

## Migration and the Rule of Law

# Asylum in the EU: One of the Many Faces of Rule of Law Backsliding?

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EU values – Rule of law backsliding – Rule of law and fundamental rights interrelation – Refugee protection – Common European Asylum System – Implementation gap in asylum – Lack of fair responsibility sharing in asylum – Structural deficiencies in national asylum systems – Defiance of asylum obligations and the duty of sincere cooperation – Systemic fundamental rights violations – Upholding the rule of law – European Asylum System redesign – Systemic infringement actions – Rule of law monitoring

### INTRODUCTION: REFUGEE PROTECTION BACKSLIDING AND THE RULE OF LAW

The shared values of fundamental rights, democracy and the rule of law are understood as the bedrock of European societies. Yet recent years have seen the EU plagued by populism, exclusionary nationalist discourses, racism and xenophobia.<sup>1</sup>

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<sup>1</sup>See, e.g., G. Halmai, ‘Populism, Authoritarianism and Constitutionalism’, 20 *German Law Journal* (2019) p. 296; T. Fournier, ‘From Rhetoric to Action: A Constitutional Analysis of Populism’, 20 *German Law Journal* (2019) p. 362.

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This has been linked with challenges to the rule of law in some member states,<sup>2</sup> leading to what has been referred to as ‘rule of law backsliding’. Building on Jan-Werner Müller’s analysis of constitutional capture,<sup>3</sup> Laurent Pech and Kim-Lane Scheppele have defined rule of law backsliding as:

the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party.<sup>4</sup>

However, the term ‘rule of law backsliding or crisis’ is also employed more loosely in scholarly analysis and policy documents to refer to systemic breaches relating to judicial independence, harassment of civil society organisations and educational institutions, and violations of the freedom of expression.<sup>5</sup> I sometimes examine rule of law deficiencies in this broader sense in my analysis, while differentiating them from the constitutional capture referred to by Pech and Scheppele.

Asylum provision and refugee protection are other urgent challenges facing the EU. Crisis vocabulary has dominated public discourse on asylum in both the EU and its member states since 2015.<sup>6</sup> The spike in arrivals of individuals seeking asylum in the EU has highlighted the limitations inherent in the legal design and implementation modes of EU asylum policy, most notably a structural solidarity deficit.<sup>7</sup> Three main problems have emerged. First, a persistent

<sup>2</sup>See, e.g., W. Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press 2019); A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart Publishing 2015).

<sup>3</sup>J.-W. Müller, ‘Should the EU Protect Democracy and the Rule of Law inside Member States?’, 21 *European Law Journal* (2015) p. 141.

<sup>4</sup>L. Pech and K.L. Scheppele, ‘Illiberalism Within: Rule of Law Backsliding in the EU’, 19 *Cambridge Yearbook of European Legal Studies* (2017) p. 3 at p. 10.

<sup>5</sup>See e.g. European Commission, ‘2020 Rule of Law Report: The rule of law situation in the European Union’, COM(2020)580; A. von Bogdandy and M. Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it Is, What Has Been Done, What Can Be Done’, 51 *Common Market Law Review* (2014) p. 59.

<sup>6</sup>See, e.g., C. Cantat et al., *Migration as Crisis. A Framework Paper* (2020), (<https://www.magyc.uliege.be/about/wp3/>), visited 20 July 2021; M. Montagut and C.M. Moragas-Fernandez, ‘The European Refugee Crisis Discourse in the Spanish Press: Mapping Humanization and Dehumanization Frames Through Metaphors’, 14 *International Journal of Communication* (2020) p. 69.

<sup>7</sup>See E. Tsourdi, ‘The Emerging Architecture of EU Asylum Policy: Insights into the Administrative Governance of the Common European Asylum System’, in F. Bignami (ed.), *EU Law in Populist Times: Crises and Prospects* (Cambridge University Press 2020) p. 191; D. Thym, ‘The “Refugee Crisis” as a Challenge of Legal Design and Institutional Legitimacy’, 53 *Common Market Law Review* (2016) p. 1545.

implementation gap has eroded mutual trust between member states.<sup>8</sup> By implementation gap, I refer to the disjunction between ‘the law on paper’, i.e. to the asylum-related obligations that member states have undertaken according to EU law, and their realisation in practice. Second, fundamental rights violations in some member states have been characterised as systemic<sup>9</sup> or reaching the level of a humanitarian emergency.<sup>10</sup> These two problems relate to the *internal dimension* of the EU asylum policy. Third, protection obligations have often been deflected, with the EU institutionalising containment and externalisation in its relations with third states.<sup>11</sup> This problem relates to the *external dimension* of the EU asylum policy. All these problems long preceded the influx of asylum seekers in 2015.<sup>12</sup> However, the extent, shifting nature, and increasing intensity of these problems in recent years is such that one can speak of ‘refugee protection backsliding’.

In this analysis, I focus exclusively on the *internal dimension* of the EU’s asylum policy, and examine the first two problems under a rule of law lens. Namely, to what extent can the implementation gap and (systemic) fundamental rights violations be considered one of the many ‘faces’ of rule of law backsliding? The typical approach in the asylum field is to analyse failings in relation to fundamental rights.<sup>13</sup> Why then also examine the two crucial problems pertaining to the internal dimension of EU asylum policy, i.e. (systemic) fundamental rights

<sup>8</sup>See, e.g., A. Scherrer and ECRE, Dublin Regulation on international protection applications: European Implementation Assessment (European Parliament, 2020); and ECRE’s Asylum Information Database comparing asylum procedural standards, reception and detention conditions, and the content of protection in 20 member states, (<https://asylumineurope.org/reports/>), visited 20 July 2021.

<sup>9</sup>ECJ 21 December 2011, Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

<sup>10</sup>For example, an intra-EU humanitarian aid budget line was established in 2016 and was immediately mobilised for the benefit of Greece to improve conditions for refugees and asylum seekers in the country. See Council Regulation No. 2016/369/EU of 15 March 2016 on the provision of emergency support within the Union, [2016] OJ L70/1, and Commission Decision of 15.4.2016 on the financing of emergency support in favour of the affected Member States in response to the current influx of refugees and migrants into the Union to be financed from the 2016 general budget of the European Union (ECHO/-EU/BUD/2016/01000), C(2016)2214 final.

<sup>11</sup>V. Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) and T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press 2011).

<sup>12</sup>See E. Tsourdi and C. Costello, ‘The Evolution of EU Law on Refugees and Asylum’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press 2021) p. 793.

<sup>13</sup>See, e.g., S. Peers et al. (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition* (Brill 2015) and K. Hailbronner and D. Thym, *EU Immigration and Asylum Law Commentary* (Beck/Hart Publishing 2016).

violations and an implementation gap, using the rule of law lens? One reason is to ascertain whether these two problems are connected to broader weaknesses in the rule of law at the national level which are linked to weak institutional capacities or insufficient resources at the administrative or judicial levels. These types of systemic deficiencies linked with capacities and resources<sup>14</sup> call primarily for policy-specific responses (capacity boosting, funding) and a redesign of the responsibility-sharing component of the asylum policy, rather than enforcement responses. A second reason is to ascertain to what extent (systemic) fundamental rights violations or an implementation gap are connected to the ‘backsliding’ processes of grave constitutional capture described by Pech and Scheppele. These failings call for different responses, most notably streamlining the examination of these violations in the existing rule of law enforcement machinery. As a symptom of the broader phenomenon of backsliding they should not be viewed as ‘mere’ policy-specific issues.

To answer this question, I first provide some indicia of the scope of the concept of the rule of law under EU law, focusing in particular on its relationship with fundamental rights: to what extent are the two co-constitutive, to what extent are they distinct, and why does this matter? I draw from political theory, legal philosophy and EU-level legal and policy texts. I then ascertain the extent to which the implementation gap and (systemic) fundamental rights violations can be understood as rule of law challenges. I draw from existing practice at national and EU levels as evidenced in legislation, case law, field research available through secondary sources, and scholarly analysis. I conclude with some thoughts on adequate responses at both EU and national levels for upholding the rule of law and fundamental rights. While the present article does not examine EU and member state externalisation practices under a rule of law lens, this is another important field of (future) study.<sup>15</sup>

#### THE RULE OF LAW AND FUNDAMENTAL RIGHTS: CO-CONSTITUTIVE OR DISTINCT, AND WHY DOES IT MATTER?

The rule of law is widely recognised as a staple of constitutional democracy.<sup>16</sup> Nonetheless, its precise scope remains elusive. In the next sections I explore

<sup>14</sup>See von Bogdandy and Ioannidis, *supra* n. 5.

<sup>15</sup>See *instead* Tsourdi and Costello, *supra* n. 12, p. 820-822; A. Ott, ‘Informalization of EU Bilateral Instruments: Categorization, Contestation, and Challenges’, 39 *Yearbook of European Law* (2020) p. 569; various contributions in S. Carrera et al. (eds.), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis: Legality, Rule of Law and Fundamental Rights Reconsidered* (Edward Elgar 2019), and V. Moreno-Lax, *EU External Migration Policy and the Protection of Human Rights* (European Parliament 2020).

