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CORE ANALYSIS

Legalism and the European Union's rule of law crisis

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Abstract

The past decade has seen the rise of the semi-authoritarian regimes within the European Union. EU law scholars are rightfully concerned that, in the absence of a meaningful response, this leads to an existential crisis for the Union, as these regimes threaten respect for the Union's foundational values. The Union did respond to what it has framed as a rule of law crisis by means of a constitutional transformation, asserting Union power to protect judicial independence within the Member States even in areas previously thought beyond the reach of Union law. This paper contends that the Union's response to the authoritarian threat is flawed for its legalist faith in law and courts. In institutional terms, it was the Court of Justice of the European Union, rather than the Union's political branches, that took the lead in this transformation. In substantive terms, the Union has transformed its constitutional framework to protect the organisational infrastructure of the judiciary, but it failed to do the same in response to various other strategies in the authoritarian playbook. By framing the authoritarian threat as, above all else, a threat to the judiciary, the Union's response contributes to the reification of political debate at Union level and risks the alienation of the European polity.

Keywords: European Union; rule of law; judicial independence; constitutional transformation; legalism

Over the past decade, the European Union has witnessed the rise of an authoritarian threat from within. When Viktor Orbán rose to power in 2010, he swiftly took control of key branches of government. In just a few years, Hungary transformed 'from one of the success stories of the transition from Communism to democracy into a semi-authoritarian regime based on an illiberal constitutional order by systematically dismantling checks and balances, undermining the rule of law, limiting the independence of judiciary, almost destroying press freedom, attacking civil society and increasing executive power'.[1] A few years later, the Law and Justice party swept to power in Poland, copying the Hungarian playbook to a significant degree. The party similarly managed to undermine the system of checks and balances characteristic of liberal constitutionalism. Both semi-authoritarian regimes packed their courts, developed a different model of economic growth and social welfare,[2] and rejected the identity politics prevalent in other European nations.[3] According to some scholars, the emergence of authoritarianism within the

[1]B Bugarič, 'Protecting Democracy inside the EU. On Article 7 TEU and the Hungarian Turn to Authoritarianism' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 82.

[2]MA Orenstein and B Bugarič, 'Work, Family, Fatherland: The Political Economy of Populism in Central and Eastern Europe' 29 (2022) Journal of European Public Policy 176.

[3]B Bugarič and A Kuhelj, 'Varieties of Populism in Europe: Is the Rule of Law in Danger?' 10 (2018) Hague Journal on the Rule of Law 21.

Union has caused a 'severe identity crisis': unless the Union can respond meaningfully, 'the common axiological basis' of the Union risks being unmasked as 'an unfounded illusion'.[4]

The rise of semi-authoritarian governments in Poland and Hungary appeared to be a European variation on theme of a phenomenon documented around the world as 'democratic backsliding' 'populism', 'autocratic legalism' or 'authoritarian constitutionalism'. But the Union framed the issue as a 'rule of law' crisis and orchestrated a de facto constitutional overhaul in order to protect the independence of domestic judiciaries of the Member States against Hungarian and Polish court packing programmes. In seminal judgements, the Court of Justice of the European Union ('CJEU') engineered a significant constitutional transformation: judicial independence within the Member States was now subject to Union oversight even in areas previously thought beyond the reach of Union law. This evolution has sometimes been hailed in the literature as a form of transformative constitutionalism[5] and prompted others to push the Commission and the CJEU to go further in the protection of the rule of law.[6] The Union legislator later followed the CJEU's lead by enacting legislation allowing the Union to withhold funding in cases of violations of the rule of law.

This contribution examines what the Union's response to this existential crisis tells us about the Union's own identity. It argues that the Union's response to the rise of semi-authoritarian governments is legalist. In institutional terms, it is the CJEU who took the initiative and the lead in working out the specifics of this constitutional transformation, with the Union's political branches merely following suit. In substantive terms, the Union's constitutional transformation narrowed the wide-ranging phenomenon of authoritarianism to a narrow question of judicial independence. In addition, European political elites arguably benefit from this legalist approach as it shields them from the messy distributive politics brought about by the threat of authoritarianism. Beyond rational self-interest, there are indications that legalism has become a self-standing *habitus* that stifles frank political debate over the content of the Union's core constitutional values. As Shklar's diagnosis of legalism suggests, the Union's attitude is ultimately 'a liability, preventing liberalism from facing up to the realities of contemporary politics'[7] and in particular from defining its own identity by way of a convincing response to an authoritarian threat.

In what follows, I first describe the Union's constitutional transformation (Section 1). After defining the notion of legalism (Section 2), I examine the institutional dynamics of constitutional transformation by contrasting transformations lead by the judiciary and those lead by legislatures (Section 3). Then I take a closer look at the kind of constitutional transformation that was triggered by the rise of semi-authoritarianism by contrasting it with alternative constitutional transformations the Union could have implemented (Section 4). Finally, I examine the distorting effects of legalism on political debate (Section 5).

1. Engineering a constitutional transformation

The president of the CJEU recently observed that the CJEU's case law expanding its powers to oversee judicial independence within the Member States 'has the same significance as cases like *Van Gend en Loos*, *Costa/ENEL*, *Simmenthal* or *ERTA* – it's a judgment of the same order and we were absolutely aware of that constitutional moment'.[8] Others suggest the CJEU's case law can

[4]A von Bogdandy, 'Principles of a Systemic Deficiencies Doctrine: How to Protect Checks and Balances in the Member States' 57 (2020) Common Market Law Review 705, 712.

[5]A von Bogdandy and LD Spieker, 'Transformative Constitutionalism in Luxembourg: How the Court Can Support Democratic Transitions' 29 (2023) Columbia Journal of European Law 65.

[6]KL Scheppele, DV Kochenov and B Grabowska-Moroz, 'EU Values are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' 39 (2020) Yearbook of European Law 3.

[7]J Shklar, *Legalism. An Essay on Law, Morals and Politics* (Harvard University Press 1964) 142.

[8]K Lenaerts, Upholding the Rule of Law through Judicial Dialogue, Speech at King's College London (21 March 2019) <https://www.youtube.com/watch?v=qBOeopzvPBY&t=37s> at 19:23, accessed 29 March 2023, as cited in von Bogdandy & Spieker (n 5) 72.

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be understood as a form of transformative constitutionalism in the sense that it seeks to 'induc[e] large-scale social change through nonviolent political processes grounded in law'.[9] How did this come to be? In what follows, I describe how the Union framed the question of the rise of semi-authoritarian movements (A.), analyse the CJEU's interventions and respond to a challenge: is such talk of a constitutional transformation justified? (B.)

A. Beginnings

Much has been written about the association between contemporary quasi-authoritarian governments and legalism, noting the reliance of these regimes on law.[10] But legalism is by no means the sole prerogative of Europe's semi-authoritarian regimes. That is apparent in the way the rise of authoritarianism in the Union has been framed. In September 2013, Commissioner Reding, in charge of Justice, Fundamental Rights and Citizenship, made the case that 'in parallel to the economic and financial crisis which the European Union and its Member States have lived through since 2009, we also have been confronted on several occasions with a true "rule of law" crisis'.[11] Her remarks made it clear that she considered the question less a political problem than one of 'rule following'.[12] She argued that:

> The rule of law is the backbone of modern democratic, pluralist societies and constitutional democracies. It is one of the main values on which the European Union is founded, as Article 2 of the Treaty on European Union and the Preamble to the Treaty recall. Respect for the rule of law is in many ways a prerequisite for the protection of all other fundamental values listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.[13]

She went on to cite the CJEU's 1986 case *Les Verts*, in which it had held that the Union's precursor, the European Economic Community, was 'a Community based on the rule of law'.[14] According to the Commissioner, national courts played a critical role in defending rights granted by Union law. In turn, that meant that 'that the proper functioning of national court systems, the independence of national courts, their efficiency and quality, is essential for the proper functioning of the whole European Union – which is why all Member States need to be concerned if there are any deficiencies in the independence, efficiency or quality of the justice system in another Member State. In our Union, these rule of law matters are thus no longer a "domaine reserve" [sic] for each Member State, but are of common European interest'.[15]

The Union's own Treaties suggest a political sanction to conflicts with Member States over the Union's foundational values. Article 7 TEU, sometimes described as the 'nuclear option',[16] allows the EU to suspend a Member State's voting rights when it observes 'a serious and persistent breach' of the Union's core values. Despite several attempts to put this provision in motion, no sanctions were ever adopted. The political will to do so is lacking, in part because one of the semi-authoritarian leaders – Viktor Orbán – was until recently a member of the Union's biggest

[9]von Bogdandy & Spieker (n 5), with reference to KE Klare, 'Legal Culture and Transformative Constitutionalism' 14 (1998) Legal Culture and Transformative Constitutionalism 146, 150.

[10]Eg KL Scheppele, 'Autocratic Legalism' 85 (2018) University of Chicago Law Review 545; P Blokker, 'Populism as a Constitutionalist Project' 17 (2019) International Journal of Constitutional Law 535.

[11]V Reding, 'The EU and the Rule of Law – What Next?' Speech at the Centre for European Policy Studies on 4 September 2013, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677> accessed 29 March 2023.

[12]I allude to the work of Judith Shklar, who argues that legalism is 'the ethical attitude that holds moral conduct to be a matter of rule following . . .' See Shklar (n 7) 1.

[13]Reding (n 11).

[14]Case C-294/83 *Les Verts* ECLI:EU:C:1986:166 para 23.

[15]Reding (n 11).

[16]Barroso (President of the European Commission), 'State of the Union address 2013', SPEECH/13/684, 11 September 2013, <http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm> accessed 29 March 2023.

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political party, which was unwilling to lose Hungarian voters in the confrontation that would ensue.[17] Another issue is deadlock in the European Council. Because the European Council must establish that such a 'serious and persistent breach' exists by unanimity vote (excluding the Member State concerned)[18] the existence of simultaneous breaches in multiple Member States is an obstacle. As Poland and Hungary are committed to protecting each other,[19] effective sanctions lie beyond reach.

B. The judiciary to the rescue

Commissioner Reding's remarks were prescient. Both Hungary and Poland had enacted doubtful measures to ensure their highest courts were staffed with political allies. In response, the CJEU would condemn both Polish and Hungarian court packing programs as violations of the rule of law. In fact, the CJEU had already dealt with the Hungarian rule of law issue in November 2012, before Commissioner Reding's intervention. After being solicited by the Commission, the court found that a Hungarian court measure lowering the retirement age of judges constituted a discrimination on the basis of age.[20] For a brief moment, it appeared that there might not be an existential crisis for Union law after all, as the application of Union legislation would suffice to counter the authoritarian threat.

When it became clear this victory against Hungary failed to reverse Orbán's court packing program,[21] the court adopted a bolder tone. The rule of law controversy gave rise to a constitutional transformation. In true Pescatorian tradition, the Court interpreted the Treaties an 'an idea of order to which participating Member States are disposed to subordinate their national interests and their national hierarchy of values'.[22] The CJEU developed a novel interpretive theory in its *Portuguese judges* case and ruled that it had an extensive power to oversee national legislation organising the judiciary when it threatened the rule of law, a basic value of European integration.[23] Using this constitutionalist vernacular, the Court was able to suspend the implementation[24] and, later, deem incompatible with the rule of law Polish measures allowing the executive to extend the mandate of judges past their retirement age,[25] lowering of the retirement age of the judges at the Supreme Court[26] and weaponising the disciplinary regime for judges.[27] The court succeeded where the Union's political branches had failed. Its decisions can be described as a 'constitutional moment' in which the Union takes position on the question 'whether illiberal democracies become part of the European public order as laid out in Article 2 TEU, or are opposed by it',[28] and have

[17]Bugarič (n 1) 90; RD Kelemen, 'Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union' 52 (2017) Government and Opposition 211.

[18]Art 7(2) TEU *jo* Art 354 TFEU.

[19]*Eg* 'Orban promises to veto any EU sanctions against Poland' (*Financial Times* 8 January 2016). Though some have argued that the European Council could vote on both countries simultaneously, circumventing a Polish and Hungarian cartel, there are no signs that politicians are willing to move in that direction either. See L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' 19 (2017) Cambridge Yearbook of European Legal Studies 3, 12–3.

[20]Case C-286/12 *Commission v Hungary* ECLI:EU:C:2012:687.

[21]KL Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov, *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) 105, 109–10.

[22]P Pescatore, *Le Droit de l'Intégration. Emergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés Européennes* (Bruylant 2004) 50. See also L Azoulai, 'Solitude, désœuvrement et conscience critique. Les ressorts d'une recomposition des études juridiques européennes' 50 (2015) *Politique européenne* 87.

[23]Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[24]Eg Order of the Court in Case C-619/18 R *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2018:1021.

[25]Case C-192/18 *Commission v Poland (Independence of the Ordinary Courts)* ECLI:EU:C:2019:924.

[26]Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

[27]Case C-791/19 *Commission v Poland (Disciplinary Regime for Judges)* ECLI:EU:C:2021:596.

[28]A von Bogdandy et al, 'A Potential Constitutional Moment for the European Rule of Law – The Importance of Red Lines' 55 (2018) Common Market Law Review 983, 984.

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been celebrated as 'a veritable stepping stone towards a "Union of values"', standing 'on a par with the Court's constitutionalising jurisprudence in *van Gend en Loos* and *Costa/ENEL*'.[29]

But in what sense is the CJEU's series of consecutive cases on judicial independence a constitutional transformation? One might object that the court's insistence on judicial independence is hardly novel, as it has been part and parcel of its case law for decades. Judicial independence is, first of all, a requirement for national courts in order to solicit a preliminary ruling. According to the *Vaassen* criteria, national courts must be independent[30] and therefore 'protected against external intervention or pressure liable to jeopardise the independent judgement of its members as regards proceedings before them . . . '[31] The CJEU found, for instance, that Austrian appeals chambers of regional finance authorities could not be considered independent in light of the hierarchical links between the appeals chambers and the regional finance authorities whose decisions they reviewed.[32] Likewise, the French *prud'homie de pêche de Martigues* was not an independent tribunal because its members could too easily be dismissed.[33] If the requirement of judicial independence has been part and parcel of the *Vaassen* doctrine for decades, that doctrine serves to determine whether domestic courts may ask questions to the CJEU or not, but not to sanction violations of the requirement of judicial independence *per se*. (This raises the puzzling question whether preliminary references from Polish courts can still be considered admissible, in light of the court's position on the shortcomings of judicial independence in Poland.[34] The CJEU still seems to welcome Polish preliminary references.)

Second, the Union legal order has required for decades that Member State courts ensure the effective judicial protection of the rights protected by EU law.[35] As early as the 1980s, the CJEU insisted on the presence of effective remedies for the protection of EU rights in areas such as the free movement of workers[36] or gender discrimination.[37] This had far-reaching implications, as the CJEU requires the courts in the Member States to grant interim relief[38] when the protection of Union rights is at stake and to provide a remedy for damages resulting from breaches of Union law.[39] In *Unibet*, the CJEU made it clear that, although Union law in principle did not require the creation of new remedies, domestic judiciaries may nevertheless have to do exactly that when no adequate remedy exists under national law.[40] The question of independence is directly relevant in the case of such remedies. *Wilson*, for example, dealt with a directive allowing lawyers to practice in other Member States. Member States were obliged to provide effective remedies in contentious cases. In *Wilson*, the Luxembourg bar had refused to register a British barrister.[41] The CJEU held that an appeals procedure against a decision refusing to register a lawyer before a body of lawyers

[29]von Bogdandy (n 4) 712–3.

[30]The *Vaassen* criteria go back to Case 61/65 *Vaassen* ECLI:EU:C:1966:39; a more current description of the test can be found in Case C-54/96 *Dorsch Consult* ECLI:EU:C:1997:413 para 23.

[31]Order in Case C-109/07 *Pilato* ECLI:EU:C:2008:274 para 23. The test is also found in a different area of law, as shown by Case C-506/04 *Wilson* ECLI:EU:C:2006:587 para 51.

[32]Case C-516/99 *Schmid* ECLI:EU:C:2002:313 paras 35–43.

[33]Order in *Pilato* (n 31) paras 25 and 28–9.

[34]See N Wahl and L Prete, 'The Gatekeepers of Article 267 TFEU: On Jurisdiction and Admissibility of References for Preliminary Rulings' 55 (2018) Common Market Law Review 511, 527–8; K Lenaerts, K Gutman and JT Nowak, *EU Procedural Law* (Oxford University Press 2023) 56–7 (both suggesting the CJEU is unlikely to bar Polish courts from asking such questions).

[35]See generally A Arnull, 'Remedies before National Courts' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law. Vol 1: The European Legal Order* (Oxford University Press 2018) 1011.

[36]Case 222/86 *Heylens* ECLI:EU:C:1987:442 paras 14–15.

[37]Case C-14/83 *von Colson and Kamann* ECLI:EU:C:1984:153; Case C-222/84 *Johnston* ECLI:EU:C:1986:44 paras 17–19.

[38]Case C-213/89 *Factortame* ECLI:EU:C:1990:257.

[39]Case C-6/90 *Francovich* ECLI:EU:C:1991:428.

[40]Case C-432/05 *Unibet* ECLI:EU:C:2007:163 paras 40–1 and 64.

[41]*Wilson* (n 31) para 26.

