From a Community of Law to a Union of Values

Hungary, Poland, and European Constitutionalism

Matteo Bonelli*

A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area - Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015)

C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)

A. Jakab and D. Kochenov (eds.), *The Enforcement of EU Law and Values - Ensuring Member States' Compliance* (Oxford University Press 2017)

Despite the absence of an EU 'capital-C' Constitution, various dimensions of the EU integration process increasingly tend to be described in constitutional terms. These 'constitutional dimensions' of the integration process are not merely a product of academic discussion, but reflect concrete changes in European law and politics and ultimately in the nature of integration itself. In the earlier decades of European integration, the constitutional label was used to describe the construction, thanks to the principles of primacy and direct effect, of a 'federal-type structure',[1] guaranteeing the functioning of the European 'community of law' described by Hallstein.[2] The constitutionalisation story then acquired a second, thicker element in Mancini and Weiler's accounts.[3] Along with the recognition of Community law as 'higher' law in its relationship to national law, the process of constitutionalisation implied that

*PhD Researcher, Faculty of Law, Maastricht University.

[1] E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *The American Journal of International Law* (1981) p. 1.

[2] W. Hallstein, Speech at the University of Padua, March 1962: 'The European Economic Community is a community of law … because it serves to realize the idea of law. The founding treaty, which may not be terminated, forms a kind of a *Constitution* for the Community'.

[3] F.G. Mancini, 'The Making of a Constitution for Europe', 26 *Common Market Law Review* (1989) p. 595; J.H.H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991), p. 2403.

European Constitutional Law Review, 13: 793–816, 2017

doi:10.1017/S1574019617000347

Community institutions were also bound by human rights[4] and the rule of law[5] when they exercised public authority. The process underscored an institutional and organisational commitment to the ideal of constitutionalism.

In the 1990s, another important constitutional dimension of the integration process emerged. After the adoption of the Copenhagen criteria, the European Union began exporting constitutionalism to Central and Eastern Europe. The EU required candidate countries to demonstrate the 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities' and to allow their progress to be monitored in periodic Commission reports. This external dimension forced the EU, at the same time, to reflect on its own commitment to the values of democracy, rule of law, and human rights, in order to at least minimise any accusation of 'double standards'.[6]

Other constitutional dimensions of the integration process are more controversial, however. EU integration has often been presented as a threat to national constitutionalism and to established human rights and rule of law values. The reaction of national supreme and constitutional courts to the adoption of the European Arrest Warrant is perhaps one of the most telling examples of this perceived threat.[7] The controversial measures taken in reaction to the Euro crisis have invited further critique in light of their impact on national social rights,[8] but also because of the effect they have had on the rule of law[9]

[4] ECJ 17 December 1970, Case C-11/70, *Internationale Handelsgesellschaft*.

[5] ECJ 23 April 1986, Case C-294/83, *Les Verts* v *Parliament*.

[6] W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press 2011) discusses the various perspectives: the EU internal perspective, the relationship between the EU and candidate countries, as well as the impact of EU enlargement on national constitutional systems. *See also* B. de Witte, 'The Impact of Enlargement on the Constitution of the European Union', in M. Cremona (ed.), *The Enlargement of the European Union* (Oxford University Press 2003).

[7] As showed in cases ECJ 29 January 2013, Case C-396/11 *Radu*; ECJ 26 February 2013, Case C-399/11, *Melloni*. On *Melloni*: *see* A. Torres Pérez, 'Melloni in Three Acts: From Dialogue to Monologue', 10 *EuConst* (2014) p. 308. Generally, on the European Arrest Warrant and its impact on European and national constitutional values, *see* J. Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles' ", 44 *Common Market Law Review* (2007) p. 9; E. Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); A. Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"', 9 *Vienna Journal of International Constitutional Law* (2015) p. 151.

[8] On the effect on crisis-reforms on national social rights, *see* the contributions in C. Kilpatrick and B. de Witte, 'Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights' Challenges', EUI Working Paper LAW (2014). Even before the crisis, however, the negative impact of EU market integration on national social rights was underlined by the decisions of the ECJ in the *Viking-Laval* saga, *see* ECJ 18 December 2007, Case C-341/05, *Laval*; ECJ 11 December 2007, Case C-438/05, *Viking*.

[9] C. Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts', 35 *Oxford Journal of Legal Studies* (2015) p. 1.

and democracy.[10] The concerns expressed by the German Constitutional Court in its Lisbon Treaty decision on the impact of European integration on national democracies are even more profound. The *Bundesverfassungsgericht* held that political integration in the EU '[can]not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions', posing an ultimate limit on the integration process.[11] As argued by the authors of the first volume reviewed here, this critical view possibly represents 'the dominant understanding of the relationship between European Union Law and national constitutionalism'.[12]

Regardless of the relevance and popularity of this analysis, however, another concurrent perspective is possible. European integration and EU institutions are seen here as upholding constitutionalism against *national* threats, reversing the role of European and national actors. Traditionally, this role was reserved for the Council of Europe, acting first and foremost through the Strasbourg Court's human rights system. Yet the EU today aims to play a role in this respect as well. This fairly recent dimension of European integration has its roots in the Eastern enlargement process and the parallel process of self-reflection that accompanied it.[13] The ambitions of the EU are expressed most clearly in Article 7 TEU.[14] This dimension is constitutional both from the point of view of the Member States and from that of the EU itself, as is made clear by Article 2 TEU, where the same concepts – 'respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities' – are indicated as the founding values of the European project *and* as *common* to the Member States and their constitutional documents.

For almost a decade, however, this dimension of the integration process has rarely garnered institutional or academic attention. One likely reason was the negative outcome of the 'Haider affair' of 2000; the Member States of the EU adopted diplomatic sanctions against Austria in response to the formation of a coalition government including the far-right, xenophobic FPÖ as junior partner. While EU institutions were not directly involved in the imposition of sanctions, the intervention was widely thought of as the failure that presaged the EU's later, more prudent approach. The sanctions were soon removed; the Member States feared both a backlash in their own countries as well as Austrian

[10] E.g. M.A. Wilkinson, 'The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union', 14 *German Law Journal* (2013) p. 527.

[11] BVerfG 30 June 2009, 2 BvE 2/08, para. 249.

[12] A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area - Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015), 'Preface', p. 5.

[13] *See* Sadurski and de Witte, *supra* n. 6.

[14] *See infra* L. Besselink, 'The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives', in Jakab and Kochenov, *infra* n. 19.

counter-measures.[15] In the following years, therefore, the EU was very careful about getting involved in national political conflicts – Brussels had very little to say, for example, about the quality of democracy in Italy under Berlusconi's governments[16] – and was generally reluctant to exercise human rights' oversight outside the scope of EU law, even when there was legitimate reason for concern.[17]

This scenario changed only with the adoption of the new 'Hungarian Basic law' which was approved by the Hungarian Parliament in April 2011 and entered into force in January 2012. The 'constitutional transformation'[18] of Hungary did not go unnoticed. Doubts about the compatibility of the Hungarian constitution with European values soon emerged in the EU legal and political order and, for the first time, the EU was confronted with the possibility of having an 'illiberal regime' within its own ranks. Moreover, the Hungarian case was and is conceptually different from the Austrian case or other past situations in that the alleged breach of EU values was the constitutional text itself. This added a further layer of complexity and created a constitutional conflict between the two orders. A *national constitution* now posed a threat to values both affirmed in the *EU constitution* and revered as the 'foundations' of the Union's structure as well as those of the Member States. The result is that the basic documents of the two constitutional orders lack the elements of commonality required by the European integration process. An informed discussion on how the EU could and should have reacted to this new challenge was very much needed.