<sup>16</sup>See e.g. J. Waldron, ‘The Concept and the Rule of Law’, 43 *Georgia Law Review* (2008) p. 1; M. Rosenfeld, ‘The Rule of Law and the Legitimacy of Constitutional Democracy’, 74 *Southern California Law Review* (2001) p. 1307.

the scope of the rule of law as a founding EU value, and the practical and legal significance of its relationship with fundamental rights.

*The rule of law in the EU: some indicia of its scope*

Arguably, the ‘high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning’.<sup>17</sup> At a minimum, it means that ‘government officials and citizens are bound by and abide by the law’.<sup>18</sup> This entails the existence of a system of laws that are set forth in advance, stated in general terms, generally known and understood and applied equally to everyone, whose requirements cannot be impossible to meet. It also entails mechanisms that enforce the laws.<sup>19</sup> Non-arbitrariness, i.e. the protection of the citizen from those in authority from exercising wide, arbitrary, or discretionary powers through posing effective controls has been considered as rule of law’s core function.<sup>20</sup>

Beyond this core, different conceptualisations of the rule of law can be distinguished into ‘thin’ or formal conceptions and ‘thick’ or substantive conceptions.<sup>21</sup> Broadly speaking, a thin conception stresses ‘the formal or instrumental aspects of rule of law – those features that any legal system allegedly must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist, liberal etc’.<sup>22</sup> By contrast, thick conceptions additionally incorporate elements of political morality such as particular economic arrangements, forms of government or conceptions of fundamental rights.<sup>23</sup> Authors have challenged this theoretical divide, even beyond the EU law framework. For example, Foran has argued that the rule of law cannot be portrayed as content-neutral; even apparently formal conceptions necessarily affect the protection of certain fundamental rights grounded in the foundations of the legal system.<sup>24</sup>

<sup>17</sup>S. Chesterman, ‘An International Rule of Law?’, 56 *American Journal of Comparative Law* (2008) p. 331 at p. 332.

<sup>18</sup>B. Tamanaha, ‘The History and Elements of the Rule of Law’, 2 *Singapore Journal of Legal Studies* (2012) p. 232 at p. 233.

<sup>19</sup>*Ibid.* For a fuller elaboration and theoretical perspective, see also B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004).

<sup>20</sup>See e.g. M. Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’, in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart Publishing 2009) 45.

<sup>21</sup>See e.g. P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’, 3 *Public Law* (1997) p. 467.

<sup>22</sup>R.P. Peerenboom, *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (Routledge 2004) p. 2-3.

<sup>23</sup>*Ibid.*, p. 3-5.

<sup>24</sup>M.P. Foran, ‘The Rule of Good Law: Form, Substance, and Fundamental Rights’, 78 *The Cambridge Law Journal* (2019) p. 570 at p. 580-85.

EU law delivers the rule of law with the status of a foundational EU value.<sup>25</sup> According to a prevalent understanding, the use of the term ‘value’ in Article 2 TEU, while unfortunate, should not be interpreted as meaning something other than a ‘legal principle’ which is capable of creating a legal rule through judicial adjudication.<sup>26</sup> This understanding and the European Court of Justice’s position on the content of the EU’s values more broadly have been critiqued from a philosophy of law perspective. Specifically, Williams critiqued the European Court of Justice as abstaining from any sophisticated value-definition and instead promoting a theory of interpretation at the expense of a theory of justice, leaving EU values ill-defined, contingent, and frequently incoherent.<sup>27</sup>

The designation of the rule of law as a ‘common’ value links it to the constitutional principles of the member states, and underscores the concept of a common European identity.<sup>28</sup> However, for East Central European states who joined the Union later, the fact that the EU *acquis* is non-negotiable, and that the process of Europeanisation essentially involves imitating the West, has led to a backlash and a questioning of liberal values.<sup>29</sup> In addition, Konstantinides has cautioned against the double standards that may ensue if member states interpret the EU’s rule of law according to their domestic understandings of this concept.<sup>30</sup> The EU does not merely replicate values originating from the member states but has found new roles for the rule of law which transcend its features as manifested in the member states.<sup>31</sup> For example, the rule of law is an EU objective,<sup>32</sup> helps guide the Union’s external action and foreign policy

<sup>25</sup>TEU, Art. 2 states that ‘[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.

<sup>26</sup>See L. Pech, ‘“A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’, 6 *EuConst* (2010) p. 359 at p. 365-67. See also A. von Bogdandy, ‘Founding Principles’, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing 2009) p. 11. On p. 22 the author states: ‘[s]ince the values of Article 2 TEU-Lis have been agreed upon in the procedure of Article 48 EU and produce legal consequences [...] they are legal norms, and since they are overarching and constitutive, they are founding principles’.

<sup>27</sup>See A.T. Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’, 29 *Oxford Journal of Legal Studies* (2009) p. 549.

<sup>28</sup>M. Claes, ‘How Common are the Values of the European Union?’, 15 *Croatian Yearbook of European Law and Policy* (2019) p. vii at p. xi.

<sup>29</sup>Ibid.; p. xiii-xiv refer to I. Krastev and S. Holmes, ‘Imitation and its Discontents’, 29 *Journal of Democracy* (2018) p. 117.

<sup>30</sup>See T. Konstantinides, *The Rule of Law in the European Union: The Internal Dimension* (Hart Publishing 2017) p. 67-69.

<sup>31</sup>Ibid., p. 70.

<sup>32</sup>See TEU, Art. 3(1).

objectives,<sup>33</sup> and constitutes a condition for accession for candidate countries.<sup>34</sup> The EU's rule of law has been incrementally articulated in the context of EU enlargement policy.<sup>35</sup> These standards could arguably be used to ascertain states' continuing observance of Article 2 TEU values within the EU.<sup>36</sup>

Furthermore, Monica Claes and Matteo Bonelli have outlined the rule of law's importance for different aspects of the constitutionalisation of the EU: the initial transformation of the Community legal order into a 'federal-type structure' underpinned by the principles of direct effect and primacy; the realisation that the EU itself needs to comply with the basic, substantive rules of constitutionalism; and the respect of these principles by the member states.<sup>37</sup> Violeta Moreno-Lax has argued, though, that in the more recent chapters of the process of EU's constitutionalisation, in priming 'autonomy' as an end in itself, the EU has reached a point of axiological vacuum which poses problems of legitimacy and is contrary to the rule of law itself.<sup>38</sup>

Beyond these initial indicia, a deeper understanding as to the scope and content of the EU rule of law can be gained through scrutinising its interrelation with fundamental rights.

### *The interrelation between the rule of law and fundamental rights*

According to one narrative, the Article 2 values of democracy, fundamental rights, and the rule of law are co-constitutive, akin to a three-legged stool: 'if one is missing the whole is not fit for purpose'.<sup>39</sup> Pech has argued that 'the Union rule

<sup>33</sup>See TEU, Art. 21(1)-(3); and for an analysis J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016).

<sup>34</sup>See TEU, Art. 49.

<sup>35</sup>See C. Hillion, 'The Copenhagen Criteria and Their Progeny', in C. Hillion (ed.), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) p. 1; D. Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer Law International 2008).

<sup>36</sup>See e.g. C. Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means', in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p. 59 at p. 67-69.

<sup>37</sup>See M. Claes and M. Bonelli, 'The Rule of Law and the Constitutionalisation of the European Union', in W. Schroeder (ed.), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Hart Publishing 2016) p. 265 at p. 269-79.

<sup>38</sup>See V. Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order', in I. Govaere and S. Garben, *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) p. 45.

<sup>39</sup>See S. Carrera et al., 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism' (CEPS 2013), (<https://www.ceps.eu/ceps-publications/triangular-relationship-between-fundamental-rights-democracy-and-rule-law-eu-towards-eu/>), visited 20 July 2021.

of law is correctly understood as sharing a consubstantial, one may say organic, link with the other foundational principles'.<sup>40</sup> The theoretical divide between formal and substantive approaches becomes problematic here, as 'the foundational principles are interdependent and must be construed in light of each other'.<sup>41</sup> In this account, the 'rule of law crisis' could be understood as a 'values crisis'. Article 7 TEU seems to lend credence to this view, referring to a 'clear risk of a serious breach' of 'the values' of the EU. More recently, Jan Wouters has argued that the Commission should examine compliance with the Article 2 values in combination, and that these values should further be read together with other crucial provisions of the EU treaties, such as the core objectives laid down in Article 3 TEU.<sup>42</sup> The European Parliament also endorses an approach of combined examination of the EU's values. It has advocated for the establishment of an EU Mechanism on Democracy, the Rule of Law, and Fundamental Rights covering all aspects of Article 2.<sup>43</sup> This mechanism would consolidate and supersede existing instruments with a more circumscribed scope, such as the Commission's annual Rule of Law report and the Council's Rule of Law dialogue.<sup>44</sup>

The view that EU's values are consubstantial and consequently that a theoretical divide between 'thin' and 'thick' approaches is problematic under EU law is not universally shared. Commentators such as Armin von Bogdandy and Michael Ioannidis have argued that by distinguishing the rule of law from respect for human dignity, freedom, democracy, and equality, the TEU seems to opt for a rather 'thin' understanding.<sup>45</sup> On the other hand, Konstantides argues that as

<sup>40</sup>Pech, *supra* n. 26, p. 368.