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which have a 'common interest contrary to his own, that is, to confirm a decision to remove from the market a competitor' did not offer sufficient guarantees of impartiality.[42]

The case law of the CJEU on the effective judicial protection of Union rights by Member State courts intersects with a very different area of Union law. Since the 1960s, the CJEU has had a restrictive interpretation of standing requirements in actions for annulment challenging the validity of measures of Union law.[43] It preferred an indirect route for such challenges by means of preliminary references from domestic courts. The court indeed maintained that 'it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection'.[44] Member States were therefore required to ensure that the avenue of a preliminary reference was open when an action for annulment would be inadmissible. The Union's Treaties were amended to confirm the views of the CJEU, in that Art 19(1) TEU requires since the Lisbon Treaty that 'Member States provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. This provision was initially understood as a remedy for the quirks of the Union's action for annulment rather than as a mechanism to challenge the composition of the judiciaries of the Member States.[45]

A third source of the requirement that courts be independent is the Charter of Fundamental Rights, which has become formally binding with the entry into force of the Lisbon Treaty. Its Article 47 provides for a right to effective judicial protection before an 'independent and impartial tribunal'. On occasion, the CJEU deploys Art 47 of the Charter to verify whether domestic remedies comply with the right to effective judicial protection as it had done in *Wilson*. Art 47 implies that a remedy before an independent tribunal must exist in cases in which a Schengen visa is refused, for example,[46] and domestic courts ruling on appeal in the context of the Union's asylum procedures must be independent.[47] Despite the norm's constitutional tone, there are few significant developments with respect to the independence of the judges of the Union's own Member States relying on Art 47[48] prior to the rule of law crisis.

The relevance of Article 47 is severely limited by the scope of application of the Charter, which, according to Art 51(1) of that instrument, binds the Member States 'only when they are implementing Union law'.[49] The meaning of 'implementation' has always been somewhat nebulous,[50] but the CJEU interprets it to mean that the Charter applies in 'in all situations governed by European Union law', specifically when acts of the Member States 'fall within the scope of European Union law'.[51] In other words, 'there must be a rule of EU law which is applicable, independent and different from the fundamental right itself'.[52] In some cases, that is straightforward, as when the rule at issue before a domestic court is a regulation. The Charter also applies when Member States derogate from free movement provisions.[53] The question is trickier when national legislation is transposing a directive or, more generally, applying Union law. In a

[42] *Wilson* (n 31) paras 57–8.

[43] Case 25/62 *Plaumann* ECLI:EU:C:1963:17.

[44] Case C-50/00 P *UPA* ECLI:EU:C:2002:462 para 41; Case C-263/02 P *Jégo-Quéré* ECLI:EU:C:2004:210 para 31.

[45] *Eg* Lenaerts (n 34) 118.

[46] Case C-403/16 *El Hassani* ECLI:EU:C:2017:960.

[47] Case C-175/11 *H.I.D. and B.A.* ECLI:EU:C:2013:45 paras 94–104.

[48] Art 47 could be a relevant benchmark to assess whether a domestic court can raise a preliminary reference, though the court appears hesitant on this issue. Contrast the order in *Pilato* (n 31) (where reference to Art 47 CFR is made) with Case C-503/15 *Panicello* ECLI:EU:C:2017:126 (where no such reference is to be found).

[49] Art 51(1) of the Charter.

[50] Several Advocate Generals at the CJEU have engaged with this question. See, for example, the opinion of Avocate General Cruz Villalón in Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2012:340; the opinion of Avocate General Wahl in Case C-497/12 *Gullotta* ECLI:EU:C:2015:168; the opinion of Avocate General Bobek in Case C-298/16 *Ispas* ECLI:EU:C:2017:650 and the opinion of Avocate General Bot in Case C-609/17 *TSN* ECLI:EU:C:2019:459.

[51] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para 19.

[52] Opinion of Advocate General Bobek in *Ispas* (n 50) para 30.

[53] Eg Case C-390/12 *Pfleger* ECLI:EU:C:2014:281 paras 35–6.

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series of a judgements, the CJEU has developed a test verifying whether national legislation can be considered to be implementing Union law: relevant is whether the legislation at issue 'intend[s]' to implement EU law, what the 'character' of the national legislation is (even when Union law is capable only of 'indirectly affecting' domestic law) and whether it pursues objectives of EU law or not, as well as whether 'there are specific rules of EU law' capable of affecting the domestic legislation.[54]

What is surprising about the *Portuguese Judges* case - the starting point of the constitutional transformation at issue here - is that the court left this question by the wayside. The question was undeniably important. Portugal and even the Commission – usually not shy to argue a situation falls within the scope of Union law – considered that the court did not have jurisdiction. In their view, the national legislation could not be considered an implementation of EU law.[55] The CJEU had good reasons to reject those arguments. In a prior case, it had held that austerity measures decided in the framework of bail-out programmes negotiated by EU institutions fell within the scope of application of Union law, and therefore triggered the application of the Charter.[56] The hurdle of Art 51(1) could have been cleared with ease. But the CJEU followed neither the arguments of Portugal and the Commission, nor its own prior case law. Instead, it pointed out that 'the material scope of the second subparagraph of Article 19(1) TEU ... relates to "the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter ...'[57] The question raised by the Portuguese court, the court argued, therefore fell within the scope of Union law. This was the decisive move that allowed the CJEU to use Art 47 of the Charter as a benchmark for judicial independence within the Member States, without dealing with the question whether Portugal was implementing Union law. The same argument would be used subsequently in the CJEU's assessment of Poland's court packing measures.

The marriage between Art 19(1) TEU and Art 47 CFR was not self-evident. Both provisions correspond to different rights under the ECHR – the former to Art 13, the latter to Art 6.[58] In *Portuguese Judges*, Advocate General Saugmansgaard Øe pointed out that Art 19(1) TEU is aimed merely at ensuring 'that possibilities of remedies exist in the Member States so that each individual is able to benefit from such protection in all the fields in which EU law is applicable'.[59] This obligation is 'primarily procedural'[60] and does not relate 'to the right to a fair hearing before an independent court, the content of which is substantially different'.[61] The 'concept of "effective judicial protection" within the meaning of the second subparagraph of Article 19(1) TEU' therefore ought not to 'be confused with the "principle of judicial independence"' given that 'the purpose and the wording of Article 47 are different from those of Article 19 TEU'.[62]

[54]Case C-40/11 *Iida* ECLI:EU:C:2012:691 para 79; Case C-87/12 *Ymeraga* ECLI:EU:C:2013:291 para 41; Case C-198/13 *Hernández* ECLI:EU:C:2014:2055 para 37; Case C-206/13 *Siragusa* ECLI:EU:C:2014:126 para 25.

[55]Opinion of Advocate General Saugmansgaard Øe in Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2017:395 para 37 and 44.

[56]Case C-258/14 *Florescu* ECLI:EU:C:2017:448. See also M Markakis and P Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*' 55 (2018) Common Market Law Review 643.

[57]*Associação Sindical* (n 23) para 29.

See also M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' 14 (2018) European Constitutional Law Review 622, 629–30.

[58]Opinion of Advocate General Saugmansgaard Øe in *Associação Sindical* (n 55) paras 65 and 70.

[59]Ibid., para 61.

[60]Ibid., para 63.

[61]Ibid., para 68.

[62]Ibid., paras 62 and 64.

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Rejecting the views of its Advocate General, the CJEU developed its new approach to the question of judicial independence by 'breathing life' into the Union's values.[63] As other Union values, the rule of law had never been considered justiciable in the past.[64] Observing that Article 19(1) TEU gives 'concrete expression'[65] to the value of the rule of law, and further associating Art 19 and the value of the rule of law with Article 47 of the Charter, the court created a new 'primary law obligation'[66] regarding the judicial independence of domestic courts. Article 19(1) TEU requires that Member States guarantee 'remedies sufficient to ensure effective judicial protection'.[67] Effective judicial review is deemed 'of the essence of the rule of law',[68] and a 'court or tribunal's independence' – as defined by the Charter – is in turn 'essential' to such an effective remedy.[69] The value of the rule of law is the glue that binds these different provisions together: the systematic interpretation of these three norms was the key to the articulation of a new, self-standing norm of judicial independence in Union law.

Wasn't this simply the right thing to do? After all, the importance of this complex web of norms cannot be underestimated. In functional terms, national courts are the ordinary courts of Union law – they serve as '*juge de droit commun*'.[70] They are therefore an essential pillar of the enforcement of Union law, alongside the CJEU. As the Court itself puts it, '[t]he system set up by Article 267 TFEU … establishes between the Court of Justice and the national courts direct cooperation as part of which the latter are closely involved in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order'.[71] Theoretically, one could imagine a judicial system in the Member States where only some courts deal with matters of Union law, but others don't. The latter courts would then be exempt from supervision by the CJEU. But the numerous tentacles of Union law make such a system unworkable in practice. In almost any case an unexpected dimension of Union law might pop up. De facto, therefore, the whole of the domestic judicial system may need to deal with questions of Union law.

As so often, the limits of the CJEU's line of argument become more apparent in light of its counter-arguments. Advocate General Tanchev points out that

> what is at stake, at constitutional level, is the extent to which the Court has competence to substitute national constitutional courts and the European Court of Human Rights in adjudicating over fundamental rights violations. Respect for the boundary between the competences of the EU, and those of the Member States, is as important in an EU legal order based on the rule of law as the protection of fundamental rights.[72]

[63]LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' 20 (2019) German Law Journal 1182.

[64]Eg von Bogdandy (n 4) 727; D Kochenov and L Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 11 (2015) European Constitutional Law Review 512, 520.

[65]*Associação Sindical* (n 23) para 32; *Commission v Poland (Independence of the Supreme Court)* (n 26) para 47; *Commission v Poland (Independence of the Ordinary Courts)* (n 25) para 98.

[66]Bonelli & Claes (n 57) 634.

[67]*Associação Sindical* (n 23) para 34.

[68]Ibid., para 36.

[69]*Associação Sindical* (n 23) 36–37; *Commission v Poland (Independence of the Supreme Court)* (n 26) para 57; see also L Pech and S Platon, 'Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case' 55 (2018) Common Market Law Review 1827, 1835.

[70]K Lenaerts 'The Rule of Law and the Coherence of the Judicial System of the European Union' 44 (2007) Common Market Law Review 1625, 1645.

[71]Opinion 1/09 ECLI:EU:C:2011:123 para 84.

[72]Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Independence of Ordinary Courts)* ECLI:EU:C:2019:529 para 114.

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The Masters of the Treaties – Poland in particular[73] – indeed conspicuously insisted that the Charter 'shall not extend in any way the competences of the Union . . .'[74] or 'establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'.[75] In doing so, they hoped to avoid the 'incorporation' of the Charter, transforming the latter into a functional equivalent of the European Convention on Human Rights.[76] The role of the EU – contrary to the Council of Europe, with its European Court of Human Rights – is not that of a guardian of fundamental rights protection in the Member States. The point of Article 51(1) of the Charter is to limit the scope of application of the Charter, and therefore the constitutional role of the Union with regard to fundamental rights protection in the Member States. It is in this respect that observers note some 'stretch'[77] in EU law, and that the same Advocate General notices some doctrinal 'tension'[78] in the CJEU's reasoning in *Portuguese Judges*. That explains why it is controversial for the CJEU to transform 'the rule of law into a legally enforceable standard to be used against national authorities to challenge targeted attacks on national judiciaries'.[79]

The CJEU was therefore confronted with a strategic choice between (at least) three options. In political and social terms, the stakes of the choice were significant. Yet all options could plausibly be justified on the basis of the legal materials. First, the CJEU could have emphasised the importance of Art 51(1) of the Charter, reiterating the traditional doctrine of its limited scope of application. Call this the 'technocratic' approach, which emphasises the limits on the Union's sphere of competences. In the absence of the CJEU's signal in *Portuguese Judges*, the Commission would likely have chosen to continue the path adopted with respect to the Hungarian court packing measures. After all, as Poland – but before it, also Portugal and even the Commission – had suggested, in the absence of a clear connecting factor to a substantive norm of Union law other than Art 19(1) TEU, there is no judicially enforceable norm of Union law policing judicial independence. The question of the organisation of the domestic judiciary was thought to be largely a matter of Member State competence, subject to occasional (but potentially significant) Union supervision when a connecting factor did exist. Had this approach been chosen, the CJEU's constitutional vernacular throughout the rule of law crisis would have remained absent. But the Union would still have been able to intervene in numerous cases, though parties before the domestic courts and the Commission would have had to demonstrate a connecting factor with a substantive norm of Union law.[80]

Second, the CJEU could have chosen a middle ground, going beyond Art 51(1) of the Charter yet recognising the importance of the limits on the EU's powers. Call this the 'balanced constitutionalist' path. Several suggestions have been made in this regard. While Art 47 CFR could apply only in the limited cases when the Member States are 'implementing' Union law, Art 19(1) TEU could play a role as an independent legal ground in cases of 'systemic or generalised deficiencies, which "compromise the essence" of the irremovability and independence of judges'[81] even beyond the limits of Art 51(1) of the Charter. Others argue Art 19(1) TEU should only be

[73]Protocol 30 to the Lisbon Treaty reiterates the importance of the limits emphasised in Arts 6(1) TEU and 51(2) of the Charter.

[74]Art 6(1) TEU.

[75]Art 51(2) of the Charter.

[76]On the notion of 'incorporation', see the Opinion of AG Sharpston in Case C-34/09 *Zambrano* paras 170–5. See also A Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights' 15 (2018) International Journal of Constitutional Law 1080, 1082 *et seq*.

[77]Bonelli & Claes (n 57) 623.

[78]Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Independence of Ordinary Courts)* (n 72) para 98.

[79]Pech & Platon (n 69) 1836.

[80]See text accompanying notes 49–54.

[81]Opinion of AG Tanchev in Case C-192/18 *Commission v Poland (Independence of Ordinary Courts)* (n 78), para 115; Opinion of AG Tanchev in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* (n 81) paras 52–60. See also von Bogdandy (n 4).

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invoked in cases of violations of the 'essence' of fundamental rights.[82] Another variation on this theme makes a distinction between questions relating to 'institutional safeguards' of domestic courts (where Union oversight is warranted at all times) and cases dealing with the 'procedural and remedial' dimension of the Union's principle of effective judicial protection (where a substantive link with Union law remains necessary).[83]

The CJEU appears, instead, to have chosen a third option. Call it the 'radical constitutionalist' approach. Sidelining the question of the limits imposed on the scope of application of the Charter, it uses the phrase 'in the fields covered by Union law' to indicate a scope of application broader than the one traditionally attributed to the Charter. The court did not indicate any limits to the use of Art 19(1) TEU, using it instead as a 'stand-alone, quasi-federal provision'.[84] Commentators observe that this opens perspectives for a 'very large, not to say unlimited' application of Art 47 of the Charter to the Member States.[85] A mere indirect or hypothetical link to Union law is sufficient to trigger the Union supervision of judicial independence.[86] Avocate General Bobek warned the CJEU that the 'at present apparently limitless ... reach of the second subparagraph of Article 19(1) TEU is not only a strength of that provision, but it is also its main weakness'.[87] Advocate General Tanchev shares the worry that the use of Art 19(1) TEU is 'used as a "subterfuge" to circumvent the limits of the scope of application of the Charter as set out in Article 51(1) thereof'.[88]

It is in this sense that the jurisprudence of the CJEU can be understood as a 'constitutional transformation'.[89] Its radical constitutionalist approach makes the leap from the demonstration of a specific link with Union law to the mere hypothesis that domestic courts may be called upon to ensure the existence of a remedy of Union law in specific cases. It also makes the leap from the question whether or not judicial independence is respected in the context of this or that specific remedy required by Union law – a question which the CJEU has long dealt with, paradigmatically in *Wilson* – to the analysis whether the judicial system of a Member State *in toto* respects the requirements of judicial independence. *Portuguese Judges* is therefore best understood as closing a loophole in the framework of Union law: 'given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any democratic system of governance, it was assumed that national governments would not threaten it'.[90] The rise of semi-authoritarianism challenged this assumption. The CJEU responded by strengthening the requirements of the Union legal order in this respect.

[82]C Rizcallah and V Davio, 'L'article 19 du Traité sur l'Union européenne: sésame de l'Union de droit' [2020] Revue trimestrielle des droits de l'homme 155, 179.

[83]S Prechal, 'Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?' in M Bonelli, M Eliantonio and G Gentile (eds), *Article 47 of the EU Charter and Effective Judicial Protection, Volume 1: The Court of Justice's Perspective* (Hart 2022) 11, 22–5.

[84]Pech & Platon (n 69) 1838.

[85]F Picod, 'Article 47. Droit à un recours effectif et à accéder à un tribunal impartial' in F Picod, C Rizcallah and S Van Drooghenbroeck (eds), *Charte des droits fondamentaux de l'Union européenne : commentaire article par article* (Bruylant 2018) 1133, 1138.

[86]Rizcallah & Davio (n 82) 176; Bonelli & Claes (n 57) 631–2.

[87]Opinion of Advocate General Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19, C-397/19 *Asociația "Forumul Judecătorilor din România"* ECLI:EU:C:2020:746, para 222.

[88]Opinion of Advocate General Tanchev in Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* (n 81) para 57.

[89]There is wide agreement in the literature that the CJEU's case law was creative. See eg Scheppele et al (n 6) 6 (discussing 'a line of truly revolutionary cases'); A Torres Pérez, 'From Portugal to Poland: The Court of Justice of the European Union as Watchdog of Judicial Independence' 27 (2020) Maastricht Journal of European and Comparative Law 105 (describing a 'bold reading of Article 19(1) TEU'); Pech & Platon (n 69) (reading the *Portuguese Judges* case as 'groundbreaking'); P Van Elsuwege and F Gremmelprez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice' 16 (2020) European Constitutional Law Review 8, 23 (discussing the CJEU's 'groundbreaking reasoning'). See, however, S Menzione, 'Anything New under the Sun? An Exercise in Defence of the Reasoning of the CJEU in the ASJP Case' 12 (2019) Review of European Administrative Law 219, making the opposite case.