The volumes reviewed here[19] not only participate in the debate – they claim to set the tone for the entire discussion[20] by pursuing three fundamental objectives.

[15] On the Haider affair: M. Merlingen, C. Mudde and U. Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions Against Austria', 39 *Journal of Common Market Studies* (2001) p. 59; W. Sadurski 'Adding Bite to a Bark: the Story of Article 7, E.U. Enlargement, and Jorg Haider', 16 *Columbia Journal of European Law* (2010) p. 385. The Austrian case is discussed also in the Jakab and Kochenov volume, *see* K. Lachmayer, 'Questioning the Basic Values – Austria and Jorg Haider', in Jakab and Kochenov, *infra* n. 19.

[16] The Italian case is discussed in F. Hoffmeister, 'Enforcing the EU Charter of Fundamental Rights in Member States: How Far are Rome, Budapest and Bucharest from Brussels?', in von Bogdandy and Sonnevend, *infra* n. 19.

[17] *See* e.g. A. Williams, 'The indifferent gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's invasion of Iraq', 31 *European Law Review* (2006) p. 3.

[18] K. Kovacs and G.A. Toth, 'Hungary's Constitutional Transformation', 7 *EuConst* (2011) p. 183.

[19] A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area - Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015); C. Closa and D. Kochevno (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016); A. Jakab and D. Kochenov (eds.), The Enforcement of EU Law and Values - Ensuring Member States' Compliance (Oxford University Press 2017).

[20] For other relevant contributions to the topic, *see* W. Schroeder (ed.), *Strengthening the Rule of Law in Europe – From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016).

First, they analyse and define the rationale for the EU's intervention in domestic constitutional affairs. Second, they propose (new) methods for the resolution of crises. Finally, they reflect on how this dilemma influences and is influenced by other constitutional dimensions of the integration process. More[21] or less explicitly, the volumes proceed from the Hungarian crisis, which since 2012 has become a major priority for EU legal and political scholars. Further stimulus came from Romania, in particular from its constitutional conflict of the summer of 2012,[22] and perhaps more surprisingly from France's Roma policies under the Sarkozy government.[23] The systemic deficiencies of the Greek asylum system deserve mention in this context too,[24] as well as the failure of several EU Member States to guarantee adequate prisons conditions.[25] Since 2015, the sense of urgency in finding concrete solutions has increased as a result of the widely discussed Polish crisis.[26] These developments show that Hungary is not a unique, isolated case and demand broader reflection beyond the concrete procedures to be deployed by EU institutions. There is a need for more precise determination of the extent of the EU's mandate and the division of responsibilities between institutions. Furthermore, the interplay between this 'new' perspective and the other constitutional dimensions identified in the introduction need to be explored – one does not replace the others, but rather adds a further element of complexity.

These three volumes published between 2015 and 2017 represent the first attempts to systematise the problem and will be a reference point for any future

Since I contributed to one of the chapters of this volume, I have chosen not to include it in my review.

[21] The volume by von Bogdandy and Sonnevend, which begins with six chapters dedicated to two constitutional crises: Hungary and Romania, *see infra*.

[22] The second case-study presented in von Bogdandy and Sonnevend. See *infra*.

[23] M. Dawson and E. Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons From the Roma', 48 *Common Market Law Review* (2011) p. 751.

[24] *See* ECtHR 21 January 2011, Case No. 30696/09, *M.S.S.* v *Belgium and Greece*; ECJ 21 December 2011, Joined Cases C-411 & 493/10, *N.S.* v *Secretary of State for the Home Department*; A. von Bogdandy and M. Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done', 51 *Common Market Law Review* (2014) p. 59.

[25] The ECtHR found systemic deficiencies in Italy (ECtHR 8 January 2013, Case No. 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, *Torreggiani and Others* v *Italy*), Belgium (ECtHR 25 November 2014, Case No. 64682/12 *Vasilescu* v *Belgium*), Bulgaria (ECtHR 27 January 2015, Case Nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 *Neshkov and Others* v *Bulgaria*) and Hungary (ECtHR 10 March 2015, Case Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, *Varga and Others* v *Hungary*).

[26] The three volumes reviewed here, for reasons of time, could not analyse the Polish constitutional crisis in detail. Some general references can, however, be found in A. von Bogdandy, C. Antpöhler and M. Ioannidis, 'Protecting EU Values - Reverse *Solange* and the EU Rule of Law Framework', in Jakab and Kochenov, *supra* n. 19.

discussion on the topic. The importance of the contributions can hardly be overstated, as they successfully combine more 'practical' matters – possible solutions, mechanisms, procedures – with broader theoretical analyses and, in doing so, clearly demonstrate the importance of and need to give effective answers to current challenges for the future of the integration process. Indeed, upholding constitutional values in Hungary, Poland, or Romania not only protects the citizens of those countries; ultimately, it guarantees the legitimacy and effectiveness of the EU project as a whole.

The present review offers a separate overview of each of the three volumes by order of their date of publication. The main focus is not on the concrete proposals advanced by the many contributors – several of them have already been extensively discussed in different contexts[27] – but rather on how the volumes contribute to a grasp of the challenges the EU is facing, while also underlining where the approaches followed by the editors and the contributors diverge. The last section explores future steps the discussion could take.

Von Bogdandy and Sonnevend: setting the scene

The first volume is the only one that explicitly takes a bottom-up approach, analysing the two 'constitutional crises' in Hungary and Romania. Its second part is then dedicated to 'instruments for maintaining constitutionalism' in the European constitutional area which, following the perspective adopted by the editors, comprises the EU as well as the Council of Europe. The last chapters are more theoretical and explore the constitutional conflict in Hungary between the national constitution and the 'European constitution', composed of the EU Treaties, the European Convention of Human Rights, and the 'general principles' of constitutionalism which can be identified through a comparative analysis of the Member States' constitutions. An 'unconstitutional constitution' is now a possibility in Europe, writes Dupré.[28]

The first case discussed in the book – and arguably the clearest example of such a conflict – is the post-2011 constitutional settlement of Hungary. The first three chapters of the volume illustrate the critical profiles of the new Basic Law and show the 'decline of constitutional culture' in the country.[29] The analyses of Solyom[30]

[27] The Reverse Solange doctrine, the systemic infringement procedure and Muller's Copenhagen Commission have been the subjects of several discussions on the *VerfassungsBlog* for Constitutional matters, for example: <http://verfassungsblog.de/category/schwerpunkte/rescue-english/>, visited 12 September 2017.

[28] Dupré (chapter 14) p. 351 ff.

[29] Solyom (chapter 1).

