3.4.2 Institutional opening

To tackle the urgent problem of climate change and to likewise meet the duties of the Aarhus Convention, the Commission installed a 'better regulation agenda' in 2017 to inform and consult citizens and stakeholders about the governance process. The agenda requires EU action to be based on scientific evidence and understanding of its impacts. One important goal is to listen more to the people it affects. In terms of enforcement, integrated monitoring and reporting rules were installed. It is stated that '[a]pplying these principles will help the

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98 Fridays for Future Europe, 'Actions' (FFF-EU, 2020) <https://fridaysforfuture.org/what-we-do/actions/> accessed 5 September 2020.

99 Fridays for Future Europe, 'Lausanne Climate Declaration' (FFF-EU 2019) 1, 2.

100 European Commission, 'Climate Change' (n 92) 5.

101 ibid 3.

102 European Commission, 'Climate Change' (n 92) 13.

Commission to meet its objective at minimum cost and administrative burden. It also responds to concerns raised by EU citizens'.[103]

It is reasonable to say that, especially in the past five years, former paths have been dissolved. The regulation on transparency, information and participation in the decision-making process impelled. The EU has revisited the 2030-goals for the share of renewable energy and reduction of CO_2-emissions by 5,5 pp. The informed, mobilized public can refer to established media as well as to social media. The younger generation is the main beneficiary and organize protests using new social media platforms. Incorporating more ambitious EU goals in national legislation is eased by consulting and involving the public. This, on the other hand, paves the way for more collective action and higher standards all over Europe in the long run. The Green Deal will be followed by a Climate Law, a regulation to be effectively enforced.[104]

5. Conclusion

The global scope and the agreements in the framework of the UN, especially the Aarhus Convention contributes to public interest, social mobility, and engagement. After having shown the development of both public opinion and institutional adaptations in the past two decades, there is need to draw a conclusion.

The aim of this paper is to investigate whether the reforms and adaptations in this specific policy field in the past 20 years can be traced back to the politization of the issue. It seems reasonable to conclude that European climate policy developed over time and follows 'learning-by-doing approaches' in order to tackle the complex and new problematiques of climate change and its impacts.[105] The topic is highly politicized and commands a lot of media attention.

In the beginning of the 21st century, European policymaker had to face the 'mammoth-task' of making consumers and producers in the MS change their

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[103] European Commission, 'Better Regulation: Why and How' (2020) <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed 02 August 2020.

[104] European Commission, 'EU Climate Action and the European Green Deal' (n 86).

[105] Jos Delbeke & Peter Vis, *EU Climate Policy Explained* (*Routledge* 2015), 1.

habits and reduce CO_2 emissions to effectively tackle climate change.[106] European policymakers could not have done it by themselves: they were highly dependent on ENGOs publicly spreading climate change awareness and communicating public demands to the policymakers. As a byproduct of globalization and technologic development in recent years, ENGOs can access information about natural hazards or global companies slashing and burning rainforests to set up production facilities, or drill oil holes, and have the media reach to inform and to mobilize citizens. The mobilized public, on the other hand, has adjusted its standards and demands effective climate action. Consequently, policymakers on both national and EU level must respond and take up these demands, by imposing stricter legislation. Taking the multi-level governance in the EU and some opposing state governments into account, this becomes even harder to achieve. However, given that more ambitious climate action directly intervenes in e.g. citizens consumption habits (e.g. ban on single-use plastic) or ways of transportation (ban on specific vehicles), it highly depends on this very public legitimation and support.

This has led to considerable success in cleaning up pollution, decoupling emissions from economic growth, and fostering global technological leadership.[107] Bressanelli and colleagues call this a 'bottom-up politicization of 'Europe' along three dimensions:

(1) the Union's work and its policies have become more publicly visible and therefore need to be communicated transparently;
(2) European integration has increased controversies and polarization throughout the whole political spectrum and;
(3) engagement with the EU is not only left to elite actors and experts anymore.[108]

The best example hereof is the Aarhus Convention. The resulting obligation is firstly to inform the public about political decisions concerning the environment and climate change and secondly, to actively encourage EU citizens' participation in the decision-making process.

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[106] ibid.

[107] ibid.

[108] Bressanelli and others (n 17) 330.

Therefore, it is reasonable to conclude that the politicization of the topic, accompanied by institutional opening and communication between policymakers and citizens or ENGOs, has laid the foundation for legitimizing a more ambitious EU approach. The governments will have to implement the Green Deal and the corresponding EU Climate Law in the following years, regardless of their national preferences.

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Making Possible into Impossible
The EU Accession to the European Convention on Human Rights

Letisia Cioaric*

The European Union accession to the European Convention on Human Rights represents an obligation under the Treaty of Lisbon. However, the CJEU has concluded in the 2/13 Opinion that the draft agreement of this accession is incompatible with the EU Law. The outlooks of the Luxembourg Court decision underline that the EU's relationship with the European Convention on Human Rights remains at the forefront of the problematic debate regarding how the EU approaches international law. Since it has been previously underlined in the academic literature that there is somewhat limited and primarily general evidence covering the accession subject, this investigation aims to shed light on the current stock of progress towards the EU accession to the ECHR. In light of the CDDH (re)launched dialogue in 2020, the article argues that the overused EU law autonomy protection argument defended by the CJEU in Opinion 2/13 cannot deliver adequate answers to human rights pluralistic law sources that operate in the European continent. The accession remains an essential indication of the concept of legal pluralism in Europe.

Introduction

Unsurprisingly or not, the European Union's founding fathers had not included a 'bill of rights' in the cornerstone principles of the Communities. Therefore, the debate of the EU's accession to the European Convention on Human Rights (ECHR) has a long history, almost since the beginning of the European Communities (EC). Throughout the years, the fundamental rights gap became

* MSc in Political Science with specialisation in European Politics, Law and Institutions, University of Copenhagen [kvg983@alumni.ku.dk].

too necessary to address. In this perspective, to cover the lack of expertise about fundamental rights in the Treaties, the European Commission took the initiative to set the EC's accession to ECHR. However, the EU institutions' political desire was hampered twice hampered twice by the CJEU in the 2/94[1] and 2/13[2] Opinions touching the accession debate.

The Court defended its position in the name of preserving its jurisdictional sovereignty, which the CJEU understands in absolute terms, obstructing in this way the opportunity to make the European human rights framework better unified.[3] The accession's main goals were to settle political and technical disputes regarding protecting human rights throughout the European continent. In a political rationale, the accession was intended to end any double protection standard at the EU level and to strengthen the Union's legitimacy in terms of its international human rights obligations.[4] On the other hand, in technical terms, it was designed to bring an end to the divergences in the case law between the ECtHR and the CJEU.[5] Conceivably the most significant attempt to solve this backlash between law and politics came with Lisbon's Treaty, which introduced Article 6 (2) TEU that regulates: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competencies as defined in the Treaties'.

This paper calls into question: which reasons oversee the Court of Justice of the European Union's unwillingness to give a favourable ruling to the EU accession to the ECHR? The CJEU normative position in Opinion 2/13 outlines, without a doubt, the conflict that exists between the effectiveness of

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[1] Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:1996:140.

[2] Opinion 2/13 *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

[3] Fisnik Korenica, *The EU Accession to the ECHR. Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection* (Springer 2015) 30.

[4] Eleanor Spaventa, 'Fundamental Rights in the European Union' in Catherine Barnard and Steve Peers (eds), *European Union Law* (2nd end, OUP 2017).

[5] Jean-Paul Jacque, 'What Next After Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?' (Directorate-General for Internal Policies 2016) 30.

human rights protection and EU law external autonomy.[6] This article draws on three general hypotheses. Firstly, the CJEU is reluctant towards the EU accession to ECHR because this movement exposes the EU legal order to a substantive change. The constitutional impact of the accession was mentioned by the CJEU not only in Opinion 2/13 but also in Opinion 2/14. Secondly, the Court explicitly says in the reasoning that 'the European Union is not a state'. Some legal scholars mentioned below duly acknowledge that the Court has highlighted this aspect for the first time. From this rationale, the accession will represent a novelty in the international law practice as the EU will undertake international law obligations explicitly designed for the states. Thirdly, the accession throws in danger one of the leading EU law privileges carefully nurtured by the Court - the primacy of the EU law. After the accession, the Strasbourg Court will play the leading role over the human rights jurisdiction, which, in turn, would lead to the increasing primacy of the Strasbourg Court.

As a general argument, such an approach towards human rights subject may have consequences for the EU law, as Callewaert highlights 'a legal system which rejects external supervision of its compliance with human rights would be a legal order closed in on itself which, with no input from outside, would be in danger of fossilisation'.[7] In addition, the intrusive and closed legal order the Court is trying to defend all the time makes the Luxembourg Court weak in the light of pluralist legal order discourse. In these circumstances, 'the Court is placed in a dilemma to which it cannot reply'.[8]

Because the CJEU considers the EU accession to the European Convention of Human a threat to the specific characteristics of the EU legal order, which for the CJEU entails primacy[9], direct effect,[10]unity and effectiveness, the Court denounces several aspects that had not been sufficiently addressed during the

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[6] Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 85.

[7] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe 2014) 17.

[8] Daniel Sarmiento, 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice' (*EJIL: Talk!*, 7 May 2018) <https://www.ejiltalk.org/a-court-that-dare-not-speak-its-name-human-rights-at-the-court-of-justice> accessed 10 January 2022.

[9]Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

[10]Case 26/62 *Van Gend & Loos* ECLI:EU:C:1963:1.

negotiations on the Draft Accession Agreement (DAA), leading to its incompatibility with the EU Treaties. Most importantly, in Opinion 2/13, the Court raised objections on the co-respondent mechanism and prior involvement procedure; it also held that the DAA had not adequately protected Article 344 and the preliminary ruling mechanism. The CJEU was also concerned that allowing Member States to apply higher human rights protection standards, as stated in Article 53 ECHR, could impose serious hindrance to the primacy of the EU law. It also fears that the EU principle of mutual trust cannot be guaranteed based on current ECtHR case law. Finally, the Luxembourg Court objected that in as much as its competence is limited regarding Common Foreign Security Policy (CFSP), allowing the ECtHR to hear cases concerning it would amount to submitting effective control of this policy-field to a non-EU body. Equally essential to mention here is that the DAA was designed around some political objectives and the rationale behind the legal principles established by the DAA aimed to legitimize the EU in the general European pluralist human rights framework.[11]

For the sake of keeping the monopoly on the final interpretation,[12] one can understand that the accession might be possible in the practice of politics, but it is impossible in law.

The research highlights that preferences defended by the CJEU outline its desire to be 'above the law'. the interests play a significant role both in law and politics. Frieden[13] highlights that actors, no matter at which level they perform, have preferences, and they apply a wide range of strategies to fulfil these aims and increase their reputation. Opinion 2/13 reinforces the assumption that the law performed by the CJEU is not neutral, and the interests of judicial actors play an essential role in shaping a particular type of outcome. In light of the CDDH (re)launched dialogue in 2020, the overused EU law autonomy protection argument defended by the CJEU in Opinion 2/13 and the defence

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[11] Korenica (n 3) 8.

[12] Turkuler Isiksel, 'European Exceptionalism and the EU's Accession to the ECHR' (2016) 27 European Journal of International Law 565.

[13] Jeffry A Frieden, 'Actors and Preferences in International Relations' in David A Lake and Robert Powell (eds), *Strategic Choice and International Relations* (Princeton UP 1999).

of a 'closed law' cannot deliver adequate solutions to human rights pluralistic law sources that operate in the European continent.

The article is organised as follows: the first section gives a brief overview of the theoretical puzzle; the second section presents the analytical framework of Opinion 2/13 given by the Court; the third section seeks to introduce the stock of progress towards the EU accession to ECHR after Opinion 2/13; and the last section concludes.

1. Theoretical Puzzle

Scholars have concentrated their efforts on explaining the legal system in the European Union by looking at the institutional design and the constitutional peculiarities of the rulings delivered by the CJEU and the Member States' constitutions.[14] As Bianchi[15] remarks, 'the interdisciplinary dialogue is hardly a natural course to follow', especially when the debate touches the European Court of Justice, a judicial body famous in the international legal order for its activism and teleological manner of Treaty interpretation. The Luxembourg court received many critiques from the Member States, particularly those in whose the constitutional tradition is significant. This precedent occurs because the rights protected by states constitutions and the catalogue of rights developed by the Court are not eminently the same.[16]

Various approaches have been proposed to explain how the judicial power of the CJEU shaped politics. In the classical process of legal neo-functionalist literature, the Court is described as an actor with considerable autonomy. Because of its legitimacy as a legal player, the CJEU can use the autonomy to

[14] Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal of European and Comparative Law 168; Cesare PR Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 Journal of International Dispute Settlement 241; Giuseppe Martinico, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe* (Routledge 2012) ch 2.

[15] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 110.

[16] Aida Torres Pérez, *Conflict of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009)

rule against the interests promoted by the Member States.[17] On the contrary, a growing body of literature has used the Principal-Agent Theory (P-A) to support the idea that states still control the authority of CJEU. This approach considers that principals create agents and confer them the power to make binding decisions.[18] The key focus of this theoretical approach is on how to control the agents. In this vein, political control represents an important tool to achieve power. However, the P-A theory's pitfall is that political control might be incomplete, and the theory lacks a conception of preferences.[19]

To clarify the actions of the CJEU, scholars have developed the theory of trusteeship (fiduciary delegation). As Karen Alter[20] underlines, 'trustees are created through a revocable delegation where the trustee is selected because of their personal and professional reputation, given authority to make meaningful decisions according to the trustee's professional criteria, and making these decisions on behalf of a beneficiary.' In the view of Sweet et al.,[21] the trusteeship aspect is responsible for the constitutionalisation path taken by the CJEU. Their work stresses that the CJEU's treaty rulings are insulated from override. First, no such judgement has ever been reversed. Secondly, the Member State governments are not able to block noncompliance litigation. And lastly, the Commission under Article 258 TFEU can impose infringement proceedings against states if they do not comply with the Court's judgments.

From an intergovernmental perspective, the Court follows the member states' instructions and preferences[22]. Although, by looking at the decision trap disputes

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[17] Karen J Alter, 'Who are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) 52 International Organization 121, 121.

[18] Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention of Human Rights, the European Union, and the World Trade Organization' (2013) 1 Journal of Law and Courts 61, 64.

[19] Karen J Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 European Journal of International Relations 33.

[20] ibid 39.

[21] Sweet and Brunell (n 18) 70.

[22] Mikael Rask Madsen, 'The European Court of Human Rights: From the Cold War to the Brighton Declaration and Backlash' in Karen J Alter, Laurence R Helfer and Mikael Rask Madsen (eds), *International Court Authority* (OUP 2018).

in EU history[23] one can easily observe the member states' ability to control the CJEU remains weak.[24] The requirement of unanimity in decision making (especially in high politics) and the lack of political consensus gives the Courtroom to override the so-called 'political control' imposed by states.