[90]K Lenaerts, 'New Horizons for the Rule of Law within the EU' 21 (2020) German Law Journal 29, 30.

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In fact, the court went on to bolster its response to authoritarian populism by anchoring judicial independence even deeper in the system of Union law. That is the lesson of its endorsement of the Union's conditionality regulation. The regulation was adopted on a legal basis allowing the Union to specify 'financial rules which determine in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts',[91] a norm which *prima facie* would not allow the Union to withhold funds from the Member States. Once more, the reference to the Union's values is critical. According to the CJEU, the Union's foundational values:

> define the very identity of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.[92]

The reference to the Union's identity is central to the court's rebuttal of the argument that the EU lacked the competence to adopt this transformative legislative act.[93] Member States have some discretion in their interpretation of the rule of law, but not to the extent that variations in the definition or interpretation of the rule of law could be admitted. To the contrary, Member States are expected to 'adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times'.[94] By personifying the Union legal order, the CJEU gives greater credibility to the idea that the protection of judicial independence is an existential matter for the Union, and must therefore be defended at all costs.

In light of the political context, these judgements send a clear message: the CJEU claims authority as 'guardian of the rule of law within its Member States'.[95] (Admittedly, the court may not always practice what it preaches, particularly in the context of preliminary references.[96]) In doing so, it takes a partial, but clear step in the direction of the incorporation of the Charter. It may not be the guardian of fundamental rights within the Member States in general, but at least it is with respect to matters related to the rule of law.

Sceptics of the court may denounce its attitude as a naked power grab.[97] Arguments abound: the move can be cast as doctrinally implausible[98] or motivated by the political will of the court to 'bolster[] its own role in the Polish debate and more generally when Member States adopt measures that allegedly undermine judicial independence'.[99] In the vocabulary of the German Federal Constitutional Court, the move amounts to a 'structurally significant shift in the order of competences to the detriment of the Member States'.[100] By contrast, defenders of the CJEU may

[91] Article 322(1)(a) TFEU.

[92] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para 127; Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para 145.

[93] *Hungary v Parliament and Council* (n 92) para 153; *Poland v Parliament and Council* (n 92) para 189.

[94] *Hungary v Parliament and Council* (n 92) paras 233 and 234; *Poland v Parliament and Council* (n 92) paras 265 and 266.

[95] E Muir, P Van Nuffel and G De Baere, 'The EU as a Guardian of the Rule of Law within its Member States' 29 (2023) Columbia Journal of European Law 1.

[96] The CJEU sticks to its refusal to respond to hypothetical questions, and it insists on the presence of a 'connecting factor' with provisions of Union law, making it difficult to bring challenges to domestic legislation before the CJEU by way of domestic courts. See Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* ECLI:EU:C:2020:234, in particular paras 48–53 and Case C-748/19 *Prokuratura Rejonowa* ECLI:EU:C:2021:931, paras 91–3. The requirement prevented the CJEU from ruling on the more problematic aspects of Hungarian judicial reforms. See Case C-564/19 *IS* ECLI:EU:C:2021:949 paras 139–47.

[97] *Eg* DV Kochenov, '*De facto* Power Grab in Context: Upgrading Rule of Law in Europe in Populist Times' 40 (2020) Polish Yearbook of International Law 197. Bonelli & Claes (n 57) 641 (describing the CJEU's 'political' attitude). See also von Bogdandy & Spieker (n 5) 69.

[98] Bonelli & Claes (n 57) 641 (describing the CJEU's argument as 'not entirely convincing').

[99] Bonelli & Claes (n 57) 641–642. See also Kochenov (n 97) 197.

[100] German Federal Constitutional Court, Judgement of the Second Senate of 5 May 2020 – 2 BvR 859/15, para 110.

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claim it is merely the logical implication of the choice of the Masters of the Treaties to enshrine judicial independence as a central requirement of Art 47 of the Charter, and the importance of effective judicial protection by Member State courts in Art 19(1) TEU – or of the functional intertwinement of the judiciaries of the Member States and that of the EU.

For the purpose of this contribution, I have little stakes in this debate. Rather, I wish to ask different questions. *Who* could and should have engineered this constitutional transformation, asserting the Union's identity in the process? Why choose *this* constitutional transformation as opposed to any other and frame *this* norm to be the core of the Union's identity, as opposed to any other? The answers to these questions suggest a diagnosis of legalism.

2. Legalism in the rule of law crisis

I define legalism as the ideology, in the pedestrian sense of a set of beliefs about the world, which takes societal problems to be best resolved by appealing to legal rules, typically as they are applied by courts.[101] Legalism reflects the 'great faith in the power of law and legal institutions to solve problems'.[102] It is often associated with Weber's typologies of legitimate forms of social domination. '[L]egal authority', one of these forms of authority, rests upon 'belief in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands',[103] and therefore also on the legitimacy of such rules.[104] In her classic study, Judith Shklar found legalism to be the characterised by the 'determination to preserve law from politics'.[105] Institutionally, legalism implies a commitment to the settlement of conflicts by an 'impartial third party', the paramount expression of which are the 'court of law and the trial according to law . . . [as] the social paradigms, the perfection, the very epitome, of legalistic morality'.[106] Unsurprisingly, legalism is typically the frame of mind of the legal profession.[107] At its most extreme, it amounts to the belief that 'all political issues ought to be solved by court-like procedures'.[108] For legalists, the judicial process is indeed 'the model for government' and even 'the substitute for politics'.[109] But legalism is more than institutional structure; it is an ethos rooted in the 'convictions, mores, and ideologies' of a community.[110]

Though legalism, understood in such terms, is descriptive, it has negative connotations. Legalism is associated with a denial that legalism itself – the commitment to law, but also to courts as institutions to resolve social conflicts – reflects a 'choice among political values'.[111] According to Shklar, legalism's 'deliberate isolation of the legal system – the treatment of law as a neutral social entity – is itself a refined political ideology'.[112] That becomes problematic especially when legalism is meant to signify not only that law is 'separate from political life' but also 'that it is a mode of social action superior to mere politics'.[113]

The legalist character of the Union's response to the rise of authoritarianism is hardly a surprise. Legalism is arguably a core part of the Union's DNA. The Union's founding fathers were committed to a path of integration through law rather than an approach which would openly

[101]For an alternative definition, see Shklar (n 7) (defining legalism as 'the ethical attitude that holds moral conduct to be matter of rule following, and moral relationships to consist of duties and rights determined by rules'.)

[102]E Posner, *The Perils of Global Legalism* (University of Chicago Press 2009) 21.

[103]M Weber, *Economy and Society. An Outline of Interpretive Sociology* (University of California Press 1968) 215.

[104]Ibid. 213.

[105]Shklar (n 7) 8.

[106]Ibid. 133 and 2.

[107]Ibid.

[108]Ibid 117–8.

[109]Ibid. 18.

[110]Ibid. 2.

[111]Ibid. 8.

[112]Ibid. 34.

[113]Ibid. 8.

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politicise economic, moral and societal questions between European partners.[114] In a context in which the project of European integration itself has become increasingly politicised,[115] such a legalist strategy becomes increasingly fragile.

In what follows, I distinguish three separate dimensions of legalism. My argument is that the cumulation of legalist features along these three dimensions ultimately amounts to a pathology of EU politics – in Shklar's words, a 'liability, preventing liberalism from facing up to the realities of contemporary politics'.[116] The first dimension answers the question *who* takes the lead in responding to this constitutional crisis, and I call it the *institutional* dimension. Shklar observes that one of the characteristics of legalism is the desire 'to resolve as many social conflicts by judicial means as possible'.[117] But the matter is not simply one of institutional role: courts rely on a specific form of reasoning. Judicial reasoning suggests the existence of 'a self-generating system in which principles are derived automatically from one another' by means of a process of 'autogenesis'.[118] Naturally, politics appears wholly absent in this equation. Below, I explore this institutional dimension in the context of the rule of law crisis.

A second aspect concerns *substantive* legalism, for the policy questions legalists focus on. In our context, it answers the question, *what* constitutes the response to the rise of authoritarianism within the Union. As is apparent from the description of the Union's constitutional transformation, it is focused on the protection of judicial independence. Shklar found such a focus on the judiciary to be problematic. In the context of international law, she was highly sceptical of the 'idea that all international problems will dissolve with the establishment of an international court with compulsory jurisdiction . . . '[119] Below, I explore this question by means of a thought experiment, analysing other possible constitutional transformations, taking the constitutional transformation described in Section 1 as a baseline.

The third and final dimension of legalism concerns its *distorting effect on political discourse*. It asks *how* constitutional transformations are debated. One of Shklar's objections to legalism was that in an 'age of totalitarianism', when the 'liberal desire to preserve individual autonomy' or the 'diversity of morals' is under threat, 'an open discussion of the political issues can contribute much more than positivist and formalist dogmatism can'.[120] Shklar's worry seems important in the context of the rise of semi-authoritianism. The institutional context she was interested in – that of post-war international law lacking 'effective institutions'[121] – was nevertheless significantly different from that of the Union today, which can rely on such institutions. Below, I explore the distorting effects of legalism on political discourse within and beyond the Union's political branches.

3. Whose constitutional transformation?

The constitutional transformation brought about by the rule of law crisis raises the age-old question of judge made law (Section A). The question ought to be considered against the horizon of a transnational militant democracy engaged in processes of peer review (Section B).

[114]See generally A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015). For example, the Commission's first president, Walter Hallstein, presented the European project as one of law rather than violent subjugation. See W Hallstein, *Der unvollendete Bundesstaat. Europäische Erfahrungen und Erkenntnisse* (Econ Verlag 1969) 33.

[115]See already L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' 39 (2008) British Journal of Political Science 1.

[116]Shklar (n 7) 142.

[117]Ibid. 117.

[118]Ibid. 130–131.

[119]Ibid. 134.

[120]Ibid. 42.

[121]Ibid. 129.

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A. Performative contradiction

Judicial decisions are intrinsically legalist not just because they are the product of the most emblematic legalist institution, the courts, but also because their justifications necessarily suggest they merely apply norms that were already there,[122] as if judicial interpretation wasn't a creative and political act. The CJEU's bold and innovative invocation of the Union's foundational values to justify this constitutional transformation represents less of a break with the past than one might imagine: the CJEU's reliance on the systematic method of interpretation is consistent with classical interpretive approaches.[123]

The centrality of the invocation of the rule of law in the constitutional transformation enacted by the CJEU makes it paradigmatically legalist. Its reasoning alludes to the ancient and sexist distinction between the rule of law and the rule of men. Respect for the rule of law implies that the sovereign will of the legislator (*gubernaculum*) is limited by a pre-existing, autonomous body of law (*iurisdictio*).[124] *In casu*, it is the power of the Member State to pack the courts that is found not to be at the sovereign's disposal, as this would conflict with the normative requirements imposed by Union law. *Iurisdictio* understood in this sense does not refer to judicial choice, but to '*jus dicere*': the 'duty to say and declare' what the law elaborated 'through the wisdom of decades or centuries' demands.[125] There is recursivity at work here: the decisions recognising the rule of law as a norm that is binding on the Member States are themselves to be understood as the rule of pre-existing law rather than of human decision-making.

It is therein that the court's case law is embroiled in a performative contradiction. Rather than the recognition of a pre-existing norm, the CJEU's defence of judicial independence by means of the invocation of the rule of law – either as being given 'concrete expression' in other norms or as the 'identity' of the Union legal order – are of course the product of a judicial choice. The CJEU's justification is a striking example of the '"dynamic" process of autogenesis'[126] that typifies legalism. Precisely when the court is seeking not just to defend but also to embody the rule of law against the rule of men, it makes a decision by judicial fiat.

Shklar reminds us of the danger that legalists may 'fail to recognize that they too have made a choice among political values'.[127] The CJEU indeed makes a controversial claim by understanding judicial independence as part of the rule of law, exhibiting an exaggerated 'faith in law'.[128] Historically, it is not evident that for example the French *état de droit* or the German *Rechtsstaat* require protection for the independence of the judiciary (though contemporary versions of those concepts may well include such a protection).[129] To this day, thin versions of the rule of law protect formal aspects of legality, such as the clarity, generality and consistency of legal norms.[130] Thin versions of the rule of law may be unable to respond to most of the root causes of authoritarianism – indeed authoritarian regimes themselves could correspond to such a definition of the rule of law. As Raz famously argued, regimes 'based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in

[122]Ibid. 10.

[123]S Martens, *Methodenlehre des Unionrechts* (Mohr Siebeck 2013), especially 406 *et seq*.

[124]G Palombella, 'The Rule of Law and its Core' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Hart 2009) 17.

[125]Ibid. 27.

[126]Shklar (n 7) 131; see also I Maus, 'Justiz als gesellschaftliches Über-Ich. Zur Funktion von Rechtsprechung in der 'vaterlosen Gesellschaft' in *id.*, *Justiz als gesellschaftliches Über-Ich Zur Position der Rechtsprechung in der Demokratie* (Suhrkamp 2018) 30 (describing the self-referential character of the jurisprudence of the German Federal Constitutional Court).

[127]Shklar (n 7) 8.

[128]Posner (n 102) 22.

[129]L Heuschling, *État de droit – Rechtsstaat – Rule of Law* (Dalloz 2002).

[130]J Waldron, 'The Rule of Law as an Essentially Contested Concept' in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 123. Fuller's conception of the rule of law, for example, does not include a requirement of judicial independence. See L Fuller, *The Morality of Law* (Yale University Press 1964) 39. Troper's positivist account of the *état de droit* similarly does not include the rule of law. See M Troper, 'Le concept d'état de droit' 15 (1992) *Droits* 51.

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principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies'.[131] Somewhat thicker versions of the rule of law do tend to include protection for the independence of the judiciary.[132] Thick definitions of the rule of law, on the other hand, tend to include a large number of substantive legal norms such as human rights,[133] and may therefore be better suited to protect against authoritarian politics, particularly when authoritarian movements enforce conservative values.

B. Transnational peer review

A constitutional transformation enacted by a legislature is the most plausible alternative to a constitutional transformation enacted by the courts. The best known example of constitutional transformation led by the legislature is perhaps the civil rights revolution in the United States half a century ago.[134] Assuming 'constitutional leadership', the United States Congress adopted a series of legislative acts extending equal rights protection to domains such as housing, employment and voting.[135] While these acts were technically of a merely legislative nature, their political significance gave them, in the eyes of some, de facto constitutional status.[136]

In this respect, the European Union has innovative resources at its disposal: the presence of a supranational organisation with democratic credentials alongside the Member States means that the Union can be a counter-power to semi-authoritarian rulers within the Member States even when they are firmly in power domestically. Constitutionally, the innovation of the European Union is a form of 'peer review'[137] which goes back to the pluralist architecture of supranational governance in Europe. Rather than the exchanges between high courts at the national and supranational level[138] most commonly alluded to in this context, what matters here is that the EU can pit one (supranational) democracy or several (national) democracies against another (national) democracy. The discourse of Union values shows that the question of militant democracy – the fight against enemies of democracy – has become a transnational one.[139]

The legislative approach can be considered a form of peer review because Member States themselves decide whether or not one of their peers has violated these foundational values.[140] In this respect, the approach moves away from the *iurisdictio* paradigm where judicial decision-makers apply a pre-existing autonomous body of rules. Peers are more democratically legitimate than courts when they seek to put pressure on semi-authoritarian regimes, especially when creativity is needed because the existing toolkit is found to be lacking. It acknowledges that this determination is not a mechanical application of pre-existing rules, but an assessment driven by political debate about the significance of the Union's core values. It is a feature rather than a bug that this procedure does not seek regime change: it merely seeks to put pressure on the domestic system deemed in violation of those core commitments, casting it as a pariah of the supranational club. Obstruction tactics are to be expected in response. Only the domestic population can, by democratic means, bring another constellation of political forces to power.

[131] J Raz, 'The Rule of Law and Its Virtue' in *id*, *The Authority of Law. Essays on Law and Morality* (Oxford University Press 2009) 210, 211.

[132] Ibid., at 216–7.

[133] Waldron (n 130) 122.

[134] I allude to B Ackerman, *We The People Vol. III The Civil Rights Revolution* (Harvard University Press 2014).

[135] Ibid. 317–8.

[136] Ibid. 34.

[137] A Somek, *The Cosmopolitan Constitution* (Oxford University Press 2014) chapters four and five.

[138] See *generally* M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

[139] U Wagrandl, 'Transnational Militant Democracy' 7 (2018) Global Constitutionalism 143, 157.

[140] On Article 7 TEU as a form of peer review and the problems it entails, see J-W Müller, 'The Problem of Peer Review in Militant Democracy' in U Belavusau and A Gliszczyńska-Grabias (eds), *Constitutionalism under Stress. Essays in Honour of Wojciech Sadurski* (Oxford University Press 2020) 259.