<sup>41</sup>*Ibid.*

<sup>42</sup>See J. Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?', 5 *European Papers* (2020) p. 255.

<sup>43</sup>See most recently the European Parliament resolution of 7 October 2020 on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (2020/2072(INI)); for analysis of previous initiatives and proposals see J. Sargentini and A. Dimitrovs, 'The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?', 54 *Journal of Common Market Studies* (2016) p. 1085.

<sup>44</sup>The annual rule of law cycle was announced by the Commission in European Commission, 'Strengthening the Rule of Law within the Union: A blueprint for action', COM(2019) 343 final, 17 July 2019. For the first annual rule of report see European Commission, *supra* n. 5. The Council's annual rule of law dialogue was established in 2014; see Council of the EU, Press Release No. 16936/14, 3362nd Council meeting, General Affairs, Brussels, 16 December 2014, p. 20-21. The Finnish Presidency undertook an evaluation of this tool in 2019; see Council of the EU, Presidency conclusions: evaluation of the annual rule of law dialogue, 14173/19, 19 November 2019.

<sup>45</sup>von Bogdandy and Ioannidis, *supra* n. 5, at p. 62-63, referring also to the writings of C. Calliess, in C. Calliess and M. Ruffert (eds.), *EU/VAEUV: Kommentar*, 4th edn. (Beck 2011), Art. 2, marg. number 26.



the EU system of judicial review includes both procedural and substantive elements it is probably best described as reflecting a version of the 'thick' understanding of the rule of law.<sup>46</sup> Nonetheless, the author also explains that the thin-thick dichotomy can tell us little about rule of law realisation.<sup>47</sup>

Without referring to the thin-thick divide, Dimitry Kochenov argues that the rule of law should be distinguished from human rights and democracy, but that it should not be conflated with 'mere' legality.<sup>48</sup> Drawing from the writings of Gianluigi Palombella,<sup>49</sup> he argues that the basic meaning of the rule of law as an institutional ideal is that the law – *gubernaculum* – should always be controlled by another kind of law – *jurisdictio* – which is not up to the sovereign to change at will.<sup>50</sup> According to Kochenov, the EU falls short of this ideal type. While the *gubernaculum* – the *acquis* – is easy to see, the EU lacks a true *jurisdictio* and Article 2's 'rule of law' cannot have any meaning beyond a requirement to observe basic legal procedures and a set of other well-known elements of legality.<sup>51</sup>

While not limiting the rule of law to legality, the European Commission also seems to adopt an approach which distinguishes it from fundamental rights. It describes the rule of law as containing the principles of legality, legal certainty, effective judicial protection, effective judicial review, separation of powers and equality before the law.<sup>52</sup> *Certain* fundamental rights are contained within its scope; for example, effective judicial protection is intrinsically linked with the right to an effective remedy and a fair trial.<sup>53</sup> Meanwhile, Council documents provide little insight into the question;<sup>54</sup> it is highly unlikely that a co-constitutive approach to EU values could be deduced from them.

<sup>46</sup>Konstantinides, *supra* n. 30, p. 58.

<sup>47</sup>*Ibid.*

<sup>48</sup>D. Kochenov, 'The Missing EU Rule of Law?', in Closa and Kochenov, *supra* n. 36, p. 290 at p. 296.

<sup>49</sup>See G. Palombella, 'The Rule of Law as an Institutional Ideal', in L. Morlino and G. Palombella (eds.), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Brill 2010) p. 3; G. Palombella, 'The Rule of Law and its Core', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (Hart Publishing 2009) p. 17.

<sup>50</sup>Kochenov, *supra* n. 48, p. 297.

<sup>51</sup>*Ibid.*, p. 303-305. See also fuller analysis in D. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?', 34 *Yearbook of European Law* (2015) p. 74.

<sup>52</sup>See European Commission, *A New EU Framework to Strengthen the Rule of Law*, COM(2014) 158, p. 4; European Commission, *Further Strengthening the Rule of Law within the Union*, COM(2019)163, p. 1; European Commission, *supra* n. 44, p. 1.

<sup>53</sup>See Art. 47 Charter. For an illustration in asylum see E. Tsourdi, 'Of Legislative Waves and Case Law: Effective Judicial Protection, Right to an Effective Remedy and Proceduralisation in the EU Asylum Policy', 12 *Review of European Administrative Law* (2019) p. 143.

<sup>54</sup>See e.g. General Affairs Council, *supra* n. 44, para. 4.

Finally, the European Court of Justice has not pronounced directly on the matter. However, it has held that the obligation to ensure effective judicial protection (Article 19, para. 1 TEU) should be understood by reference to the right to an effective remedy and to a fair trial (Article 47 Charter) and read together with the articles on EU values (Article 2 TEU) and the principle of sincere cooperation (Article 4, para. 3 TEU) to establish a general obligation for member states to guarantee the independence of their national courts and tribunals.<sup>55</sup> Thus, as a minimum, the Court understands the rule of law to include respect for the principle of effective judicial protection and the right to an effective remedy.

### *The rule of law as an analytical lens of asylum failings*

The aim of this piece is not to propose a new theoretical understanding of the EU's conception of the rule of law. To the extent that one tries to conceptualise EU's rule of law under a thin-thick divide, I would argue that a highly 'thin' conception seems untenable, however. The EU integration project is undoubtedly underpinned by at least some elements of political morality, such as preferences about specific types of economic arrangement, as illustrated by EU's internal market *acquis*, and forms of government and conceptions of fundamental rights, as illustrated by its Charter on Fundamental Rights. These are bound to influence the understanding of the rule of law and its requirements, even if it, democracy, and fundamental rights are not viewed as co-constitutive. Additionally, as made clear by the European Commission and European Court of Justice case law, the rule of law encircles at least *certain* fundamental rights, such as the right to an effective remedy.

At the enforcement level, the approach proposed by the European Parliament and some commentators – monitoring the entire spectrum of EU values through a single process, rather than trying to distinguish breaches of the rule of law from fundamental rights failings – also has merit. Even if their scope does not fully correlate, weaknesses in one area are bound to affect the other. A streamlined reporting and monitoring process could help identify such effects, providing a full account of the situation in each member state,<sup>56</sup> and highlight systemic

<sup>55</sup>ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*; and commentary in M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary ECJ 27 February 2018, Case C-64/16, *Associação Sindical dos Juizes Portugueses*', 14 *EuConst* (2018) p. 622; and P. Van Elswege and F. Gremmelperez, 'Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice', 16 *EuConst* (2020) p. 8 at p. 23-25.

<sup>56</sup>For the usefulness of a rights-based performance see also G. Toggenburg and J. Grimheden, 'The Rule of Law and the Role of Fundamental Rights: Seven Practical Pointers', in Closa and Kochenov, *supra* n. 36, p. 147.

weaknesses, or grave situations of constitutional capture such as those outlined by Pech and Scheppele.<sup>57</sup>

In the following section, I analyse two ills of the internal dimension of EU's asylum policy, i.e.: (i) the implementation gap; and (ii) (systemic) fundamental rights violations, under a rule of law compatibility lens. On the one hand, I focus on the link between the two identified ills of the asylum policy and situations of grave constitutional capture referred to by Pech and Scheppele as 'rule of law backsliding'.<sup>58</sup> On the other, I also focus on the links between these ills and the type of rule of law failings observed by von Bogdandy and Ioannidis. These authors have argued that EU norms remain suspended if 'the institutions of a Member State are unwilling or unable to observe the rule of (domestic) law – be it due to endemic corruption, weak institutional capacities, or insufficient resources at the administrative or judicial levels'.<sup>59</sup> This translates to deficient rule of EU law.<sup>60</sup> While distinguishable from Pech and Scheppele's 'rule of law backsliding',<sup>61</sup> these systemic deficiencies also have far-reaching implications. This analysis later forms the basis of reflection on the adequate means of enforcement and responses for two different types of rule of law failings identified here.

#### REFUGEE PROTECTION AND RULE OF LAW BACKSLIDING: OF INABILITY, DEFIANCE AND SYSTEMIC FUNDAMENTAL RIGHTS VIOLATIONS

EU asylum policy is plagued by an implementation gap.<sup>62</sup> Diagnosing its roots is complex. While the fair sharing of responsibility is required by EU law, in practice its responsibility allocation system, the Dublin system,<sup>63</sup> allocates more responsibility to states at the Union's external maritime borders.<sup>64</sup> Worse, it

<sup>57</sup>Pech and Scheppele, *supra* n. 4, p. 10.