In the lenses of judicial competition theory, the CJEU is an actor who intends to diminish the external sources of authority and power, which might affect its special relationship with the Member States. The political context influences judicial bodies, and sometimes the Court's rational-legal authority is unable to explain the position taken in a specific political context.[25] In international politics, one of the primary concerns of the judicial bodies is their reputation and authority. For them, a reputation is a key tool that 'improves their chances that parties will comply with their future judgments'[26] Even though the CJEU is a regional adjudicative body, its system is very different from a classical model of the International Court; this institution is famous in the international legal order as 'the most powerful supranational court in world history'.[27] It becomes evident that one of the Court's leading interests is to keep this status. In this regard, the Court is engaged diplomatically in a race of judicial competition with the ECtHR to defend the autonomy of the EU legal order at the heart of its functioning. The CJEU' understands autonomy to signify that the EU may be the construction of international law, but that in its internal order its own rules displace the principles and mechanisms of international law'[28]

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[23] Fritz Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1998) 66 Public Administration 239; Fritz Scharpf, 'The Joint-Decision Trap Revisited' (2006) 44 Journal of Common Market Studies 845.

[24] Alter, 'Who are the "Masters of the Treaty"? …' (n 17) 129–33.

[25] Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Alter, Helfer and Madsen (eds) (n 22).

[26] Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (CUP 2014) 114.

[27] R Daniel Kelemen, 'The Court of Justice of the European Union: Changing Authority in the Twenty-First Century' in Alter, Helfer and Madsen (eds) (n 22) 223.

[28] Stefan Reitemeyer and Benedikt Pirker, 'Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One Step Ahead and Two Steps Back' (*European Law Blog*, 31 March 2015) <https://europeanlawblog.eu/2015/03/31/opinion-213-of-the-court-of-justice-on-access-of-the-eu-to-the-echr-one-step-ahead-and-two-steps-back/> accessed 20 October 2021.

On many occasions, scholars stressed that legal fields are generally characterised by contestations of ideas and clashes of power and interests.[29] Concerning human rights, Member States are bound by the litigation of CJEU but also by the ECtHR, where 'the European Convention on Human Rights is the most effective human rights regime in the world'.[30] The ECtHR, a human rights judicial body, fears the CJEU to lose the opportunity to enhance the connection with national judicial actors. On this aspect, Karen Alter[31] suggests that 'the more attractive the alternatives, the fewer cases a court is likely to receive and the less likely it is to gain any level of authority in fact, especially if there is a disjuncture between litigant preferences and international priorities.' Additionally, the human rights subject is salient in substance; in many cases, the overlap and conflict between legal rules are bound to happen. Therefore, the Court pursues its legal rationale and political preferences. The Courts' interests are not neutral and unbiased, and sometimes the judicial actors can be seen as better decision-makers than politicians.[32] One possible solution to clarify choices and their consequences is the 'environment within which the behaviour takes place'[33] In so doing, the unique nature of the EU law and the privileges derived from it for the CJEU might help to analyse the preferences of this actor and their effects on the EU's accession to ECHR.

2. Judicial Competition in a Nutshell: Opinion 2/13 – 'A Legal Bombshell'[34]

In Europe are at least three spheres of human rights protection – national venue, supranational (the Charter of Fundamental Rights and Freedoms) and the

[29] Karen J Alter, Laurence R Helfer and Mikael Rask Madsen, 'How Context Shapes the Authority of International Courts' in Alter, Helfer and Madsen (eds) (n 22) 35.
[30] Helen Keller and Alec Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).
[31] Alter, Helfer and Madsen (n 29) 40.
[32] Alter, 'Agents or Trustees? …' (n 19) 46.
[33] Frieden (n 13) 70.
[34] Martin Scheinin, 'CJEU Opinion 2/13 – Three Mitigating Circumstances' (*Verfassungsblog* 26 December 2014) <http://www.verfassungsblog.de/cjeu-opinion-213-three-mitigating-circumstances/> accessed 19 May 2020).

international stage (the ECHR).[35] Concerning the supranational level, the CJEU role as a human rights adjudicator is relatively recent.[36] In many cases, the Charter of the Fundamental Rights has confirmed the need to interpret the EU rights according to the Convention.[37] However, an empirical study conducted by Kuijer[38] shows the contrary:

> '[I]n the period between December 2009 and December 2012, the Court referred to or drew on the Charter's provisions in at least 122 judgments. In 27 cases, the CJEU dealt with arguments based on the Charter substantively. Out of the 122 cases mentioned above, the Court referred to the ECHR in just 20, and it did not refer at all to the other sources of human rights jurisprudence. One may conclude that the CJEU has become orientated towards the Charter at the expense of the Convention and the Strasbourg Court case law.'

On the other hand, the ECtHR has exploited its notoriety and willingness to cooperate in the *Bosphorus case.*[39] The presumption of equivalent protection stress that States that are part of an international organisation and implement their duties from the membership must observe human rights' protection equivalently to the provisions stated in the Convention. The Bosphorus establishes a presumption of equivalent protection of EU law with the ECHR in general terms. Thus, the ECtHR compromised with the CJEU because of its specific characteristics of law. Despite the competitive nature of these two regional courts, the EU is still privileged by the ECtHR. For example, the accession agreement recognises the EU's particular position and institutional design. For this reason, with the accession, the EU will become *primus inter*

[35] Pérez (n 16) 27.
[36] de Búrca (n 14) 170.
[37] Pérez (n 16) 33.
[38] Martin Kuijer, 'The Challenging Relationship between the European Convention on Human Rights and the EU Legal Order: Consequences of a Delayed Accession' (2020) 24 The International Journal of Human Rights 998, 1002.
[39] *Bosphorus Hava Yolları Turizm ve Ticaret Anonim S,irketi v Ireland* ECHR 2005-VI 107.

pares, having all rights of a Convention party and beyond.[40] The EU law's overall framework acknowledges the importance of the ECHR and its monumental contribution when interpreting human rights law. Nevertheless, the legal and political concerns are still present because the ECtHR jurisdiction does not apply to the EU.

2.1 The Autonomy of the EU Law

After the first lecture of Opinion 2/13, one can conclude that more than half of the judgment is built on legal justifications concerning the EU law autonomy. However, fundamental rights are closely linked to 'constitutional pluralism' [41] which means that it requires considerable openness to adaptation.

Notably, the Court motivates its position by emphasising two types of objections: procedural (Protocol 16 and preliminary ruling mechanism) and substantive (Common Foreign Security Policy). Consequently, Opinion 2/13 is just another signal from the CJEU that it would not tolerate in any circumstances 'being deprived of the possibility of preliminary scrutiny over the compatibility with fundamental rights of EU law'.[42] The CJEU considers essential to explain the peculiarities of the EU legal system because 'the European Union is not a state' and the amendments of ECHR are warranted precisely because, unlike any other Contracting Party, the EU is, under international law, precluded by its very nature from being considered a State'.[43] As Steve Peers duly notes,[44] it is for the first time when the Court notably asserted that the EU is not a state. But what CJEU is missing by continuously emphasising the autonomy of EU law and biasing its rulings with the provisions regulated by the Charter of

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[40] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 The Modern Law Review 254, 265.

[41] Pérez (n 16).

[42] Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (2015) 22 Maastricht Journal of European and Comparative Law 35, 44.

[43] Opinion 2/13 (n 2) para 157.

[44] Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (*EU Law Analysis*, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 19 May 2020.

Fundamental Rights is the opportunity of developing informed expertise in the field of human rights.[45] The decision not to use the comparative international legal sources in the human rights jurisprudence supports the CJEU to have the exclusive authority to rule on matters of EU law.

From the CJEU perspective, the ECHR accession disturbs EU competencies and the Court's interpretation monopoly of the EU law.[46] Although Protocol No. 8, Article 1, ensures the accession will consider Union Law's distinctive characteristics. Further, Article 2 enhances that accession will not affect the Union's competencies and the power of its institutions. Yet, the legal arguments provided by the CJEU suggest that the accession agreement is still breaching the competencies of the EU law. One of the Court's primary concerns is Article 53 of the Convention, which gives the High Contracting Parties the power to ensure higher protection standards than those outlined in the Charter of Fundamental Rights and Freedoms. Article 53 of the Convention is in line with Article 53 of the Charter of Fundamental Rights and Freedoms, which stress 'nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised [...] including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'[47] Though, the position taken by the CJEU in *Melloni*[48] is considerable different. The reluctance to accede to ECHR provides more concern on the sovereignty of CJEU than the human rights protection. In this vein, the 'accession has been discussed for over fifty years and is yet to happen indeed indicative of the EU's general unsuitability to be a contracting party to the ECHR was traditionally understood as the limitless power to rule; without being bound by any rules.'[49]

[45] de Búrca (n 14) 184.

[46] Sionaidh Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice' (*Verfassungsblog*, 24 December 2014) <https://verfassungsblog.de/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice-2/> accessed 19 May 2020.

[47] Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

[48] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

[49] Pérez (n 16) 44.

2.2 *Melloni* Doctrine

The Court stated in the 2/13 Opinion 'it should not be possible for the ECtHR to call into question the Court's findings of the scope *ratione materiae* of EU law, for the purposes of determining whether fundamental rights of the EU bound a Member State'.[50] The *Melloni* case is particular within the jurisprudence of the CJEU because it questioned Article 53 of the Charter of Human Rights. Therefore, the Member States are not allowed to apply standards of protection of fundamental rights as guaranteed by their constitutional provisions when the standard is higher than those stated in the Charter.[51] For this reason, the Charter cannot fall below the ECHR standard, but it can ensure the same level of protection. While, according to the Convention, Member States can provide higher security standards, they are deprived of acting in the same manner under the primacy of EU law. In this regard, Melloni challenged the national constitutional provisions and the Convention.

2.3 Special Relationship of the CJEU with National Courts

Another reason behind the opposing opinion is depicted in Protocol 16 ECHR[52] called by the experts 'the protocol of the dialogue.'[53] In a summary, it 'permits the highest courts and tribunals of the Member States to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms guaranteed by the ECHR or the protocols thereto'[54] but it gives a considerable amount of discretion. The CJEU fears that in the case of accession, the mechanism established by the Protocol could affect the autonomy and effectiveness of the preliminary mechanism procedure regulated in Article 267 TFEU. So, the CJEU is considering the probability that

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[50] Opinion 2/13 (n 2) para 186.

[51] Vanessa Franssen, 'Melloni as Wake-up Call – Setting Limits to Higher National Standards of Fundamental Rights Protection' (*European Law Blog*, 10 March 2014) <https://europeanlawblog.eu/2014/03/10/melloni-as-a-wake-up-call-setting-limits-to-higher-national-standards-of-fundamental-rights-protection/> accessed 20 May 2020.

[52] Opinion 2/13 (n 2) paras 196–99.

[53] Johan Callewaert, 'Protocol No 16 and EU Law' in Josep Casadevall and others (eds), *Essays in Honour of Dean Spielmann* (Wolf Legal Publishers 2017).

[54] Opinion 2/13 (n 2) paras 198–99.

national courts may be tempted to address preliminary questions, where the cases are touching the subject of human rights, to the Strasbourg Court. Nonetheless, as pointed out by some authors, the agreement on EU-accession is not primarily intended to apply to the EU Member States but rather to the EU as such.[55]

2.4 Article 344 TFEU

The Court has consistently assessed that an international agreement cannot affect the allocation of powers fixed by the Treaties of the EU legal system's autonomy. This principle is enshrined in Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any settlement method other than those provided for therein.[56] Furthermore, the obligation of Member States to have recourse to the procedures for settling disputes established by EU law – and to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system – must be understood as a specific expression of Member States' more general duty of loyalty resulting from Article 4(3) TEU.[57]

2.5 The Co-Respondent Mechanism

The mechanism 'provides that a Contracting Party is to become a co-respondent either by accepting an invitation from the ECtHR or by the ECtHR's decision upon the request of that Contracting Party. However, carrying out such a review would require the ECtHR to assess EU law rules governing the division of powers between the EU and its Member States.[58] The co-respondent mechanism permits the ECtHR to refrain from determining the correct respondent or how responsibility should be apportioned between them.[59] Most importantly, the co-responded mechanism intends to enforce principles such as participation, accountability, and enforceability in the ECHR system.

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[55] Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (n 7) 13.
[56] Opinion 2/13 (n 2) para 200.
[57] ibid, para 201.
[58] Douglas-Scott (n 46).
[59] Eckes (n 40) 26.

From a normative perspective, it can enhance the legitimacy of the acts and actions taken by the Member States, the CJEU, and the Strasbourg Court. However, from the normative perspective of the CJEU, it might burden the division of competences between EU and the Member States because the ECtHR should not have the power to allocate responsibility for the breach of the ECHR between the EU and the Member States since only the CJEU can rule on the EU law.[60] The mechanism privileges the CJEU to intervene as a co-respondent in cases where there is uncertainty in interpreting the legislation. But the reversal might also happen because the Member States can be co-responded in cases directed against the EU if they found a violation of the Treaty provisions.[61] In *Matthews*[62] was found a breach of primary law because the EU oversaw extending the liaison for the European Parliament to EU citizen residents in Gibraltar.[63]

2.6 Common Foreign and Security Policy – A Competition Race

One of the last and most important is the Court's concern regarding the EU law specific characteristics concerning judicial review in CFSP. Foremost, it is worth mentioning that the CFSP is given separate treatment from all other Union policies because of its location in the TEU instead of in the TFEU.[64] On this matter, the Court has jurisdiction to review two categories of measures 'reviewing the legality of decisions providing restrictive measures against natural or legal persons adopted by the Council based on Chapter 2 of Title V of the EU Treaty'[65] The second duty is to ensure that measures adopted here do not

[60] Peers (n 44).
[61] Spaventa, 'Fundamental Rights in the European Union' (n 4) 255.
[62] *Matthews v UK* ECHR 1999-I 251.
[63] Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' (n 42).
[64] Kieran St C Bradley, 'Legislating in the European Union' in Barnard and Peers (eds) (n 61) 110.
[65] Opinion 2/13 (n 2) para 250.

encroach on the Union's competencies under the general regime.[66] Based on the accession agreement, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the CJEU cannot, for want of jurisdiction, review in the light of fundamental rights.[67] According to Opinion 2/13, a non-EU court cannot be given the power of judicial review over EU acts. This approach applies to the ECtHR and other international adjudicatory bodies like the International Court of Justice (ICJ). In a scenario where a Member State brings a CFSP dispute to ICJ, the CJEU would state that it violates EU law.[68]

3. Beyond Judicial Competition – The Ongoing Trends

Article 6(2) TEU does not mention a time frame for the EU accession to ECHR. In theory, the provision could be ignored for a long time, even indefinitely.[69] After Opinion 2/13, many considered that accession is politically unrealistic, but, as mentioned at the beginning of this paper, 'actors no matter at which level they perform have interests and preferences.' In this regard, it is imperative to consider that in a letter by 31 of October 2019, co-signed by the President and the First Vice-President of the European Commission, the Secretary-General of the Council of Europe was informed that the EU 'stood ready to resume the negotiations on its accession to the European Convention on Human Rights'[70] Consequently, at its 92nd meeting[71], in November 2019, the Steering Committee

[66] Bradley (n 64) 111.

[67] Opinion 2/13 (n 2) para 254.

[68] Peers (n 60)

[69] Adam Łazowski and Ramses A. Wessel, 'When Caveats Turn into Locks: *Opinion 2/13* on Accession of the European Union to the ECHR' (2015) 16 German Law Journal 179, 204.

[70] EU accession to the ECHR' (Council of Europe) <https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights> accessed 20 October 2021.

[71] Steering Committee for Human Rights (CDDH), 'Report, 92nd meeting, Strasbourg, 26–29 November 2019' (CDDH(2019)R92, Council of Europe 20 December 2019).

for Human Rights (CDDH) proposed a series of arrangements to continue the negotiations within an *ad hoc* group composed of representatives of the 47 Member States of the Council of Europe and a representative of the European Union (47+1 format).