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The point of Union legislation is to create political friction with and within Member States that no longer respect its foundational values, in the hope those Member States will change course.[141]

The Union can indeed use its political power to put pressure on the Member States who undermine democracy. Famously, the Lisbon Treaty created a procedure to establish the 'existence of a serious and persistent breach' of the Union's foundational values, which can entail sanctions such as the suspension of the voting rights of the Member State concerned.[142] Yet the Union does not have to resort to this procedure in order to protect those foundational values: it can simply resort to its legislative powers to generate such friction. By justifying legislative intervention with reference to the Union's values, the legislature can be the driver of constitutional transformation, as in the American model. The Union's conditionality regulation stands out as an example. It allows the Union to withhold funds from Member States who breach rule of law when such breaches can demonstrably be linked to the execution of the Union's budget.[143]

Claims that such transformative legislation is *ultra vires* are characteristic of such constitutional transformations. In the context of the United States, the issue of competences was central, as the civil rights legislation empowered of the federal government to the detriment of the states in contentious policy areas.[144] In the context of Union law, similar challenges are to be expected. They were at the heart of the Polish and Hungarian challenge to the conditionality regulation.[145] Though the Union is limited by the powers conferred upon it, it has been argued long ago that '[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community'.[146] Such could be the motto of constitutional change driven by Union legislation. Competence creep is an asset in such circumstances, because it allows the Union to assert its foundational values at times when they are challenged and a strict reading of Union powers would prevent it from overcoming an identity crisis.

4. What constitutional transformation?

Though the Union's recently adopted conditionality regulation is not legalist in *institutional* terms, it exemplifies a *substantively* legalist approach: instead of targeting a wide range of authoritarian strategies, the regulation echoes the court's focus on 'the effective judicial review by independent courts' of matters related to the Union budget.[147] In view of the political branches of the Union, the crux of the matter lies in Hungary's and Poland's refusal to respect a Union rule: the protection of judicial independence.

The rule of law is a fuzzy concept. If legalists tend to hide 'that they too have made a choice among political values',[148] the very notion of the rule of law makes this choice even harder to discern. The rule of law indeed acts as an 'empty signifier'[149] onto which all sorts of substantive values can be projected (or not). The rule of law is often associated, for instance, with the protection of human rights, from the protection of economic rights to social, cultural, civil and political rights. But that association is neither always relevant nor logically necessary. Raz was keen

[141]See *generally* on the value of such friction J Bulman-Pozen and HK Gerken, 'Uncooperative Federalism' 118 (2009) Yale Law Journal 1256.

[142]Article 7 TEU.

[143]Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (2020) OJ L 433I/1.

[144]On southern opposition to the Voting Rights act, see Ackerman (n 134) at 161; on opposition to the Fair Housing Act, see *id* at 202–3.

[145]*Eg Hungary v Parliament and Council* (n 92) paras 67–95; *Poland v Parliament and Council* (n 92) paras 63–109 and 253–8.

[146]K Lenaerts, 'Constitutionalism and the Many Faces of Federalism' 38 (1990) American Journal of Comparative Law 205, 220.

[147]Art 4(2)(d) of the Conditionality Regulation (n 143).

[148]Shklar (n 7) 8.

[149]E Laclau, *On Populist Reason* (Verso 2005).

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to remind us not to confuse the rule of law with the rule of good law.[150] The rule of law is controversial for this very reason: an 'unqualified human good' for some[151] but a pernicious fig leaf to 'conceal … class dominance' for others.[152]

The very substance of this constitutional transformation is therefore a matter of interest. What justifies the focus on judicial independence? To untangle the significance of this constitutional transformation, it is useful to contextualise it within the playbook of semi-authoritarian rulers. Beyond attacks on the judiciary, those rulers have contested the separation of powers more broadly, defended ethnic nationalism by enforcing traditional family values and restricting immigration, as well as through a reconfiguration of the relation between the economy and the state.[153] While it is commonly observed that the EU underwent a constitutional transformation with respect to judicial independence within the Member States, it is often forgotten that the EU has chosen *not* to respond to other aspects of that playbook. In the remainder of this section, I engage in a thought experiment to examine the constitutional transformations that could have been: constitutional transformations to promote Union redistribution in order to limit the power base of semi-authoritarian rulers, to strengthen Union protection of reproductive and LGBTQ rights, as well as the rights of migrants, and in order to defend democratic processes within the Member States. By contrasting the Union's constitutional transformation with regard to judicial independence with these transformations which did not occur, it becomes possible to understand the emphasis on judicial independence as one of the numerous 'processes of redistribution' of the Union.[154] Below I analyse, in turn, questions of economic inequality (A.), identity politics (B.) and democracy (C.).

A. Economic inequality

Semi-authoritarian regimes tend to court the vote of the economic losers of globalisation. Because globalisation creates both winners and losers, 'economic anxiety and distributional struggles exacerbated by globalization generate a base for populism' (whether of the left- or right-wing variety).[155] Autocrats succeed because they 'are promising better pensions, health care, and more jobs, an agenda that is winning over the abandoned working class communities that were once a stronghold of the European social democratic and other progressive parties'[156] – arguably a positive dimension of the rise of authoritarianism. Despite some differences in emphasis, there are significant parallels between the social policies of semi-authoritarian Member States in their development of a 'conservative developmental state'.[157] The Polish Law and Justice party relies

[150]Raz (n 131) 227.

[151]EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin 1977) 267. See also D Hay, 'E.P. Thompson and the Rule of Law: Qualifying the Unqualified Good' in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 202.

[152]*Eg* M Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford University Press 2021) 55, citing Hermann Heller.

[153]The literature about the causes of the rise of semi-authoritarian regimes mirrors this playbook: the popularity of these regimes is ascribed either to depoliticisation or to substantive reasons such as an increase in economic inequality, a shift in dominant cultural values on issues related to identity politics or a mix of both. See S Berman, 'The Causes of Populism in the West' 24 (2021) Annual Review of Political Science 71.

[154]Editorial Comments, 'A Jurisprudence of Distribution for the EU' 59 (2022) Common Market Law Review 957, 960; see also T Perisin and S Koplewicz, 'Blame it on Brussels: EU Law and the Distributive Effects of Globalisation' 14 (2018) Croatian Yearbook of European Law and Policy vii.

[155]D Rodrik, 'Populism and the Economics of Globalization' 1 (2018) Journal of International Business Policy 12, 13–4; D Rodrik, 'Why Does Globalization Fuel Populism? Economics, Culture, and the Rise of Right-Wing Populism' 13 (2021) Annual Review of Economics 133.

[156]B Bugarič, 'The Populist Backlash against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe' in F Bignami (ed), *EU Law in Populist Times. Crises and Prospects* (Cambridge University Press 2020) 477, 503.

[157]Bugarič (n 2) 181.

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heavily on redistributive policies. When it came to power, it reversed a measure which had lowered the retirement age, limited employer's abilities to use precarious short-term labour contracts, raised the minimum wage and launched a popular child benefit scheme.[158] The Hungarian case is more complex: Orbán initially curtailed the social welfare state by reducing the duration of unemployment benefits to three months, reducing the value of sick pay and social assistance benefits as well as family allowances and maternity benefits. Benefits received at the top of the income distribution increased.[159] Orbán's reforms can therefore be described as an attempt to boost the wealth and power of Hungary's growing national bourgeoisie.[160] Predictably, such policies cause much anger and resentment among those who are worried about their economic prospects. These policies are part of Orbán's "Eastern winds" approach which seeks to mimic the growth model of fast-growing South-East Asian economies, in part by attracting foreign investments and more job opportunities for Hungarians.[161] More recently, Orbán turned to more generous social benefits as part of his natalist welfare nationalism, providing for instance a "lifetime exemption from personal income tax for women who bear and raise four or more children"[162] in an attempt to strengthen his chances of victory in anticipation of the next election cycle. Authoritarian regimes thus seek to respond, more or less skilfully, to the excesses of decades of neoliberalism and the high levels of inequality it has generated.[163]

In response to this semi-authoritarian strategy, the Union could have sought to redistribute resources itself in order to undercut part of the semi-authoritarian electoral strategy. The Union's constitutional transformation could have been targeted at a more just redistribution of economic resources throughout the Union, rather than at judicial independence. As 'equality' and 'solidarity' – alongside numerous social rights protected in the Charter covered under the heading of 'human rights' – can be counted among the Union's foundational values,[164] the rise of inequality could be recognised as a threat to core Union values not unlike court packing.

In fact, the Union's actions did involve some form of redistribution. The Union's conditionality regulation[165] allows it to withhold funds from those Member States who pose a threat to the rule of law. But this is an ineffective response to the authoritarian strategy. For one, the conditionality regulation is triggered by rule of law issues, rather than the economic anxiety which generates a voter base for would-be authoritarians. In principle, nothing prevents authoritarian regimes from emerging in the absence of threats to judicial independence. More importantly, the conditionality regulation seeks to stop redistribution rather than to promote it, likely causing even greater economic anxiety than in the absence of an instrument allowing for the withholding of funds.

The Union has not seized the opportunity of the crisis to develop stronger redistributive policies to compensate those who lost out in the process of globalisation.[166] It was not for want of opportunity. Traditionally, the question of economic redistribution was considered within the remit of the national politics of the Member States, outside the bounds of Union powers. But in the

[158]S Shields, 'Domesticating Neoliberalism: 'Domification' and the Contradictions of the Populist Countermovement in Poland' 73 (2021) Europe-Asia Studies 1622; D Ost, 'Workers and the Radical Right in Poland' 93 (2018) International Labor and Working-Class History 113, 115.

[159]G Scheiring, *The Retreat of Liberal Democracy. Authoritarian Capitalism and the Accumulative State in Hungary* (Palgrave MacMillan 2020) 270–2.

[160]Ibid., 312.

[161]Bugarič (n 2) 182.

[162]Bugarič (n 2) 180–3. See also KL Scheppele, 'How Viktor Orbán Wins' 33 (2022) Journal of Democracy 45, 46.

[163]T Piketty, *Capital and Ideology* (Harvard University Press 2020).

[164]Art 2 TEU.

[165]See *generally* the Conditionality Regulation (n 143).

[166]This is arguably consonant with the Union's commitment to economic liberalism to the detriment of the social question. Among numerous contributions, see Wilkinson (n 152); AJ Menendez, 'The Existential Crisis of the European Union' 14 (2013) German Law Journal 453; E Balibar, 'The Rise and Fall of the European Union: Temporalities and Teleologies' 21 (2014) Constellations 202.

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midst of the rule of law crisis, the COVID-19 pandemic engendered another major constitutional transformation for the Union: its budgetary framework was overhauled considerably by borrowing on financial markets.[167] Yet NextGenerationEU (NGEU) merely seeks to overcome the economic recession caused by the COVID-19 pandemic and to restore growth and resilience of the European economy in its aftermath[168] rather than to redistribute Union resources to undercut the rise of semi-authoritarian governments. To finance the economic recovery, distributive decisions plainly had to be made. NGEU chose, for example, to redistribute resources in order to ensure a "fair and inclusive" transition to a carbon-neutral economy through its new just transition fund.[169] Yet it did not channel extra resources to existing Union instruments that could mitigate high levels of inequality such as the Union's existing European Globalisation Adjustment Fund for Displaced Workers,[170] nor did it create any new Union instruments tailored to the economic anxieties that fuel the rise of authoritarianism. That is a missed opportunity.

B. Identity politics

To examine the distributive implications of the Union's defence of the rule of law is not merely to question its economic and monetary implications. The economic resources authoritarian rulers redistribute are simultaneously a vector for the propagation of "welfare chauvinis[m]" which seeks to defend "patriotism, religion, and traditional family values".[171] This ideology claims to protect the nation against what they perceive to be external threats (such as migrants) but also internal threats (such as women and the LGBTQ community).[172] It is infused in their vision of the welfare state, but also in other policy areas. Hungary's Orbán has argued, for instance, that he wanted his country to be "a home to European citizens who do not want migrants, who do not want multiculturalism, who have not descended into LGBTQ lunacy".[173] By contrast with the effects of globalisation, which predate the rise of semi-authoritarianism in the Union, the responsibility for the effects of these policies lie squarely with these regimes. The Union's constitutional transformation could have sought to strengthen the rights of those most affected by such identity politics, rather than strengthening judicial independence, but it did not do so. Below, I examine how the Union's response to the rule of law crisis has (not) impacted such identity politics.

Reproductive rights

European semi-authoritarian regimes have put reproductive rights, specifically the question of abortion rights, at the heart of their political agenda.[174] They defend a "traditionalist . . . interpretation of gender" which rewards women for "reproductive and care work," simultaneously

[167]See *generally* B De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' 58 (2021) Common Market Law Review 635; P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal Integration in Europe: Between Continuity and Rupture' 47 (2021) Legal Issues of Economic Integration 337; F Fabbrini, *EU Fiscal Capacity Legal Integration After Covid-19 and the War in Ukraine* (Oxford University Press 2022).

[168]Article 5 of Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union (2020) OJ L 424/1 (authorising borrowing on financial markets for 'the sole purpose of addressing the consequences of the COVID-19 crisis').

[169]Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund (2021) OJ L 231/1.

[170]Regulation (EU) 2021/691 of the European Parliament and of the Council of 28 April 2021 on the European Globalisation Adjustment Fund for Displaced Workers (EGF) (2021) OJ L 153/48.

[171]Bugarič, (n 2) 181.

[172]See *generally* S Mancini and N Palazzo, 'The Body of the Nation. Illiberalism and Gender' in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2022) 403.

[173]As cited in Mancini & Palazzo (n 172) 403.

[174]See *generally* E Kováts, 'The Emergence of Powerful Anti-Gender Movements in Europe and the Crisis of Liberal Democracy' in M Köttig, R Bitzan and A Pető (eds), *Gender and Far Right Politics in Europe* (Palgrave Macmillan 2017) 175.

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hoping to "seize and appropriate … feminist resistance toward neoliberalism".[175] Hungary's 2011 constitution, adopted after Orbán had come to power with a supermajority in Parliament, protects "the right to life and human dignity" and specifies that "embryonic and foetal life shall be subject to protection from the moment of conception".[176] It took some time before Orbán gave this constitutional mandate legislative bite. In the fall of 2022 the Hungarian legislature enacted a heartbeat law which requires women to listen to the foetal heartbeat before an abortion can be performed, a move widely criticised as a regression in terms of women's rights.[177] Because of the lack of a supermajority, Polish politics related to the abortion question have been more fraught, despite a similar agenda.[178] A 2016 legislative effort by the Law and Justice party to abolish abortion rights failed after significant popular opposition.[179] In October 2020, the (packed) Polish Constitutional Tribunal nevertheless severely curtailed abortion rights, finding that abortion in cases of foetal impairment was incompatible with the Polish constitution.[180] Abortion is now only allowed in cases of rape or incest, or cases where the pregnant woman's life is at stake.

Given that 'human dignity', 'human rights' and 'equality' (specifically 'equality between men and women') count among the Union's values just as much as the 'rule of law,'[181] authoritarian attacks on reproductive rights can be considered as problematic as attacks on the independence of the judiciary. Neither the CJEU[182] nor the Union legislator have taken forceful action in response to these authoritarian policies, despite the Union's unequivocal commitment to "eliminat[ing] inequalities, and to promot[ing] equality, between men and women".[183] In the Polish context, the European Commissioner for Equality linked the abortion question with lack of judicial independence, qualifying the problem as one of judicial independence rather than one of women's rights. She reaffirmed the established view that the Union lacked the necessary competences to adopt legislation protecting abortion rights within the Member States themselves.[184] But this view of the Union's competences is excessively timid. Article 19(1) TFEU, a legal basis allowing for "a spectacular broadening … of EU equality law"[185] gives the Union significant powers to "take appropriate action to combat discrimination based on sex." No initiative has ever been taken to

[175]A Petö, 'Gender and Illiberalism' in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2022) 313, 314–5.

[176]Article II of the 2011 Constitution, <https://www.constituteproject.org/constitution/Hungary_2011.pdf> accessed 29 March 2023.

[177]W Strzyżyńska, 'Hungary Tightens Abortion Access with Listen to 'Foetal Heartbeat' Rule' (*The Guardian* 13 September 2022) <https://www.theguardian.com/global-development/2022/sep/13/hungary-tightens-abortion-access-with-listen-to-foetal-heartbeat-rule> accessed 29 March 2023.

[178]A Gwiazda, 'Right-Wing Populism and Feminist Politics: The Case of Law and Justice in Poland' 42 (2021) International Political Science Review 580.

[179]M Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon' 14 (2022) Hague Journal on the Rule of Law 73, 84.

[180]The Constitutional Tribunal's ruling can be found at <https://trybunal.gov.pl/s/k-1-20> accessed 29 March 2023.

[181]Article 2 TEU.

[182]The Court's most significant precedent on the matter dates from thirty years ago and deals with right to travel to other Member States to obtain an abortion right as a service protected by the Union's internal market. See Case C-159/90 *Grogan*, ECLI:EU:C:1991:378; see also F Fabbrini, 'The European Court of Human Rights, the EU Charter of Fundamental Rights, and the Right to Abortion: Roe v Wade on the Other Side of the Atlantic?' 18 (2011) Columbia Journal of European Law 1, 16–9.

[183]Article 8 TFEU.

[184]'Abortion rights in Poland: Opening statement by Helena DALLI, European Commissioner for Equality', <https://multimedia.europarl.europa.eu/fr/video/abortion-rights-in-poland-opening-statements-by-council-and-commission-_I199144> accessed 29 March 2023. See also answers to several Parliamentary Questions confirming this view, available at <https://www.europarl.europa.eu/doceo/document/E-9-2020-006085-ASW_EN.html> accessed 29 March 2023 (noting that 'The Commission is aware of the developments in Poland, which can affect women's rights' but adding that 'the Member States are responsible for the definition of health policy and the organisation and delivery of health services and medical care'.) and <https://www.europarl.europa.eu/doceo/document/E-9-2020-005924-ASW_EN.html> accessed 29 March 2023 ('Legislative powers on sexual and reproductive health and rights, including abortion, lie with the Member States that are also responsible for the definition of health policy'.)

[185]E Muir, *EU Equality Law* (Oxford University Press 2018) 6, 73–5.