[30] Ibid.

https://doi.org/10.1017/S1574019617000347 Published online by Cambridge University Press

and of Sonnevend, Jakab, and Csink[31] are largely similar. The authors argue that most parts of the new constitutional text are not problematic *per se*, as the language of the Basic Law 'still reflects mainstream European constitutionalism',[32] but certain features make the entire system questionable. In particular, the limitation on the powers of the Constitutional Court, further weakened by Fourth Amendment, conflicts with established European standards.[33] As a result of this transformation the constitution can be used for the fulfilment of political needs and thus lacks stability and reliability; guarantees of fundamental rights have deteriorated; and there is a lack of effective checks and balances.[34] Testimony given by Kim Lane Scheppele before the 'Helsinki Commission'[35] concludes the analysis of the constitutional changes in Hungary in an even more pessimistic and drastic tone.[36] Finally, in Chapter 4 Gabor Polyak analyses another critical aspect of Hungarian institutional reform, namely the Media Laws already adopted in 2010.

The volume continues with two chapters on 'Issues of Constitutionality in Romania', by Bogdan Iancu and Cosmina Tanasoiu. Both contributions underline that the events of Summer 2012[37] are to be read in a broader constitutional context characterised by a weak political and public sphere, a Constitutional Court that struggles to ensure consistency in its case law,[38] a not entirely independent judiciary, and 'rampant' levels of corruption.[39] The case of Romania, the two authors implicitly suggest, is not perfectly comparable to Hungary because of the long-standing deficiencies of the Romanian rule of law system. While Hungary, at least on the face of things, made a successful transition from socialism to liberal democracy, Romania still had outstanding issues in need of resolution when it acceded to the EU. Brussels aimed to address those issues through the Cooperation and Verification Mechanism, critically discussed in Tanasoiu.[40]

In my view, it is questionable whether the two cases should be discussed together under the same label of 'constitutional crises', and it is regrettable that the

[31] Sonnevend, Jakab and Csink (chapter 2).

[32] Ibid., p. 34.

[33] Solyom (chapter 1) p. 21.

[34] Ibid., p. 107.

[35] The US Commission on Security and Cooperation in Europe, which monitors compliance with the commitments undertaken with the Helsinki Final Act and other OSCE documents.

[36] Scheppele (chapter 3). She argues at p. 112 that 'Under cover of constitutional reform, the Fidesz government gave itself a practically unlimited power'.

[37] Iancu (chapter 5) pp. 163-167.

[38] The record of the Court, Iancu (chapter 5) argues, is 'marked … by opportunistic twists and turns in the case law', p. 168.

[39] Tanasoiu (chapter 6) p. 181.

[40] Ibid., pp. 180-181 and 186-188.

volume does not offer a definition of the concept, which could serve to explain its choice of case studies. While the events of summer 2012 were certainly a 'crisis' in a rather general sense, the nature of the each of the cases are different and should arguably elicit different reactions from the European actors. Not all national political crises should be treated as European constitutional crises.

The second part of the volume reflects mainly on the contribution that existing bodies, procedures, and documents could offer in response to the constitutional crises discussed earlier, with the potential addition of the 'Reverse Solange' doctrine advanced by Armin von Bogdandy and others.[41] The analysis begins with Frank Hoffmeister's chapter on the EU Charter of Fundamental Rights and its enforcement in the Member States at both the national and the EU level. The chapter argues that the Charter could also be used in Article 7 actions. In these cases, the document would not be applied directly, but would serve as a 'yardstick' to identify EU human rights standards.[42] Focusing on the Charter, Hoffmeister suggests mainly taking a human rights approach to constitutional crises. *Enforcing* human rights *via* the Charter is thus a way to protect the common values of Article 2 TEU more generally.This approach is shared by the proponents of the 'Reverse Solange' doctrine and more generally by many contributions to the volumes reviewed here.[43] The 'Reverse Solange' doctrine argues for linking (EU) fundamental rights to status of EU citizens, on the basis of the *Zambrano* case law of the Court of Justice.[44] According to von Bogdandy and others, the 'substance of the rights' deriving from EU citizenship[45] should correspond with the 'essence of fundamental rights' guaranteed by Article 2 TEU.[46] Under ordinary circumstances, protection of the substance of EU citizens' rights (and of the essence of fundamental rights) is left to national law, supported if necessary by the European Court of Human Rights. This is the 'Solange' part of the equation: as long as the essence of fundamental rights is generally guaranteed by national authorities the EU does not acquire jurisdiction – this in accordance with the limitations of Article 51 Charter and the national and constitutional identity clause of Article 4(2) TEU. There is therefore a presumption that national authorities comply with Article 2 TEU, but this is only a rebuttable presumption.[47] Solange can be 'reversed' in cases of 'systemic' failure: individuals can then invoke their citizenship rights and EU fundamental rights

[41] A. von Bogdandy and others, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* (2012) p. 489.

[42] Hoffmeister (chapter 7) p. 204.

[43] See chapters 9, 10 and 13.

[44] ECJ 8 March 2011, Case C-34/09, *Zambrano*.

[45] Ibid., para. 42.

[46] von Bogdandy and others (chapter 8) p. 242.

[47] Ibid., p. 246.

even in purely internal situations before domestic courts, with the possibility of triggering the jurisdiction of the Court of Justice via Article 267 TFEU.[48] The Reverse Solange proposal would cover only one of the values of Article 2: human rights.[49] At this stage, therefore, the focus is on human rights as a tool to address constitutional crises in the Member States. The key aim of these contributions is to strengthen or create procedures for human rights protection in the EU that address broader concerns with respect to Member States' commitment to constitutionalism.

To a large extent, the same approach is followed in the chapters dedicated to the Council of Europe system, in particular Grabenwarter and Hofmann. In Chapter 11, Nergeluis analyses a body more directly involved in the two case studies: the Venice Commission. It is argued that Brussels should listen to *Venice* when taking action against backsliding Member States, as the Venice Commission has the required expertise, prestige, and weight needed to counter constitutional crises in Europe.[50]

The last part of the book is more theoretical and considers the rationale behind Europe's intervention in national constitutional law and politics. Hartwig reflects on how national constitutions increasingly claim legitimacy by relying on international standards. This phenomenon is particularly evident in Europe, where the EU and the Council of Europe set standards either directly, or more indirectly by fostering best-practices exchanges between the Member States. In Dupré, this development is reflected in the concept of 'European (un)constitutionality'. In the 'dignity constitutionalism' established by the Lisbon Treaty, which imposes a 'duty of democracy', national constitutions must comply with the standards deriving from European documents, and in particular with European human rights – 'the clearest and easiest criterion of Euro-Constitutionality'.[51] The concept of European constitutionality, Dupré argues, is not merely a doctrinal construction, but a principle that can be *enforced* both in the Council of Europe and in the European Union, although existing sanctions are often not entirely appropriate to the achievement of these objectives.