<sup>58</sup>*Ibid.*, *supra* n. 4, p. 11.

<sup>59</sup>See von Bogdandy and Ioannidis, *supra* n. 5, p. 64.

<sup>60</sup>*Ibid.*

<sup>61</sup>Pech and Scheppele, *supra* n. 4, p. 11.

<sup>62</sup>See V. Moreno-Lax et al., *The EU Approach on Migration in the Mediterranean* (European Parliament 2021) p. 26-69; ECRE, *The Implementation of the Dublin III Regulation in 2018* (ECRE 2019); A. Scherrer, *Dublin Regulation on International Protection Applications*, PE 642.813 (European Parliamentary Research Service 2020); EASO, *Annual Report on the Situation of Asylum in the European Union*, 2020.

<sup>63</sup>Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), OJ L 180/31 (Dublin III Regulation).

<sup>64</sup>TFEU, Art. 80; E. Tsourdi, 'Solidarity at Work? The Prevalence of Emergency-Driven Solidarity in the Administrative Governance of the Common European Asylum System', 24 *MJECL* (2017) p. 673-675.

fails to reinforce asylum provision as a regional public good.<sup>65</sup> Instead, once responsibility is assigned, it is for the individual member state to provide for the refugee.<sup>66</sup> Refugee immobility permeates the system, hindering further redistributive efforts. EU support measures such as funding are limited. In addition, member states have different levels of economic development and conceptualisations of welfare, entailing differences in protection capacity. These factors are intertwined and lead to deficient implementation; sometimes this leads to grave violations of fundamental rights, like failure to protect from torture and inhuman or degrading treatment.<sup>67</sup>

The implementation gap is not merely due to legal design and member states' capacities, however. A more recent development is the non-implementation of asylum-related obligations as defiance.<sup>68</sup> Through this stance some member states express their disagreement with the aims of the EU's asylum and migration policies, both through a complete refusal to implement the policies and a systemic erosion of procedural guarantees and other fundamental rights.

The next sections explore whether and how the implementation gap and fundamental rights violations link with the rule of law.

*The implementation gap: the 'elixir of long life' of a faulty common asylum system or a gesture of defiance towards the rule of law?*

Article 80 TFEU contains an arguably legally binding principle of solidarity and fair sharing of responsibility. This principle profoundly impacts the goal of EU asylum policy: it dictates a certain 'quality' in the cooperation between the various actors, and arguably unsettles the policy's implementation modes, for example the method of allocating responsibility.<sup>69</sup> Nevertheless, EU asylum policy lacks a system for allocating responsibility among the member states based on objective indicators.<sup>70</sup>

<sup>65</sup>A. Suhrke, 'Burden-Sharing During Refugee Emergencies: The Logic of Collective versus National Action', 11 *Journal of Refugee Studies* (1998) p. 396; A. Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009) p. 29.

<sup>66</sup>E. Guild, 'The Europeanisation of Europe's Asylum Policy', 18 *International Journal of Refugee Law* (2006) p. 630.

<sup>67</sup>See e.g. Cases C-411 and 493/10.

<sup>68</sup>See, e.g., ECJ 2 April 2020, Joined Cases C-715-17, C-718/17 and C-719-17, *European Commission v Poland, Czech Republic and Hungary*.

<sup>69</sup>Tsourdi, *supra* n. 64, p. 675. See also analysis in E. Küçük, 'The Principle of Solidarity and Fairness in Responsibility Sharing: More than Window Dressing?', 22 *European Law Journal* (2016) p. 448; E. Karageorgiou, 'Solidarity and Sharing in the Common European Asylum System: the Case of Syrian Refugees', 17 *European Politics and Society* (2016) p. 196.

<sup>70</sup>P. De Bruycker and E. Tsourdi, 'In Search of Fairness in Responsibility Sharing', 51 *Forced Migration Review* (2016) p. 64 at p. 65. See also E. Guild et al., 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece', Study for the LIBE Committee (2017) p. 68-70.

Given an objective assessment of the protection capacity of each member state, the ‘inability to comply’ with a state’s obligations could be clearly distinguished from an ‘unwillingness to comply’, reducing tensions between member states. Instead, the current system pits member states against one other and creates disincentives for compliance. The problems it creates long predated the surge in arrivals in 2015–16, as noted by most academic commentators.<sup>71</sup>

There have been various attempts to explain Dublin’s puzzling longevity.<sup>72</sup> These include path dependence,<sup>73</sup> trade-offs between Schengen and responsibility assignment as part of a broader ‘security union’,<sup>74</sup> and Dublin’s symbolic value of state control.<sup>75</sup> More importantly for my analysis, Francesco Bosso has argued that ‘tolerated non-compliance’ has been Dublin’s ‘elixir of long life’.<sup>76</sup> This argument has merit. In the earlier Dublin Convention days,<sup>77</sup> Eurodac, the centralised fingerprinting database that complements Dublin,<sup>78</sup> was not operational. Therefore, member states at the external borders could assume that the first country of entry rule would not be enforceable. Later, Dublin fuelled an implementation gap which reached beyond the responsibility allocation system itself to cover the entire substantive asylum *acquis*. Possibly due to the other benefits linked with Dublin, from its symbolic function to its links with Schengen, member states largely tolerated non-implementation. It was the 2015-16 increase that brought the demise of the *modus vivendi*.<sup>79</sup> However, even the so-called refugee crisis did

<sup>71</sup>See e.g. P. McDonough and E. Tsourdi, ‘The “Other” Greek Crisis: Asylum and EU Solidarity’, 31 *Refugee Survey Quarterly* (2012) p. 67; F. Maiani, ‘The Dublin III Regulation: A New Legal Framework for a More Humane System?’, in V. Chetail et al. (eds.), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill 2016) p. 92 at p. 104–14.

<sup>72</sup>See Tsourdi and Costello, *supra* n. 12, p. 805-809.

<sup>73</sup>For a definition of path dependence see P. Pierson, ‘The Path to European Integration: A Historical Institutional Analysis’, 29 *Comparative Political Studies* (1996) p. 123 at p. 146.

<sup>74</sup>E. Thielemann and C. Armstrong, ‘Understanding European Asylum Cooperation under the Schengen/Dublin System: a Public Goods Framework’, 22 *European Security* (2013) p. 148.

<sup>75</sup>M. Mouzourakis, ‘“We Need to Talk about Dublin”: Responsibility under the Dublin System as a Blockage to Asylum Burden-sharing in the European Union’, Oxford Refugee Studies Centre Working Paper Series No. 115, 2014.

<sup>76</sup>F. Bosso, *Cornerstone, Dead Letter or . . . Both?: Explaining the Puzzling Longevity of the Dublin System*, unpublished thesis for an MSc in Forced Migration Studies, 2017 (copy with the author).

<sup>77</sup>Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities (adopted 15 June 1990, entered into force 1 September 1997) OJ C 254, 1.

<sup>78</sup>Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013, OJ L 180/1.

<sup>79</sup>Bosso, *supra* n. 76, p. 24-31. Violeta Moreno Lax, however, argues that this formula of ‘tolerated non-implementation’ has apparently now been embedded in the constitutional fabric of the CEAS: see V. Moreno-Lax, ‘Mutual (Dis-)Trust in EU Migration and Asylum Law: The

not provoke a departure from the main premise of Dublin; instead, it spurred a renewed impulse to externalise protection obligations.<sup>80</sup>

This mixture of unwillingness and inability to implement asylum-related obligations raises intricate rule of law adherence issues. Under von Bogdandy and Ioannidis's conception of rule of law inability to implement EU law due to weak institutional capacities, or insufficient resources at the administrative or judicial levels also jeopardises the rule of law.<sup>81</sup> The implementation gap and unequally distributed obligations have eroded mutual trust among the member states concerning asylum. During 2015-16 they jeopardised the functioning of the Schengen area.<sup>82</sup>

Different considerations apply where non-implementation is an act of defiance motivated by ideological disagreement with the goal of asylum provision, as will be analysed below. Of course, governments are not always explicit about their motivations. Kochenov and Bárd analyse the different strategies that illiberal governments employ to justify their policies, including the arbitrary invocation of national sovereignty, appeals to constitutional identity or national security and disinformation campaigns.<sup>83</sup> Member states, both 'backsliding' and other, have employed these strategies to justify non-implementation of asylum obligations. I will consider two examples: the non-implementation of emergency relocation schemes by several member states, and Greece's suspension of the right to asylum preceding the Covid-19 pandemic.