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protect abortion rights on the theory that it amounts to such a discrimination.[186] Another confrontation with authoritarian right-wing politics some twenty years ago had strengthened the Council's determination to adopt an ambitious anti-discrimination programme,[187] but that has not been the case during the rule of law crisis.

The difficulty of this approach is that Article 19(1) TFEU only empowers the Union to act "within the limits of the powers conferred by them upon the Union." The Treaties do not empower the EU to regulate abortion as such. While the EU only has the power to adopt "incentive measures designed to protect and improve human health," it does not have the power to adopt harmonisations of the laws and regulations of the Member States with regard to abortion.[188] Yet abortion could be considered a service, a matter well within the powers of the Union, and be regulated as such irrespective of other limits on Union action.[189] Abortion therefore arguably falls within the textual limits of Art 19(1) TFEU. Furthermore, the literature notes that this constraint may not be significant, given that "EU equal treatment legislation ... autonomously defines its scope of application as well as that of EU intervention on the matter."[190]

The main obstacle to the adoption of a legislative measure protecting abortion at Union level is therefore political rather than constitutional. A Union initiative to uphold abortion rights on the basis of Article 19(1) TFEU would struggle to meet the requirement of unanimity – especially when states such as Hungary or Poland are likely to oppose such measures. Yet the conditionality regulation was adopted, overcoming a similar unanimity hurdle.[191] Debating such measures and putting them up for a vote, even if unanimity could not be obtained, has the merit of clarifying the Union's position on matters which affect its fundamental values. Even if the unanimity hurdle would remain insurmountable, such a measure could always be adopted by a critical mass of Member States willing to go further, on the basis of the mechanism of enhanced cooperation.[192] While such a measure would do little to protect abortion rights in those states were it is actively being curtailed, it would at least send the signal in which direction European integration is headed.

The proposals currently envisaged by the Union to strengthen abortion rights are unlikely to provide an effective response to the authoritarian threat against abortion rights, let alone reflect the kind of ambition of the Union's constitutional transformation with respect to to judicial independence. The Commmission's "Gender Equality Strategy 2020 – 2025"[193] as well as a recent legislative initiative[194] seek to combat gender-based violence in the form of "forced abortion" but

[186]For a general argument that abortion rights can be analysed as a matter of discrimination between men and women, see C MacKinnon, 'Reflections on Sex Equality under Law' 100 (1991) Yale Law Journal 1281. The case law of the CJEU seems open to such an approach. See Case C-177/88 *Dekker* ECLI:EU:C:1990:383 para 17 (finding a refusal to employ a woman on the grounds that she is pregnant to be direct discrimination, even though men are not in a comparable situation). I am indebted to Elise Muir for this reference.

[187]M Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press 2002) 74.

[188]Art 168(5) TFEU.

[189]The CJEU accepted as much in *Grogan* (n 182). The EU also has a competence to adopt secondary legislation relating to services (Art 59 TFEU) as well as the internal market more generally (Art 114 TFEU).

[190]Muir (n 185) 27.

[191]Though the regulation itself was adopted by qualified majority vote on the basis of Art 322(1) TFEU, so that it could pass even over the objections of Poland and Hungary, the measure was adopted as part of a package deal with two other landmark political decisions for which unanimity was required (the Own Resources Decision and the Union's multi-annual financial framework), giving both countries *de facto* veto power over the adoption of the regulation. See also 'EU warns of serious obstacles to budget deal after Poland and Hungary veto' (*Financial Times* 19 November 2020).

[192]Article 329 TFEU provides that enhanced cooperation may be established in all 'areas covered by the Treaties'.

[193]European Commission, 'A Union of Equality: Gender Equality Strategy 2020–2025', COM(2020) 152 final.

[194]European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Combating Violence against Women and Domestic Violence' COM(2022) 105 final.

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does not target restrictions to abortion rights *per se* under that header. The EU's ratification of the Istanbul Convention[195] likewise has little practical impact. While the European Parliament has argued that national legislation which results "in women having to seek clandestine abortions, to travel to other countries or to carry their pregnancy to term against their will" constitutes "a form of gender-based violence affecting women's and girls' rights to life, physical and mental integrity, equality, non-discrimination and health",[196] the suggestion to protect abortion rights as part of the combat against gender-based violence appears to have fallen on deaf ears *rond-point Schuman*.

The European Parliament points to even lower hanging fruit. Directive 2004/113/EC, adopted on the basis of Article 19(1) TFEU, has been in force for almost two decades and seeks to protect "the principle of equal treatment between men and women in the access to and supply of goods and services".[197] Because abortion can be considered such a service, the Parliament called on the Commission to "confirm" that "limits" and "barriers" to sexual health and reproductive rights "constitute gender-based discrimination, as they disproportionally affect one gender (women) . . . "[198] The Commission has not yet taken up the Parliament's invitation.

The only institution to have sought to meaningfully strengthen abortion rights is the European Parliament. It adopted several resolutions stressing the importance of abortion rights generally and protesting the Polish Constitutional Tribunal's ruling specifically. But the Parliament's approach is remarkably legalist: it relies on the vernacular of human rights, deferring to judicial institutions, rather than debating the more controversial content and limits of those rights. Though the Parliament "condemns" Polish restrictions on abortion rights, it urges Polish authorities to "protect the inherent and inalienable rights and dignity of women" and "to respect, fulfil and promote women's human rights to life, health and equality, as well as their freedom from discrimination, violence and torture or cruel, inhuman and degrading treatment".[199] Despite political controversy over the significance of European values in the abortion debate,[200] the issue appears to be merely legal, as opposed to one within the remit of democratic contestation: in light of the fact that "women's rights are fundamental human rights . . . the EU institutions and the Member States are legally obliged to uphold and protect them in accordance with the Treaties and the Charter, as well as international law."[201]

The controversy culminated in a resolution adopted in the aftermath of the overruling of *Roe v Wade* by the United States Supreme Court. In its response, Parliament proposed the inclusion of a

[195]Council of the EU, 'Combatting Violence against Women: Council Adopts Decision about EU's Accession to Istanbul Convention' (1 June 2023) <https://www.consilium.europa.eu/en/press/press-releases/2023/06/01/combatting-violence-against-women-council-adopts-decision-about-eu-s-accession-to-istanbul-convention/> accessed 29 March 2023.

[196]'European Parliament Resolution of 24 June 2021 on the Situation of Sexual and Reproductive Health and Rights in the EU, in the Frame of Women's Health' P9_TA(2021)0314, point 35, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0314_EN.html> accessed 29 March 2023.

[197]Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ (2004) L 373/37.

[198]'European Parliament resolution of 26 November 2020 on the de facto ban on the right to abortion in Poland' P9_TA(2020)0336, point 22, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0336_EN.html> accessed 29 March 2023. See also E. C. di Torella and B. McLellan, 'Research Paper on the Implementation across the Member States of Directive 2004/113/EC on the principle of equal treatment between men and women in the access to and supply of goods and services' I-19 to I-21, available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/593787/EPRS_STU(2017)593787_EN.pdf> accessed 29 March 2023.

[199]European Parliament, 'European Parliament resolution of 11 November 2021 on the first anniversary of the de facto abortion ban in Poland' P9_TA(2021)0455, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0455_EN.html> accessed 29 March 2023. See also European Parliament, 'European Parliament resolution of 13 February 2019 on experiencing a backlash in women's rights and gender equality in the EU' P8_TA(2019)0111, available at <https://www.europarl.europa.eu/doceo/document/TA-8-2019-0111_EN.html> accessed 29 March 2023.

[200]V Berthet, 'United in Crisis: Abortion Politics in the European Parliament and Political Groups' Disputes over EU Values' 60 (2022) Journal of Common Market Studies 1797.

[201]Ibid.

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new right in the Charter, proclaiming that "Everyone has the right to safe and legal abortion".[202] Unfortunately, that concise statement of abortion rights is question begging. Adding an additional right to the Charter indeed would not respond to the argument that the Union has no substantive competence on this matter. The Charter indeed famously only applies to the Member States to the extent they are implementing Union law.[203] In addition, even the restrictive Polish abortion normative framework does not completely outlaw abortion. The rise of authoritarian politics does not prompt the question whether a right to abortion exists in the abstract, but rather what its limits are. The politics of abortion depend on the limits of these rights in specific circumstances. In its proposed form, the amendment to the Charter relies on the CJEU to specify such limits, leaving the essential political questions to the goodwill of that Court. It is ironic that the European Parliament should put its faith in that institution at a moment at which the United States counterpart of that court reversed its position on abortion rights.

LGBTQ rights

LGBTQ rights are another salient issue of identity politics. Semi-authoritarian regimes defend a vision of the nation which seeks to exclude the LGBTQ minority.[204] Hungary's 2012 constitution, adopted shortly after Orbán came to power, already contained a ban on same-sex marriage.[205] Almost ten years later, in 2021, Hungary passed a law banning depictions of homosexuality and any mentions of transgender individuals in educational materials.[206] LGBTQ parents were also stripped of their adoption rights.[207] The Polish authorities' similar anti-LGBTQ rights stance dates further back. Since 2019, at the height of the controversy over judicial independence, a number of Polish municipalities and regional authorities have, for example, declared themselves 'LGBT free zones'.[208] The government has proposed a ban on adoption for same-sex couples and a ban on any activities promoting LGBTQ rights.[209]

As the Union is founded on the values of 'human dignity', 'human rights' and 'equality' as much as on the 'rule of law'[210], such actions could be considered as problematic as interference with the independence of domestic judiciaries. But the European institutions do not consider the matter as high stakes, despite the fact that the Union aims to "combat discrimination based on … sexual orientation".[211] No transformative legislation emerged to defend LGBTQ rights. Article 19(1) TFEU nevertheless empowers the Union to "take appropriate action to combat

[202]European Parliament resolution of 7 July 2022 on the US Supreme Court decision to overturn abortion rights in the United States and the need to safeguard abortion rights and women's heath in the EU, P9_TA(2022)0302, <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0302_EN.html> accessed 29 March 2023. A similar suggestion was made in the European Parliament resolution of 9 June 2022 on global threats to abortion rights: the possible overturning of abortion rights in the US by the Supreme Court <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html> accessed 29 March 2023.

[203]Article 51(1) of the Charter.

[204]R Smilanova, 'The Ideational Core of Democratic Illiberalism' in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2022) 177, 196; see also E Kováts (n 174) 175.

[205]Article L(1) of Hungary's 2011 Constitution provides that 'Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival'.

[206]See <https://www.amnesty.org/en/latest/news/2021/06/hungary-proposed-law-a-new-full-frontal-attack-against-lgbti-people/> accessed 29 March 2023.

[207]See <https://www.amnesty.org/en/latest/press-release/2020/12/hungary-dark-day-for-lgbti-community-as-homophobic-discriminatory-bill-and-constitutional-amendments-are-passed/> accessed 29 March 2023.

[208]'Life beyond Europe's rainbow curtain' (*The Economist*, 21 November 2020).

[209]*Reuters*, 'Poland to Ban Gays from Adopting, Even as Single Parents' <https://www.reuters.com/article/us-eu-rights-lgbt-poland-idUSKBN2B31WN> accessed 29 March 2023; Amnesty International, 'Poland: New "Stop LGBT" Bill Is "Discriminatory to Its Core"' <https://www.amnesty.org.uk/press-releases/poland-new-stop-lgbt-bill-discriminatory-its-core> accessed 29 March 2023.

[210]Article 2 TEU.

[211]Article 10 TFEU.

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discrimination based on . . . sexual orientation." The Union's political branches seek to avoid political controversy in this matter, for instance with regard to the symbolically significant question of same-sex marriage. Alongside broader legislation in order to combat discrimination against the LGBTQ community, Union-wide recognition of same-sex marriage could have been a meaningful response to authoritarian attacks on the LGBTQ community. Though it is routinely argued that the Union has no powers to legislate on the issue of marriage in general and same-sex marriage specifically,[212] it could do so on the basis of Article 19(1) TFEU, on the theory that the recognition of same-sex marriage is necessary to combat a discrimination on the basis of sexual orientation.

As noted above, Article 19(1) TFEU only empowers the Union to act 'within the limits of the powers conferred by them upon the Union'. Yet Union institutions have largely disregarded this proviso when they adopted measures combatting discrimination in areas only tenuously related to other substantive Union policies.[213] The example of the Race Equality Directive is significant: despite the Union's weak competences in relation to education and healthcare, both domains are part of the directive's scope of application.[214] The same goes for access to housing, in which it is doubtful the Union has any powers at all.[215] For this reason, it has been argued that 'EU equal treatment legislation ... autonomously defines its scope of application as well as that of EU intervention on the matter'.[216] Reliance on the Union's foundational values *a fortiori* justify a legislatively driven intervention on the basis of Art 19(1) TFEU.

Wouldn't the CJEU block such transformative legislation? The case law seems reluctant to impose strict limits on the Union legislator. Though the *ultra vires* argument has not been used as such to challenge instruments adopted on the basis of Art 19(1) TFEU, the court's interpretive practice provides an indication as to how it might respond. In the context of the Race Equality directive, the CJEU finds that 'in the light of the objective of Directive 2000/43 and the nature of the rights which it seeks to safeguard, and in view of the fact that that directive is merely an expression, within the area under consideration, of the principle of equality, which is one of the general principles of EU law, as recognised in Article 21 of the Charter, the scope of that directive cannot be defined restrictively'.[217] (It nevertheless did so in a context in which secondary EU law was clearly applicable.[218]) The CJEU also seems reluctant to restrict the application of this directive to the powers conferred upon the Union. The CJEU has rejected the application of the directive in the context of the attribution of names and surnames – arguably a competence of the Member States – on the theory that the attribution of such names are not a 'service' within the meaning of the Directive, rather than the question of the scope of application *ratione materiae*

[212]Not in the least by the CJEU, see eg Case C-673/16 *Coman* ECLI:EU:C:2018:385 para 37.

[213]Muir (n 185) 27, 73–75; P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' 39 (2002) Common Market Law Review 945, 986–8.

[214]Art 3(e) and (g) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ (2000) L 180/22. With regard to education, Art 6 TFEU provides that the Union merely has powers to encourage cooperation between the Member States, or to support and supplement their actions (Art 165 and 6 TFEU). With regard to healthcare, the Union may only adopt incentive measures and has no power to harmonise the laws of the Member States (Art 168(5) TFEU). (The Race Equality Directive seems unrelated to the Union's shared competence in the limited areas described in Art 168(4) TFEU.)

[215]Art 3(h) of Directive 2000/43/EC (n 214). In this area, the Union may only have powers in the context of the free movement provisions or under the Long-Term Residence Directive.

[216]Muir (n 185) 27.

[217]Case C-83/14 *CHEZ* ECLI:EU:C:2015:480 para 42 (finding the requirement of the material scope of application of the Directive to be satisfied). *CHEZ* concerned discrimination in the provision of electricity meters, which was a requirement of secondary Union law. The same quote also appears in Case C-391/09 *Runevič-Vardyn* ECLI:EU:C:2011:291, para 43, where the CJEU nevertheless finds that national rules relating to names do not fall within the scope of application of the same directive.

[218]*CHEZ* (n 217) para 44.

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of the directive.[219] The court has rejected the application of the directive with respect to grants of housing assistance – arguably a competence of the Member States – on the grounds that there was no discrimination on the basis of ethnic origin, rather than the lack of Union competence with regard to housing assistance.[220] Finally, while the CJEU has been reluctant in the past to recognise the comparability of heterosexual and same sex couples when it comes to marriage and civil partnerships,[221] Union legislation could overrule such concerns.

The principal obstacle to Union legislation on this matter is not a legal or constitutional one, but the political reluctance of the Member States to draw 'red lines'[222] in response to the rise of semi-authoritarian Member States. Even if such a measure failed to secure unanimity, it could have shown that a significant number of Member States are willing to defend the Union's foundational values and to oppose discrimination against the LGBTQ community. Though it would not have provided direct relief to the affected communities, a critical mass of Member States could also have pushed for the adoption of same-sex marriage as a matter of Union law on the basis of enhanced cooperation in order to defend core Union values,[223] showing the future direction of European integration. A legislative initiative dating back to 2008 and implementing the non-discrimination principle with respect to sexual orientation beyond the workplace has been stalled because of the same voting hurdle. No progress was made on the issue during the rule of law crisis.[224] The European Parliament has underlined 'that this blockage sends the wrong message, namely that EU institutions turn a blind eye to – and allow the persistence of – serious discrimination taking place in EU Member States'.[225]

To the Commission's credit, it has sought to push the political branches forward by proposing new initiatives. While it does not aim for substantive harmonisation of Member State laws, the Commission does seek to 'propose a horizontal legislative initiative on the mutual recognition of parenthood between Member States' or to 'explore possible measures to support the mutual recognition of same-gender partnership between Member States'.[226] The Commission has also sought to oppose anti-LGBTQ rhetoric on technical administrative grounds, albeit with mixed results. In May 2020, it threatened to withhold COVID-19 funding,[227] noting that applicable EU legislation required Member States to 'take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' in the implementation of EU funding programmes.[228] In response, some regional councils changed their

[219]Case C-391/09 *Runevič-Vardyn* ECLI:EU:C:2011:291 para 44–48.

[220]Case C-94/20 *Land Oberösterreich* ECLI:EU:C:2021:477 paras 50–57.

[221]See Case C-267/06 *Maruko* ECLI:EU:C:2008:179 paras 69, 72 and 73; Case C-147/08 *Römer* ECLI:EU:C:2011:286 paras 38, 42, 52; Case C-267/12 *Hay* ECLI:EU:C:2013:823 paras 32-34, as well as A Somek, *Engineering Equality. An Essay on European Anti-Discrimination Law* (Oxford University Press 2011) 126. I am indebted to Elise Muir on this point.