This first volume is successful in two senses. First, it sheds further light on the constitutional developments in Hungary, and also in Romania – a case that has been little explored in comparison. While there may be some disagreement on whether the situation in Romania should be described as a constitutional crisis, there is no doubt that ten years after accession to the EU its long-standing problems – strengthening the rule of law, fighting corruption, and guaranteeing

[48] Ibid., p. 248.
[49] As acknowledged in von Bogdandy and others (chapter 8) p. 246.
[50] J. Nergelius (chapter 11) p. 308.
[51] Dupré (chapter 14) p. 359.

the independence of the legislature – remain, as noted by both Iancu and Tanasoiu. It will be necessary to reflect upon how European bodies should address those challenges. Second, and even more importantly, the volume achieves the objective expressed in its preface: expressing and more firmly establishing the perspective which sees the EU as a guarantee for constitutionalism in the Member States. It considers the mechanisms and procedures of EU intervention, and the complex questions this raises. This dimension of the integration process is set against the broader landscape of the European constitutional area, which is depicted in an excellent manner by Dupré. In particular, two key contributions to the volume – Hoffmeister, von Bogdandy and others – call for strengthening the protection of fundamental rights within the EU, relying on citizens and national and European institutions. This fundamental rights approach differs from both the dominant understanding within EU institutions which has mainly tended to focus on the 'rule of law', as well as from the second book to be analysed in this review.

Closa and Kochenov: proposing new solutions

The second volume to be reviewed shares the first publication's sense of crisis. 'There is a problem and something needs to be done', the editors write in their introduction.[52] This is the main point of agreement between the various contributors. The core of the book – Part II – is thus dedicated to a set of practical proposals which would, according to their proponents, strengthen the EU's capacity to react to 'rule of law crises' in EU Member States. The volume is not only a collection of concrete proposals, however, but also aims to establish the 'normative foundations' for EU intervention and reflect on the interplay between the different constitutional dimensions.

Part I aims to establish the 'foundations' of EU rule of law oversight. First, it reflects on the *normative reasons* for EU intervention, as illustrated in the chapter by Closa. That author identifies three main arguments: the need to preserve and foster mutual recognition and mutual trust between Member States; the 'all affected' principle, i.e. the idea that democratic and rule of law problems have externalities affecting *all* citizens and Member States throughout the Union; and the principle of consistency between internal and external policies, especially in the context of the enlargement policy.[53] Hillion then explores the *legal* mandate of the EU in protecting and promoting the rule of law. He argues that this mandate is 'strong and multi-layered',[54] despite the current difficulties in exercising it. Hillion believes that the EU mandate can be exercised both through special procedures

[52] Closa and Kochenov (Introduction) p. 1.
[53] Closa (chapter 1) pp. 16-22.
[54] Hillion (chapter 3) p. 81.

(Article 7) and through the ordinary enforcement mechanism of the infringement procedure – even outside the scope of EU law.[55] Bugaric writes from a more practical, concrete perspective and looks at the reasons for the potential activation of Article 7 in Hungary and the previous European intervention in Austria during the Haider affair.

Perhaps slightly out of place in this first part of the volume is the chapter by Gianluigi Palombella on the concept of the rule of law in the EU. On the one hand, the chapter may be seen as a reflection on *what exactly* the EU aims to protect when it takes action in upholding the rule of law. Palombella argues quite critically that it is 'controversial that the problems which arose in France, Hungary and Romania in recent years represent structural failures of the rule of law'.[56] This may be due to the fact that the concept of rule of law in Palombella is 'thinner' than in other contributions to the book. Indeed, it only prescribes *legal* features[57] and does not necessarily require a democratic system. On the other hand, the chapter anticipates Part III of the volume when it identifies the 'deeper problems' making rule of law oversight more controversial and problematic. Palombella wonders whether the fact that EU citizens are perhaps unconvinced of the EU's exemplary observance of the rule of law could undermine the legitimacy and effectiveness of its interventions in Member States. In other words: can EU citizens rely on a rule of law-deficient organisation as a guardian of the rule of law?[58]

The second Part of the book offers seven proposals for reinforcing rule of law oversight. The ideas vary to a quite significant extent and are in some cases even explicitly and intentionally meant as alternative proposals.[59] The editors decided however to present them in an '*à la carte* menu'. It is for the reader to decide which ideas work best – whether separately or in combination. This approach may serve to facilitate further discussion at this stage of the debate, although it would be hard to find explicit criteria for determining the right combination to uphold constitutionalism in the Member States anywhere in this volume. With the exception of Muller's Copenhagen Commission, all proposals take existing instruments, institutions, and documents as a springboard. The idea underlying the entire volume is indeed that the current framework offers adequate tools to

[55] This view will be reflected in the chapter by Scheppele on 'systemic infringement actions, *see infra* p. 11.

[56] Palombella (chapter 2) p. 48.

[57] Ibid., p. 41.

[58] Palombella, however, distinguishes this rule of law caveat from the democratic caveat identified by Weiler (*see infra*) in light of his narrower definition of the Rule of Law as a concept which does not require democracy.

[59] Compare Muller's Copenhagen Commission (chapter 10) with Tuori's proposal to rely on the Venice Commission (chapter 11).

protect the rule of law in the Member States, although some rethinking is needed in order to strengthen them.

The clearest example of such rethinking is Scheppele's idea of a 'systemic infringement action'. This proposal reflects on the shortcomings of the Commission infringement actions in Hungary[60] and envisages bundling separate instances of violation of EU values into a single case in order to prevent what has been defined as 'creative' or 'symbolic' compliance.[61] These actions could be based directly on an infringement of Article 2 TEU, though some alternative doctrinal triggers are offered, including the principle of sincere cooperation. The suspension of structural funding is identified as one of the potential outcomes of a Court ruling that identifies a systemic violation of EU values, either in the context of Article 260 TFEU proceeding, or through a more comprehensive reform of the structural funding system.[62]

The chapters that follow propose softer solutions. Hirsch Ballin reflects on the role of the Member States in the Council and on models of peer review already tested in the Area of Freedom, Security and Justice. The Council 'Rule of Law Dialogue' could therefore be transformed into a more comprehensive peer review scheme, with the main function of *preventing* future crises. As the author himself admits, the proposal would not be a substitute for strong legal and political action in crisis cases.[63] Toggenburg and Grimheden, as well as Scheinin, once again shift the target of analysis to the arena of fundamental rights. Both contributions call for the development of fundamental rights indicators based on the Charter and they suggest assigning a central role for the Fundamental Rights Agency in monitoring whether Member States respect their commitments in the context of a broad Strategic Framework and a 'fundamental rights cycle'.[64]

Like the previous chapters, Jakab's contribution is based on protecting fundamental rights, although it relies on legal mechanisms rather on than monitoring or governance frameworks. Jakab calls for re-interpreting Article 51 of the Charter in order to guarantee full applicability of the Charter even in purely domestic cases. The doctrinal triggers for this interpretation would be Articles 2 and 7 TEU or, alternatively, EU citizenship.[65] The proposal echoes the Reverse Solange approach of the Heidelberg proposal in its reliance on national courts and

[60] Leading to two Court decisions: *see* ECJ 6 November 2012, Case C-286/12, *Commission* v *Hungary* and ECJ 8 April 2014, Case C-288/12, *Commission* v *Hungary*.

[61] A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', 94 *Public Administration* (2016) p. 685.

[62] Scheppele (chapter 5) pp. 125-131.

[63] Hirsch Ballin (chapter 6) p. 146.

[64] Toggenburg and Grimheden (chapter 7) p. 166.