Two Council decisions established emergency relocation, meaning intra-EU transfer of asylum seekers between member states, to benefit Italy and Greece during 2015-17.<sup>84</sup> This initiative was undercut by several factors, including its

Exceptionalisation of Fundamental Rights', in Gonzalez Pascual and S. Iglesias Sanchez (eds.), *Fundamental Rights in the EU Area of Freedom, Security and Justice* (Cambridge University Press 2021) p. 77.

<sup>80</sup>See subsection below.

<sup>81</sup>See von Bogdandy and Ioannidis, *supra* n. 5, p. 64.

<sup>82</sup>See European Parliament and Council Regulation (EU) 2016/399, On the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code), 2016 OJ (L 77) 1 [hereafter Schengen Borders Code]. The decisions were initially based on Art. 25 of the Schengen Borders Code, which allows for reintroduced controls at internal borders for a period of up to two months. The controls have subsequently been prolonged based on Arts. 23 and 24 of the Schengen Borders Code, which allows for reintroduced controls at internal borders for a period of up to six months.

<sup>83</sup>D. Kochenov and P. Bárd, 'Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement', Reconnect Working Papers No. 1, 2018, p. 10-14, ([https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP\\_27072018b.pdf](https://reconnect-europe.eu/wp-content/uploads/2018/07/RECONNECT-KochenovBard-WP_27072018b.pdf)), visited 20 July 2021.

<sup>84</sup>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 L239/146 (1st Emergency Relocation Decision); 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 L248/80 (2nd Emergency Relocation Decision).

own legislative and administrative characteristics.<sup>85</sup> Both decisions numerically capped their beneficiaries,<sup>86</sup> restrictively defined eligible applicants,<sup>87</sup> and expired after two years.<sup>88</sup> Like the Dublin system, they failed to take into account the preferences of asylum seekers.

The scheme's implementation was also undercut by the outright refusal of certain member states to relocate asylum applicants. I will focus on Hungary, Poland, the Czech Republic and Slovakia. A mixture of 'moral' and legal arguments undergirded resistance to the implementation of the decisions, and to asylum obligations more broadly. For example, Hungary's Prime Minister Viktor Orban claimed that migrants threaten Europe's (and Hungary's) Christian identity,<sup>89</sup> an identity which according to this narrative precludes 'welcoming the stranger'. He went on to wage a misinformation campaign as to the content and purposes of the relocation scheme.<sup>90</sup> Later, the Hungarian Constitutional Court judges referred to the country's 'constitutional identity' to justify the government's refusal to action the scheme.<sup>91</sup>

<sup>85</sup>B. De Witte and E. Tsourdi, 'Confrontation on Relocation – The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the European Union: Slovak Republic and Hungary v Council', 55 *CMLRev* (2018) p. 1457 at p. 1459-67; E. Guild et al., 'Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and of Greece', Study for the LIBE Committee (2017) p. 42-44, ([https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL\\_STU\(2017\)583132\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583132/IPOL_STU(2017)583132_EN.pdf)), visited 20 July 2021.

<sup>86</sup>1st Emergency Relocation Decision, Art. 4; 2nd Emergency Relocation Decision, Art. 4(1).

<sup>87</sup>1st Emergency Relocation Decision, Art. 3(2); 2nd Emergency Relocation Decision, Art. 3(2) establishing the notion of applicants 'in clear need of international protection'.

<sup>88</sup>The first relocation decision applied until 17 September 2017 and the second until 26 September 2017. See respectively 1st Emergency Relocation Decision, Art. 13(2) and 2nd Emergency Relocation Decision, Art. 4.

<sup>89</sup>See e.g. M. Karnitschnig, 'Orban says migrants threaten "Christian" Europe' (*Politico Europe*, 3 September 2015), referring to the Hungarian PM's op-ed for the German newspaper *Frankfurter Allgemeine Zeitung*, (<https://www.politico.eu/article/orban-migrants-threaten-christian-europe-identity-refugees-asylum-crisis/>), visited 20 July 2021.

<sup>90</sup>See details and quotations from government speeches in B. Nagy, 'Hungarian Asylum Law and Policy in 2015–2016: Securitization Instead of Loyal Cooperation', 17 *German Law Journal* (2016) p. 1033 at p. 1055-57.

<sup>91</sup>For analysis of this case law see G. Halmai, 'Abuse of Constitutional Identity: The Hungarian Constitutional Court on Interpretation of Article E(2) of the Fundamental Law', 43 *Review of Central and East European Law* (2018) p. 23. On the dangers for the rule of law emanating from constitutional pluralism, see also D.R. Kelemen and L. Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland', 21 *Cambridge Yearbook of European Legal Studies* (2019) p. 59. For views in support of constitutional pluralism see various contributions in G. Davies and M. Avbelj (eds.), *Research Handbook on Pluralism and EU Law* (Edward Elgar 2018).

Additionally, Hungary and Slovakia introduced an action for annulment before the European Court of Justice, constructing a series of imaginative legal arguments, mainly regarding procedural failings that ostensibly occurred during the adoption process of the decision, and which the European Court rejected.<sup>92</sup> Poland intervened, raising an objection based on its linguistic and cultural identity, citing:

[the] allegedly disproportionate effects of those quotas on a number of host Member States which, in order to meet their relocation obligations, have to make far greater efforts and bear far heavier burdens than other host Member States. That is said to be the case of Member States which are ‘virtually ethnically homogeneous, like Poland’ and whose populations are different, from a cultural and linguistic point of view, from the migrants to be relocated on their territory.<sup>93</sup>

The Court rejected this argument due to procedural errors (it was inadmissible since it was put forth in a statement of intervention while going beyond the arguments raised by the claimants) as well as its contravening the principles of solidarity and fair sharing (Article 80 TFEU) and non-discrimination (Article 21 Charter).<sup>94</sup> By the expiry of the emergency relocation scheme, Poland and Hungary had failed to relocate a single asylum seeker in their territory, while the Czech Republic had relocated only 12 before deciding to unilaterally suspend the implementation of its obligations.<sup>95</sup> In an infringement action, the European Court of Justice found that the countries’ refusal violated EU law, rejecting a mix of procedural and substantive arguments and notably invocation of national identity (Article 4, para. 2 TEU), in combination with maintenance of law and order and internal security (Article 72 TFEU).<sup>96</sup>

The second example regards Greece’s suspension of the right to asylum approximately two weeks prior to the adoption of any national Covid-19 related restrictions. Following a dispute with Turkey at its borders, Greece both suspended the right to asylum for those newly arrived throughout March 2020 and stipulated immediate deportation of those entering the Greek territory through an Act of Legislative Content unrelated to Covid-19.<sup>97</sup> This formed part

<sup>92</sup>See ECJ 6 September 2017, Joined Cases C-643/15 and C-647/15, *Slovak Republic and Hungary v Council of the European Union*; and commentary in De Witte and Tsourdi, *supra* n. 85.

<sup>93</sup>*Ibid.*, para. 302.

<sup>94</sup>*Ibid.*, paras. 303-305.

<sup>95</sup>ECJ 2 April 2020, Joined Cases C-715-17, C-718/17 and C-719-17, *European Commission v Poland, Czech Republic and Hungary*, paras. 24-31.

<sup>96</sup>*Ibid.*, paras. 134-72.

<sup>97</sup>Government Decree on ‘suspension of the submission of asylum applications’, OG A’ 45/2.3.2020, (<https://lawnet.gr/law-news/fek-a45-2020-anastoli-tis-y-povolis-etiseo/>) (in Greek), visited 3 January 2021.



of the Greek response to Turkey's declaration that it would no longer prevent refugees and migrants from crossing to Greece despite its obligations under the EU-Turkey Statement.<sup>98</sup> The Greek government also based the suspension on the 'extraordinary circumstances of the urgent and unforeseeable necessity to confront an asymmetrical threat to national security, which prevails over the reasoning for applying the rules of EU law and international law on asylum procedures'.<sup>99</sup> The suspension arguably violated international and EU law, which recognises the absolute nature of the principle of *non-refoulement* – a topic which goes beyond the scope of the present contribution.<sup>100</sup> The suspension had highly damaging effects on a significant number of people in need of protection, with thousands arbitrarily detained without effective judicial protection.<sup>101</sup> Under international and EU law, asylum seekers may only be deprived of their liberty if one of six exhaustively enumerated grounds apply, based on individualised assessment.<sup>102</sup>

The pandemic led to a continuum of restrictions regarding the right to asylum.<sup>103</sup> This meant two layers of restrictions coincided during March 2020, while thereafter only the Covid-19 related restrictions stood. Thus, persons arriving from 1 March 2020 onwards had no access to asylum for more than two and a half months. However, protection needs cannot be set aside in border control, nor while implementing measures to address public health.<sup>104</sup> Asylum seekers also faced a continuum of restrictions regarding their right to liberty and security,

<sup>98</sup>See SN 38/16, 18 March 2016.

<sup>99</sup>See Government Decree, *supra* n. 97.

<sup>100</sup>See instead 'UNHCR statement on the situation at the Turkey-EU border' (UNHCR, 2 March 2020), (<https://bit.ly/3bhsM8D>), visited 20 July 2021.