Equally important to acknowledge is that in an informal meeting held in June 2020, the EU Commission underlines that the new CDDH working arrangements should focus on the objections raised by CJEU in Opinion 2/13. In light of the current developments, it is essential to emphasise that the DHH working meetings do not constitute a new accession initiative but rather a continuation of the abandoned talks in 2013. Paradoxically, 24 out of 28 EU Member States, the institutions, and the non-EU Council of Europe Member States – unanimously agreed on the 2013 DAA. Their position towards the accession has not changed (Johansen 2021). In addition, the non-EU Council of Europe Member States have the task now to find solutions for the objectives raised by CJEU in Opinion 2/13 that primarily deals with the internal affairs of the EU law.

At time when Opinion 2/13 was delivered, some experts argued that the Court's position is 'a political decision disguised as a legal argument.'[72] Relevant for this argument is the political pressure the CJEU received from some national governments, notably from the UK, which, at that time, was recognised as one of the strongest voices in the Union.[73] As Steve Peers duly notes, 'the Court's judgment is essentially a more articulate and EU-specific version of the document recently produced by the UK's Justice Minister, which sought changes to the law to ensure that the UK would be free to do as it wished as regards human rights issues, while (possibly) nominally remaining a signatory of the ECHR'.[74] Historically, the United Kingdom was unwilling to accept the Strasbourg Court's jurisdiction. Throughout the years, the ECtHR tried to harmonise its relationship with the members of the Council of Europe. Still,

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[72] Graham Butler, 'A Political Decision Disguised as a Legal Argument? Opinion 2/13 and EU Accession to the ECHR' (2015) 31(81) Utrecht Journal for International and European Law 104.
[73] European Scrutiny Committee, *Subsidiarity and Proportionality and the Commission's Relations with National Parliaments* (HC 2014–15, 219-XXIX) 23 ff.
[74] Peers (n 44).

even the UK accepted the ECtHR judgments its compliance was sometimes partial or delayed.[75] On the other hand, the British legal system was also reluctant to the EU law, with Brexit it is not the case regarding the political pressure on the Court.

In October 2020, the CDDH (re)launched the dialogue for the first time since 2013.[76] Even though in the context of the EU accession, some voices in the academia stressed the sensitive nature of the EU legal order - the current political dialogue emphasises that the current circumstances demand constructive work to make a reconciliation between the Strasbourg and the Luxembourg Court human rights jurisdiction. On another note, the ongoing work of the CDDH could be considered a response to the CJEU overused arguments in favour of the EU law autonomy, which are no longer sufficiently sound 'to excuse' the EU from taking substantive measures to fulfil its obligations expressed in Article 6(2) of the Lisbon Treaty. In this regard, discussions about the co-responded mechanism, the prior involvement procedure and the principle of mutual trust between the Member States and the exchange of views on CFSP represents the centrepiece of CDDH ad-hoc meetings.[77] It is worth emphasizing that case law since 2014 had 'steadily widened the scope of the counter-exceptions which granted jurisdiction to the CJEU in the CFSP area and established that the exclusions from the general jurisdiction of the CJEU must be given a narrow interpretation. Additional cases which could further widen the CJEU's jurisdiction were currently pending'[78] One of the proposals during the CDDH meetings was to ensure that 'an explicit attribution clause in the draft Accession Agreement for the relevant CFSP situations could be an avenue to pursue.'[79] Tonje Meinich, a former chair of

[75] Madsen (n 22) 244.

[76] Council of Europe, '6th Meeting of the CDDH Ad Hoc Negotiation on the EU Accession to the ECHR' (OJ06rev, Council of Europe 3 September 2020).

[77] Council of Europe '6th Meeting Report of the CDDH Ad Hoc Negotiation Group on the Accession of the EU to the ECHR' (47+1(2020)R6, Council of Europe 22 October 2020).

[78] ibid 9.

[79] Council of Europe, '8th Meeting Report of the CDDH Ad Hoc Negotiation Group (47+1) on the Accession of the EU to the ECHR' (47+1(2021)R8, Council of Europe 4 February 2021).

CDDH - UE and 47+1 group, stressed in 2019 that the CFSP was the 'challenging question to solve.' The CFSP remains a sensitive topic in the current working meeting format since the CJEU has limited jurisdiction in this field and, concerning ECHR, no party to the ECHR is entitled to exclude a policy area from the ECtHR jurisdiction.[80]

The EU stated that maintaining the criteria in Article 3 of the draft Accession Agreement would carry the legal consequences that the ECtHR retained the final authority on the application of the requirements for the triggering of the co-respondent mechanism, and therefore would rule incidentally on the internal distribution of powers, which had triggered the concern raised by the CJEU in Opinion 2/13.[81] Some delegations suggested that the criteria could be removed to other places in the draft accession instruments, such as the draft declaration by the EU in Appendix II or the explanatory report. The EU indicated openness to this proposal, while other delegations preferred to keep it in the DAA.[82] However, the complexity of the mechanism should not disguise the fact that its use in practice would be infrequent.[83] In addition, the Group considered a proposal by the EU on the coordination of Article 53 ECHR and Article 53 of the EU Fundamental Rights Charter.[84] There was some support on the proposal's substance if it was amended with a clarification that the minimum protection as enshrined in the ECHR was maintained, and the proposal would not be included in Article 5 of the draft Accession Agreement.[85] One delegation raised the question about whether the EU should have a vote on any matters in the Committee of Ministers, bearing in mind that the EU will not become a member of the Council of Europe.[86]

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[80] Rules of Strasbourg Court, October 2021.
[81] ibid 4.
[82] ibid.
[83] Council of Europe, '9th Meeting Report of the CDDH Ad Hoc Negotiation Group on the Accession of the EU to the ECHR' (47+1(2021)R9, Council of Europe 25 March 2021) 9.
[84] ibid 4.
[85] ibid 5.
[86] ibid 6.

Among other things, the principle of mutual trust concerned most of the delegations.[87] The Group discussed proposals related to the EU's specific procedure mechanism before the ECtHR and the operation of inter-party applications (Article 33 of the Convention) and requests for advisory opinions under Protocol No. 16 to the Convention. The Group considered a proposal for a new Article 5a.[88] According to this proposal, the EU would be given the opportunity, in the case, a court or tribunal of an EU member state makes a request to the ECtHR for an advisory opinion, to clarify in an EU-internal procedure whether the procedure under Article 267 of the TFEU had been circumvented by such request. If this was to be confirmed, the ECtHR should exercise its discretion under Protocol No. 16 not to accept the request as far as it was violating EU law. The EU welcomed the approach of the proposal.[89]

It seems that one of the most challenging aspects to adjust after Opinion 2/13 remains at the substantive level – namely, the CFSP matter. From this standpoint, one of the main concerns for the CDDH in the ongoing ad-hoc meetings remains: how to adjust the Court's requirements without touching the cornerstone of the EU law autonomy?

Conclusion

The EU-accession to the ECHR rights represents a great occasion to observe the Union itself bound by international law. But, unfortunately, the position articulated by the CJEU in Opinion 2/13 shows that ordinary citizens have to wait to benefit from the privileges of such an act. This paper has given an account of the judicial competition between two powerful Courts – on the one hand, the CJEU defending its autonomy over EU legal interpretation; on the other hand, ECtHR militating for synergies between the two human rights legal sources – the ECHR and the EU Charter of the Fundamental Rights and Freedoms.

In a nutshell, the 2/13 Opinion highlights the argument that the reasons behind blocking the accession reveal that CJEU cares more about its status than

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[87] Council of Europe, '8th Meeting of the CDDH Ad Hoc Negotiation Group 47+1 on the EU Accession to the ECHR' (n 79).

[88] Council of Europe, '10th Meeting of the CDDH Ad Hoc Negotiation Group 47+1 on the EU Accession to the ECHR' (47+1(2021)R10, Council of Europe 2 July 2021) 3

[89] ibid 5.

the effectiveness of human rights law. Noticeably, the preferences defended by the CJEU outlines its desire to be 'above the law'. This normative conflict throws the harmonisation and effectiveness of the human rights system at the EU level. Even one of the former presidents of the EU Court of Justice declared at the FIDE Conference in 2014, 'the Court is not a human rights court', which gives the impression that the human rights subject is not among the Luxembourg Court's priorities. The different interpretation of the human rights law given by the ECtHR and CJEU represents the conflict's primary source, which might increase further. Since the Court refers more to the Charter of the fundamental rights in its rulings, in time, the Strasbourg Court's jurisprudence might be marginalised, making a real risk 'of the two central European legal systems drifting apart'.[90] The normative conflict could be fostered if the ECtHR may respond to CJEU. Secondly, the continued protection of its jurisdiction by the CJEU in this area may trigger domestic Constitutional Courts to do the same.[91] This statement seems to be plausible more than ever for the EU legal order considering the current Polish Constitutional Tribunal ruling stating that the country's constitution takes precedence over the EU law.[92] Lastly, the notion of autonomy and effectiveness should be accommodated in a manner to reflect that these concerns are not EU *sui generis*, but constitutional concerns common to all ECHR Contracting Parties.[93] As Professor David Thór Björgvinsson outlines - 'if you have political preferences, ways can be found to accommodate that within legal reasoning'.[94]

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[90] Jörg Polakiewicz, 'Legal Challenges and Opportunities Raised by EU Participation in Council of Europe Treaties' <https://www.coe.int/en/web/dlapil/-/legal-challenges-and-opportunities-raised-by-eu-participation-in-council-of-europe-treaties> accessed 25 May 2020.

[91] Stian Øby Johansen, 'EU Accession to the ECHR: Details of the Relaunched Negotiations' (*EU Law Analysis*, 30 January 2021) <http://eulawanalysis.blogspot.com/2021/01/negotiations-for-eu-accession-to-echr.html> accessed 1 July 2021.

[92] European Commission Press Statement, October 7, 2021. <https://ec.europa.eu/commission/presscorner/detail/en/statement_21_5142> accessed 23 October 2021.

[93] Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' (2015) 16 German Law Journal 147.

[94] Butler (n 72) 108.

On a final note, the law is not a fixed ground. In this regard, the EU accession to ECHR depends on the political will and of the willingness of the judiciary bodies to build a standard system of 'Europe of Rights'[95] Even though the Court, with its 2/13 Opinion, provided more questions than solutions, at least one aspect remains clear – the European Union, under Article 6 (2) of the Lisbon Treaty, is obliged to accede to the ECHR. Ultimately, seeing that EU accession to the ECHR is an essential indication of the concept of legal pluralism in Europe and beyond.[96]

[95] Alec Stone Sweet and others, 'The Reception of ECHR in National Legal Orders' in Hellen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (OUP 2008).
[96] Korenica (n 3) 10.

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Emergency Legislation in Times of COVID-19

Can the Hungarian legal response to the COVID-19 pandemic be considered in conformity with the EU values? If not, what implications might this have for the Union?

Sascha Lassen & Vibe Milthers*

During the COVID-19 pandemic, the declaration of a national state of emergency in many countries posed the risk of a shift in the balance of power between the legislative, judiciary and executive branch and limited or suspended civil liberties and human rights in order to prohibit the spread of the virus. In this context, this article seeks to examine emergency legislation and its consequences for the rule of law as the fundamental principle for upholding a democratic society, of which the protection of basic civil and political rights is a primary characteristic.

The primary part of the article consists of a case analysis of the emergency legislation that was introduced in Hungary[1]. This analysis aims to investigate whether or not the legislation was in conformity with the international framework for emergency legislation as defined in the terms of legality, necessity and proportionality, and finally non-abuse of powers. These are embedded in the founding Treaties of the EU, of which

* Former students at the Faculty of Law, University of Copenhagen [fbq363@alumni.ku.dk & bwr477@alumni.ku.dk]

[1] It should be noted that in June of 2020 the Hungarian parliament voted to end the state of emergency. However, the article was written previous to this developement, and takes outset in the emergency legislation, as it was passed in March of 2020. Therefore, the conclusions reached in the article do not reflect developments following May of 2020.

Hungary is a member. Thus, it is also prudent to examine the substance of the mechanisms for addressing violations of the EU values.

Finally, the article considers whether the emergency legislative measures that were implemented has put focus on an impending crisis of a much larger scale; the future of EU. The article argues that the Hungarian emergency legislation is an example of a culminating political trajectory, undermining the support for intergovernmental cooperation in Europe, not only by the public but also on a governmental level. This trajectory threatens the future of an intergovernmental European cooperation that is based on a shared understanding of the rule of law and shared values regarding civil liberties and human rights.

1. Introduction

The outbreak of COVID-19 changed the world's view on what measures are necessary to protect the people from a public health crisis of such a caliber. The situation evolved swiftly, and the efforts to contain the pandemic resulted, for almost every country, in the rapid implementation of new legislation involving limitations on freedoms, which most people perceive as inalienable, in order to prohibit the spread of the virus until a vaccine was developed.[2]

The year 2020 marked the 70th anniversary for the establishment of a European cooperation, which has since become the European Union, as we know it today. Throughout the past years, critique has been raised as to whether the European intergovernmental cooperation is functioning as intended, especially in regards to handling the influx of refugees in Greece and Turkey, just as it has been claimed that the Union has failed to respond in a timely and adequate manner to global environmental issues. Simultaneously, in several cases the institutions of the Union have raised concerns towards some Member States for not complying with the fundamental values of the European Union.

This article is motivated by a shared concern as to whether the legislation, which by many Member States of the European Union was considered necessary

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[2] McCaffrey, Darren:" Analysis: Is Hungary dumping democracy amid coronavirus crisis?" Euronoews, 2020, https://www.euronews.com/2020/04/06/analysis-is-hungary-dumping-democracy-amid-coronavirus-crisis.

in handling a global health and economic crisis, might contribute to a more fundamental crisis for the EU. Especially the Hungarian emergency legislation was met with severe critique, both from academic scholars, the Secretary General of the Council of Europe[3] as well as several Member States of the EU.[4] The article is therefore based on a case study of the Hungarian emergency legislation, on the basis of which, it will be discussed what implications such legislation could have for the intergovernmental cooperation, should it persist indefinitely.

Firstly, the article will provide an outline of the regional European legal foundations against which national emergency legislation can be assessed as well as the framework, which can be used to address the legal and political concerns that may arise from the implementation of emergency legislation. Hereafter, the Hungarian emergency legislation implemented in response to the COVID-19 pandemic will be analyzed, as well as the existing mechanisms for addressing violations of EU values. Finally, the broader trends, which the national legislative responses to the COVID-19 pandemic shed light on, will be discussed.

2. The EU Constitutional and Regional European Framework for Emergency Legislation

In order to accede to the EU, a country must fulfill the Copenhagen criteria, which were first established in 1993 and later strengthened in 1995. The first criteria stipulates, that a Member State candidate must have stable institutions that guarantee the rule of law, human rights and respect for and protection of minorities.[5] Furthermore, the conditions and principles, which a potential Member State must meet and adhere to in order to join the EU, are codified in

[3] Secretary General to The Council of Europe, Marija Pejčinović Burić: ”Letter for the Attention of Victor Orbán”, 24 March 2020 https://rm.coe.int/orban-pm-hungary-24-03-2020/16809d5f04.

[4] Bayer, Lili: ”13 countries ”deeply concerned” over rule of law.”, Politico, 2020, https://www.politico.eu/article/viktor-orban-hungary-13-countries-deeply-concerned-over-rule-of-law/.

[5] Criteria for accession to the EU of 1993 (Copenhagen criteria) as formulated by the Copenhagen European Council, https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhague.html?locale=en.