[65] Jakab (chapter 9) p. 195.

preliminary references, but of course would have more radical, federal effects, since the Charter would be applicable in its entirety – and not only the 'essence' of fundamental rights – even under ordinary circumstances. In Reverse Solange, on the other hand, the EU acquires jurisdiction only when there are systemic problems in a Member State.

Next in the list of proposals is Muller's Copenhagen Commission. This can be seen as a bridge between purely legal and essentially political solutions. Muller's attempts to 'locate … an *agent of credible legal-political judgment*' able to evaluate whether a Member States is threatening or violating the 'normative acquis' of the Union.[66] This body, although inspired by the Venice Commission, would be situated within the EU, and some of its functioning rules would differ as well. The Copenhagen Commission would be able to start an investigation on its own and, most significantly, its decisions would be binding on the EU Commission: 'once Copenhagen has spoken, Brussels needs to act',[67] for example adopting financial sanctions or activating Article 7. Tuori on the other hand suggests relying on the Venice Commission, although he acknowledges that the Council of Europe body does not possess any means of enforcement or compliance.[68] It can, however, support the EU Commission in its Rule of Law Framework and plays an important role in identifying the standards of the 'European constitutional heritage'. Significantly, Muller's chapter argues that the Copenhagen Commission would act not only in the name of the 'rule of law', but also to protect 'democracy'. Democracy itself is at stake in Hungary, and the EU would commit a mistake were it to leave to illiberal governments 'the d-word'.[69] This is yet another way to frame the crises discussed here, along with the human rights approach suggested earlier and the rule of law focus favoured by the editors of the second volume.

If the goal of Part II was to demonstrate that the EU possessed adequate mechanisms and the capacity to take action, Part III strikes a more pessimistic tone. Even strengthening and re-inventing legal and political procedures would not be sufficient if the EU failed to address outstanding sociological,[70] socio-legal,[71] and constitutional issues.[72] Here, the various constitutional dimensions cross paths. Blokker criticises the mainly legalistic approach to Member State constitutional crises; this has its roots in the technical approach to the rule of law

[66] Muller (chapter 10) p. 211.
[67] Ibid., p. 217.
[68] Tuori (chapter 11) p. 239.
[69] Muller (chapter 10) p. 224. For a similar approach, Editorial, 'Talking about European Democracy', 13 *EuConst* (2017).
[70] Blokker (chapter 12).
[71] Vachudova (chapter 13).
[72] Kochenov (chapter 14) and Weiler (chapter 15).

that prevailed during the Eastern Enlargement process.[73] If the EU wants to stabilise democracy and the rule of law in the long run, it must profoundly rethink its own understanding of the rule of law, scratching beneath the legal-institutional surface to explore the societal and civic dimensions of constitutionalism. Similar considerations emerge in the analysis of Vachudova, whose goal is to show how the EU needs to improve its leverage – not only in cases such as Hungary where liberal democracy is being dismantled, but also when high-level corruption results in 'state capture'. The Cooperation and Verification mechanism in place for Bulgaria and Romania may offer a model framework for EU efforts to fight corruption, but its effects will remain modest if EU pressure is not coupled with domestic incentives.[74]

Kochenov and Weiler address two 'deficits' of the EU – the rule of law and democratic deficit respectively – and reflect on whether and if so how they influence the EU's capacity to respond to national threats to the same values. Kochenov proceeds from Palombella's conception of the rule of law as 'an institutional ideal concerning the law': law – the *gubernaculum* – is controlled by other positive law located beyond the reach of sovereign power – the *jurisdictio*.[75] According to Kochenov, however, the EU's legal system is 'pure *gubernaculum*'[76] and lacks the element of *jurisdictio*. The EU's 'rule of law problem' is therefore not just a lack of mechanisms to operationalise it; there is a broader '*design problem*'.[77] The consequence of these weaknesses in EU design and conception of the rule of law may be paradoxical: enforcing a formalistic understanding of the rule of law could actually threaten constitutionalism and human rights in the 'good' Member States. Reference is made in particular to the impact of mutual recognition schemes on national protection of human rights. It is therefore the EU's own conception of the rule of law that should be discussed and tackled, Kochenov argues, even more than the actual enforcement of the rule of law.[78]

Weiler's epilogue consists of two main arguments. First, Weiler criticises the framing of possible state violations of EU values exclusively in terms of the 'rule of law'. The crisis is (also) about the 'nature and content of European Democracy', and any separation of the two is untenable in the long run.[79]

[73] Blokker (chapter 12) p. 254. *See* more generally P. Blokker, *New Democracies in Crises* (Routledge 2013).

[74] Vachudova (chapter 13) p. 283.

[75] Palombella (chapter 2). *See also* G. Palombella, 'The Rule of Law as an Institutional Idea', in G. Palombella and L. Morlino, *Rule of Law and Democracy: Internal and External Issues* (Brill 2010).

[76] Kochenov (chapter 14) p. 291.

[77] Ibid., pp. 294-295.

[78] Ibid., p. 312.

[79] Weiler (epilogue) p. 314: 'Democracy and human rights … are part of the ontology of the Rule of Law'.

If this is true, however, the quality of the EU's own democratic system comes under review. In the second part of the contribution, Weiler therefore reflects on the EU's democratic deficit and in particular on its 'Political Deficit'.[80] The persistence of this deficit, however, does not imply that the EU should refrain from taking action on gross violations of its values but rather that it should not neglect to address its own democratic problems while doing so.[81]

The tone of this final part of the volume is thus more pessimistic than the previous contributions, which aimed to find possible solutions *within the current constitutional framework*. The conclusion not only adds a series of conceptual issues which must be addressed by the EU if action is to be effective, but also suggests that it will take time; profound reforms of the EU's own constitutional structure will be necessary before those problems can be resolved. The way such reforms should be carried out and successfully achieved is, however, not spelled out. Although – according to the editors – these 'deeper problems' will not 'undermine the potential workability of the proposals'[82] as long as the concerns identified by Weiler and Kochenov are taken seriously, the possibility of effective and legitimate EU action may seem rather limited at this stage. On the contrary, Muller forcefully argues that EU interventions cannot be postponed until it resolves its own deficits. Priority must be given to responding to cases of constitutional capture. The 'profound rethinking' of how those values are to be understood and realised at the supranational level should not impede intervention in Hungary or in any similar case.[83]

It is hard not to share Muller's sense of urgency. The same call for adequate response was made in the editors' introduction. Nonetheless, the sober tone of the conclusion is to be appreciated. The EU will not be able – certainly in the long term and possibly even in the short term – to uphold constitutional values in the Member States if it cannot provide answers to the deeper problems identified in Part III of the volume. For it to be effective, national actors must perceive EU action as something both positive and legitimate. Any rule of law or democratic deficit will thus undermine the effectiveness of EU intervention vis-à-vis the Member States. Therefore, combining the various constitutional dimensions into a coherent constitutional project is a task both urgent and extremely complex. In this sense, the volume leaves many questions unanswered: which of the instruments presented in Part II is to be preferred? How exactly can the EU

[80] Ibid., p. 322.

[81] 'Those living in glass houses should be careful when throwing stones', Weiler concludes ibid., p. 326.