[222]I draw the expression from von Bogdandy et al (n 28) 983.

[223]Article 329 TFEU provides that enhanced cooperation may be established in all 'areas covered by the Treaties'.

[224]In 2008, the Commission proposed a legislative measures to combat discrimination, among others on the basis of sexual orientation, beyond the sphere of the workplace. See Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM(2008) 426 final.

[225]'European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU' point 6, <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html> accessed 29 March 2023.

[226]See European Commission, 'Union of Equality: LGBTIQ Equality Strategy 2020-2025' COM(2020) 698 final. The Commission has made a proposal regarding the recognition of parenthood, including for same-sex partners, but not regarding same-sex marriage, at the time of writing. See Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood COM(2022) 695 final.

[227]A copy of the letter is available online at <https://archiwumosiatynskiego.pl/images/2020/06/2020-Letter-from-EMPL-and-REGIO_LGBT_COVID.docx.pdf> accessed 29 March 2023.

[228]Articles 6 and 7 of Regulation 1303/2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund, [2013] OJ L 347/320.

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policy stance, retracting their claim to be 'LGBTQ-free zones', whereas others did not.[229] Several cities lost EU funding on similar grounds, though that funding was compensated by the Polish government.[230] The episode was a rehearsal for the enforcement of the conditionality regulation, a much more visible episode of Union constitutional law.[231]

The CJEU has also intervened to protect the LGBTQ community during the crisis. It enforces, for example, non-discrimination principles in the workplace.[232] The CJEU also intervened on the question of same-sex marriage. In *Coman*, that court upheld the right of same-sex partners married in one of the Member States of the Union to reside freely in other Member States as spouses within the meaning of Directive 2004/38/EC.[233] Romania does not allow same-sex marriage, and it refused to recognise such a marriage concluded abroad. Though the judgement avoids a direct confrontation with Polish and Hungarian anti-LGBTQ policies, it can be understood against the background of culture wars within the Union.[234] The Court found that the 'the obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state' – as opposed to the requirement to create the institution of same-sex marriage – did 'not undermine the national identity or pose a threat to the public policy of the Member State concerned'.[235] Alongside a minimalist defence of same-sex marriage – which must be recognised by semi-authoritarian governments if validly concluded abroad – *Coman*'s main achievement is to shield Union law from an authoritarian interpretation of the national identity clause, which would permit authoritarian identity politics to flourish in the realm of Union law.

Yet *Coman* did not signal a constitutional transformation of the sort prompted by the *Portuguese Judges* case. A constitutional transformation of such stature might have taken the form of protection of same-sex marriage by means of Union judicial intervention on the model of *Obergefell*.[236] The idea is less outlandish than it seems. In the past, the CJEU has given the constitutional vernacular of the general principle of non-discrimination a transformative function, even beyond the limits of Union legislation, in a line of cases that starts with *Mangold*.[237] The insistence of the CJEU on the protection of 'the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union'[238] – read or not in combination with a fundamental right[239] – has a similar transformative bent and provides additional rhetorical ammunition for the CJEU to move in that direction. *Coman* is a missed opportunity to at least suggest non-discrimination might be used as a self-standing principle in order to grant broader protection to same-sex couples beyond the text of Union secondary law, as a first step in a

[229]'Three Polish regions scrap anti-LGBT resolutions' (*BBC News*, 28 September 2021) <https://www.bbc.com/news/world-europe-58714658> accessed 29 March 2023.

[230]Helsinki Foundation for Human Rights, 'Franet National contribution to the Fundamental Rights Report 2021 Poland' p. 7, available at <https://fra.europa.eu/sites/default/files/fra_uploads/frr2021_poland-frr2021_en.pdf> accessed 29 March 2023.

[231]See Conditionality Regulation (n 143) as well as *Hungary v Parliament and Council* (n 92) and *Poland v Parliament and Council* (n 92).

[232]Case C-356/21 *TP* ECLI:EU:C:2023:9.

[233]*Coman* (n 212).

[234]JJ Rijpma, 'You Gotta Let Love Move' 15 (2019) European Constitutional Law Review 324, 326.

[235]*Coman* (n 212) 45–6.

[236]Obergefell v. Hodges, 576 U.S. 644 (2015).

[237]See in particular Case C-144/04 *Mangold* ECLI:EU:C:2005:709 and Case C-555/07 *Kücükdeveci* ECLI:EU:C:2010:21; Case C-441/14 *Dansk Industri* ECLI:EU:C:2016:278. See also R Xenidis, 'Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies' 38 (2019) Yearbook of European Law e2, e11–4; E Muir, 'The Transformative Function of EU Equality Law' 21 (2013) European Review of Private Law 1231.

[238]Case C-34/09 *Zambrano* ECLI:EU:C:2011:124 para 42. See also, on the significance of this judgement, A von Bogdandy et al, 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States' 49 (2012) Common Market Law Review 489.

[239]Case C-133/15 *Chavez-Vilchez* ECLI:EU:C:2017:354 para 70 (in which the CJEU finds a fundamental right important in the determination whether the substance of citizenship rights has been affected).

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constitutional transformation as significant as that brought about by authoritarian court packing programs. In political terms, *Coman* sought to split the difference between progressives (seeking greater protection of LGBTQ rights) and conservatives (who seek to abolish such protections instead).

That might change. The Commission launched an infringement procedure against Hungary and Poland in July 2021 on the matter of LGBTQ rights.[240] Its complaint uses a constitutionalist vernacular reminiscent of the transformation brought about by the rule of law crisis, emphasising the importance of the foundational values of the Union and inviting the CJEU to go down the path of constitutional transformation parallel to the one initiated by *Portuguese Judges*. The Commission's approach is nevertheless ambivalent, as it has also linked the question of LGBTQ rights to the Union's existing powers, such as its internal market.[241]

So far, the European Parliament most vocally protested against attacks on LGBTQ rights. Some of its interventions were symbolic: in response to Polish LGBT free zones, the Parliament declared the Union as a whole to be a 'LGBTIQ Freedom Zone'.[242] It also issued a resolution on discrimination and hate speech against LGBTQ people, in which it expressed its 'deep concern at the growing numbers of attacks against the LGBTI community', and in particular the discrimination through the 'declarations of zones in Poland free from so-called "LGBT ideology"'.[243] But in light of the lack of transformative legislation, the Parliament was forced to retreat into a position of legalism, defending rights discovered by the CJEU. It called upon the Commission to examine 'whether Member States comply' with the *Coman* judgement and, if necessary, 'to take enforcement action' against Member States failing to do so.[244] It further calls upon the Commission to 'include in its upcoming guidelines on free movement a clarification' on recent case law of the CJEU and ECtHR on LGBTI rights, and specifically on significantly older precedents of the court protecting the right of same-sex partners to pension and survivors benefits, benefits with respect to pay and working conditions.[245] Rather than driving the Union's legislative agenda, the Parliament is reduced to applauding and supporting the CJEU's judicial innovations.

Migration

Another well-documented aspect of semi-authoritarianism in Europe is exclusionary populist rhetoric and policy in the migration context.[246] Populists and semi-authoritarian regimes succeeded in politicising migration, developing a dividing line between a communitarian world-view committed to closed borders and a cosmopolitan world-view amenable to free movement of people across borders.[247] Orbán's Hungary turned the migration question into a central political issue by creating a border fence, adding legal hurdles to be legally recognised as a refugee and

[240]European Commission, 'EU founding values: Commission starts legal action against Hungary and Poland for violations of fundamental rights of LGBTIQ people,' available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668> accessed 29 March 2023.

[241]Ibid. and the application in Case C-769/22 *Commission v Hungary* (pending).

[242]'European Parliament resolution of 11 March 2021 on the declaration of the EU as an LGBTIQ Freedom Zone' P9_TA(2021)0089, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0089_EN.html> accessed 29 March 2023.

[243]'European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones' points 2 and 3, <https://www.europarl.europa.eu/doceo/document/TA-9-2019-0101_EN.html> accessed 29 March 2023.

[244]'European Parliament resolution of 14 September 2021 on LGBTIQ rights in the EU' point 10, <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0366_EN.html> accessed 29 March 2023.

[245]Ibid., point 11, referring to the judgements *Römer* (n 113); *Maruko* (n 113) and *Hay* (n 113). The Parliament also refers to the ECtHR's jurisprudence in *Taddeucci and McCall v Italy* (Application No 51362/09).

[246]See generally JD Ingram, 'Populism and Cosmopolitanism' in CR Kaltwasser, P Taggart, P Ochoa Espejo and P Ostiguy, *The Oxford Handbook of Populism* (Oxford University Press 2017) 644.

[247]L Hadj-Abdou, 'Illiberal Democracy and the Politicization of Immigration' in A Sajó, R Uitz and S Holmes (eds), *Routledge Handbook of Illiberalism* (Routledge 2022) 299, 304–8.

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making life difficult for NGOs defending migrant rights.[248] Poland capitalised on identity politics as well, constructing narratives aiming to blame the 'other'. Like Hungary, it curtailed possibilities for migrants to be recognised as asylum seekers under domestic law, as a result of the anti-migration rhetoric of the Law and Justice Party.[249]

This, too, is problematic in light of the Union's commitment to upholding 'human dignity', 'equality', 'solidarity' and 'human rights, including the rights of persons belonging to minorities'.[250] Yet the EU did not adopt any specific legislation targeting xenophobic policy in semi-authoritarian Member States – in fact, those policies developed at least in part in response to existing Union legislation. Only the CJEU has provided the beginning of a response. The Court requires compliance with the procedural obligations resting on Member States in the framework of asylum procedures,[251] has held the circumstances in which refugees are held in the Hungarian transit zone Röszke to constitute a form of detention[252] and called a halt to authoritarian policies seeking to criminalise assistance to asylum seekers.[253]

The migration crisis has been a focal point of the back and forth between the Union and semi-authoritarian Member States. In order to relieve the pressure on Italy and Greece – the two Member States who had to deal with the greatest inflow of refugees from the Syrian conflict – the EU decided in 2015 to relocate refugees to other Member States of the Union.[254] Despite the existence of legally binding obligations, some Member States disregarded those obligations in an 'act of defiance motivated by ideological disagreement with the goal of asylum provision', a phenomenon sometimes itself considered an aspect of rule of law backsliding.[255] The Court rejected a proto-authoritarian interpretation of the Treaties put forward by those Member States. Poland argued that Member States had an 'exclusive competence for the maintenance of law and order and the safeguarding of internal security in the context of acts adopted in the area of freedom, security and justice'.[256] Its 'assessment of the risks posed by the possible relocation on their territory of dangerous and extremist persons who might carry out violent acts or acts of a terrorist nature' could justify, in the view of that Member State, a refusal to implement the relocation decision.[257] The CJEU curtly replied that although the Treaty respects the Member States' prerogatives 'with regard to the maintenance of law and order and the safeguarding of internal security', that nevertheless does not 'confer on Member States the power to depart from the provisions of the Treaty based on no more than reliance on those responsibilities'.[258] The CJEU's interpretation offered a shield protecting EU law against an authoritarian interpretation of the Treaties. Yet the court's intervention was arguably rearguard action by the time it was decided.

[248]A Bíró-Nagy, 'Orbán's Political Jackpot: Migration and the Hungarian Electorate' 48 (2022) Journal of Ethnic and Migration Studies 405; B Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation' 17 (2016) German Law Journal 1033.

[249]W Klaus, 'Between Closing Borders to Refugees and Welcoming Ukrainian Workers' in EM Goździak, I Main and B Suter (eds), *Europe and the Refugee Response. A Crisis of Values?* (Routledge 2020) 74.

[250]Art 2 TEU.

[251]Case C-159/21 *GM* ECLI:EU:C:2022:708.

[252]Joined Cases C-924/19 PPU and C-925/19 PPU *FMS* ECLI:EU:C:2020:367; C-808/18 *Commission v Hungary* ECLI:EU:C:2020:1029.

[253]Case C-821/19 *Commission v Hungary (Criminalisation of Assistance to Asylum Seekers)* ECLI:EU:C:2021:930.

[254]Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, (2015) OJ L 248/80; Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece, [2015] OJ L 239/146.

[255]E Tsourdi, 'Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?' 17 (2021) European Constitutional Law Review 471, 484.

[256]Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, ECLI:EU:C:2020:257, para 134.

[257]*Commission v Poland, Hungary and Czech Republic* (n 256) para 135.

[258]Ibid. para 145.

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Most Member States – with the notable exception of Malta – had fallen dramatically short of their obligations under the relocation decision.[259]

It is significant that these infringement proceedings against Poland, Hungary and the Czech Republic failed to address the fundamental question of values. The Commission challenged the defiance of Member States who claimed to be '"rebels", who wanted to stand up and oppose the implementation of the relocation mechanism'.[260] Whereas Advocate General Sharpston had noted that '[d]isregarding' one's obligations under Union law because 'they are unwelcome or unpopular is a dangerous first step towards the breakdown of the orderly and structured society governed by the rule of law',[261] the court refused to frame the matter in terms of the Union's fundamental values.[262]

The Union's response to the semi-authoritarian politicisation of the migration question does not rise to the significance of a constitutional transformation. The Union's legislative process could have done that, for example by setting out an ambitious reform of its migration policy. Building upon the Union's core values, such legislation could have sought to strengthen the solidarity between Member States with respect to asylum claims well beyond the horizon of the crisis and to rein in the xenophobia within the Member States. Yet the opposite happened. Since the migration crisis, the legislative process de facto ratified the political failure of the relocation decision, given the impossibility to find an acceptable bargain on solidarity between member States in the framework of a redesigned Dublin system.[263] The reform of the migration pact that was recently voted accepts xenophobia and erodes solidarity between the Member States by giving them the possibility to opt out and pay into a common fund instead of accepting refugees.[264] It has been said that the Visegrad countries managed to 'transplant[] some of their policy preferences' into the EU's New Pact on Migration and Asylum.[265] Alongside these developments, the EU-Turkey deal stands out as the model for an increasing externalisation of the EU's asylum policies. By concluding this deal, both the EU and its Member States effectively managed to sidestep 'democratic rule of law and fundamental rights standards'.[266] The 'externalisation' of the Union's migration policies through deals such as these 'lends credence to the xenophobic rhetoric of populist political leaders [and] further saps the foundations of the Union's "holy trinity" of values: the rule of law, fundamental rights and democracy'.[267] (The treatment of refugees affected by Russia's invasion of Ukraine is perhaps the exception to the

[259]Eg European Commission, 'Fifteenth Report on Relocation and Resettlement' COM (2017) 465 final.

[260]Opinion of Advocate General Sharpston in Joined Cases C-715/17, C-718/17 and C-719/17 *Commission v Poland, Hungary and Czech Republic*, ECLI:EU:C:2019:917, para 141.

[261]Ibid., para 241.

[262]In fairness, the court did echo the Advocate General's concerns, but merely with respect to the admissibility of the case as opposed to its substance. See *Commission v Poland, Hungary and Czech Republic* (n 256) para 65 ('to uphold, in circumstances such as those of the present cases, the inadmissibility of an action for failure to fulfil obligations ... would be detrimental ... to the respect for the values on which the European Union, in accordance with Article 2 TEU, is founded, one such being the rule of law').

[263]E Tsourdi, 'Relocation Blues – Refugee Protection Backsliding, Division of Competences, and the Purpose of Infringement Proceedings: Commission v. Poland, Hungary and the Czech Republic' 58 (2021) Common Market Law Review 1819, 1837.

[264]L Dubois, 'EU Ministers Clinch Deal on Migration Reform' (*Financial Times* 8 June 2023).

[265]Tsourdi (n 263), 1842.

[266]S Carrera, L den Hertog and M Stefan, 'The EU-Turkey Deal: Reversing "Lisbonisation" in EU Migration and Asylum Policies' in S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019) 155, 162; see also FM Gatti and A Ott, 'The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law' in the same volume, 175, 200.

[267]Tsourdi (n 255) 497. See also B Grabowska-Moroz and DV Kochenov, 'The Loss of Face for Everyone Concerned: EU Rule of Law in the Context of the "Migration Crisis"' in V Stoyanova and S Smet (eds), *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022) 187.

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rule.[268]) Worryingly, the CJEU does not uphold the value of the rule of law in a thicker sense even when the EU's own migration policies echo authoritarian tendencies.[269]

C. Democratisation

The rhetoric of the 'rule of law' has focused attention on domestic judiciaries, and this approach is not devoid of blind spots. The attack of authoritarian governments on the judiciary is arguably only a minor part of a much larger assault on democracy which has made 'real turnovers in power increasingly difficult'.[270] Authoritarian governments have, for example, tinkered with the legal infrastructure of elections. In Hungary, Orbán gerrymandered election districts and altered the political composition of the electoral commission.[271] Similarly, the Law and Justice party in Poland has restructured the electoral bureaucracy to increase political influence.[272] Political pressure on media outlets – for instance through strategic use of state advertising or of public bodies supervising the media – is also a common feature of democratic backsliding, and Hungary and Poland have not been exceptions to that rule.[273] This is alarming in light of the Union's rhetorical emphasis on the rule of law, democracy and human rights as a 'trinity' of Union values. If the protection of judicial independence is essential to the survival of democratic societies,[274] surely the same can be said of democracy?