Article 49(1) and Article 6 of the Treaty of the European Union (TEU) respectively.

Article 6 concerns the relationship between the EU and European human rights acts. In accordance with Article 6(1) the EU recognizes all rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union, and as such all Member States must respect these. However, the provisions of the Charter do not extend the competences of the EU beyond what is defined within the Treaties. Similarly, Article 6(2) stipulates that the EU, and thereby also all Member States, shall accede to the European Convention on Human Rights, while also not extending the competences of the EU as defined within the Treaties. Thereby, TEU binds all Member States by the principles of human rights as they are enshrined in the Charter and the ECHR. Human rights, both as guaranteed within the ECHR and the constitutional traditions of the Member States, constitute a fundamental set of values within the EU, cf. Article 6(3) TEU.

Article 49(1) stipulates, that any European State, committed to the principles following from TEU Article 2, can apply to become a member of the Union. These principles are as follows: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, cf. Article 2(1) and they constitute a natural extension of the Copenhagen Criteria. The values enshrined within Article 2 are the fundamental values upon which the EU is built. As such, democracy and the separation of powers constitute the normative backbone of the Union, and must in turn also constitute the normative backbone of the Member States. Compliance with the fundamental values is both the basis for and the result of normative integration of a Member State into the EU.[6]

Article 7 TEU contains the measures that can be enacted to sanction a breach or a potential breach of Article 2. Following this provision, a proposal by one third of the Member States may determine a clear risk of a serious breach by a Member State of the values referred to in Article 2, cf. Article 7(1). The existence of a serious and persistent breach by a Member State may be sanctioned under Article 7(2).

[6] Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". Hague J Rule Law 11, 133–170, 2019.

National emergencies require certain flexibility as regards legislation, and several of the international conventions on human rights contain provisions providing for such flexibility. Article 15(1) of the European Convention on Human Rights (ECHR) provides a derogation clause, which can be invoked in times of public emergency as regards the protection of human rights. With these provisions, the situation must be understood as a threat to the "life of the nation" which is to be decided upon by the national government.[7]

Certain criteria must be met when implementing emergency legislative measures, such as the universally recognized principles[8] of legality, necessity and proportionality, and finally non-abuse of powers. Several international institutions have recognized these criteria, ex. the Council of Europe, as exemplified by the Rule of Law Checklist on States of Emergency, established by the Venice Commission to the Council of Europe. This list was adopted by the Venice Commission in March 2016 and states the abovementioned principles amongst others.

3. The Hungarian Situation

During the COVID-19 pandemic Hungary implemented numerous provisions in order to handle the crisis. The critique thereof mainly centered on limitations of several rights codified in the above-mentioned legal bodies by which Hungary is bound, including the right to assemble, right to free movement, freedom of speech as well as basic democratic principles. Similarly, concerns were raised as to whether the Hungarian legislation could be considered in conformity with the principle of rule of law. In the following section, the most relevant aspects of these provisions will be analyzed in accordance with the universally acknowledged principles of legality, necessity and proportionality, as well as the principle of non-abuse of powers.

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[7] Emmons, Cassandra: "International Human Rights Law and COVID-19 States of Emergency", Verfassungsblog, 2020.

[8] Ensig Sørensen, Karsten, et al: "Uddrag af EU-retten", DJØF Forlag, 2014.

3.1 Concerning the Principle of Legality in Terms of National Law

The Hungarian Constitution is the primary law and foundation of the Hungarian legal system. It contains the fundamental democratic principles, which are safeguarded through a series of provisions that constitute classic checks and balances of power,[9] and the Constitution acts as the primary defense of democratic principles.[10] It is therefore first and foremost relevant to consider whether the emergency legislation was implemented in conformity with the Constitution.

The Hungarian government declared Hungary to be in a state of emergency on March 11th 2020 in accordance with Article 53(2) and Article 15(1) of the Constitution. A decree such as this has an automatic expiry after 15 days, cf. Article 53(3) of the Constitution. The declaration of a state of emergency allows the government to pass cardinal law, which allows for the suspension of or derogation from certain provisions of the Constitution, as well as the introduction of other extraordinary measures. In accordance with Article T(4) of the Hungarian Constitution, such law must be passed by the consent of two thirds of the parliamentary representatives.

In extension of the declaration of a state of emergency, the government proposed The Act XII of 2020 on the Containment of Coronavirus on March

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[9] Amongst other provisions Article 24(1) establishes a Constitutional Court, with the purpose of protecting the Constitution, and securing that all domestic law is in conformity with the Constitution. It follows from the Hungarian Constitution Article 24(2)e) that members and the President of the Constitutional Court are chosen by the Parliament, which in actuality renders it dependent upon the legislative branch.

[10] It should be noted that the Hungarian Constitution in itself has been criticized by several legal scholars (e.g. Petra Bard, professor of European constitutionalism at the Central European University, and Laurent Pech, professor of European law at Middlesex University, in "No checks, no balances: the reality of Orbán's autocratic constitutional revolution" published in 2019 at https://reconnect-europe.eu/blog/no-checks-no-balances-bard-pech/) in light of the development taking place in Hungary over the past decade. The more recent amendments to the Constitution raise questions concerning the democratic nature of the Hungarian State. It can therefore be argued, that conformity with the Hungarian Constitution, does not necessarily in itself guarantee that democratic principles are upheld.

23rd 2020, in order to extend the legal effect of the state of emergency. The Act was justified on the grounds that it allows the government to take the necessary measures to prevent the spread of the virus, and thereby protect the health and life of Hungarian citizens.[11]

The government requested that the law be adopted by an expedited procedure, citing the urgency of the emergency at hand. The Parliament, however, denied an expedited procedure, and so the initial decree expired on the 26th of March.[12] In spite of this, the Act was approved and promulgated by the Hungarian government on March 30th 2020. As the Act was passed with the required majority, the Act has been adopted in conformity with the requirements of the Hungarian Constitution.

3.2 Concerning the Principles of Necessity and Proportionality

For emergency legislation to be in compliance with international obligations concerning the protection of civil and political rights, the necessity must be explicit for the protection of public health and to limit the existing threat. Upon first glance, the implementation of emergency measures constituted the response to a global pandemic, which developed at a pace that the world did not seem prepared for. This triggered a widespread implementation of emergency laws and restrictive legal measures of varying severity, emphasizing the necessity of a speedy response. However, the material substance of the Hungarian emergency legislation drastically limited civil liberties.

In the justification of the Act, the Hungarian Government declared, that the measures introduced were necessary *"with the aim of preventing and slowing down the propagation of the COVID-19, as well as supporting the fight against the infection (...) and subsequently mitigating the negative economic impact of the*

[11] "Rationale for the law on protecting against the coronavirus", Hungarian Spectrum, 2020 https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/.

[12] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

pandemic on Hungary."[13] By this justification the Hungarian Government implied a continuous necessity of the Act. Experts have pointed to social distancing as one of the most effective ways of combating the spread of the virus,[14] and measures designed to effectuate social distancing, such as imposing a limit on the amount of people allowed to gather together, can therefore be seen as a direct necessity for limiting the spread of the threat.

The Act, however, also introduced changes to the penal code, by criminalizing obstruction of epidemic prevention and publication of false facts, which impeded the protection of the public. This also extended to those who might criticize the actions of the government, and as such severely limited free press and speech. Such limitations pose a threat to the maintenance of a democratic society, by censoring media, which keeps the public informed, and thus capable of being critical of their government.

This provision was justified in reference to protecting public order from the turmoil and panic that the spread of false information might incite, cf. Section 10 of the Act.[15] Though the spread of false information might be detrimental to the successful containment of COVID-19, it is questionable whether the justification could be considered legitimate, or whether the prevention of public turmoil in fact was more conducive to maintaining control of the nation, than to actually combating the pandemic. It is therefore doubtful that such a broad limitation of the freedom of speech can be considered necessary.

Once it has been determined whether the emergency measures can be considered necessary and in conformity with international obligations as codified in the treaties, the proportionality of the implemented provisions must be considered. The declaration of a state of emergency allows a government to invoke the derogation clauses set forth in Article 15 of the ECHR, however, this is only allowed if the measures can be considered proportionate in relation to the

[13] "Rationale for the law on protecting against the coronavirus", Hungarian Spectrum, 2020 https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/.

[14] Coronavirus disease (COVID-19) advice for the public, WHO, 2020 https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public.

[15] "Rationale for the law on protecting against the coronavirus", Hungarian Spectrum, 2020 https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/.

objective that they are designed to achieve. The Venice Commission has issued a list of checkpoints that, once fulfilled, ensure compliance with the ECHR. Most importantly, emergency legislative measures must have a time limit, as they cannot last longer than the emergency itself.

The ECtHR has previously found that Article 15(3) ECHR implies a requirement of permanent review for the necessity of the emergency measures, and the implementation of these must leave room for a dynamic development and assessment.[16] The Hungarian Parliament has access to terminating the Act at any given time upon the end of the emergency, cf. Section 8.[17] However, the Act did not provide any sunset clauses as such, giving the Hungarian Parliament unlimited resources until decided otherwise by the Parliament. This lack of a time-limiting provision is at odds with the values, which support rule of law and democratic standards guaranteed by TEU and ECHR.

3.3 Concerning the Abuse of Power

To some extent, the limitation of civil liberties can be justified as a necessary and proportionate response to the COVID-19 pandemic. Such limitations, however, can only be considered proportionate while fundamental democratic principles are simultaneously being upheld. Checks and balances function to ensure that limitations on civil rights and liberties, which are invoked in times of crisis, remain of a temporary character. As illustrated above, the scope of the Hungarian emergency measures was broad and therefore specific provisions, which ensured that checks and balances were being upheld, were necessary in order to maintain a functioning democracy.

The Act was passed with basis in Articles 15(1) and 53 of the Hungarian Constitution. Article 15(1) of the Constitution states that "*(the government's) responsibilities and competences shall include all matters not expressly delegated by the Fundamental Law or other legislation to the responsibilities and competencies of another body*". Legal scholars have criticized the legislative basis found in Article

[16] Compilation of Venice Commission Opinions and Reports on States of Emergency https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)003-e.
[17] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

15(1) as a vague legal basis for the implementation of the emergency legislative measures.[18] The provision extends to the executive branch an amount of power that is only defined in negative terms, and thereby not clearly demarcated. A vague legal basis can more easily be stretched, and thus ultimately allow for abuse of power. Following Section 2 of the Act, the emergency law gave unlimited decree power to Viktor Orbán to *"suspend the enforcement of certain laws, depart from statutory regulations and implement additional extraordinary measures by decree."*[19] The vague nature of Article 15(1) does not clearly regulate the scope of power that can be conferred upon the executive branch. It can be argued, that granting the executive branch extraordinary power such as that granted by the Act, should be based in clear legislation, which very specifically defines the scope and limits of power being transferred.

Furthermore, the Act cancelled elections and referenda until the Parliament had declared the end of the emergency. The functioning of the Courts was impacted as well. The Constitutional Court remained operational, however, cases could normally be brought before this instance through the ordinary courts. As these were closed, this was no longer possible.[20] Even though the Constitutional Court remained open, it can be argued, as also pointed out by Kriszta Kovács, scholar of global constitutionalism at Wissenschaftszentrum Berlin, that judicial review of the emergency legislation might be of an illusory character as the Constitutional Court largely consists of political allies of the government.[21] As such, any judicial review of the emergency legislation was effectively severely limited.

Kovács further argues that the government and the head of the National Public Health Center issued orders on the restriction of movement already in the period between the 26th of March and the 30th of March, before the Act was adopted by the Parliament. Thus, the Government demonstrated that it was

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[18] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

[19] Halmai, Gabor and Scheppele, Kim Lane: "Don't be Fooled by Autocrats!" Verfassungsblog, 2020.

[20] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

[21] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

capable of issuing necessary legislation and restrictions to implement social distancing without further augmentation of its power.[22] This in itself negates the necessity of the Act and the access to bypass checks and balances on the executive branch that it allows.

It can be argued that the Hungarian Parliament remained in session to receive reports from the Government as well as fulfilling other parliamentary duties, thereby upholding the semblance of parliamentary control and infusing the Act with the credentials of democratic legitimacy. However, though the Parliament did have a technical access to repeal the emergency legislation upon the end of the crisis, the Fidesz Party, led by Orbán, holds two thirds of the seats in the Hungarian Parliament,[23][24] and is thereby in a position to exercise decisive control. Ultimately, the parliamentary control that remains in place following the Act is rendered somewhat illusory. It should be noted, that Orbán was recently reelected[25], upholding the composition of the Hungarian Parliament.

As illustrated above, the Act quite clearly allowed for the extensive removal of checks and balances upon the power of the executive branch. The legislation can on this basis be considered problematic. However, a temporary grant of power to the executive branch can be necessary in times of crisis. In extension thereof, it can be argued that the implementation of a clearly defined state of emergency signals that the laws introduced, and whatever shifts in power and limitations of civil rights and freedoms these result in, are invoked in response to something very specific. Failing to officially derogate from obligations under international human rights law risks the normalizing of the exceptional measures taken in response to the crisis. This might in turn enable the permanency of

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[22] Kovács, Kriszta: “Hungary’s Orbánistan: A Complete Arsenal of Emergency Powers”, Verfassungsblog, 2020.

[23] Scheppele, Kim Lane: “Legal but not Fair: Viktor Orbáns New Supermajority”, Verfassungsblog, 2014.

[24] Rankin, Jennifer: “Hungary election: Viktor Orbán declares victory - as it happened“, The Guardian, 2018, https://www.theguardian.com/world/live/2018/apr/08/hungary-election-victor-orban-expected-to-win-third-term-live-updates.

[25] Garamvolgyi, Flora and Robert Tait: ” Viktor Orbán wins fourth consecutive term as Hungary’s prime minister”, The Guardian, 2022, https://www.theguardian.com/world/2022/apr/03/viktor-orban-expected-to-win-big-majority-in-hungarian-general-election.

these measures. Notably, however, Hungary has not officially derogated from its obligations under ECHR, cf. art. 15, and likewise the state of emergency is not clearly defined in temporal scope.[26] In contrast, the Hungarian Minister of Justice, Judit Varga, claims that the new legislation contains a sunset clause, as it provides a guideline for the termination of the emergency legislation.[27] This may refer to the vague access that Parliament has to repeal the Act. However, upon casting a glance backwards on the history of Hungarian emergency legislation, the government appears to have a tendency of maintaining a national state of emergency, even when physical circumstances, which originally provoked the state of emergency, no longer exist.[28] This may indicate an emerging pattern of using emergencies as leverage to strengthen the government's position of power.

The Hungarian emergency legislation constituted quite a clear breach of the democratic principles upon which the EU is built, as it shifted power from both the legislative and judiciary branches to rest almost exclusively with the executive branch. Despite the global health crisis, the Hungarian response cannot be considered proportional, largely because the new legislation had no expiry date at the time. The new legislation effectively granted the Government unlimited power for an unlimited period of time. As such, it can be argued that it de facto constituted not just a limitation of civil liberties of the public, but also an indefinite suspension of the checks and balances designed to protect the rule of law. As becomes apparent in the fact that both the ECHR and ICCPR allow derogations in some cases, the limitation of civil liberties may be acceptable to

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[26] Greene, Alan: " States should declare a State of Emergency using Article 15 ECHR to confront the Coronavirus Pandemic", Strasbourg Observers, 2020, https://strasbourgobservers.com/2020/04/01/states-should-declare-a-state-of-emergency-using-article-15-echr-to-confront-the-coronavirus-pandemic/.