[82] Closa and Kochenov (Introduction) p. 5.

[83] Muller (chapter 10) p. 210.

address its own rule of law and democratic deficits while incorporating not only politico-institutional features but also while taking sociological 'supporting circumstances' into account?[84]

Jakab and Kochenov: the values and the acquis

The final volume reviewed here approaches the topic from a rather different perspective. The question of how to uphold EU constitutionalism in the Member States is analysed through the lens of 'EU enforcement'. Part II of the volume therefore merges a set of traditional mechanisms for the enforcement of the acquis[85] with existing[86] and proposed[87] mechanisms for the enforcement of EU values. In addition, the volume contains a series of comparative contributions on enforcement in federal systems and international organisations, and case studies on 'defiance' in EU Member States. It would be impossible to do justice to each contribution in this review, which will instead focus mainly on the pieces on the *enforcement* of values.

However, it should be acknowledged that several chapters are extremely valuable and informative in their own right. The contributions on EU law enforcement in Part II are remarkable for their critical reflection on how to improve the efficacy of the mechanisms and how to address new challenges in EU law enforcement.[88] What is missing, however, is a more direct connection between these procedures and the other matter of enforcing EU values.[89] Part III offers a comparative survey of enforcement mechanisms in federal systems[90] and international law.[91] Underlying this overview is the classic debate on the nature of the EU as a federal or international entity. Should the EU be inspired by federal systems, despite the fact that it still lacks any direct means of intervention that for

[84] Blokker (chapter 12).

[85] Infringement proceedings: Gormley (chapter 4); financial penalties: Wenneras (chapter 5); preliminary references: Broberg (chapter 5).

[86] Besselink (chapter 8).

[87] von Bogdandy, Antpöhler and Ioannidis (chapter 12); Muller (chapter 13); Jakab (chapter 14).

[88] Economic and Monetary Union in Amtenbrink and Repasi (chapter 9); soft law in Stefan (chapter 11).

[89] The exception is Gormley's chapter on infringement proceedings, which reflects on Scheppele's proposal for systemic actions based on Art. 2 TEU. Ultimately, however, it seems to consider this unrealistic in light of the difficulty in identifying clear obligations the violation of which could be sanctioned by the Court: *see* Gormley (chapter 4) p. 78.

[90] Germany – Hanschel (chapter 15); Belgium – Romainville and Verdussen (chapter 16); Spain – Lopez-Basaguren (chapter 17); and the United States (chapter 18).

[91] The European Court of Human Rights – Lambert Abedelgawad (chapter 19); the WTO – Tancredi (chapter 20); the UN Security Council – Couzigou (chapter 21); and regional organizations – Closa (chapter 22).

example the United States has?[92] Or, on the contrary, would enforcement of democratic requirements in regional organisations offer a valuable model for the EU, regardless of the purely political-diplomatic nature of those mechanisms?[93] The volume unfortunately only presents the experiences of international organisations and federal states, but does not reflect on how the two models could be a source of inspiration for the EU system.

The final part of the book is dedicated to a series of case studies. The key, common concept is 'defiance'; after all, not every case can be described as an enforcement problem. Defiance cases are comprised of several challenges to EU norms and authority, but the situations covered differ so much that it is hard to understand what warrants discussing them within the same framework. In three cases – the German Constitutional Court,[94] the empty chair crisis precipitated by France,[95] and the pre-Brexit United Kingdom[96] – defiance (if the cases can indeed be classified as such) is ultimately considered relatively unproblematic, a question which did not warrant a direct reaction from the EU institutions. More controversial are the other three situations: the Haider affair in Austria,[97] the constitutional transformation of Hungary[98] and the enforcement of EU law (and values) in 'weak' Member States.[99] This last chapter is of great interest, as it shows another instance of a rule of law problem in an EU Member State – not due to ideological challenges *à la Orban*, but rather to more structural problems and institutional weaknesses, broadening the spectrum of defiance in the EU.

Yet, despite the extremely broad range of subjects discussed in the volume, at its core are the chapters dedicated to the *enforcement* of EU values. The entire project proceeds from the notion of the 'apparent inability of the Union to be effective in ensuring that all its Member States comply with the principles and values underlying the integration process'.[100] This introduction makes clear that the goal of the volume is similar to the other two analysed here, but the twist proposed by Jakab and Kochenov is to approach the problem from a more strictly *legal* perspective, contrasting the success of the EU in enforcing traditional EU law with the 'failure of the law as it stands to capture the essence of the problem at hand and

[92] Including the federalisation and deployment of the National Guard, as happened during the desegregation crisis in the 1960s: *see* Tushnet (chapter 18) p. 324.
[93] Closa (chapter 22).
[94] Mayer (chapter 23).
[95] Ziller (chapter 24).
[96] Lazowski (chapter 28).
[97] Lachmayer (chapter 25).
[98] Szente (chapter 26).
[99] Ioannidis (chapter 28).
[100] Jakab-Kochenov (Introductory remarks) p. 1.

offer workable solutions to it'.[101] Even the correct enforcement of the acquis, of EU law, cannot automatically bring about respect for the values. It is therefore necessary to reflect on how to enforce values directly. The theoretical backdrop for adopting a broader view of enforcement and compliance is offered by the first part of the volume and in particular by Kochenov's chapter.

The starting point of that contribution is a critique of the traditional studies on the enforcement of EU law, which have largely tended to disregard the question of how to guarantee the values of Article 2 TEU. The compatibility of Member State systems with EU constitutionalism could, for many years, simply be presumed or at best guaranteed through the enforcement of the acquis.[102] Current events, however, show that this presumption is not justified and therefore call for further reflection on how to guarantee respect for EU values in the Member States, and for strengthening EU mechanisms. Moreover, Kochenov warns that enforcement of the acquis could even be 'dangerous' if countries are not fully compliant with EU values: mutual trust obligations may prevent states from exercising fundamental rights review even when there is a risk of a potential individual rights breach.[103] This diagnosis seems to be largely correct and is shared by nearly all contributors to the three volumes reviewed here, as well as being expressed in the introduction to this review itself.

It is, however, the suggested treatment that is most controversial. Kochenov proposes 'bring[ing] the values closer to the acquis', thus expanding the study of EU law enforcement to include the 'enforcement' of *values*. Two arguments are presented in support of this view. First, he considers the values to be actually *principles* and, therefore, enforceable norms. Second, he focuses on Article 2 TEU itself, arguing that it has a 'clearly enforceable nature'[104] and therefore can be enforced not only through Article 7, but also by traditional means.[105]

I would argue, however, that the matter is not this straightforward. It is at least debatable whether from a philosophical point of view (in particular for concepts such as liberty and democracy), several of the concepts mentioned in Article 2 are 'values' or 'principles'.[106] But the qualification may not make much of a difference

[101] Ibid., pp. 1-2.

[102] Kochenov (chapter 1) p. 11.

[103] Ibid., p. 26. Here the implicit reference is to the (in)famous para. 192 of ECJ 18 December 2014, *Opinion 2/13* where the Court held that under mutual recognition schemes Member States 'may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU' in applying the presumption of fundamental rights' compliance at the basis of mutual trust.