Alongside the rule of law, democracy figures prominently in the catalogue of fundamental values of the Union.[275] Like the judiciary, the Union's supranational political process depends on the proper functioning of its national counterpart.[276] Given populist emphasis on democracy and anti-elitism, some argue it might have been prudent to focus attention on democracy rather than on the judiciary, especially as the argument for militant democracy is strongest in that context.[277] But the Union has given a far greater role to the judiciary than to the democratic process. It failed to adopt significant legislative measures in order to strengthen democracy in the Member States. Admittedly, the Union has limited competences in this area. Yet, within those limits, the Union could have intervened meaningfully in order to signal its commitment to the value of democracy where it could. The conditionality regulation – which could have protected any number of Union values – focuses on the rule of law, not on democracy *stricto sensu*. The Union could have adopted specific rules related to municipal and European elections[278] or otherwise extended the rights of

[268]See generally C Costello and M Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?' 22 (2022) International Journal of Discrimination and the Law 244.

[269]Order of the court in Joined Cases C-208/17 P to C-210/17 P *NF* ECLI:EU:C:2018:705.

[270]J-W Müller, 'Eastern Europe Goes South: Disappearing Democracy in the EU's Newest Members' 93 (2) (2014) Foreign Affairs 14.

[271]See B Bugarič, 'Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism' 17 (2019) International Journal of Constitutional Law 597, 607.

[272]W Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' Sydney Law School Legal Studies Research Paper 18/01.

[273]See generally A Huq, T Ginsburg and M Versteeg, 'The Coming Demise of Liberal Constitutionalism' 85 (2018) University of Chicago Law Review 239, 241. In the European context, P Bajomi-Lázár, 'The Party Colonisation of the Media: The Case of Hungary' 27 (2013) East European Politics and Societies 69; A Bátorfy and Á Urbán, 'State Advertising as an Instrument of Transformation of the Media Market in Hungary' 36 (2020) East European Politics 36, 44; P Surowiec, M Kania-Lundholm and M Winiarska-Brodowska, 'Towards Illiberal Conditioning? New Politics of Media Regulations in Poland (2015–2018)' 36 (2020) East European Politics 27.

[274]K Lenaerts, 'La Cour de justice de l'Union européenne et l'indépendance de la justice' in JF Kjølbro, M Tsirli and S O'Leary, *Liber Amicorum Robert Spano* (Anthemis 2022) 429.

[275]Article 2 TEU. The importance of democracy is echoed in articles 11, 12, 39 and 40 of the Charter.

[276]See Art 10 TEU and von Bogdandy & Spieker (n 5) 83.

[277]Weiler, 'Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law' in Closa & Kochenov (n 1) 313, 314. For an argument that the case for militant democracy is strongest in order to defend democracy itself, see L Vinx, 'Democratic Equality and Militant Democracy' 27 (2020) Constellations 685.

[278]Art 22 TFEU and Article 223 TFEU.

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Union citizens.[279] So far, the Union has acted solely to check potential violations of Article 2 by parties within the European Parliament (as opposed to within the Member States).[280] The European Media Freedom Act recently proposed by the Commission in the sphere of media regulation is an encouraging sign, though its new tools may be insufficient to combat existing or new semi-authoritarian regimes. The Act would require oversight over new domestic measures affecting media outlets, an assessment whether concentrations in the media sector risk undermining media pluralism and require public authorities to provide information about their advertising expenditure to media outlets.[281] Those features have constitutional significance. At the time of writing, political negotiations with the Parliament and the Council were ongoing. By contrast with the conditionality regulation – which foregrounds the importance of the defence of the Union's core values – the Commission frames this Act as a technical intervention in the internal market for media services, rather than as transformative legislation seeking to defend the Union's foundational commitment to democracy.[282]

The lack of transformative case law on this issue attests to the limited appetite of the CJEU to strengthen the democratic process within the Member States. Yet democracy, not unlike the rule of law, is also given 'concrete expression' – to use the vernacular of the CJEU – in the Treaties which claim that the 'functioning of the Union shall be founded on representative democracy'.[283] The court has not developed a parallel jurisprudence to *Portuguese Judges* protecting domestic democracy[284] or protecting media freedom where it is being violated systematically.[285] Only in July 2022 did the Commission decide to refer Hungary to the Court of Justice, in particular for its refusal to license to the Hungarian radio station *Klubradio*.[286] Though the Commission cites the question of freedom of speech, the Commission's intervention mainly relies on technical questions of compliance with Union legislation, while lacking the constitutional ambition that characterised the rule of law transformation of the European legal order.

In this sense, the cause of democracy has lost out in comparison with the project of strengthening the protection of domestic judiciaries. Worryingly, the strengthening of judicial independence might play into the hands of authoritarian regimes. Those regimes indeed find legitimacy in their 'claim … to overcome the significant constraints to popular rule that they observe in liberal or legal constitutionalism', such as 'the entrenchment of norms [or] judicial independence …'[287] By reinforcing the counter-majoritarian power of the judiciary, the rule of law crisis has doubled down on technocratic rather than democratic governance throughout the Union. Some consider populism a 'response to undemocratic liberalism' and to the

[279]Art 25 TFEU. See also K Lenaerts and JA Gutiérrez-Fons, 'Epilogue on EU Citizenship: Hopes and Fears' in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (Cambridge University Press 2017) 751, 773.

[280]See generally J Morijn, 'Responding to "Populist" Politics at EU Level: Regulation 1141/2014 and Beyond' 17 (2019) International Journal of Constitutional Law 617.

[281]'Proposal for a Regulation establishing a common framework for media services in the internal market (European Media Freedom Act)' COM (2022) 457 final.

[282]The Union's internal market competence is often understood as a backdoor, allowing the Union to regulate substantive areas in which it has only limited powers, as long as a link to the internal market can be demonstrated. See S Garben, 'Competence Creep Revisited' 57 (2019) Journal of Common Market Studies 205; S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' 12 (2011) German Law Journal 827.

[283]Article 10 TEU.

[284]For an argument the CJEU could have intervened in this sense, von Bogdandy & Spieker (n 5).

[285]For an argument it could and should do so, see von Bogdandy et al (n 238).

[286]European Commission, 'Media freedom: the Commission refers Hungary to the Court of Justice of the European Union for failure to comply with EU electronic communications rules', 15 July 2022, available at <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2688> accessed 29 March 2023.

[287]Blokker (n 10) 536.

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'depoliticization of politics'.[288] Strengthening technocratic governance might play into the hands of semi-authoritarian populists who claim democratic rule is under threat from liberal institutions rather than weaken them. As a result, the case has been made that the most appropriate response to authoritarian movements is through 'more rather than less politics' (albeit a 'liberal democratic' rather than an authoritarian populist politics).[289] That is the road not taken by the Union during the rule of law crisis.

D. Intermediary conclusion

The Union's constitutional transformation is legalist not only in institutional terms – because the CJEU took the lead in engineering a de facto constitutional transformation – but also in substantive terms, because that constitutional transformation focuses on judicial independence. The thought experiment developed in this section shows that other constitutional transformations could have been imagined. The CJEU could, for example, have extended its transformative case law in the area of non-discrimination by applying it to the rights of the LGBTQ community. Such an approach would without question have been legalist in institutional terms, but less so in substantive terms. The Union's legislature could also have taken a bolder approach to, for example, questions of migration or economic redistribution. The latter approach would have been significantly less legalist in both institutional and substantive terms. In comparative terms, the substantive focus on judicial independence is undeniably legalist.

It is not that the Union is not responding to the threat of authoritarianism in policy areas unrelated to judicial independence. The Union does intervene, with varying degrees of success, by means of judicial, executive or legislative action. The argument is, rather, that those actions fail to rise to the level of a constitutional transformation. This is significant, as the rise of semi-authoritarian regimes poses at least as much of a threat to democracy, identity politics and economic redistribution as it does to judicial independence. The Union is in the midst of a 'severe identity crisis'[290] not just because of a threat to judicial independence, but also because of these other aspects of the authoritarian playbook. Beyond the matter of judicial independence, the Union's refusal to respond to these threats in the language of constitutional transformation attests to the Union's lack of appetite to uphold its own core values.

With its emphasis on the issue of judicial independence, the Union maintains, in essence, that authoritarianism is less objectionable in the absence of court packing measures. At best, this idea relies on a controversial assessment of authoritarianism according to which courts can be effective agents in the fight against authoritarianism. Sceptics retort that courts are best understood as 'speed bumps' on the road to authoritarianism.[291] But the most important implication of the Union's focus on judicial independence is that it covers up the lack of a genuine, substantive response to the multifaceted phenomenon of authoritarianism. Because of its failure to engage with other aspects of the semi-authoritarian playbook, this constitutional transformation constitutes a missed opportunity: it is not a constitutional transformation to compensate the losers of globalisation, nor to protect abortion rights or same sex marriage, nor to put a greater emphasis on solidarity and openness towards third country nationals, nor to defend national democracy. The emphasis on the rule of law is a poor substitute for a substantive vision of the Union's core values, expressed in the vocabulary of constitutional transformation appropriate to their importance. Bolstering judicial independence merely hides the Union's painful inability not just to reach consensus over the meaning of those other values, but even to engage in a genuine

[288]C Mudde, 'Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism' 56 (2021) Government and Opposition 577, 581.

[289]Ibid. 590.

[290]von Bogdandy (n 4) 712.

[291]For a critique, see B Bugarič, 'Can Law Protect Democracy? Legal Institutions as "Speed Bumps"' 11 (2019) Hague Journal on the Rule of Law 447.

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debate over their meaning. The Union's defence of judicial independence is a form of 'value-free functionalism'[292] which legitimises authoritarian policies unrelated to judicial independence as unproblematic in terms of the Union's foundational values.

Commissioner Reding might respond to this line of argument that the protection of the rule of law is merely the 'prerequisite for the protection of all other fundamental values'.[293] Yet the Union's emphasis on the rule of law likely delayed action in other policy fields. The existence of an answer to semi-authoritarian rulers – even if it was merely in terms of judicial independence – nevertheless meant that the Union had responded to that threat, making action in other policy areas less pressing. In addition, there are reasons to doubt that the CJEU would be eager to push its constitutional transformation further into other policy areas.[294] In the aftermath of the CJEU's transformative case law with respect to judicial independence, it is likely the CJEU would pause and think twice before risking a backlash from the Member States in connection with other salient political questions. The same can be said for the Union's legislature.

If so, the expansion of EU supervision over domestic judiciaries came at the cost of Union intervention in other matters. In other words, the Union's focus on judicial independence has significant distributive implications. Numerous interest groups have lost out in the constitutional transformation brought about by the 'rule of law': those concerned for women's reproductive rights, those who rally in opposition to xenophobic or anti-LGBTQ policies, but also those who seek Union-wide redistributive policies or are worried about the state of their national democracies. By contrast, there is one indisputable winner of the rule of law crisis: the judiciary itself. In the long run, the rule of law crisis has most of all been a justification for the strengthening of juristocracy throughout the European Union.

5. The distorting effects of legalist political culture

The argument that the Union's approach was legalist is likely to encounter the objection that the Union's constitutional transformation wasn't driven by political actors because those actors lacked the will, courage or determination to steer such a transformation.[295] Political actors even failed to trigger the sanctions of Article 7, the procedure intended to deal with such a scenario. Some push the objection further and contend that rule of law litigation 'stir[red] and improve[d] the quality of public discourse'[296] that lead up to the adoption of that regulation.

This contribution finds instead that there is cause for worry that the dominance of a legalistic *habitus* displaces and stifles democratic debate on the critical issue of the definition and defence of Europe's foundational values. Essential political questions are not debated because they are believed to lie beyond the realm of political debate but within the purview of the CJEU. Legalism risks reifying political debate within the Union and alienating the European polity. Below, I first analyse the institutional bargain behind this constitutional transformation (Section A). Subsequently, I examine the distorting effects of legalism on politics within the Union's institutions (Section B) and on the European polity in a broader sense (Section C and D).

A. An institutional alibi

The idea that the CJEU came to the rescue of a failing Union democratic process only captures part of the implicit bargain that has been struck between the judicial and political branches. On the one hand, it downplays just how convenient the situation is to the Union's political branches.

[292]C Schmitt, *Legalität und Legitimität* (Duncker und Hublot 1993) 57.

[293]Reding (n 11).

[294]The Commission may be pushing the CJEU in this direction. The application in pending Case C-769/22 can be read as suggesting that Art 2 TEU can be used as a self-standing legal basis.

[295]Eg von Bogdandy & Spieker (n 5) 65.

[296]von Bogdandy & Spieker (n 5) 69.

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The judicial response shields them from the messy trade-offs prompted by the authoritarian threat, from economic redistribution to the recognition of LGBTQ or reproductive rights and so on: they can avoid accusations of inaction and claim instead that the issue of authoritarianism is tackled effectively by the Union's rule of law policies. The court unburdens the Union's political institutions – but also the society at large – of anxious debates about the *malaise* provoked by the rise of authoritarianism in Europe.[297] On the other, it downplays the strength of the CJEU's position. The CJEU successfully managed to avoid the constraints of democratic policy-making. Because of the intrinsic difficulty of amending the Treaties, especially on such sensitive matters, the CJEU is putting itself beyond the reach of democratic control when it develops a jurisprudence of values. Political optics make it all but impossible to respond to the court's transformational case law by setting aside the rule of law or reinterpreting it. The values the court mobilises – paradigmatically the value of the rule of law – are so vague that the textual limits on the court recede far into the background.[298]

The CJEU's constitutional transformation has created a vicious circle in which politicians may not feel the need to act, anticipating intervention by the CJEU. When politicians do intervene, they simply echo and reinforce the achievements of the CJEU as opposed to adopting a genuinely original legislative agenda, with all the difficult political trade-offs that requires. That is what they did by adopting a conditionality regulation focused on the rule of law (though it further narrowed the grounds on which the withholding of funds would have been acceptable).[299] Had the CJEU stuck to a technocratic approach, a different situation might have emerged. Pressure on the political branches to take action would have been considerably greater and might have broken the political deadlock. The fact that a targeted legislative response to the rise of semi-authoritarian policies in different policy areas often requires unanimity among the Member States (for instance with respect to questions of non-discrimination, as the discussion of abortion and LGBTQ rights suggests) could also have made the triggering of Article 7 TEU more attractive. That provision indeed allows for a suspension of the voting rights of those Member States most vigorously opposed to such measures.

The idea that legalism stands for 'law without government'[300] – insofar as judicial governance explicitly denies that is a form of government – therefore rings especially true at the current juncture. This institutional constellation spells trouble for the widespread appeals for a deeper democratisation of the Union.[301] The legalist attitude towards the Union's values results in the ungrudging disempowerment of the Union's political branches, who don't want and don't get to determine which values they deem to be at the heart of to the European project. The problem is not merely that party political considerations[302] result in a lack of political will to trigger Article 7: there is also an issue of institutional collusion to avoid democratic debate about the Union's values, their contours, and the priority between them.

B. Reifying political discourse

The CJEU's framing of authoritarianism as a matter of judicial independence constitutes an astoundingly successful exercise of agenda setting. If Habermas was worried, some two decades ago, about the capacity of the German constitutional court to 'program[] itself',[303] the CJEU has succeeded in programming not just itself, but the Union's political process as a whole. When the Court endorsed the doctrinal argument that Article 19 gave 'concrete expression' to Article 2 TEU,

[297]Maus (n 126) 20.
[298]See, *mutatis mutandis*, Maus (n 126) 27–8.
[299]Conditionality Regulation (n 143).
[300]Posner (n 102) 8.
[301]Eg A Vauchez, *Democratizing Europe* (Palgrave Macmillan 2016).
[302]Kelemen (n 17).
[303]J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996) 172.

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signalling a potential constitutional transformation, the Commission – despite its initial reservations[304] – gladly followed suit and adopted the strategy in its challenge to Polish judicial reforms.[305] The CJEU's supply created the Commission's demand, and the constitutional transformation became a reality. Parliament and Council echoed this approach by adopting a conditionality regulation allowing the Union to suspend financial flows to Member States who do not respect the rule of law, and in particular judicial independence, whenever a link can be established with the Union's budget.[306] By accepting the CJEU's framing, Parliament and Council implicitly set aside broader interpretations of what the rule of law entails, views which would include other Union values and different politically salient issues in the rise of authoritarianism in the Union.[307] Political debate over the means to protect judicial independence displaced debate over the role of the Union's other foundational values and the way they could be protected. It is plausible that this has distorted Union policy-making, to the extent that the Union's legislators did not come up with alternative legislative responses to the crisis.[308]

The question is not just whether but also how the Union's institutions take up the baton of legal reform in order to oppose authoritarianism. The fact that the court frames a constitutional transformation may be a welcome contribution to democratic debate, but it can become problematic when the framing is reifying in the sense that it 'engender[s] a particularly deep form of de-politicisation'.[309] Framing authoritarianism as a rule of law issue entails framing it as one of pre-existing higher law[310] rather than as a matter of political decision-making, preventing the Union's political branches from engaging in an open-ended dialogue about the contours of the Union's foundational values and, thereby, the Union's identity. The attitude of the Parliament, in particular, shows the extent to which political action at the Union level has been distorted by its reliance on higher norms. When the Commission fails to enforce the conditionality regulation, Parliament chooses to take it to court[311] instead of confronting it with its political responsibility.[312] Rather than demanding legislative initiatives respecting specific minimal guarantees regarding the right to abortion, Parliament calls for the inclusion of an abstract right to abortion in the Charter, leaving the politically most vexed question of its precise contours to the CJEU. Instead of pressuring Commission and Council to adopt legislation to protect LGBTQ rights across the Union, the Parliament prefers to invite the Commission to enforce the CJEU's latest judicial

[304]The Commission initially argued that the Union did not have the power to oversee the organisation of the domestic judiciary. See Opinion of Advocate General Saugmansgaard Øe in *Associação Sindical* (n 55) paras 18, 20 and 37.