[27] Zsiros, Sandor: "There is definitely a clause' to scrap state of emergency, says Hungary's Justice Minister", Euronews, 2020 https://www.euronews.com/2020/04/02/there-is-definitely-a-clause-to-scrap-state-of-emergency-says-hungary-s-justice-minister.

[28] This has been illustrated, i.e. by the response of the Hungarian government to the mass migration of 2015, in which the government declared a national state of crisis in 2016. Though the physical circumstances, which provoked the state of emergency, are no longer present, the government has continually renewed the national state of crisis.

some degree. However, the suspension of democratic checks and balances is a different matter altogether, cf. the fundamental values enshrined in Article 2 TEU.

4. Mechanisms for Addressing Violations of EU Values

Derogations that are small and limited in scope (largely due to the fact that checks and balances of democracy remain in place), do not necessarily threaten the substance and integrity of the EU. However, the Hungarian response to the COVID-19 pandemic challenged the very autonomy and success of the EU legal order.[29] The rule of law concept is complex and cannot be defined in singular legal terms. Similarly, the matter of enforcing violations of the EU values is not solely legal.[30] A number of mechanisms already exist and will be discussed in the following.

4.1 Political and Legal Mechanisms

4.1.1 Article 7 TEU

The power to enforce the basic values of the EU, as enshrined within Article 2 TEU, lies within Article 7 TEU.[31] The sanctions, which can be employed in accordance with Article 7(3) TEU, are specified by the Council upon their decision to enact them and can relate to any rights deriving from membership of the Union.[32] The possibilities include the suspension of certain political rights

[29] Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". Hague J Rule Law 11, 133–170, 2019.
[30] Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". Hague J Rule Law 11, 133–170, 2019.
[31] The procedure in Article 7 TEU is complemented by a number of other mechanisms established by the European Commission as well as the Council. These function primarily as monitoring mechanisms, which are designed to help early identification of threats to the rule of law within the EU, and likewise to have a preventive effect, but do not allow for the possibility of sanctioning violations.
[32] Besselink, Leonard: "The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives", Oxford Scholarship – Oxford University Press, 2017, p. 130.

within the EU, such as the voting rights of the Member State's representative in the European Council. At first glance, such a reduction in the influence of a Member State seems to have potential as both an appropriate, effective and logical sanction. However, it should be noted, that though this serves as a punishment, it might not actually address the domestic cause of the violation.[33]

Similarly, it is questionable, whether the provision can live up to its inherent potential. The power held within Article 7 is highly political by nature.[34] Activation of the Article 7 procedure requires large majorities within the institutions of the EU, and is therefore often contentious, as such large majorities often are undermined by a tendency of European Parties to protect and support the Prime Ministers within own ranks.[35] None of the institutions conferred with power under Article 7 are judicial by nature, and as such the assessment is not made on basis of legal criteria, but rather of a socio-legal-political nature. If all required majorities are reached, the Council can still decide not to sanction.[36] Thus, the procedure has been broadly criticized as unlikely to result in any actual sanctions, even in case of activation.[37] [38] In light of this, the procedure seems to possess little clout and the actual efficiency of the procedure has yet to reveal itself.

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[33] Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". Hague J Rule Law 11, 133–170, 2019.

[34] Besselink, Leonard: "The Bite, the Bark and the Howl: Article 7 and the Rule of Law Initiatives", Oxford Scholarship – Oxford University Press, 2017, p. 132.

[35] Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" Routledge, 2020, p. 231.

[36] Mader, Oliver: "Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law". Hague J Rule Law 11, 133–170, 2019.

[37] State of the Union Address of 2013 of the former President of the European Commission, Jose Manuel Barroso, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_684

[38] Mos, Martijn: "Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary", Taylor & Francis Online, 2020

4.1.2 Infringement Procedures under Articles 258-260 TFEU

The infringement procedures under Articles 258-260 of the Treaty on the Functioning of the European Union (TFEU) constitute the most established tools, with which Member State compliance with EU law before the Court of Justice of the EU can be secured. The official legal position of the European Commission, as also supported by the European Parliament, is that it is not possible to use the infringement procedures under Article 258-260 TFEU to explicitly protect the fundamental values enshrined in Article 2 TEU.[39] However, it has been argued by some scholars that the European Commission, despite this position, has made use of the infringement procedures to address violations of the European Treaties as well as the Charter; violations which also de facto have conflicted with fundamental values, such as the rule of law.[40] However, unlike the procedure in Article 7 TEU, the infringement procedure is restricted by the fact that it can only be invoked as response to acts or omissions, which have relation to matters that are regulated by EU law. It cannot be used to enforce the values under Article 2 in matters, which are solely national, despite the fact that these may be in conflict with the rule of law, and other fundamental EU values.

4.2 Exclusion

Membership of the EU and thereby compliance with the Treaties, including the values enshrined in Article 2 TEU, is, in its essence, a voluntary matter. On that basis a Member State cannot be coerced into compliance. Similarly, there are no provisions allowing the forceful exclusion of a Member State within the Treaties. A Member State can only leave by free will, cf. Article 50 TEU. As long as remaining within the Union is beneficial, and the sanctioning of a violation of Article 2 TEU is minimal, it is doubtful that a Member State will leave of its own accord, but similarly also doubtful that a Member State will mend its ways.

The activation of an Article 50 procedure requires notification of the European Council of this intention, cf. Article 50(2) TEU. The provision does

[39] Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" Routledge, 2020, p. 230.
[40] Albanesi, Enrico: "The use of the EU infringement procedures to protect de facto the rule of law via development of the parameter" Routledge, 2020, p. 230.

not specify any temporal, formal or material criteria pertaining to this notification. On that basis it can be considered whether repeated violations of the EU values signify a wish no longer to be bound by the Treaties, and in extension thereof, a desire to no longer be a member of the Union.[41] Recognizing such behavior as notification of the intent to leave, would allow the EU to react in accordance with Article 50 TEU, and instigate the two-year period designated for negotiations to make the necessary arrangements for the exit of a Member State. It is, however, unlikely that consistent breaches of the fundamental EU values can be characterized as a sufficient notice of leave. Similarly, a notification of intention to leave is neither definitive nor irrevocable,[42] and it is doubtful that the offending Member State, when confronted with the potential of leaving, should wish to do so. Considering this in light of the highly complicated procedure, which the activation of Article 50 gives rise to, the exclusion or willingly exit of an offending Member State does not seem a likely option.

In summary, violations of the fundamental EU values can primarily be addressed through the activation of Article 7 TEU while cases that lie within the scope of EU law, can be adjudicated before the CJEU. Despite some apparent shortcomings, scholars argue, that when made use of to its fullest extent, and in a prompt, forceful and coordinated manner, the EU system is sufficiently comprehensive to at least contain lapses in conformity with the values under Article 2 TEU, including the rule of law principles,[43] though it is not without room for improvement.[44] Ultimately all factors indicate, that though the EU possesses a number of tools to handle violations of the EU values, it is questionable whether these are adequate, and perhaps more importantly also whether the EU is in possession of the necessary political will and coordination

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[41] Hillion, Christophe: "Poland and Hungary are Withdrawing from the EU", Verfassungsblog, 2020.

[42] C-621/18,Wightman and others, pr. 49, as cited in Hillion's article "Poland and Hungary are withdrawing from the EU".

[43] Pech, Laurent and Kochenov, Dimitry et al., "Strengthening the Rule of Law Within the European Union: Diagnosis, Recommendations, and What to Avoid". RECONNECT Report, 2019.

[44] Pech, Laurent and Kochenov, Dimitry et al., "Strengthening the Rule of Law Within the European Union: Diagnosis, Recommendations, and What to Avoid". RECONNECT Report, 2019.

to make adequate use of these tools. Similarly, experience teaches that democracy or compliance cannot be forced upon an unwilling State.[45] It is therefore relevant to consider the mechanisms that drive the aberrant behavior of offending Member States.

5. Three Emerging Trends

With the present section the article seeks to discuss the implications of the legislative reactions by national parliaments to the COVID-19 pandemic, however, continuously drawing examples from the Hungarian case. This will be done by outlining three different trends in regard to the intergovernmental cooperation in extension of the COVID-19 pandemic. The three trends that will be focused on are: the derogation from international obligations, fragmentation within and decreasing national support for the EU, and an internal debate concerning the EU values.

5.1 Trend: Prioritizing National Security

It is not only in Hungary that extreme measures were introduced to the detriment of basic civil rights and democratic principles. Many countries experienced serious limitations of the public's rights. Such actions can be explained through the theory of securitization, developed by the Copenhagen School of Security Studies.[46] This theory concerns the way by which countries justify their actions and legislative measures in states of emergency, specifically during times of war. The theory offers a constructivist model for distinguishing the process of securitization from that of politicization. Securitization studies aims to understand "who securitizes (securitizing actor), on what issues (threats),

[45] Exemplified in the fact that some countries continuously violate obligations under International Human Rights Instruments in spite of repeated convictions before the adjudicating institutions.

[46] The theory of securitization was developed by Danish professor Ole Wæver in 1993 with Barry Buzan et al.. The Copenhagen School offers a constructivist model for distinguishing the process of securitisation from that of politicisation.

for whom (referent object), why, with what results, and not least, under what conditions."[47]

Victor Orbán turned the matter of public health in Hungary into a matter of national security. By doing so, Orbán and the Hungarian Government, legitimized the possibility of enacting extraordinary measures derogating from "normal" obligations by international conventions in order to secure the functioning of the nation and its people from the outside threat through the sovereign power of the State.[48]

The audience of these "necessary" measures was the public of Hungary, as they were to comply with the emergency laws being implemented. Victor Orbán therefore constructed a situation where the emergency legislation was necessary from an objective point of view for the survival of the nation. The effective success of this move could be attributed to Orbán's position of power in the Hungarian society as well as the global rhetoric regarding the pandemic. Orbán and the Hungarian Government declared, "*fighting against the coronavirus and protecting the Hungarian people is our own common task, and the important decisions must be made by the Parliament and the government.*"[49] This is a clear example of how Orbán seized the opportunity to declare the country at war with the coronavirus[50] ensuring that the crisis appeared to be of such a magnitude[51] that extraordinary measures were needed to protect civil society. The government further sought to justify and legitimize the emergency measures in claiming that other EU Member States have taken similar steps in order to

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[47] Buzan, Barry, Wæver, Ole and de Wilde, Jaap, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998), p. 32.

[48] Buzan, Barry, Wæver, Ole, Kelstrup, Morten and Lemaitre, Pierre: *Identity, Migration and the New Security Order in Europe* (London: Pinter, 1993), chapter. 2.

[49] "Rationale for the law on protecting against the coronavirus", Hungarian Spectrum, 2020 https://hungarianspectrum.org/2020/03/27/rationale-for-the-law-on-protecting-against-the-coronavirus/.

[50] Kovács, Kriszta: "Hungary's Orbánistan: A Complete Arsenal of Emergency Powers", Verfassungsblog, 2020.

[51] It should be noted that the authors do not wish to negate severity of the COVID-19 crisis. However, the crisis cannot de facto be ascribed as a state of armed conflict, and as also explored in the article, comparing the crisis to such is a rhetorical toolemployed in a political context.

handle the crisis.[52] Though this was indeed the case, several other Member States, such as Denmark[53], included a sunset clause, thereby seeking to uphold democratic checks and balances. This constitutes a significant difference, as such a clause is key in enacting democratic values.

According to Wæver[54] it is to be expected that the political response to a crisis of this caliber constitutes a political state of emergency, in which the norms, regulating the relationship between state and individual, cease to apply. Wæver notes that this is not limited to countries such as Hungary. Using Denmark as an example he underlines that this is the case in many countries throughout the world, regardless of whether the country can be considered to have a strong rule of law or not. However, an issue arises, when the state of emergency becomes "the new normal" and is not revoked. Thus, conversely "securitization" does not allow much leeway for the critical opposition to maneuver and secure checks and balances.

This seems to have been exactly the case in Hungary. Several scholars, as previously referred to in this article, have described Orbán as an authoritarian leader, who seized a "convenient" time to silence the critics and consolidate power. This view is based on emergency measures, such as the amendment of the Hungarian Penal Code Section 337 giving 3 years of prison to those distributing "false" information, which, as mentioned earlier, hardly can be considered necessary or proportional. As also stated by Kenneth Roth: "*When independent media is silenced, governments are able to promote self-serving propaganda rather than facts*",[55] clearly recalling why the Hungarian Act, in

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[52] Varga, Judit: "No Power Grab in Hungary", Politico, 2020, https://www.politico.eu/article/coronavirus-hungary-no-power-grab/.

[53] LBK nr 1444 af 01/10/2020, "Bekendtgørelse af lov om foranstaltninger mod smitsomme og andre overførbare sygdomme"

[54] In an interview by Gjerding, Sebastian: "Faren ved undtagelsestilstand er, at den bliver normaltilstand. Men det sker næppe her, mener ekspert". Dagbladet Information, 2020 https://www.information.dk/indland/2020/03/faren-ved-undtagelsestilstand-normaltilstand-sker-naeppe-mener-ekspert.

[55] Roth, Kenneth: "How Authoritarians Are Exploiting the COVID-19 Crisis to Grab Power", Human Rights Watch, 2020 https://www.hrw.org/news/2020/04/03/how-authoritarians-are-exploiting-covid-19-crisis-grab-power.

reference to the Enabling Act by the Nazi-regime in 1933,[56] has been referred to many as the Enabling Act. In light hereof, it seems clear, that the recognition of public willingness to accept great change of circumstances in times of crisis was for Orbán an opportunity to undermine national checks and balances in the seeming pursuit of his own political agenda, while greatly affecting the democratic rule of law.

The trend of securitization also impacts national support to the EU and can result in countries withdrawing from the European community if leaders see withdrawal as a necessary action in protecting national interests including, as in the case of COVD-19, national public health. If the EU fails to act and respond to problems and issues occurring in the respective societies, an opportunist leader, e.g. Orbán, can make use of this as a chance to solidify his autocratic power. In extension thereof, it can be argued that the growing number of crises the EU has encountered since the financial crisis in 2008, has weakened the national trust in the Union, which in turn can be exploited by domestic politicians using securitization as an excuse for solidifying autocratic power. It can therefore be argued that the COVID-19 pandemic created ideal conditions for the perpetuation of a preexisting tendency towards an increased focus on the nation state instead of an intergovernmental cooperation across the EU.

5.2 Trend: Accumulation of Dissonance within the EU as a Socio-Political System

The public support of the authoritarian form of government in countries such as Hungary can be explained by the theory of social conflict and social change by Lewis Coser linking security policy and classic sociology. Through this lens the support of strong leadership as a bulwark against a common threat is strengthened in times of crisis. Similarly, crises create a sense of emergency, and the public expects strong leadership, which empowers the executive branch to gain greater authority at the expense of the legislative branch. This approach is one of the fundamental laws of sociology as a strengthened unity and centralization is often caused by an outer threat. In order to address this

[56] Encyclopaedia Britannica: ”The Enabling Act”, 2018 https://www.britannica.com/topic/Enabling-Act.

(potential) threat state leaders increase their power, thereby centralizing the power to the national government.