[104] Kochenov (chapter 1) p. 11.

[105] *See* Hillion, Scheppele, in Closa and Kochenov, *supra* n. 19, for similar arguments.

[106] On the distinction between principles and values, *see* J. Habermas, *Between Facts and Norms – Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

in practice because, even if they were to be considered principles, it would remain extremely difficult to identify concrete standards for their enforcement – especially their judicial enforcement. More profoundly, the challenges faced by the EU when upholding constitutionalism in the Member States seem to be of a wholly different nature than the challenges arising from the enforcement of competition law or state aid, for example. There is no common, central conception to be enforced on the 'periphery'. The exercise is subtler. The EU must uphold the common core of Article 2 values, but must at the same time respect the particular way in which that value is realised at the national level – in other words, respect the national and constitutional identity of the Member State as guaranteed by Article 4(2) TEU. Kochenov himself acknowledges that a technical enforcement approach would not resolve the issues confronting the EU. As argued in the previous volume, 'presenting the current rule of law-related problems which the Union addresses as *enforcement* problems … most likely falls short of achieving its aims' and does not promote finding concrete solutions to the Union's rule of law crisis.[107] Moreover, he adds that compliance with values does not simply mean 'correspondence of behaviour with legal rules', quoting Kingsbury.[108] It needs to reconnect with the meaning of justice the EU constitutional system intends to uphold.[109] So, while it is of fundamental importance that compliance with Article 2 values is not simply presumed, as Kochenov argues, it is appropriate not to conflate the questions of respect for EU law and respect for EU values. Doing so makes it more difficult to perceive the political and constitutional[110] dimensions of the complex exercise demanded of the EU, which was so well portrayed in the last part of the Closa – Kochenov volume. Indeed, *oversight*[111] may be a more accurate term than *enforcement*.[112]

The following chapters by Itzcovich and Avbelj confirm, in my view, that the two exercises are distinct from each other. 'The expression "enforcement of values" may strike … as somewhat obscure and problematic', Itzcovich argues.[113] It is only by issuing concrete laws that values can be imposed on a community, whereas the concept of rule of law makes any 'direct enforcement of values' not permissible.[114] In other words, EU and national institutions 'cannot and should

[107] Kochenov, in Closa and Kochenov, *supra* n. 18, p. 294.

[108] B. Kingsburg, 'The Concept of Compliance as a Function of Competing Conceptions of International Law', 19 *Michigan Journal of International Law* (1998) p. 345.

[109] Kochenov (chapter 1) p. 27. *See in general* D. Kochenov, G. de Burca and A. Williams, *Europe's Justice Deficit?* (Hart Publishing 2015).

[110] On which *see* Besselink (chapter 8).

[111] Closa and Kochenov, *supra* n. 18.

[112] Jakab and Kochenov, *supra* n. 18.

[113] Itzcovich (chapter 2) p. 28.

[114] Ibid.

not enforce non-legally binding moral values'.[115] Even while accepting that Article 2 proclaims values of a different kind – legally binding, constitutional rather than moral – Itzcovich shows how presenting the question of respect for these values in terms of enforcement may not be the most appropriate way to approach the challenges facing the EU. The pluralist perspective[116] adopted by Avbelj also challenges whether it is possible to truly talk of 'enforcement of values' in the same sense implied by the concept of enforcement of EU law. According to Avbelj, what is required of EU institutions is not, or at least not primarily, a legal exercise. He concludes that the 'values and objectives of Article 2 TEU … can never be restored through the courts, neither national nor supranational'.[117] The nature of EU intervention is different; it requires the strengthening of the endogenous commitment to pluralism of national civil societies, but by using different tools: legal, but also (and perhaps mainly) political and societal. This is certainly not enforcement in the classical sense.

The multi-faceted nature of the challenge is also evident in most of the contributions in Part II, which explores the existing and proposed mechanisms intended to guarantee the rule of law and other EU values. The only exception is Jakab's chapter on application of the Charter in purely domestic cases,[118] which largely reproduces the arguments presented in Closa – Kochenov. Jakab is the only author to propose a purely legal approach, while all others acknowledge the need to combine legal and political instruments. In von Bogdandy and others, the 'Reverse Solange' doctrine would be complemented by a 'Systemic Deficiency Committee'.[119] While the former would focus on fundamental rights' protection, the latter would have as its main responsibility guaranteeing democracy and the rule of law. The committee would be in charge of monitoring Member States' compliance with *all* values of Article 2 and it could issue a public report in the event of a systemic threat. The Commission would then be required to trigger activation of the Rule of Law Framework, thus complementing any potential judicial action (including actions based on the Reverse Solange doctrine). The proposal shares some obvious similarities with Muller's Copenhagen Commission, reiterated and further developed in Chapter 13.[120]

[115] Ibid., p. 29.
[116] Avbelj (chapter 3) pp. 45-49.
[117] Ibid., p. 59.
[118] Jakab (chapter 14).
[119] von Bogdandy, Antpöhler and Ioannidis (chapter 12).
[120] Muller (chapter 13). There are two main differences, however: in Muller's construction, a negative assessment by the Copenhagen Commission would lead directly to the imposition of sanctions on the 'guilty' Member State, while the Systemic Deficiency Committee would not have direct or indirect sanctioning powers; second, the Committee would be created within the

Finally, Leonard Besselink's chapter looks back at certain essential elements of the system: the procedures of Article 7 TEU and the question of 'boundaries' between the constitutional orders of the EU and the Member States. His contribution reflects upon the 'legal possibilities' offered by Article 7, still relatively unexplored, and on the rule of law initiatives of the Commission and the Council. According to Besselink, the latter should be seen as an integral part of the Article 7 system rather than outside it.[121] But the focal point of his piece is the politically and constitutionally sensitive nature of the challenges ahead. It must be recalled that Article 7 is a peculiar, even unique, provision in the EU system, because it empowers EU institutions to act outside the scope of EU law *stricto sensu* in order to protect those values 'which are the basis of the exercise of *all* public authority'[122] in the European constitutional area, and form the 'common constitutional identity' of both the Union and the Member States'.[123] This dual political and constitutional nature of Articles 2 and 7 TEU implies that guaranteeing these common values cannot be left exclusively to the courts or to bodies that cannot be held democratically accountable. It would be wrong, or plainly impossible, to address the question only from a legal-technical perspective.

In conclusion, there is no doubt that the Jakab-Kochenov volume makes a significant contribution to the ongoing discussion. It demonstrates the urgent need to find solutions for the values crises in EU Member States by both exploring existing mechanisms and proposing new ones. Adopting a broader (and in some cases perhaps even too broad: Brexit, the empty chair crisis, the German Constitutional Court) spectrum of defiance that extends to cases in which non-compliance with EU law and/or values is caused by institutional weakness or systemic corruption, is another important step in the discourse. It allows cases such as Romania to be dealt with more convincingly than with the relatively vague concept of 'constitutional crises' adopted in the first volume reviewed here. I am not entirely convinced, however, that 'enforcement of values' is the best approach. It runs the risk of undermining the peculiarity and constitutional sensitivity – so well presented by Besselink – of the exercise. There is of course some interplay between enforcing the acquis and upholding values. When values are translated into concrete EU law provisions,[124] enforcing the acquis also helps safeguard them. But this approach may lead to the prioritisation of the legal-procedural over the political-constitutional dimension. Depoliticisation is simply not an option when it comes to protecting democracy, or the rule of law. Rather, it should be

Commission as an expert group and would not require treaty revision. Unanimity under Art. 352 TFEU would still be required, however.