<sup>101</sup>See analysis in Refugee Support Aegean, *Rights denied during Greek asylum procedure suspension*, April 2020.

<sup>102</sup>See Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive), OJ L 180/96, Arts. 8-11; and analysis in E. Tsourdi, 'Asylum Detention in EU Law: Falling between Two Stools?', 35 *Refugee Survey Quarterly* (2016) p. 7; E. Tsourdi, 'International Human Rights Law, EU Law, and Alternatives to Immigration Detention: Shaping Control Standards and Judicial Interaction in an Heterarchy', in M. Moraru et al. (eds.), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) p. 167.

<sup>103</sup>For analysis see E. Tsourdi and N. Vavoula, 'Killing Me Softly? Scrutinising the Role of Soft Law in Greece's Response to COVID-19', 12 *European Journal of Risk Regulation* (2021) p. 59 at p. 71-73.

<sup>104</sup>See e.g. Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 77/1, Arts. 3(b) and 7; EU Charter of Fundamental Rights, Arts. 18 and 19; and analysis in FRA and Council of Europe, *Fundamental Rights of Refugees, Asylum Applicants and Migrants at the European Borders*, 2020.

alongside their right to freedom of movement. The Greek policy of blanket detention of all new arrivals based on the ‘immediate deportation decree’ was arguably followed by disproportionate restrictions on their freedom of movement.<sup>105</sup> An unfortunate conclusion is that the pandemic served partly as a fig leaf to consolidate restrictions to the right to asylum and the right to freedom of movement, based on completely different considerations. Similar restrictive trends undermining the right to asylum under the guise of Covid-19 responses were reported in Cyprus and Hungary.<sup>106</sup>

How do the above failings connect with the value of the rule of law? Advocate General Sharpston provided a forceful answer in her Opinion for the infringement action against Poland, Hungary and the Czech Republic. She noted that the three defendant member states explicitly claimed at the hearing that they were ‘rebels’ who opposed the implementation of the relocation mechanism.<sup>107</sup> Despite the armoury of procedural and substantive counter-arguments presented by these member states, they could not resist advocating their ideological stance and highlighting their defiance. Hence, the Advocate General finished her Opinion arguing:

At a deeper level, respect for the rule of law implies compliance with one’s legal obligations. Disregarding those obligations because, in a particular instance, 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 which, as citizens, we enjoy both for its comfort and its safety. The bad example is particularly pernicious if it is set by a Member State.<sup>108</sup>

The Court was not so explicit as to its reasoning. However, it did note that to find the action inadmissible (as the defendant states had requested) would be ‘detrimental [...] more generally, 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’,<sup>109</sup> and that ‘[i]n a European Union based on the rule of law, acts of the institutions enjoy a presumption of lawfulness’.<sup>110</sup> Accordingly, the relocation decisions were binding and member states were required to comply, a fact unaltered by the eventually unsuccessful action for annulment against

<sup>105</sup>See Tsourdi and Vavoula, *supra* n. 103, p. 63-67.

<sup>106</sup>See FRA, Coronavirus Pandemic in the EU – Fundamental Rights Implications: Bulletin No. 1, April 2020, 24.

<sup>107</sup>See Opinion of AG Sharpston in ECJ 2 April 2020, Joined Cases C-715-17, C-718/17 and C-719-17, *European Commission v Poland, Czech Republic and Hungary*, para. 141.

<sup>108</sup>*Ibid.*, para. 241.

<sup>109</sup>*European Commission v Poland, Czech Republic and Hungary*, *supra* n. 95, para. 65.

<sup>110</sup>*Ibid.*, para. 139.

the decisions introduced by Hungary and Poland.<sup>111</sup> This understanding of the concept of the rule of law by the European Court of Justice and Advocate General Sharpston intrinsically links it with the duty of sincere cooperation (Article 4, para. 3 TEU). The same holds true for Greece's unilateral suspension of the right to asylum, which however has not been scrutinised judicially.

*Fundamental rights violations and the rule of law: intricate links and complex problems*

The implementation gap is connected with systemic fundamental rights violations, but not all fundamental rights violations in asylum are linked with that gap. Nor does a member state's ideological defiance of asylum obligations always result in fundamental rights violations (though it may result in violations of intra-state solidarity and loyal cooperation). Hence, it is worth focusing exclusively on the interrelationship between fundamental rights violations in asylum and the rule of law. Therefore, the next section focuses on: (i) fundamental rights violations, including those involving procedural rights; and (ii) systemic fundamental rights violations. The term refers to violations of a certain type, intensity or duration.

Fundamental rights violations in asylum are not always systemic. Even beyond the implementation gap, constitutional capture or conscious defiance, asylum legislative harmonisation has left a significant level of discretion to member states.<sup>112</sup> This has resulted in fundamental rights violations at the national level as evidenced by European Court of Justice case law. For example, drawing from the principle of human dignity and the prohibition of torture, inhuman or degrading treatment, the Court has fleshed out the notion of a 'dignified standard of living' included in the Reception Conditions Directive. On this basis, the European Court of Justice has barred the practice of depriving asylum seekers subject to a 'Dublin transfer' of material reception conditions,<sup>113</sup> or withdrawing said conditions as a sanction for breaching the rules of a reception centre.<sup>114</sup>

<sup>111</sup>Ibid., paras. 139-40.

<sup>112</sup>See, e.g., C. Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles', in A. Baldaccini et al. (eds.), *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law after 1999* (Hart Publishing 2007) p. 151, and E. Tsourdi, 'EU Reception Conditions: A Dignified Standard of Living for Asylum Seekers?', in Chetail et al., *supra* n. 71, p. 271.

<sup>113</sup>ECJ 27 September 2012, Case C-179/11, *Cimade, Groupe d'information et de soutien des immigrés (Gisti) v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*.

<sup>114</sup>ECJ 12 November 2019, Case C-233/18, *Zubair Haqbin v Federaal Agentschap voor de opvang van asielzoekers*.

Similarly, it has found that where reception conditions are offered as financial allowances, they must ensure subsistence by enabling asylum seekers to obtain housing on the private rental market, if necessary.<sup>115</sup>

Concerning procedural standards, the European Court of Justice rulings have usually taken a text-based approach to interpreting the Directive, generally permitting national procedural practices. Even so, the Court has been willing to adduce additional procedural requirements through the Charter-based rights to an effective remedy and good administration.<sup>116</sup> For example, the European Court of Justice found that the right to be heard requires national authorities to examine eligibility for refugee status and subsidiary protection via distinct hearings in two separate procedures, as in Ireland;<sup>117</sup> or that the right to an effective remedy entails that national procedures should be arranged so that, should the case file be returned to the first instance authority: (i) a new decision is adopted within a short period of time; and (ii) that decision complies with the assessment contained in the judgment annulling the initial decision.<sup>118</sup>

Different considerations apply to systemic fundamental rights violations. The term refers to violations of a certain type, intensity or duration. This is to be distinguished from the European Court of Justice's dubious notion that the bar on return regarding intra-EU transfers of asylum seekers turned on 'systemic deficiencies' in the state concerned.<sup>119</sup> The European Court of Human Rights later rejected this notion in *Tarakhel*<sup>120</sup> and the European Court of Justice followed suit.<sup>121</sup> Systemic violations could point to structural implementation weaknesses or constitutional capture, leading to violations of the duty of sincere cooperation which – in the EU – is also linked with the rule of law. I will now illustrate the concept with two examples: the functioning of the asylum system in Greece, and in Hungary.

As early as 2011, the European Court of Human Rights identified structural deficiencies in Greece's asylum procedures and reception conditions while examining complaints of alleged infringement of various rights of the ECHR by Greece and Belgium:

<sup>115</sup>ECJ 27 February 2014, Case C-79/13, *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others*, para. 42.

<sup>116</sup>Tsourdi, *supra* n. 53.

<sup>117</sup>ECJ 22 November 2012, Case C-277/11, *MM v Minister for Justice, Equality and Law Reform*.

<sup>118</sup>ECJ 25 July 2018, Case C-585/16, *Serin Albeto v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, para. 126.

<sup>119</sup>ECJ, 21 December 2011, Cases *N. S.* (C-411/10) v *Secretary of State for the Home Department and M. E. and Others* (C-493/10) v *Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*.

<sup>120</sup>ECtHR, 4 November 2014, No. 29217/12, *Tarakhel v Switzerland*.

<sup>121</sup>ECJ 16 February 2017, Case C-578/16 PPU, *CK and Others v Republika Slovenija*.

Those persons who have no family or relations in Greece and cannot afford to pay rent just sleep on the streets. As a result, many homeless asylum-seekers, mainly single men but also families, have illegally occupied public spaces [ . . . ]. Many of those interviewed reported a permanent state of fear of being attacked and robbed, and of complete destitution generated by their situation (difficulty in finding food, no access to sanitary facilities, etc.).<sup>122</sup>

These structural deficiencies were conceivably due to Greece's inability and unwillingness to protect asylum seekers and refugees. Arguably, the Dublin system, which Greece perceived as unfair, incentivised these breaches of EU asylum policy.