According to Coser, changes of a system happen gradually over time, and he compares the changes to the changes of an earthquake; “A stable earth is a dead earth” arguing that systems that are more stretchable can more easily adapt to and address changes or conflicts.[57] Therefore, what appears to be changes of a system (i.e. Hungary moving from a democratic system to an authoritarian system) can be the sum total of changes within the system. However, these changes do not happen overnight or simply as a single response to prohibit the spread of a pandemic. Furthermore, for this strengthened unity to apply, a prior feeling of community and patriotism is required. For this reason the similar public support for authoritarian leadership does not appear in all Member States to the EU. It is interesting to consider the recent reelection of Orbán in light of his approach to the COVID-19 pandemic. According to Coser’s theory, this reelection seems to be a natural result of the need for strong leadership in times of crisis. However, Orbán’s continued popularity within Hungary constitutes a seemingly sharp contrast to the external opinions within the EU, which remain concerned about the precarious state of the rule of law in Hungary.[58]

Every social system needs the allocation of powers to function as a social system rather than anarchy. However, there can never be consensus between groups and individuals within the social system, that such allocation is just and fair. When a social system has institutionalized norms and values to govern the conduct of component actors, such as the EU and its member states, and the access to these goals of society is limited to some members, deviation from the social norms and values is bound to occur.[59] This also applies, when the norms and values are not institutionalized, as the actors will begin to express discontent. The consequence therefore might be a complete denunciation of previous conformity with the institutionalized values and goals, in some cases resulting in

[57] Coser, Lewis A.: ”Social Conflict and the Theory of Social Change”, The British Journal of Sociology, Vol. 8, No. 3, 1957, p. 202.
[58] Verellen, Thomas: ”Hungary’s Lesson for Europe Democracy is Part of Europe’s Constitutional Identity. It Should be Justiciable”, Verfassungsblog, 2022.
[59] Coser, Lewis A.: ”Social Conflict and the Theory of Social Change”, The British Journal of Sociology, Vol. 8, No. 3, 1957, p. 203.

new value systems,[60] as can be observed in the cases of Hungary, Poland and Russia.[61][62]

In conclusion, if the EU as a social system is able to adjust to the COVID-19 crisis, we will only see gradual changes within the system. However, if the EU is not able to stretch and adjust to the occurring issues it will allow for the accumulation of conflict within the system. Actors, such as Hungary, with their new system of values, may threaten to split the consensus of the EU as a whole.[63]

5.3 Trend: Conflicting Values within the EU

Though the Hungarian government may have justified the measures taken in response to COVID-19 as necessary to secure the nation, the response appears to be the continuation of a growing political trajectory, which clearly conflicts with the fundamental values of the EU.

It must be noted that "*the rule of law has progressively become a dominant organizational paradigm of modern constitutional law in all the EU member states*".[64] With this statement Laurent Pech defines the rule of law as shared political ideal of constitutional value, and a principle of great importance for membership of the Union. If the founding values are not respected, the cornerstone of the EU is lost. However, it is of great importance to include domestic and/or supranational interests in the equation to truly understand the actions and principles of the EU.

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[60] Coser, Lewis A.: "Social Conflict and the Theory of Social Change", The British Journal of Sociology, Vol. 8, No. 3, 1957, p. 203.

[61] Pech, Laurent and Scheppele, Kim Lane: "The EU and Poland: Giving Up on the Rule of Law?", Verfassungsblog, 2016.

[62] Dzehtsiarou, Kanstantsin: "Between a Rock and a Hard Place: The Dilemma of Continuing or Ceasing Russian Membership in the Council of Europe", Verfassungsblog, 2016.

[63] R. K. Merton, *Social Theory and Social Structure,* Ope cit., pp. 42-3 and 116-17, as referred to in Coser, "Social Conflict and the Theory of Social Change", p. 204.

[64] Pech, Laurent: The Rule of Law as a Constitutional Principle of the European Union, Jean Monnet Working Paper 04/09, New York University School of Law, 2009, p. 44.

Several European countries have stressed their concern over the apparent Hungarian disregard of the rule of law principle.[65] It has been reiterated that emergency measures should be limited to what is strictly necessary, proportionate and temporary in nature, confirming the guidelines set out by international institutions and further supporting the initiative from the European Commission "*to monitor the application of emergency measures to ensure the fundamental values of the Union are upheld*".[66] Though Hungary was not directly named in the statement, the statement indirectly addressed the controversial provisions of the Act.[67] Furthermore, the President to the Commission of the EU, Ursula von der Leyen stated *"it is of utmost importance that emergency measures are not at the expense of our fundamental principles and values as set out in the Treaties*."[68]

Some scholars argue that the EU is suffering from "illiberalism within".[69] This is underlined in the above case study of the Hungarian response to COVID-19. Similar tendencies have previously become apparent in other (namely eastern) European countries, e.g. during the refugee crisis in 2015 where the "Visegrad countries" strongly opposed a shared quota for allocation of refugees. In connection with the responses to the COVID-19 pandemic, this highlights a much deeper value crisis, illustrating that some European countries may perceive European solidarity as a practice moving only in one direction. Furthermore, such a conflict of values becomes apparent in different approaches concerning abortion legislation, environmental issues as well as financial aid. It

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[65] Diplomatic statement by Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden, published by the Government of the Netherlands. https://www.government.nl/documents/diplomatic-statements/2020/04/01/statement-by-belgium-denmark-finland-france-germany-greece-ireland-italy-luxembourg-the-netherlands-portugal-spain-sweden.

[66] Ibid.

[67] Bayer, Lili: "13 countries "deeply concerned" over rule of law.", Politico, 2020, https://www.politico.eu/article/viktor-orban-hungary-13-countries-deeply-concerned-over-rule-of-law/.

[68] Statement by President von der Leyen on emergency measures in Member States: https://ec.europa.eu/commission/presscorner/detail/en/statement_20_567.

[69] Mos, Martijn: "Ambiguity and interpretive politics in the crisis of European values: evidence from Hungary", Taylor & Francis Online, 2020.

seems that there remains a divide between the mentalities of the countries previously (before 1989) "locked behind the iron curtain" and the "old" western European countries. If this conflict of values continues to escalate, it may result in the breakdown of dialogue and ultimately put the intergovernmental cooperation between the Member States of EU at risk.

It is unquestionable that the EU is facing a considerable challenge, originating from within it's own constituent members. All three trends identified in this section concern national political support to the EU. If these trends continue, it can result in undermining the support for intergovernmental cooperation in Europe, not only by the public but also on a governmental level.

The COVID-19 pandemic has not in itself changed the EU, but rather it has highlighted and reinforced already existing tendencies. This gives rise to concern for the future of the EU. Member States' repeated and seemingly blatant defiance of the Treaties undermines the very purpose of the EU. Continued defiance while still remaining within the EU and with only the limited consequences allowed for by the EU legislative framework greatly weakens the democratic cooperation, agency and effectiveness of the EU, and risks great damage to the legal order, which is established in the Treaties. Likewise, it is conducive to mistrust miscommunication and conflict between the Member States. It is therefore not unfounded to question whether the Union can thrive, and perhaps even if it can survive.

6. Conclusion

The rule of law is fundamental in upholding a democratic society, of which the protection of basic civil and political rights is a primary characteristic. As such the two concepts are inseparable and complementary in a democratic state. A strong rule of law is necessary for the protection of human rights within society, and likewise rule of law cannot exist if human rights are not protected. Therefore, the rule of law acts as a mechanism for the implementation of human rights and protection of democracy, by turning these values from principle into reality.[70] Derogation from democratic principles undermines the very structure

[70] Rule of Law and Human Rights, United Nations, https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/.

protecting the people from autocratic abuse of power and arbitrary limitation or suspension of their civil and political rights. However, by their very nature, such derogations are also more difficult to qualify and remedy.

Overall the COVID-19 pandemic resulted in various responses as regards states of emergency. Particularly, the Hungarian response has raised concerns regarding the emergency legislative measures' conformity with the fundamental EU values as enshrined in the Treaties. On the basis that this emergency legislation de facto had no clearly defined expiry date, the derogations could not be considered proportionate. Thus, they constituted a breach of the international human rights bodies by which Hungary is bound. Similarly, the legislation resulted in a marked shift in power from both the legislative and judiciary branches to the executive branch, of which the temporal scope was also indefinite. The Hungarian response thereby also constituted a suspension of the democratic checks and balances designed to protect the rule of law.

Our analysis sheds light on three emerging trends, which illustrate a more general political trajectory within the EU. Hesitation from the EU to address the derogations of a Member State demonstrates that the mechanisms in place do not constitute a credible threat. This allows for other countries to follow a similar political agenda and such cumulative disregard of fundamental EU values ultimately risks the dismantling of the EU.

Though the Hungarian emergency legislation was reversed in time, the tendency that the legislation is indicative of has not ended. There continues to be a fundamental debate within the EU and we continue to see examples of divergence from EU values. Every crisis we face will test the integrity of the EU and the continuation of the abovementioned trends risks the potential breakdown of cooperation and thereby poses a risk to the function of the EU. However, though problematic, these trends do not necessarily constitute the end of the EU. Instead the COVID-19 crisis may be the very thing that catalyzes a comprehensive response to the growing value crisis by highlighting the need of a shared understanding of the fundamental values, through which the function of the Union can be secured.

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Interview med Lars Bay Larsen, dommer ved EU-Domstolen

Christoffer de Neergaard[*]

Interviewet nedenfor med højesteretsdommer og dommer ved EU-Domstolen Lars Bay Larsen er blevet udarbejdet af daværende stud.jur. Christoffer de Neergaard d. 3. august 2020 til brug for Christoffers specialeafhandling på Københavns Universitet med titlen 'Højesterets retsskabende virksomhed'. Christoffer indleverede specialeafhandlingen på Det Juridiske Fakultet i december 2020 og forsvarede den i januar 2021 til karakteren 12. Christoffers specialevejleder var Mikael Rask Madsen, som er professor i europæisk ret og integration og centerleder for iCourts – Danmarks Grundforskningsfonds Centre of Excellence for Internationale Domstole på Københavns Universitet. Specialeafhandlingens problemformulering lød: 'I hvilket omfang og på hvilke måder udøver Højesteret retsskabende virksomhed?'. For at besvare problemformuleringen fyldestgørende og videnskabeligt opererede Christoffer med fire kernebegreber, nemlig 'retsanvendende virksomhed', 'retsudfyldende virksomhed', 'retsskabende virksomhed' og 'aktivisme', som Christoffer definerede i et afsnit ved navn 'Begrebsafklaring'. Det er årsagen til, at Christoffer bl.a. spurgte Lars Bay Larsen om hans forståelse af de fire begreber. Den fulde specialeafhandling kan rekvireres ved at rette henvendelse til Christoffer.

Interviewet med Lars Bay Larsen er det første af tre, eftersom Christoffer også interviewede højesteretsdommer, dr.jur. Jens Peter Christensen og fhv. kammeradvokat og adjungeret professor Karsten Hagel-Sørensen. De to øvrige interview vil blive bragt i de kommende to numre af Retskraft. De tre interview, der bl.a. vedrører respondenternes syn på Højesterets virkemåde og rolle i det danske samfund, havde til formål at bidrage til specialeafhandlingens retsdogmatiske analyse af Højesterets retsskabende virksomhed. Hvert interview fandt sted ved et

[*] Cand.jur., MJur-studerende ved University of Oxford [cjtdn@gunderslevholm.dk]

> enkelt fysisk møde. Efterfølgende blev interviewene undergivet en omfattende efterbehandling, som havde til formål at sikre en retvisende gengivelse af dem. Interviewene er desuden blevet forsynet med henvisninger til relevant lovgivning, retspraksis og litteratur.

Christoffer de Neergaard: Årsagen til, at jeg gerne ville tale med dig, er, at du – foruden at være dommer ved EU-Domstolen – tillige er højesteretsdommer. Med al sandsynlighed vil det kunne bidrage med et par interessante perspektiver til min specialeafhandling, at du ligeledes er dommer ved EU-Domstolen, da du dermed kender begge domstole indefra. Men det er navnlig din indsigt i Højesteret, som er relevant for min specialeafhandling. Må jeg som det første spørge dig, hvad du forstår ved 'retsanvendelse', 'retsudfyldning', 'retsskabelse' og 'aktivisme'?

Lars Bay Larsen: Arbejdet som dommer, hvad enten det er i Højesteret eller ved EU-Domstolen, handler om at træffe den juridisk rigtige afgørelse i konkrete sager. Når man som dommer skal afgøre en sag, ligger det i situationen, at man er tilbøjelig til at skue mere tilbage end frem, for man ved jo ikke nødvendigvis, hvor man er på vej hen, men man ved principielt altid, hvor man kommer fra, og hvad man i retspraksis har gjort tidligere. Spørgsmålet er med andre ord, hvordan den brik i puslespillet, som man netop skal til at lægge, passer ind i forhold til de brikker, som man og ens kolleger allerede har lagt. Det drejer sig om at finde den rigtige brik i puslespillet her og nu, hvorimod det i betydeligt mindre grad drejer sig om at finde den brik, som man skal lægge tusinde brikker senere. I mine øjne er hverken EU-Domstolen eller Højesteret synderligt begejstrede for at afsige obiter dicta, dvs. udtale sig om mere end det, som en given sag giver anledning til. Jeg forstår dog fuldt ud, hvorfor det kan være fristende, ikke mindst fra et akademisk synspunkt.

En landmand, som har fået til opgave at pløje en mark op, og som med ploven spændt på sin traktor allerede er i fuld færd med pløjningen, kan måske få øje på en anden mark i nærheden. Landmanden er måske ikke blevet bedt om også at pløje den anden mark op. Men han kan måske blive klar over, at den sådan set trænger til det, og det kan også være, at han ved, at han sandsynligvis vil få til opgave at pløje denne mark op en anden dag. Hvis vejret nu fortsat er

godt, og landmanden allerede har haft besværet med at spænde ploven på traktoren, kan han måske blive fristet af også at pløje den næste mark op for dermed at gøre helt rent bord og slippe for at skulle spænde ploven for igen en anden dag. Faren kan dog være, at den anden mark har en lidt anden beskaffenhed end den mark, som landmanden allerede har pløjet op, hvilket landmanden måske ikke rigtigt var blevet varslet om på forhånd. Der viste sig med andre ord at være nogle forhold, som landmanden ikke rigtigt havde tænkt over, mens han pløjede den første mark op. I de tilfælde er det min erfaring, at det er meget bedre for landmanden at vente, til han får den opgave, der utvivlsomt ligger på den anden side af det levende hegn. Det er en fejltagelse, som jeg tror, at mange domstole er kommet til at begå før eller siden. Man giver efter for en trang til at formulere sig lidt bredere, lidt mere generelt og på en måde, så dommens rækkevidde kommer til at gå videre end til de spørgsmål, hvorom parterne har procederet.

Christoffer de Neergaard: Dit smukke billedsprog synes at lægge op til, at dommere bør holde sig til at anvende den ret, som de allerede kender til, frem for at skabe ny ret på et utilstrækkeligt oplyst grundlag, hvis de ikke er helt sikre på, hvordan marken ser ud på den anden side af det levende hegn?