[121] Besselink (chapter 8) pp. 128 and 138-140.

[122] Ibid., p. 141.

[123] Ibid., p. 142.

[124] The EU's non-discrimination Directives may be the clearest example of this phenomenon.

https://doi.org/10.1017/S1574019617000347 Published online by Cambridge University Press

possible to combine legal and political methods, as suggested by von Bogdandy and his colleagues; but also in Muller, where the Copenhagen Commission would exercise 'legal-political judgment'. It should be noted, however, that this sensitivity is pointed out in several chapters of the volume, signalling that the precise calibration of the EU's response to values' crises is still open for discussion.

The Polish crisis and future questions

While writing this book review, the Polish constitutional crisis grew even more acute due to the approval by the ruling majority of the widely contested judiciary laws that strengthened the government's control over the National Council of the Judiciary, the Supreme Court and local courts. The EU Commission stepped up its pressure by explicitly threatening use of Article 7, and there were mass demonstrations in the streets of Warsaw. On 25 July 2017, President of the Republic Duda vetoed two of the three bills. The following day the Commission decided to adopt a third rule of law recommendation in the context of the Rule of Law Framework and announced an infringement action concerning the law on local courts.[125] The Polish events illustrate even more clearly the urgency of the discussion furthered by the three volumes reviewed here. Their highly relevant and timely analyses and proposals will provide a frame of reference for academics and policy-makers for years to come.

This sense of urgency, while almost certainly unavoidable, makes the analysis even more complex. There is a risk of conflating several questions. First, we are reflecting at the same time on how EU institutions (and also the Council of Europe and national bodies) should react to *current* challenges – a question mainly of procedures, mechanisms, and institutional responsibilities – and on how the constitutional framework should be strengthened in the medium-long run to *prevent* and if necessary address *future* threats. While the first is mostly a matter of strategy, the latter is a question of institutional design. In a similar fashion, it is still unclear *what* exactly the EU is aiming to *protect*: human rights,[126] the rule of law,[127] democracy,[128] or ultimately (EU) constitutionalism as a form of exercise of public authority requiring respect for all three of those values.[129] It is not surprising that proposals to strengthen fundamental rights' protection seem more

[125] European Commission, Press Release - European Commission acts to preserve the rule of law in Poland, Brussels, 26 July 2017, Doc. IP/17/2161.

[126] Approach followed in: the Reverse Solange doctrine; enforcement of the Charter by EU institutions (Hoffmeister), or national courts (Jakab); development of fundamental rights indicators (Toggenburg and Grimheden; Scheinin).

[127] *See* for example Scheppele and Hirsch Ballin.

[128] Muller.

[129] Besselink.

https://doi.org/10.1017/S1574019617000347 Published online by Cambridge University Press

geared to the short term – something to be done now, immediately – while the other suggestions are better suited to the medium-long term.

Moreover, there is some risk of overstating what the EU and EU law can actually accomplish. Do EU institutions truly have the capacity to rescue national democracies and rule of law systems? To what extent can outsiders help resolve domestic political and constitutional conflicts?[130] The need to provide concrete answers to problems in the real world has to some extent obfuscated the theoretical background of the questions. The focus on institutions and legal procedures could also cause the role of political actors both in the Member States in crisis and in Europe at large to be underestimated. It should not be forgotten that decision-making in Article 7 TEU rests in the hands of political actors, the European Parliament and the Council or the European Council. Action or inaction of EU institutions depends therefore to a great extent on political considerations. It would be impossible to understand the careful approach of the EU vis-à-vis Hungary, for example, without taking into consideration how the European People's Party has often shielded Fidesz and Viktor Orban from European criticism.[131] This may not be desirable, especially from a lawyer's perspective, but ultimately the constitutional framework itself (once again, witness Article 7) leaves room for the political game as a matter of European constitutionalism. This political dimension is only implicitly present in the volumes reviewed here and is often considered a barrier to the effective protection of the common values. Even in federal systems, however, upholding constitutional values is not always a purely legal matter, but instead an 'essentially political question', as repeatedly held by the US Supreme Court with reference to the 'guarantee clause' of Article IV Section 4.[132] How to combine legal and political responses therefore remains a question that will need to be addressed in further studies.

In conclusion, the most valuable contribution made by these volumes is that they shed light on yet another constitutional dimension of the EU integration process. The question they discuss is controversial and complex because it reaches deep into the nature of the European project. In the dialogue between EU institutions on the one hand – with the Commission at the forefront – and the Hungarian and Polish governments on the other, two different views of the nature of European integration emerge. Those national governments still regard the EU mainly as a community of economic interests: the single market is the core of what the EU is and should be, while national governments should be free from any EU

[130] See also E.K. Jenne and C. Mudde, 'Hungary's Illiberal Turn: Can Outsiders Help?', 23 *Journal of Democracy* (2012) p. 147.

[131] As analysed in R.D. Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union', 52 *Government and Opposition* (2016).

[132] US Supreme Court, *Luther v Borden* 48 U.S. 1 (1849) and *Baker v Carr* 369 U.S. 186 (1962).

scrutiny when they act outside the scope of EU law. The competing vision offered by the Commission is that the EU is a union or community of 'values': a political rather than an economic project. The proponents of this view argue that while the single market remains a crucial Union policy, the rule of law and other grand ideals of peace, justice, and human rights are the EU's DNA.[133] The rule of law (and other EU values) '[is] part of where we come from and where we need to go',[134] in the words of Commission Vice-President in charge of the Charter of Fundamental Rights and the Rule of Law, Frans Timmermans. It is the rule of law 'that makes us what we are' and not the internal market, one might add.

The clash between EU and national actors could therefore end up being potentially more profound – and more difficult to reconcile – than any specific differences of opinion on the composition or functioning of a Member State's constitutional court. It is true that various policy elements can be combined, as recent discussion on strengthening political conditionality in structural funds suggests. But ultimately Member States' commitment to constitutionalism and to the common European values cannot be a matter of economic advantage alone. The constitutional crises in Hungary and Poland demonstrate – quite starkly – the failure of enlargement conditionality to ensure long-term democratic stability if society and the political class do not share a fundamental commitment to the basic values of the project. Herein, I believe, lies the difference between a 'community of interests' and a 'union of values'. The clash between the two perspectives is at the centre of discussion on which direction the integration process should take, and finds one of its clearest manifestations in the constitutional crises discussed in this review. These three volumes therefore feed into the debate on the future of Europe and, although they suggest more questions than they answer, they are deserving of the full attention of scholars of EU law and politics.

[133] F. Timmermans, 'The European Union and the Rule of Law' - Keynote speech at Conference on the Rule of Law, Tilburg University, 31 August 2015.
[134] Ivi.

https://doi.org/10.1017/S1574019617000347 Published online by Cambridge University Press