[305]*Commission v Poland (Independence of the Ordinary Courts)* (n 25); *Commission v Poland (Independence of the Supreme Court)* (n 26); *Commission v Poland (Disciplinary Regime for Judges)* (n 27).

[306]Conditionality Regulation (n 143).

[307]See *supra* section 4.

[308]See generally M Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' 94 (1995) Michigan Law Review 245.

[309]M Bartl, 'Internal Market Rationality: In the Way of Re-Imagining the Future' 24 (2015) European Law Journal 99, 106; see also G Davies, 'The European Union Legislature as an Agent of the European Court of Justice' 54 (2016) Journal of Common Market Studies 846.

[310]See *supra* section 3.A.

[311]When it became clear that the Commission would not enforce the conditionality regulation until its constitutionality had been assessed by the CJEU, it opted for the legalistic route of litigation. It urged the Commission in March 2021 'to avoid any further delay in its application' and suggested it would go to court '[i]n case the Commission [did] not fulfil its obligations' to withhold Union funds (European Parliament resolution of 25 March 2021 on the application of Regulation (EU, Euratom) 2020/2092, the rule-of-law conditionality mechanism (2021/2582(RSP)), points 13 and 14). In June of the same year, the Parliament found the Commission's inaction to be 'a refusal by the Commission to fulfil its obligations' in accordance with the regulation"3 and threatened that it would 'start the necessary preparations for potential court proceedings ... against the Commission' for its failure to act (European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)), point 10 and 12). (Ultimately, Parliament folded.)

[312]For example, by using the political threat of a motion of censure (Article 234 TFEU).

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innovations on the relevant matter. The attitude of the Council is no different when it enacts a conditionality regulation along the lines of the CJEU's prior constitutional transformation.

This anecdotal evidence on one of the most salient political episodes of the past years suggests that it is not a lack of constitutional or political tools of the Union's political branches which is the key to the Union's depoliticisation. Instead, the Union's institutions remain beholden to the authority of the law and of the court, attesting to a 'culture of legalism in politics'.[313] That European institutions are reluctant to get their hands dirty in the messy politics of the Union's values could be explained as being in their rational self-interest in the current context of rising semi-authoritarian populism. But once these institutions do decide to get their hands dirty, the way they pursue their political objectives sometimes shows the marks less of their rational self-interest than of a 'religious admiration'[314] of Union law and of the CJEU. Even with regard to policy questions where political institutions have broad discretion for political action, they appear to imagine a legal straightjacket restricting their discretionary powers. It is the 'symbolic power of the law at work in the sphere of politics itself' which seems to diminish the authority of political actors 'to speak authoritatively on political matters that implicate constitutional issues'.[315] Legalism thereby becomes a liability which prevents the Union from facing up to the multi-faceted threat of authoritarian politics.

C. Ideological force of narratives

For the Union at large, the constitutional transformation brought about by the rule of law crisis may be most problematic not because of the immediate, practical effects of the case law of the CJEU – ie in the degree of independence of this or that tribunal in Poland or elsewhere – nor for the systematic impact on the doctrinal (re-)elaboration of Union law in light of the role of the Union's foundational values, nor even for the other constitutional transformations which it hinders, but for its ideological implications. The constitutional transformation brought about by the rule of law crisis indeed conveys an implicit narrative about the significance of the project of European integration.[316] The normative force of the idea of the rule of law, an ideal which commands authority – and casts suspicion on those who contest it as outside the bounds of acceptable democratic debate – makes this narrative appealing. The narrative has considerable success, as is witnessed by the thousands who have been protesting on Polish streets for the rule of law and judicial independence as opposed to more immediate political goals.[317] The narrative suggests it can transcend the distributive conflicts implicit in the policy of defending the judiciary. Yet it may become contentious when no consensus exists around the significance of judicial independence as the key to the rise of authoritarianism.[318]

The narrative of the rule of law crisis emerges at a difficult juncture for the Union. The Union's reliance on political messianism as a source of legitimacy was observed long ago.[319] The dream of

[313]C Casey and E Daly, 'Political Constitutionalism under a Culture of Legalism: Case Studies from Ireland' 11 (2021) European Constitutional Law Review 202, 229 (developing a similar argument in the context of domestic Irish politics).

[314]Maus (n 126) 17, 18. See already M Shapiro, 'Comparative Law and Comparative Politics' 53 (1980) California Law Review 537, 538 (describing the perception of the CJEU as the 'disembodied voice of right reason and constitutional theology').

[315]Casey & Daly (n 313) 220, 231.

[316]Eg Lenaerts (n 274) 429. On the significance of such narratives, see A Bailleux, 'Enjeux, Jalons et Esquisse d'une Recherche sur les Récits Judicaires de l'Europe' in A Bailleux, E Bernard, S Jacquot and Q Landenne (eds), *Les récits judicaires de l'Europe. Dynamiques et conflits* (Bruylant 2021) 1 and E Bernard, 'Les Récits judicaires de l'Europe: Distanciation, Politisation, Intégration' *in id*, 229.

[317]'Thousands protest against Poland's plan to discipline judges' (*Reuters* 11 January 2020).

[318]Shklar worries this is a key weakness of legalism. See Shklar (n 7) 10–11, as well as the analysis of this distributive question in section 4.

[319]JHH Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' 9 (2011) International Journal of Constitutional Law 678, 684.

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an 'ever-closer union among the peoples of Europe' which emerged in the shadow of the self-destruction of the European continent has energised generations of scholars and citizens. Irrespective of the economic benefits of European integration or its degree of democratic legitimacy, European integration seemed immune to critique because it was the 'right thing to do' in a continent torn apart by two world wars. More than half a century later, the messianic force of the project of European integration seems a thing of the past. Teetering from (constitutional) crisis to (euro zone, migration, Brexit, ...) crisis, it has become painfully apparent that the project of European integration no longer commands universal assent.[320] Instead, the European project is viewed with increasing disillusionment and resistance.

The rule of law crisis allows the European institutions to tap once more into the legitimacy reservoir of political messianism. Reconnecting with the 'heroic' jurisprudence from the earliest decades of European integration,[321] the European institutions and the Court of Justice rely on the belief that the rule of law is an essential component of a just society to challenge quasi-authoritarian states. The Union appears as the guardian of the foundational values of democracy, its legal order as a vital tool to protect it, and the Court of Justice as the courageous actor enforcing that vision against the Union's semi-authoritarian Member States.

D. Alienating the polity

The emphasis on the rule of law may cause collateral damage. The narrative dismisses plausible causal accounts of the rise of authoritarianism. Three stand out. According to some, the root cause of the emergence of quasi-authoritarian regimes is the 'depoliticization of politics' in which an increasing number of political issues is relegated to decision-making powers outside of the realm of democratic control.[322] Others argue that the rise of economic inequality inherent in later phases of economic globalisation[323] or the turn towards identity politics[324] may have produced a backlash. If these accounts of the rise of authoritarianism are correct, the Union may already be an alienating force for significant numbers of European citizens.

By framing authoritarian politics as an issue of judicial independence – and, correlatively, refusing to frame it as a crisis of values in other respects – the rule of law narrative performatively silences these plausible accounts as insignificant from the perspective of EU law. Those who identify with such narratives – arguably already feeling alienated for that very reason – may feel alienated once more because of the Union's response to what it has framed as a 'rule of law' crisis.[325] Their understanding of the problem is dismissed: they are being told the 'real' problem was lack of respect for the 'rule of law', ie for the independence of the judiciary, all along.

The matter is not solely one of narrative: the languages of law and politics are enmeshed to the extent that the language of law is a vehicle for emancipatory claims of recognition.[326] Those who identify with either of these causal narratives – whether on the right or on the left – are likely to

[320]Weiler, 'Political and Legal Culture' (n 319) 684; L. Azoulai, '"Integration Through Law" and Us' 14 (2016) International Journal of Constitutional Law 449 and D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit* (Hart 2015).

[321]J Weiler, 'The Transformation of Europe' 100 (1991) Yale Law Journal 2408, 2423 (describing the 'heroic period' of the Court's case law); von Bogdandy (n 4) 712 (analogising the Court's transformative case law on the rule of law with its foundational jurisprudence in *Van Gend en Loos*).

[322]Mudde (n 288) 581 (the phenomenon is also described as 'undemocratic liberalism' at 585).

[323]Rodrik, 'Populism and the Economics of Globalization' (n 154).

[324]P Norris and R Inglehart, *Cultural Backlash. Trump, Brexit and Authoritarian Populism* (Cambridge University Press 2019).

[325]For a non-essentialist account of alienation, see R Jaeggi, *Alienation* (Columbia University Press 2014). See also PJ Neuvonen, 'A Way of Critique: What Can EU Law Scholars Learn from Critical Theory?' 1 (2022) European Law Open 60, 77–82.

[326]A Honneth, *Kampf um Anerkennung. Zur moralischen Grammatik sozialer Konflikte* (Suhrkamp 1992) 173 *et seq*. In what follows, I include claims for economic redistribution in the category of claims for recognition. See A Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' in N Fraser and A Honneth (eds), *Redistribution or Recognition? A Political–Philosophical Exchange* (Verso 2003) 110.

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have demands: demands for a more egalitarian distribution of resources, demands for the recognition of same-sex marriage or, at the opposite end of the political spectrum, demands for recognition of traditional family values. These demands are logically connected to legal claims, in the form of the recognition, on the left, of human dignity, equality rights and social welfare rights and, on the right, of a defence of public morality or national identity. EU law can be understood as a site of contestation for these different claims of recognition, and the courtroom as the stage of the 'symbolic struggle' of the competing world views they imply.[327] The CJEU has rejected all but the most centrist claims of recognition: that of judicial independence. Its technical but firm response to Member States which reject the Union's imposition of solidarity regarding questions of migration during the migration crisis sends a clear message. Authoritarian claims of domestic competence over matters of law and order were categorically rejected,[328] a message unlikely to be received favourably by the semi-authoritarian voter base. Simultaneously, the Union also refuses to take up progressive claims about the preservation of abortion rights[329] or the recognition of a Union right to same-sex marriage[330] as outside the scope of Union law, and thus as values unworthy of protection. To make matters worse, the way in which the Union has defended judicial independence rejects claims of recognition which seek a repoliticisation of domestic political spaces in favour of a continued and constitutionally anchored depoliticisation of national and supranational politics – itself one of the root causes of the rise of authoritarianism. The lack of recognition of such claims in the language of law is a troubling manifestation of the 'symbolic domination' of the law.[331] If the Union and its CJEU in particular has become the guardian of the Union's values, it also has become a censor of those legal claims of recognition not deemed important enough for the project of European integration.

The Union's response to the rise of authoritarianism is best understood as a defence of centrist, technocratic values which will be disappointing to both to left-of-center and to right-of-center claims of emancipation, all of which fall on relatively deaf ears in the realm of EU law. They are meant to make do with an *Ersatz* for their grievances: a better protection of the judiciary. Rather than an emancipatory influence, Union law then becomes a polarising factor, and an alienating force for those European citizens who seek to resist what they deem to be forms of domination that originate in the European project itself[332] or forms of domination that originate in semi-authoritarian Member States.

If the revival of political messianism in the context of the rule of law crisis is problematic on several counts, the narrative behind the transformation of the Union's constitution also stands out for its shallowness. It has been argued that, even in its best days, political messianism is intrinsically 'self-referential and self-legitimating'.[333] Yet this seems true to an even greater degree for the narrative of this particular constitutional transformation. In its original version, political messianism was based upon a transformative vision for European society which sought a 'fundamental restructuring of society and societal attitudes'.[334] Law was to be a means for the realisation of peace and prosperity on a continent disfigured by decades of conflict. Today, the

[327]P Bourdieu, 'La Force du Droit' 64 (1986) *Actes de la recherche en sciences sociales* 3, 12.

[328]See text accompanying note 147.

[329]See text accompanying notes 174–203.

[330]See text accompanying notes 204–45.

[331]Bourdieu (n 327) 16.

[332]On the significance of forms of domination generated by the Union, see F De Witte, 'Emancipation Through Law?' in L Azoulai, S Barbou des Places and E Pataut (eds), *Constructing the Person in EU Law. Rights, Roles, Identities* (Hart 2016) 15, 27–8 *et seq.* See also Azoulai (n 320) 450.

[333]J Weiler, 'Deciphering the Political and Legal DNA of European Integration. An Exploratory Essay' in J Dickson and P. Eleftheriadis (eds), *The Philosophical Foundations of European Union Law* (Oxford University Press 2012) 137, 151.

[334]M Cappelletti, M Seccombe and JHH Weiler, 'Integration Through Law: Europe and the American Federal Experience. A General Introduction' in *id*, *Integration through Law. Europe and the American Federal Experience* Vol 1 Book 1 (Walter de Gruyter 1986) 3, 43.

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transformative vision of Union law has become shallow, a shadow of its former self. In its current iteration, political messianism reveals the inward-looking attitude of European institutions towards the Union's legal order. Other than the object and the instrument of European integration,[335] law appears to have become an end in itself. The 'dream'[336] which once could inspire Europeans across the continent has become a legalistic tautology: the rule of law must be enforced as that is what the rule of law demands. Rather than a Court around which the Union could rally, as a representative of what Europeans shared,[337] the vision of the Union's judiciary seems blurred by its own status interests, which the Union's politicians seem unwilling or unable to look beyond. Rather than a genuinely transformative project, the constitutional transformation brought about by the rule of law crisis merely serves up the old wine of technocracy and juristocracy in new bottles.

6. Conclusion

By casting the multi-faceted rise of authoritarian governance in the Union as a 'rule of law' crisis, the Union's attitude can be understood as legalist in the sense of a 'great faith in the power of law and legal institutions to solve problems'.[338] In seminal judgements, the CJEU mobilised the Union's value of the rule of law to respond to the authoritarian threat. The Union's legislature followed suit, providing for a possibility to withhold Union funding for Member States who do not respect the rule of law.

Judith Shklar was prescient when she argued in 1964 that legalism was 'a liability, preventing liberalism from facing up to the realities of contemporary politics'.[339] The Union's legalism is an impediment to frank political debate over the substance of its core values. This contribution has described the Union's response to the crisis as a legalist along three dimensions: an institutional dimension, a substantive dimension, and in terms of its distorting effects on political debate. In institutional terms, the Union's response to the crisis can be described as legalist because it was the CJEU, rather than the Union's political branches, who took the lead in engineering a constitutional transformation. The CJEU indeed responded to authoritarian court packing strategies by creating new guarantees protecting the independence of the judiciary, soon echoed by legislation allowing the Union to withhold funding when the lack of judicial independence causes risks for the Union's budget. The Union's response creates a paradox: precisely at the time the Union invokes higher, pre-existing law, it is apparent that it in fact rewrites such law to justify an incursion of the Union into a realm traditionally understood as part of the 'domaine réservé' of the Member States.

In substantive terms, the Union's response to the crisis is legalist in that it focuses on the procedural value of judicial independence to the detriment of the substantive values supposedly at the core of the Union's identity. The Union's emphasis on judicial independence does indeed have numerous opportunity costs: though it undoubtedly bolstered the legal position of the domestic judiciary within the Member States, the rise of authoritarianism is also a missed opportunity to strengthen the protection of reproductive rights, LGBTQ rights, migrant rights as well as to establish greater economic redistribution or even to deepen the democratic legitimacy throughout the Union. The Union's crisis of values concerns these questions as much as the matter of judicial independence. Interest groups other than the judiciary seem to have lost rather than gained when the Union strengthened its protection of domestic judges. As an empty signifier, many progressive

[335]R Dehousse and JHH Weiler, 'The Legal Dimension' in W Wallace (ed), *The Dynamics of European Integration* (Pinter Publishers 1990) 242, 243.

[336]J Weiler (n 333) 145.

[337]E Bernard (n 316) 230.

[338]Posner (n 102) 21.

[339]Shklar (n 7) 142.

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ideals can be attached to the notion of the rule of law. But the Union's emphasis on judicial independence is a poor *Ersatz* for a response to the numerous authoritarian attacks on the Union's core values. Instead, the normative appeal of the rule of law covers up the Union's failure to give concrete expression to those values.

The CJEU's rule of law doctrine constitutes a convenient alibi behind which the Union's political institutions can hide. Even when they take legislative action, they do so in language that echoes the CJEU's innovation. A necessary and contentious debate over the content of the Union's values is thereby avoided. More worryingly, the Union's legislature tends to formulate its projects and grievances in terms of higher law. This is symptomatic of the Union's reified political debate, as formulating a political agenda in such terms intrinsically defers to judicial interpretation instead of giving a central place to democratic law-making.

The narrative of the constitutional transformation brought about by the rule of law crisis is likely alienating for large parts of the European polity. Neither those who rally with right-wing opposition to the Union, nor those who mobilise on the left against the rise of authoritarianism will identify with the Union's centrist diagnosis of the issue – political manipulation of the judiciary – or the Union's solution – strengthening the independence of those judiciaries. The Union's institutions refuse to recognise their grievances, all of which have corollaries in the language of EU law. Instead, the Union doubles down on technocratic politics, casting the Union and the CJEU in the role of the guardian of European values while marginalising citizens who seek greater involvement in the Union's processes of political decision-making. If this crisis is an existential one for the Union, the Union's response is also an opportunity to glance in the mirror. What becomes visible there is how shallow the Union's emancipatory claim has become: once a grand vision which promised peace and prosperity to a continent torn apart by war, the Union now seems incapable or unwilling to look beyond the status interests of its own juristocracy.

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