Lars Bay Larsen: Det synes jeg absolut, og det er også det forfatningsretlige udgangspunkt. Dommere er legitimerede til at løse konkrete retstvister, men de har i udgangspunktet ikke noget mandat til at skabe ret, og det er desuden heller ikke deres spidskompetence. I et demokrati som det danske er det de folkevalgte politikere, der har den demokratiske legitimitet til at vedtage love. Det udgangspunkt kan måske variere lidt rundtomkring i Europa, hvilket kan hænge sammen med de enkelte landes historie. Befolkningerne i lande, hvor statsmagten historisk har været repressiv, kan givetvis have en mere begrænset tillid til politiske organer og en større tillid til dommere, hvor risikoen for korruption alt andet lige kan synes mindre. Det oplever vi heldigvis ikke i Danmark, hvor tilliden til demokratiet med rette er stor. Selvfølgelig kan danske politikere også begå fejl, men det gør de som regel ikke, fordi de er ondskabsfulde eller korrumperede. Som altovervejende udgangspunkt forsøger danske politikere at gøre det så godt, som de overhovedet kan.

Christoffer de Neergaard: Så hvis man anerkender den gængse præmis om, at Højesteret som oftest er forholdsvist forsigtig, kan det så skyldes, at det danske samfund historisk har været meget stabilt, og at den demokratiske proces har fungeret tilfredsstillende?

Lars Bay Larsen: Ja, det kan det nok. Det interessante ved Højesteret er, at det er en gammel institution, som har formået at udvikle sig og følge med tiden. Samtidig er det forbløffende, hvor meget arvegods fra de oprindelige instrukser fra enevælden der er bevaret i Højesterets arbejdsmåde. Det afspejles f.eks. i voteringsprotokollerne, der er bevarede for hele perioden fra Højesterets fødsel i 1661 og i et vist omfang også for tiden forinden med Kongens Retterting. De ældre voteringsprotokoller opbevares i dag i Rigsarkivet, men de kan fortsat konsulteres, hvis dommerne i Højesteret måtte have brug for dem til at forberede deres voteringer.

Christoffer de Neergaard: Gjorde du selv brug af ældre voteringsprotokoller i dit arbejde som højesteretsdommer?

Lars Bay Larsen: Ja, det gjorde jeg faktisk. Enkelte gange rekvirerede jeg voteringsprotokoller fra 1800-tallet for at granske ældre sager, som jeg troede kunne være af betydning. Ældre højesteretsdomme er ofte mindre udførligt begrundede, end de er i dag. Derfor kan det være interessant at se, hvad højesteretsdommerne rent faktisk lagde vægt på i deres voteringer – lidt ligesom, når man studerer Folketingets forhandlinger for at forstå, hvad den lovgivende magt lagde vægt på, da den vedtog en given lov. Sommetider forundres man over, at et senere opstået retligt spørgsmål slet ikke har spillet nogen rolle i Folketingets drøftelser.

Christoffer de Neergaard: Måske fordi den lovgivende magt ikke kan forudse enhver tænkelig situation?

Lars Bay Larsen: Ja, jeg mindes den såkaldte blødersag fra 1980'erne og 1990'erne, da hiv kom til Danmark. Dengang foretog man ikke en systematisk

screening og varmebehandling af donorblod, hvilket førte til, at et stort antal blødere blev smittet med hiv. Bløderne rejste derfor erstatningssag mod staten – en sag, som de i alt væsentligt og efter et meget langt sagsforløb endte med at tabe i både landsretten og Højesteret. På et tidspunkt besluttede Folketinget derfor at yde hver af de smittede blødere en kulancemæssig godtgørelse, der ad flere omgange blev forhøjet. Denne ordning var tydeligvis møntet på de omkring 100 hiv-smittede blødere. Der viste sig dog også at være nogle få andre personer, som ligesom bløderne måtte antages at være blevet smittet med hiv gennem behandling med inficeret donorblod, f.eks. ved en blodtransfusion. Spørgsmålet var nu, om de personer, der til forskel fra bløderne ikke var organiseret, skulle anses for omfattet af ordningen om kulancemæssig godtgørelse, selv om ordningen, der var beskrevet i et såkaldt akstykke, efter sin ordlyd kun rettede sig mod bløderne. Spørgsmålet blev i det videre politiske forløb i Folketinget løst således, at de øvrige personer også blev omfattet af ordningen. Havde det ikke været tilfældet, ville spørgsmålet formentlig være blevet indbragt for domstolene.

Christoffer de Neergaard: I sådanne situationer kan der opstå et 'retstomt rum', der kan give anledning til at overveje, hvordan man som dommer bør løse det retlige problem, som den konkrete sag giver anledning til. Synes du, at dommere i sådanne tilfælde bør gøre brug af lidt friere fortolkninger?

Lars Bay Larsen: Som oftest vil Højesteret nok være forsigtig i sådanne situationer, fordi Højesteret mener, at det hverken er Højesterets opgave eller spidskompetence. Men i Højesterets dom om kompensationskrav mellem ugifte samlevende fra 1984[1] kan man muligvis tale om, at Højesteret vovede sig lidt mere frem på banen på baggrund af nogle mere almindelige betragtninger. Sagen bør imidlertid ses i lyset af, at den blev afsagt i en tid med megen diskussion om ugifte samlevende i både den politiske og retsvidenskabelige debat. Det var en tid, hvor ægteskabet var under pres. Men i mine øjne vovede Højesterets flertal sig længere ud på noget, som nogen måske ville opfatte som gyngende grund, hvis jeg kan udtrykke det på den måde.

[1] Højesterets dom af 18. januar 1984 i sag nr 527/1982, gengivet i UfR 1984 166/2 H.

Højesterets to domme i sagen om de islandske håndskrifter er nok også et eksempel på, at Højesterets følte sig kaldet til at gå videre, end man ellers gør.[2] Der var dog tale om en helt séregen situation, som nok også må forstås i lyset af sagens historiske omstændigheder. Sagen opstod nemlig i kølvandet på Islands selvstændighed, først som kongerige i personalunion med Danmark i 1918 og fra 1944 som selvstændig republik. Den 25-års-periode, som var blevet aftalt mellem Danmark og Island i 1918, udløb med udgangen af 1943, dvs. under Anden Verdenskrig, hvor Danmark var besat af Tyskland og stod uden regering. Der var derfor en vis bitterhed i Danmark over, at Island havde ophævet personalunionen med Danmark uden at drøfte det med Danmark. Danmarks officielle holdning blev imidlertid, at man skulle se fremad og reparere de sår, der endnu måtte være. Jeg tror derfor, at Højesterets domme skal ses i det lys.

Christoffer de Neergaard: Men hvordan kan det være, at der ikke er flere domme, hvor Højesteret tilsidesætter den lovgivende magts vurderinger?

Lars Bay Larsen: Du har ret i, at der ud over Tvind-dommen ikke er mange af den slags domme.[3] Det skyldes formentlig dels, at den lovgivende magt som regel gør sig meget umage for at overholde de forfatningsretlige spilleregler. Derudover har vi jo også en grundlov, som ikke vrimler med meget præcise bestemmelser, men som er præget af mere runde og brede formuleringer. Mange af grundlovens bestemmelser er såkaldte løfteparagraffer, der alene fastslår, at visse forhold skal ordnes ved lov, som det f.eks. skete ved retsplejeloven, der først trådte i kraft i 1919, dvs. 70 år efter Junigrundloven. Grundlovens karakter er i mine øjne en af grundene til, at vi har kunnet leve så glimrende med den i så mange år. I flere andre europæiske lande revideres forfatningerne langt hyppigere, fordi de ofte indeholder adskillige bestemmelser, som er mere specifikke end grundlovens.

[2] Højesterets domme af 17. november 1966 i sag nr 107/1966, gengivet i UfR 1967 22 H, og af 18. marts 1971 i sag nr 68/1970, gengivet i UfR 1971 299 H.
[3] Højesterets dom af 19. februar 1999 i sag nr 295/1998, gengivet i UfR 1999 841 H.

Christoffer de Neergaard: Så det forholdsvist lave antal sager om grundloven skyldes formentlig, at grundloven ikke siger så frygteligt meget, snarere end at Højesterets grundlovsfortolkning er for forsigtig?

Lars Bay Larsen: Ja, jeg tror, at grundlovens lidt begrænsede rækkevidde spiller en betydelig rolle. Jeg kan huske, at vi i Justitsministeriet skulle vurdere et lovudkast, der muligvis kunne rejse spørgsmål om grundlovens § 75, stk. 2, hvorefter '[d]en, der ikke selv kan ernære sig eller sine, og hvis forsørgelse ikke påhviler nogen anden, er berettiget til hjælp af det offentlige'. Spørgsmålet var, hvor langt nede barren for sociale ydelser kunne sættes af den lovgivende magt i forhold til grundlovens § 75, stk. 2, der vel foreskriver en vis social minimumsstandard.

Christoffer de Neergaard: Men ville en bestemmelse såsom grundlovens § 75, stk. 2, ikke kunne undergives en mere dynamisk fortolkning af Højesteret som et 'living instrument', der skulle fortolkes i lyset af 'present day conditions', hvis Højesterets fortolkningsstil havde været som Menneskerettighedsdomstolens?

Lars Bay Larsen: Jo bestemt, men her er det værd at overveje, om det ikke er grundlovens fædre, der har været forudseende ved i grundlovens § 75, stk. 2, at indbygge en dynamik i form af en social standard, der ændrer sig over tid i takt med den økonomiske og sociale udvikling, snarere end det er Højesteret, der er aktivistisk.

Christoffer de Neergaard: Men er Højesteret sommetider for forsigtig? Selv om jordlovsdommene efterhånden er temmelig historiske, hævdes det visse steder, at jordlovene *var* i strid med grundloven, og at Højesteret derfor burde have tilsidesat dem. I fæsteafløsningssagen[4] var der endda oprindeligt et flertal på 6-5 for at tilsidesætte fæsteafløsningsloven[5] som grundlovsstridig. Én dommer besluttede sig dog for at ændre sit votum, hvorfor udfaldet blev det modsatte.

[4] Højesterets dom af 18. maj 1921 i sag nr 116/1921, gengivet i UfR 1921 644 H.

[5] Lov nr 373 af 30. juni 1919 om Fæstegodsets Overgang til Selveje m.m.

Lars Bay Larsen: Ja, men det kan forekomme, at man som højesteretsdommer ombestemmer sig undervejs i sagen – og det samme kan i øvrigt også ske ved EU-Domstolen. Efter den formelle votering, der begynder med den i anciennitet yngste dommer og slutter med retsformanden, sætter højesteretsdommerne sig ind i et tilstødende lokale, hvor domsskrivningen finder sted. Domsskrivningen tager som regel udgangspunkt i det udkast til domsbegrundelse, som den førstevoterende dommer har forberedt. Hvis flertallet ønsker en anden løsning på sagen, må der et andet udgangspunkt til. Det er ikke noget særsyn, at en eller flere af dommerne ændrer opfattelse undervejs i domsskrivningen, ja det kan endda hænde, at samtlige dommere ændrer opfattelse og når frem til en løsning, som ingen af dem havde voteret for under den formelle votering. Voteringens formål er jo netop, at man afprøver styrken af sine egne og andres argumenter, og at man derved kollektivt bliver klogere – fordi man er flere, der deltager aktivt og engageret i processen. Man skal naturligvis være i stand til at danne sig sin egen mening om sagen, men man bør også være lydhør over for andres argumenter, ikke bare under parternes procedure, men også under og efter voteringen. Det kan ultimativt indebære, at man må revidere sin egen opfattelse fuldkomment.

Domsskrivningen er mere dynamisk end den formelle votering, men måske også mere kaotisk. Undervejs kan den enkelte dommer som nævnt skifte mening. Det kan ske individuelt, men også kollektivt. Der kan dog også være tilfælde, hvor man ikke er helt overbevist af flertallets resultat, men hvor man mener, at sagen ikke fortjener en dissens, og på den baggrund afstår fra at dissentiere.

Christoffer de Neergaard: Du har også skrevet,[6] at der kan være tilfælde, hvor man afstår fra at dissentiere, fordi man hellere vil have indflydelse på flertallets domsbegrundelse.

Lars Bay Larsen: Ja, i de tilfælde kan flertallet vælge mellem at afsige en dom med dissens eller en énstemmig dom med en lidt mindre vidtrækkende begrundelse. Hvis flertallet vælger at leve med dissensen, er det typisk nødt til omhyggeligt at

[6] Lars Bay Larsen, 'Domsarbejdet i Højesteret og ved EU-Domstolen' i Børge Dahl, Michael Hansen Jensen og Søren Højgaard Mørup (red), *Festskrift til Jens Peter Christensen* (Jurist- og Økonomforbundets Forlag 2016) 859–60.

forklare, hvorfor dissensens argumenter ikke er valide. Det kan sommetider indebære, at 'fronterne trækkes lidt hårdere op', men det kan være fint, hvis sagen fortjener det. Der kan herefter opstå det interessante spørgsmål, om de dommere, der tidligere har dissentieret, bliver bundet af flertallets resultat, eller om de kan fastholde deres tidligere synspunkt i fremtidige sager. Min opfattelse er grundlæggende, at en dissentierende dommer som udgangspunkt må bøje sig for flertallets resultat i fremtiden og acceptere det som åndeligt fælleseje på det pågældende retsområde.

Christoffer de Neergaard: Men kan tankegangen om, at en dissentierende dommer er bundet af tidligere retspraksis, ikke være svær at forene med tankegangen om, at man skal vurdere hver sag for sig på grundlag af de konkrete omstændigheder?

Lars Bay Larsen: Nej, for jeg mener, at man som dommer har pligt til at tage højde for de brikker i puslespillet, som ens forgængere allerede har lagt, når man skal vurdere, hvordan den brik, som man nu skal til at lægge, bedst muligt passer ind i det større billede. Hvis puslespillet så småt begynder at tage form af et skib, flår man ikke puslespillet op og begynder forfra, blot fordi man synes, at det kunne være morsommere at bygge en katedral. Selvfølgelig kan man godt have indflydelse på, hvordan skibet skal tage sig ud, men der skal stadigvæk være tale om et skib, hvis det er dét puslespil, som Højesteret er i færd med at lægge. Derudover er det klart, at almindelig sund fornuft spiller en væsentlig rolle, og hvis man kan se, at noget burde være på en given måde, så kan det jo selvfølgelig også spille ind i de juridiske overvejelser.

Christoffer de Neergaard: Men det er vel for så vidt rimeligt nok, at almindelig sund fornuft også spiller en væsentlig rolle i Højesterets overvejelser?

Lars Bay Larsen: Ja, det er i mine øjne helt efter bogen, og jeg ved, at mange af mine kolleger i Højesteret deler den opfattelse. Hvis ens mavefornemmelse tilsiger, at en sag bør afgøres på en bestemt måde, kan man sommetider stille de juridiske klodser op, så de fører til det resultat. Det kan dog ikke altid lade sig gøre, og så må man nøjes med at bygge den figur, som det juridiske byggesæt

rækker til – også selv om det kan være en anden figur end den, som man havde i tankerne. Det er interessant, hvordan andre landes regler er indrettede. I tilfælde, hvor dansk ret har én måde at regulere et retligt problem på, kan vore nabolande have et helt andet regelsæt, som dog kan 'gradbøjes' lidt nogle gange, så det i praksis kan føre til samme resultat. Slutresultatet kan dermed være det samme, selv om vejen dertil kan sno sig på forskellige måder. Man kan måske sige, at de nationale dommere i sådanne tilfælde sidder med forskellige juridiske byggesæt, men at de alligevel formår at bygge hver deres bro over den samme flod.

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Description of the Situation of the Judiciary in Poland

Bogdan Jędrys*

The following is a presentation given by Judge Bogdan Jędrys at the event 'Retsstaten under pres' (the *rechtsstaat* under pressure), arranged by the legal policy think tank Forsete and the union of Danish jurists and economists Djøf, held at the Danish Parliament on 6 December 2021.