Greece has slowly been improving its national asylum system, for example through the establishment of a dedicated national administrative authority.<sup>123</sup> Supported by EU funding, it has implemented programmes to provide urban accommodation and cash assistance to growing numbers of asylum seekers.<sup>124</sup> Nevertheless, deficiencies in asylum processing, and most notably in reception conditions, persist. The Covid-19 pandemic has brought asylum conditions in Greece back into focus.<sup>125</sup> The outbreak of the pandemic found almost 39,000 asylum seekers,<sup>126</sup> including thousands of unaccompanied children,<sup>127</sup> residing in 'hotspots' on the Greek Aegean islands<sup>128</sup> and facing unsanitary conditions. On Lesbos, there was one shower for every 500 people and one toilet for every 160.<sup>129</sup> Instead of evacuating the camps, the Greek government

<sup>122</sup>ECtHR, 21 January 2011, No. 30696, *MSS v Belgium and Greece*, paras. 169-70.

<sup>123</sup>First established through Law No. 3907/2011 (26 January 2011), Official Gazette of the Greek Government, Series A, Issue 7, 19 ff.

<sup>124</sup>See 'Emergency Support to Integration and Accommodation' (ESTiA, UNHCR), (<http://estia.unhcr.gr/en/home/>), visited 20 July 2021.

<sup>125</sup>See analysis in E. Tsourdi, 'COVID-19, asylum in the EU, and the great expectations of solidarity', 31 *International Journal of Refugee Law* (2020) p. 374.

<sup>126</sup>See UNHCR, *Aegean Islands Weekly Snapshot: 27 April – 03 May 2020*, 2020, (<https://reliefweb.int/report/greece/greece-aegean-islands-weekly-snapshot-27-april-3-may-2020>), visited 20 July 2021.

<sup>127</sup>Greek National Centre for Social Solidarity, *Situation Update: Unaccompanied Children (UAC) in Greece*, 30 April 2020, (<https://reliefweb.int/report/greece/situation-update-unaccompanied-children-uac-greece-30-april-2021-enel>), visited 30 July 2021.

<sup>128</sup>For a brief overview of the 'hotspot approach to migration management' and to 'hotspots', namely, the colloquial name of first reception facilities, see European Parliamentary Research Service, *Hotspots at EU External Borders: State of Play*, 2018, ([https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS\\_BRI\(2018\)623563\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623563/EPRS_BRI(2018)623563_EN.pdf)), visited 20 July 2021. For a detailed list of the tasks to be performed at hotspots by different agencies see D. Neville et al., *On the Frontline: The Hotspot Approach to Managing Migration* (European Parliament 2016), p. 27-29.

<sup>129</sup>Greek Council for Refugees and Oxfam, *Lesbos COVID-19 briefing: Update on the EU 'hotspot' Moria by the Greek Council for Refugees and Oxfam*, 1 April 2020, (<https://www.gcr.gr/en/news/press-releases-announcements/item/1420-oxfam-gcr-briefing-for-lesvos-amidst-the-coronavirus>), visited 20 July 2021.

restricted asylum seekers' right to freedom of movement by immobilising them in camps, even when limitations were lifted for the rest of the population.

Since 2015, the Hungarian government has dismantled refugee protection through a series of legislative amendments. A detailed analysis goes beyond the remit of this contribution;<sup>130</sup> the measures touched every aspect of the national asylum system. Among other things, they curtailed procedural rights under 'normal procedures'; abolished integration measures for recognised beneficiaries; introduced a fully informal removal mechanism first within an eight-kilometre distance of the fence with Serbia and later throughout the whole territory; criminalised the crossing of the 175-kilometre fence; and established that a 'crisis situation' permits the deprivation of liberty of asylum seekers in transit zones during the entire refugee status determination procedure.<sup>131</sup>

As Nagy has explained, this established that during a 'crisis situation caused by mass immigration' (which the Hungarian government immediately instated and has repeatedly renewed without objective indicators to justify it), all asylum seekers are obliged to submit themselves to a forced (and escorted) removal from within Hungarian territory to the Serbian side of the fence, depriving them of effective access to the procedure.<sup>132</sup> Only three exceptional categories of individuals were granted access to a regular procedure: those in detention; those who regularly stayed in Hungary; and those under 14 years of age.<sup>133</sup> The official narrative is that removed persons could then walk along the fence to reach the Hungarian transit zone and wait for admission, with no water, sanitation or shelter provided.<sup>134</sup> Admissions to the transit zone were extremely limited, benefiting just one person per day in January 2018.<sup>135</sup> Within the transit zone, asylum seekers were deprived of a number of procedural rights and reception conditions, and of their liberty.<sup>136</sup>

<sup>130</sup>See instead B. Nagy, 'From Reluctance to Total Denial: Asylum Policy in Hungary 2015-2018', in V. Stoyanova and E. Karageorgiou (eds.), *The New Asylum and Transit Countries in Europe During and in the Aftermath of the 2015/2016 Crisis* (Brill 2019) p. 17; K. Juhász, 'Assessing Hungary's Stance on Migration and Asylum in Light of the European and Hungarian Migration Strategies', 13 *Politics in Central Europe* (2017) p. 35; Hungarian Helsinki Committee, *Two Years After: What's Left of Refugee Protection in Hungary?*, ([http://www.helsinki.hu/wp-content/uploads/Two-years-after\\_2017.pdf](http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf)), visited 20 July 2021.

<sup>131</sup>Nagy, *supra* n. 130.

<sup>132</sup>Ibid., p. 38.

<sup>133</sup>Hungarian Asylum Act, Art. 80/J.

<sup>134</sup>Nagy, *supra* n. 130, p. 38.

<sup>135</sup>UNHCR, *Hungary: UNHCR dismayed over further border restrictions and draft law targeting NGOs working with asylum-seekers and refugees*, Press release, 16 February 2018, (<https://www.unhcr.org/news/press/2018/2/5a86dcff4/hungary-unhcr-dismayed-further-border-restrictions-draft-law-targeting.html>), visited 20 July 2021.

<sup>136</sup>ECJ 14 May 2020, Joined Cases C-924/19 and C-925-19, *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*.

These amendments led to systemic violations of asylum seekers' fundamental rights as apparent through a host of references for preliminary rulings by Hungarian courts. These, for example, led the European Court of Justice to find that the EU *acquis* and the right to an effective remedy of the Charter precluded national practices such as an eight-day time limit for lodging appeals,<sup>137</sup> or first-instance authorities refusing to comply with the assessment of the appeals court.<sup>138</sup> The *FMS* judgment allowed the European Court of Justice to scrutinise conditions within the transit zones, and to find multiple violations of the substantive asylum and return *acquis* on detention standards (i.e. arbitrary deprivation of liberty), alongside related procedural standards (i.e. no possibility of judicial review of detention).<sup>139</sup> It was an infringement action initiated by the Commission that allowed the European Court of Justice to holistically examine the dismantling of the national asylum and return systems.<sup>140</sup> The Court found that the 'automatic removal' of asylum seekers from Hungarian territory, the drastic limitation of the number of applicants allowed to enter the transit zones, and the system of detention in transit zones, breached a number of the EU's asylum and return *acquis* provisions and the fundamental rights under the Charter (notably Articles 6, 18 and 47).

So far, this analysis has revealed that the implementation of the asylum *acquis* has led to both 'isolated' and systemic instances of fundamental rights violations. How do these link with respect for the rule of law? The earlier exploration revealed different conceptualisations of the interrelation between fundamental rights and the rule of law. Under a co-constitutive and co-substantial understanding, there is no separation between these values. What matters is the source and level of the risk in deciding the most adequate means to address these failings. Even if one conceptualises the rule of law and fundamental rights as distinct, though, the rule of law incorporates at least *certain* fundamental rights, such as the right to an effective remedy and to a fair trial. Procedural rights are especially jeopardised in cases of systemic deficiencies, through a mixture of inability and conscious efforts to curtail procedural guarantees. The extent of the failings in both preceding sections brings the urgency of appropriate responses into sharp relief.

### *Upholding the rule of law: one size fits all?*

Should the EU's response to failure to uphold the rule of law in asylum-related instances be different than in those other cases of non-implementation of the EU

<sup>137</sup>ECJ 19 March 2019, Case C-564/18, *LH v Bevándorlási és Menekültügyi Hivatal*.

<sup>138</sup>ECJ 29 July 2019, Case C-556/17, *Torubarov*.

<sup>139</sup>See *FMS and Others*, *supra* n. 136.

<sup>140</sup>ECJ 17 December 2020, Case C-808/18, *Commission v Hungary*.

*acquis*? The answer is not straightforward. The immediate focal point is fundamental rights violations linked with the operationalisation of EU asylum policy. If there is a well-functioning and independent judiciary at national level, and these fundamental rights violations are not linked with implementation capacity issues, defiance, or constitutional capture, then national courts or tribunals can address them. The European Court of Justice may influence through preliminary rulings, while the Commission may intervene through infringement actions, or address some of these issues in monitoring cycles.

Rule of law failings that are intrinsically linked with the unequal distributive effect of the EU's current responsibility allocation system, i.e. the Dublin system, and the lack of financial and human resource capacities at member state level, call for primarily policy-specific responses. They include a redesign of the EU's responsibility allocation system that would better embed fair sharing, passage to more structural forms of EU funding and joint implementation through EU agencies.<sup>141</sup> The first signs from the Commission's proposals as part of the 'New Pact on Migration and Asylum' released in September 2020<sup>142</sup> are not encouraging in this regard.<sup>143</sup> Any such redesign and other structural policy-specific solutions should also be supplemented by enforcement measures such as infringement procedures, especially when systemic violations of fundamental rights are involved. Nonetheless, enforcement alone is not the answer, as these failings also – at least partially – relate to the inability to provide refugee protection.

The picture is different where non-implementation relates to defiance for ideological or political reasons. Defiance could be a symptom of constitutional capture and part of a strategy to dismantle rule of law guarantees, inciting xenophobia, and particularly targeting minority and vulnerable groups such as asylum seekers. The response here cannot remain policy specific. As part of broader patterns of dismantling the rule of law at national level, these failings' examination should be incorporated into processes seeking to probe risks to EU values, such as Article 7 TEU procedures, or related procedures like the Commission's rule of law framework.<sup>144</sup>

<sup>141</sup>For the latter point see E. Tsourdi, 'Holding the European Asylum Support Office Accountable for its Role in Asylum Decision-Making: Mission Impossible?', 21 *German Law Journal* (2020) p. 506.

<sup>142</sup>European Commission, *Communication on a New Pact on Migration and Asylum*, COM(2020) 609 and relevant legislative proposals, (<https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601287338054&uri=COM%3A2020%3A609%3AFIN>), visited 20 July 2021.

<sup>143</sup>See a dedicated series of blog posts guest edited by Daniel Thym at the 'Immigration and Asylum Law and Policy' blog of the Odysseus Academic Network, (<https://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/>), visited 20 July 2021.

<sup>144</sup>For commentary regarding their functioning and limits see M. Bonelli, 'From Sanctions to Prevention, and Now Back to Sanctions?: Article 7 TEU and the Protection of the EU Founding Values', in S. Montaldo et al., *European Union Law Enforcement: The Evolution of Sanctioning Powers* (Routledge 2021) p. 47; D. Kochenov and L. Pech, 'Better Late than



Examinations could also be part of what Scheppele conceptualises as ‘systemic infringement actions’,<sup>145</sup> particularly the type of action arguing that systemic violations of basic principles of EU law violate the principle of sincere cooperation (Article 4, para. 3 TEU).<sup>146</sup> Another variant of the infringement procedure could allege systemic violations of fundamental rights.<sup>147</sup> The infringement procedure against Hungary is arguably an example of this mechanism. Finally, Kochenov has described how member state initiated infringement actions focusing on rule of law failings could forcefully complement pressure by EU institutions.<sup>148</sup> There are some modest signs that member states could be willing to engage in such actions.<sup>149</sup> However, to date there has not been an actual initiation of an infringement action by another member state relating to respect of the rule of law.

Even where defiance does not relate to constitutional capture, as with the suspension of the right to asylum in Greece, the situation should be separated from capacity issues and scrutinised via appropriate enforcement measures. Vigilance is necessary to ensure that the defiance does not escalate; for example, asylum-related failings could feature more prominently in processes such as the Commission’s annual rule of law report. The first such report released in September 2020 does not seem to grasp the intricate links between asylum-related violations, the situation at the EU’s borders and the rule of law.<sup>150</sup> It refers only to the restrictive space for action for migration non-governmental organisations in Italy and Greece.<sup>151</sup> While this is an issue of grave concern and certainly linked with rule of law failings, it is also necessary for the Commission to engage with the bigger picture when considering refugee protection and asylum.

Never?: On the European Commission’s Rule of Law Framework and its First Activation’, 54 *Journal of Common Market Studies* (2016) p. 1062.

<sup>145</sup>K.L. Scheppele, ‘Enforcing the Basic Principles of EU Law through Systemic Infringement Actions’, in Closa and Kochenov, *supra* n. 36, p. 105.

<sup>146</sup>See analysis in K.L. Scheppele and R D. Kelemen, ‘Defending Democracy in EU Member States: Beyond Article 7 TEU’, in Bignami, *supra* n. 7, p. 413 at pp. 437-438. See also *Associação Sindical dos Juizes Portugueses*, *supra* n. 55, paras. 30-36.

<sup>147</sup>See K.L. Scheppele et al., ‘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 *Yearbook of European Law* p. 3 at p. 80-85.

<sup>148</sup>D. Kochenov, ‘Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool’, 7 *The Hague Journal of the Rule of Law* (2015) p. 153.

<sup>149</sup>I am referring to the December 2020 resolution of the Dutch House of Representatives to request the government to initiate an infringement action against Poland for undermining the rule of law. See G. Íñiguez, *The Enemy Within? Article 259 and the Union’s Intergovernmentalism (New Federalist*, 12 December 2020), (<https://www.thenewfederalist.eu/the-enemy-within-article-259-and-the-union-s-intergovernmentalism?lang=fr>), visited 20 July 2021.

<sup>150</sup>European Commission, ‘2020 Rule of Law Report’, *supra* n. 44.

<sup>151</sup>*Ibid.*, p. 24.

## CONCLUSION

Asylum in the EU is one of the many faces of ‘rule of law backsliding’, understood as a form of constitutional capture. Member states which present grave failings in areas such as judicial independence or freedom of expression have also either completely dismantled refugee protection (i.e. Hungary), or are defying particular obligations (i.e. Visegrad countries’ stance on the relocation schemes). However, asylum-related rule of law failings are not limited to ‘backsliding’ member states. The EU’s asylum system creates asymmetric responsibilities towards member states at the external sea borders which, exacerbated by deficiencies in their administrative and financial capacities, fuels an implementation gap and results in systemic fundamental rights violations.

These failings engage the EU’s rule of law in the form of the duty of loyal cooperation; ‘procedural’ fundamental rights such as the right to fair trial; and, under a co-constitutive conception of EU’s values, with fundamental rights more broadly. The rule of law’s scope within the Union is still debated. This analysis, however, has indicated that the current state of asylum provision in the EU raises issues about rule of law adherence even under more restrictive understandings of its scope. In addition, while not forming part of the analysis of the specific piece, these issues do not stop at member state territory: the externalisation of protection responsibilities towards non-EU countries is similarly rife with rule of law failings.<sup>152</sup> Here, the perpetrators of the violations are not only the member states, but the EU itself through the actions of its institutions and agencies.

This article has analysed appropriate responses for asylum failings in the internal dimension of EU’s asylum policy that link with rule of law failings. EU institutions are beginning to grapple with the intricate links between the rule of law and asylum, as seen in the 2020 infringement against Hungary, which could be understood as containing some elements of a systemic infringement procedure, or the comments of Advocate General Sharpston about the emergency relocation schemes infringement. Nevertheless, this approach is not systematic. For example, the first annual rule of law report of the Commission fails to connect the gradual dismantling of a national asylum system or the situation at the EU’s external borders with the rule of law. If the rule of law is to be upheld, all the available tools and procedures should engage with the state of asylum provision in the EU. Finally, some failings relate to the asylum policy’s design and can only be addressed by bold policy moves such as a redesign that takes in the fair sharing of responsibilities and makes structural forms of funding available for this purpose.

<sup>152</sup>See, *supra* n. 15 for references.

Instead, the member states and the EU have focused their energies on further externalising protection obligations, for example through introducing negative conditionality between mobility, legal migration opportunities and control-oriented commitments, or through funding.<sup>153</sup> This article has identified a systematic analysis of EU's externalisation practices under a rule of law lens as an important field of (future) study. Externalisation of protection obligations is often pursued via soft law instruments or outside the EU legal framework.<sup>154</sup> This can disable political accountability by the European Parliament and judicial oversight from the European Court of Justice. Externalisation also lends credence to the xenophobic rhetoric of populist political leaders, removes credibility from the EU when insisting on the respect for refugees' and migrants' rights on member states' territory and, more broadly, further saps the foundations of the Union's 'holy trinity' of values: the rule of law, fundamental rights and democracy.



<sup>153</sup>See analysis in Moreno-Lax et al., *supra* n. 62, p. 118-155.

<sup>154</sup>A good example of this approach is the EU-Turkey statement. See SN 38/16, 18 March 2016.