The presentation concerns the situation of the judiciary in Poland vis-à-vis the ongoing rule of law crisis in the country. Considering its thematic relevance for this special issue, as well as its ongoing relevancy to the international legal community, the Editorial Board of Retskraft has decided to publish it in full here.

Structure of my talk

I. Political background that exists behind the current situation of the Polish judiciary.
II. Systemic backslide of the independent judiciary in Poland.
III. Landmark cases of Polish judges persecuted by the Polish current government.
IV. Update on developments in Poland.

* Judge, Krakow Regional Court. Member of Stowarzyszenie Sędziów Polskich Iustitia (Association of Polish Judges Iustitia). For any further information please do not hesitate to contact me under the email address bjedrys@gmail.com, or to visit IUSTITIA's website https://www.iustitia.pl/en/.

I. Political background that exists behind the current situation of the Polish judiciary

The nationalist-populist coalition of political parties led by Law and Justice won fully democratic elections in Poland in 2015.

At that time, a part of Polish society assessed the judiciary as having been ineffective, and judges as inaccessible and devoid of empathy.

Therefore, newly elected Politicians clamour for the reform of the judiciary. On top of that, they claim that this reform should be framed by politicians rather than experts, law professors, judges or members of the society itself. The rationale behind that is that politicians, as elected representatives of society, know better the real wishes of the people around the organisation of the judiciary.

The reform is widely advertised in the pro-governmental media as aimed at improving the efficiency of the judiciary and breaking up an inaccessible judiciary caste.

In reality, however, politicians in order to get more power, are trying to subordinate judges, undermining the rule of law and weakening the authority of independent judges in society.

In the nutshell, Law and Justice, according to sociological research and survey results, has decided to draw political capital from the denial of an independent judiciary and the rule of law.

II. Systemic backslide of the independent judiciary in Poland

Let's take look at this issue in the chronological order

1. In November 2015, the new Parliament amended the Law on the Constitutional Tribunal. In December, the Parliament introduced changes to the Tribunal's procedure - for example by requiring it to hear the majority of cases at full bench and decide by a two-thirds majority, as opposed to a simple majority. The amendment also gave Poland's President and the Minister of Justice the right to open disciplinary proceedings against Tribunal judges.

2. In December 2016, the Parliament adopted a package of new laws on the Constitutional Tribunal, including a new procedure for the election of the President of the Tribunal, authorizing the President of Poland to appoint an 'Acting President', a term not recognized by the Polish Constitution. Also in December 2016, the President of Poland chose to appoint Julia Przyłębska to the post of the President of the Constitutional Tribunal. It worth to mention that Julia Przyłębska has been an ordinary judge who previously had dealt with social insurance cases on first instance level and who has had no jurisprudence and scientific achievements in the field of constitutional law but who does not deny her close social relations with the leader of the ruling party – the Law and Justice political party. Subsequently, the Tribunal was packed with two other people, former members of the Law and Justice party and Members of Parliament. The first one is widely known as the person who keeps on posting homophobic texts online. The second one, used to be a communist prosecutor who accused members of the anti-communist opposition in the 1980s.
3. In March 2016, changes were brought to the Law on the Public Prosecutor's Office which strengthened the competencies of the Minister of Justice. Under the amended law, the function of the Minister of Justice was merged with the Prosecutor General. He can give written instructions to all the public prosecutors concerning the content of any individual case they are dealing with.
4. In August 2017, an amendment to the Law on the System of Common Court entered into force. The law empowered the Minister of Justice to dismiss and appoint presidents and vice-presidents of courts, without requiring that a justification be provided (this was applicable during the first six months since the law came into force). In the period between 12 August 2017 and 12 February 2018, over 70 presidents and 70 vice-presidents of courts had been dismissed under the six-month transitional regime and the same number of new ones were appointed via fax messages from Minister of Justice (we call them 'faxed presidents'). This law also created a new position of Disciplinary Prosecutor/Commissionaire for Common Courts. The post holder and his two deputies are directly appointed by the Minister of Justice for a four-year term. The Disciplinary

Prosecutor also chooses disciplinary prosecutors at the regional and appeal courts. The Disciplinary Prosecutor investigates possible offences of judges pursuant to the request of the Minister of Justice, president of an appeal or district court, college of an appeal or district court, National Council of Judiciary or on his own initiative. The Disciplinary Prosecutor for Common Courts was appointed by the Minister of Justice in June 2018.

5. In December 2017, amendment of the Law on the Supreme Court entered into force in April and July 2018, changing the retirement age of the Supreme Court judges. By lowering the retirement age for Supreme Court judges from 70 to 65 years, it aimed at - among other things - the forced retirement of 27 Supreme Court judges. The law also established two new chambers: the Disciplinary Chamber and the Extraordinary Chamber. The Disciplinary Chamber's members were to be elected by the National Council of the Judiciary and its ‘lay judges’ by members of the Senate.
6. In September 2018, the President of Poland appointed 10 new judges of the Disciplinary Chamber and in February 2019, the President of Poland appointed the heads of the two new chambers. Both new Chambers are widely regarded as unconstitutional since they are not envisaged in the Polish Constitution.
7. In January 2018, an amendment to the Law on the National Council for the Judiciary entered into force. The law gave Parliament the power to appoint the 15 judges that comprise the NCJ. The Polish Constitution, however, expressly limits the number of the members of the NCJ appointed by Parliament to six. On 5 March 2018, Parliament appointed the new NCJ members, 8 of whom are the new presidents or vice-presidents of courts appointed by the Minister of Justice since August 2017. The amendment of the Law on NCJ prematurely terminated the tenure of the previous NCJ members.
8. On 17 September 2018 the Board of the European Network of Councils for the Judiciary the Polish National Council of the Judiciary suspended the Polish NCJ on the grounds that it does not meet the requirements of the ENCJ in the area of independence from the legislature and the executive and thus does not ensure independence for the Polish courts and

judges and subsequently excluded Poland from the membership in the Network on the meeting in Vilnius, in 2021.

III. Landmark cases of Polish judges persecuted by the Polish current government

After having talked about the law let's move on to case study.

Case 1: Fake patriotism

On the 2 July 2021 three former prosecutors appointed by the politicized National Council of the Judiciary and the President of the Republic of Poland to the disputed Disciplinary Chamber of Supreme Court, have made a decision to waive the immunity and suspend the President of the Labour and the Social Security Chamber of the Supreme Court. The formal reasoning behind this decision is the content of the case which the President decided 40 years ago that is before political transformation.

However, it seems obvious that the real goal is to eliminate the President from his duty in order to take over his cases and allocate them to newly appointed quasi judges.

It is worth mentioning here that the suspended President heads the Chamber of the Supreme Court which referred many questions to the Court of Justice of the European Union regarding particularly the observance of the rule of law in Poland. After the President having been suspended it will be easy to withdraw these questions and disregard the Court of Justice of the European Union decisions.

At the same time, as I mentioned above, the former communist prosecutor is promoted to the one of the highest positions in judiciary - judge in the Constitutional Tribunal - for his service to the Law and Justice Party. During the appointment procedure President of the State Duda claims him to be a real patriot.

My take on this case: *Consequently more and more Law and Justice party politicians emphasize patriotism as a main feature of the judge-to-be. However they mistakenly perceive patriotism as a service to the political party tinted with nationalist slogans with no regard to civil rights and the rule of law.*

Case 2: 'Le juge est la bouche de la loi'

On the 14 September 2021, the President of the Regional Court in Warsaw, the Disciplinary Prosecutor for Common Courts at the same time, ordered an immediate interruption of the judicial duties of the member of IUSTITIA judge of the Regional Court in Warsaw and file the request for instigation disciplinary proceedings against the judge.

The reasoning behind this decision is that the judge refused to adjudicate in a panel with a person appointed to the position of a judge with the participation of the neo-NCJ.

The judge who was suspended in the written statements justifying his position referred to a number of legal arguments and court rulings, in particular, he pointed out:

- that the Court of Justice of the European Union in its judgments C-824/18 and C-791/19 argued that that the present National Council of the Judiciary is not an independent body capable of initiating the nomination procedure for judicial position;
- moreover, the European Court of Human Rights in Strasbourg in the case of Reczkowicz v. Poland (application no. 43447/19) argued that in the context of the procedure of the nomination of judges, the National Council of the Judiciary did not provide sufficient guarantees of independence against the legislative and executive authorities.

My take on this case: *Politically affiliated Disciplinary Prosecutor imposes false take on judge as to be just a Montesquieu 'la bouche de la loi', with disregard to the widespread case law of European Courts on 'judicial speech' (see ECtHR cases: Baka v. Hungary [GC], § 165, Wille, § 64, Kudeshkina, § 94 or Di Giovanni and Poyraz).*

Case 3: 'The punishing arm of the party'

Now, I will try to present to you rationale which lays behind the intervention of American Bar Association in Igor Tuleya's case:

Judge Igor Tuleya is a judge in the criminal division of the Regional Court in Warsaw. He has been publicly critical of the Law and Justice government's reforms to the judiciary and has made numerous public statements calling for adherence to the rule of law and preservation of judicial independence.

In December 2017, Judge Tuleya adjudicated a complaint concerning discontinuation of an investigation by the prosecutor's office in a high-profile, politically sensitive case involving the lawfulness of a vote convened by the Speaker of the lower house of Parliament, who was a member of the Law and Justice party. Judge Tuleya allowed media representatives to attend the December 2017 hearing, where, in delivering the justifications for his ruling, he referred to evidence from the preparatory proceedings, including witness testimony.

The prosecutor present at the hearing did not object to the media presence at that time or to Judge Tuleya's reference to the evidence presented in his public decision.

However, in 2018, the deputy disciplinary officer for common court judges launched an investigation into Judge Tuleya's decision to allow journalists access to the proceedings. It was one of seven investigations opened by the deputy disciplinary officer involving Judge Tuleya in 2018 alone. At the same time, he was being repeatedly named and publicly criticized for his decision by PiS party members.

In February 2020, the National Prosecutor's Office sought permission to lift Judge Tuleya's judicial immunity from criminal prosecution in relation to the December 2017 proceedings. The Prosecutor's office alleged that Judge Tuleya failed to fulfill his duties and overstepped his authority by allowing the media to record the December 2017 session. The Disciplinary Chamber considered the request, in a closed hearing, on June 9, 2020 and refused to lift Judge Tuleya's immunity. The Disciplinary Chamber found that Judge Tuleya's decision to permit media recordings 'in no way' constituted overstepping the judge's authority as judicial discretion to admit media to such proceedings is explicitly authorized under statutory law. The Prosecutor's office appealed the June ruling.

On November 18, 2020, the Disciplinary Chamber overturned its first instance decision and granted the prosecutor's motion to waive Judge Tuleya's immunity. It also suspended him from professional duties for an indefinite period and reduced his pay for the duration of the suspension. There is no further appeal within the Polish court system and it appears that Judge Tuleya may now face criminal charges for exercising his judicial discretion during a proceeding in his courtroom.

The decision against Judge Tuleya poses a severe threat to the independence of the judiciary in Poland and undermines his individual rights. An independent judiciary is a core element of a democratic system of government that adheres to the rule of law. A key component of an independent judiciary is the immunity of judges from prosecution for judicial decisions. The National Prosecutor's quest to criminally charge Judge Tuleya – and the Disciplinary Chamber's revocation of his immunity – for a judicial decision made within the scope of his judicial discretion, goes against international and European standards on judicial independence. The numerous disciplinary inquiries and the Disciplinary Chamber's November 18 ruling also signal an escalation in the government's efforts to curb Polish judges' engagement in the public discourse surrounding the reforms and violate Judge Tuleya's freedom of speech. Furthermore, the proceedings before the Disciplinary Chamber concerning lifting Judge Tuleya's immunity do not meet international standards on the right to a fair hearing. The independence and impartiality of the Disciplinary Chamber has been called into question by the European Commission, and due to concerns about its impartiality and independence, the Court of Justice of the European Union suspended the Chamber's disciplinary jurisdiction on April 8, 2020.

Commentary by American Bar Association: *After having monitored the disciplinary proceedings against Judge Igor Tuleya the ABA Center for Human Rights highlights: since regaining power in 2015, the Law and Justice Party (PiS) has passed numerous pieces of legislation affecting Poland's judicial system. These reforms impact the scope of disciplinary liability of judges, the structure of and appointments within the judicial disciplinary system, and the applicable disciplinary procedures. The reforms have faced widespread criticism from international organizations and the European Union as they generally increase opportunities for overt political influence over the judiciary. Unfortunately, these concerns have been borne out in the instant case.*

My short take on this particular case: *Crucial in this case is that the judge has been held accountable for judicial decision rendered during the due legal process which undermines the foundation of an independent judiciary.*

Krakow rebellion

Several weeks ago, 11 judges from the District Court in Krakow stated that they would not adjudicate in panels composed of judges with the opinion of the current National Council of the Judiciary. In the justification, Krakow judges argued inter alia:

- that the Court of Justice of the European Union in its judgments C-824/18 and C-791/19 argued that that the present National Council of the Judiciary is not an independent body capable of initiating the nomination procedure for judicial position;
- moreover, the European Court of Human Rights in Strasbourg in the case of Reczkowicz v. Poland (application no. 43447/19) argued that in the context of the procedure of the nomination of judges, the National Council of the Judiciary did not provide sufficient guarantees of independence against the legislative and executive authorities.

Three judges have already refused to adjudicate in such panels. The President of the Regional Court in Kraków reacted by transferring these third judges to other divisions and filing a motion to institute disciplinary proceedings against these judges due to the refusal to perform the duties of a judge. This retaliatory action will, of course, lead to excessive length in cases heard by these judges so far.

More and more judges from all over Poland declare their support for Krakow judges.

To sum this point up, politically motivated disciplinary cases against judges in Poland concern the following actions of judges:

- public statements about harmful changes in the justice system,
- issuing a ruling based on the application of European law,
- implementation of the CJEU judgment of 19 November 2019 (questioning the status of newly appointed judges).

IV. Update on developments in Poland

Several weeks ago, The Constitutional Tribunal headed by mentioned above Julia Przyłębska handed down decision as follows;

> Article 6 of the Convention ... as far as it includes the Constitutional Tribunal in its definition of a court, is not compatible with the Polish Constitution…

Please do allow me to quote article 6 of the Convention European Convention on Human Rights:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This provision of the Convention is one of the greatest achievements of European legal culture, with the above mentioned decision this achievement was dismantled by a person with basic legal education.

In the end, I would like to tell a short anecdote that illustrates the determination of Polish independent judges.

During one of the demonstrations in Krakow, I had a chat with one of the suspended judges. He told me: You know Bogdan, I am surprised that she have suspended me from my duties, she knows that I run marathons, these real marathons over 40 kilometres and I gave up only once when I broke my leg while running ...

I explained that when he was mentioning the person who suspended him, he referred to the current president of Krakow Regional Court. One of the most trusted people of the Minister of Justice Ziobro, who was a basic level judge having been promoted by Minister Ziobro to this position and appointed as a member of the now excluded from European Network, Polish National Council for the Judiciary, and a big gun in the Polish School of Judiciary and Prosecution.

I would like to finish this short article with the significant words by President Ursula von der Leyen, who made herself clear:

Justice systems across the European Union must be independent and fair. The rights of EU citizens must be guaranteed in the same way, wherever they live in the European Union.

Judge Bogdan Jędrys
Krakow Regional Court
IUSTITIA