

The EU's rule of law: work is needed

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One of the European Union's main values, the rule of law, is under severe pressure. The cases of Hungary and Poland, albeit not isolated, are certainly the most paradigmatic ones. The two eastern European countries, in fact, do not wish to leave the EU, but repeatedly challenge the EU's rule of law ideal by claiming that different interpretations of it are possible and that illiberal democracies can co-exist with liberal ones within the EU constitutional framework. The recent EU budget negotiations again brought the question into the spotlight with the so-called conditionality regulation, whereby Hungary and Poland are legally bound to accept an EU role in the rule of law and yet simultaneously attempt to restrict an EU role in the rule of law, via the European Council. These recent developments call for an analysis of the (evolution of the) principle of the rule of law in the EU, as well as an overview of how Hungary and Poland (in the meantime) have changed the actual situation of the rule of law domestically and of the strategies that the two countries have devised to further counter (legal) intervention by the EU.

The rule of law is a founding value of the European Union, as stated in Article 2 of the EU Treaty (TEU). However, since 2012 the EU has increasingly realised that this value and principle is under severe pressure – not solely in Hungary and Poland, but particularly in these two countries. For example, in 2013, EU Justice Commissioner Viviane Reding spoke about a rule of law crisis mentioning Hungary and Romania, but also the situation of Roma people in France. At the same time, the EU struggles to articulate and enforce what previously was considered as self-evident.

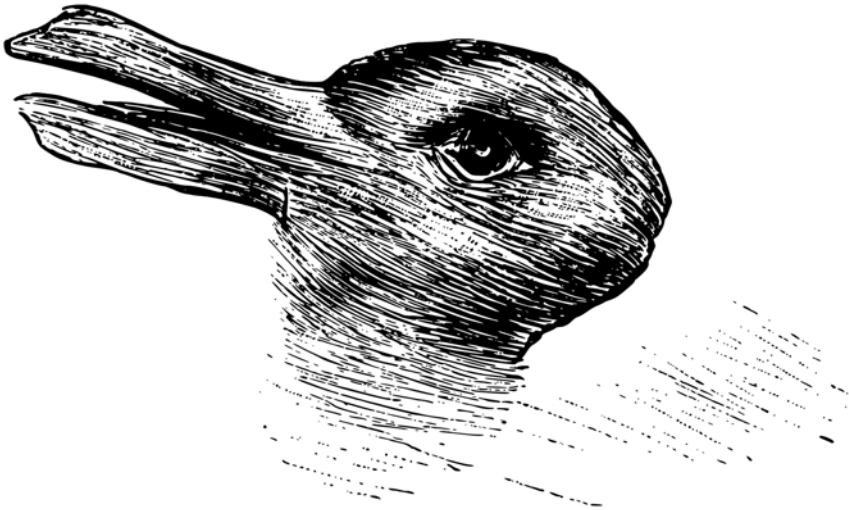
The Hungarian and Polish ruling political parties do not wish to leave the EU (and their citizens even less so) and they do not necessarily claim a preference of national law *against* EU law. They rather claim a *legitimate* – but different – interpretation of EU law. For example, in the recent discussion about

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the rule of law conditionality of the EU budget Hungary's prime minister Viktor Orbán said “we defended the European constitution”.

Hungary and Poland thus attempt to influence the *de facto* meaning of the rule of law ideal in the EU's legal discourse. Like the ‘duck-rabbit’ picture in which you can perceive a rabbit as well as a duck, Hungary and Poland are in the process of a *Gestalt Switch*: they try to convince their audience that in the current EU legal constitutional ‘picture’ it is possible *also* to see so-called ‘illiberal democracies’, majoritarian national democracies or a “justice-based idea of a democratic state” – as Poland's prime minister Mateusz Morawiecki recently said – even though the practice behind these concepts has included ‘rule by law’ and ‘rule by men’ (violating national and European laws and court rulings). For example, the speaker of the Hungarian parliament stated in 2019 that checks and balances or the separation of powers has nothing to do with the rule of law and democracy. In Poland, against the background of the ruling Law and Justice (PiS) party's capture of the Constitutional Tribunal with disregard for a Tribunal ruling, party leader Jaroslaw Kaczyński said that the rule of law does not necessarily provide for a democratic state.

Welche Thiere gleichen ein- ander am meisten?



Kaninchen und Ente.

Source: Fliegende Blätter, *Kaninchen und Ente* (Rabbit and Duck), 23 October 1892.

The cunningness of these concepts demands considerable legal and political vigilance from those who wish to protect and articulate the EU's rule of law ideal. Without this vigilance, the EU risks letting in the proverbial Trojan Horse that could take over the European Union.

The controversy of the EU's rule of law ideal recently came to the fore with the EU-budget negotiations. The claims of Hungary and Poland in these negotiations clearly illustrate the two countries' general attempts to influence the EU's legal discourse. Some examples of their claims are:

- *Interpretive ambiguity*: there is no definite definition of the rule of law, consequently, an EU budget conditionality regulation would be tantamount to political blackmail.
- *Margin of appreciation*: the rule of law varies according to national legal traditions and therefore a large or absolute margin of appreciation for member states to carry out judicial or constitutional reforms is, or should be, granted.
- *Principles of conferral and subsidiarity*: Article 2 TEU values, including the rule of law, are a matter of the European Council as 'Masters of the Treaties'. Any EU discussion is dealt with via the Article 7 TEU procedure in which the European Council ultimately determines whether there is a serious breach by a member state of the values referred to in Article 2. (Other) EU law issues are dealt with by the EU Court of Justice. A rule of law regulation would "give power and discretion to entities without democratic legitimacy, or to entities with a significant 'democratic deficit'" and requires Treaty change.
- *Constitutional identity*: the constitutional identity of a member state must be respected according to Article 4(2) TEU, which stipulates that the Union shall respect member states, "national identities, inherent in their fundamental structures, political and constitutional".
- *Danger to mutual trust*: criticism of national constitutional and judicial reform damages mutual trust (and sincere cooperation) between member states and therefore unnecessarily damages European cooperation and unity.

In light of these claims, this chapter aims to reflect upon and review the current development of the EU's legal discourse on the rule of law.

The 'rule of law' conditionality regulation

On 10-11 December 2020, the EU concluded the negotiations on the EU budget and the coronavirus recovery fund with a regulation attaching a conditionality regime to these funds. The regulation entails "the rules necessary for the protection of the Union's budget in the case of breaches of the principles of the rule of law in the member states". Drawing from European (case) law and EU documents, the regulation clarifies what the rule of law in Article 2 TEU means.¹

It was agreed that in order to guarantee the sound financial management of EU funds, competent and independent judiciaries and law enforcement authorities in the member states

¹ Article 2 (a) of the Regulation states: "'the rule of law' refers to the Union value enshrined in Article 2 TEU. The rule of law includes the principles of legality, implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU".

are required as control mechanisms to check whether EU funds are properly spent.² Appropriate measures in case of breaches of the rule of law will be proposed by the Commission and adopted by the Council by qualified majority when such breaches “affect or seriously risk affecting the principles of sound financial management of the EU budget or the protection of the financial interests of the Union in a sufficiently direct way”.

It is therefore not only breaches affecting the management of EU funds than can lead to measures, but also breaches that *risk* affecting it. Importantly, breaches of the rule of law include the “*endangerment* of the independence of the judiciary”, implying that no definite breach of the rule of law needs to be established. The desire for the regulation to cover a wider scope, such as ‘fundamental rights’ or ‘democracy’ (the other Article 2 TEU values), as requested by the European Parliament for example, was not taken on board.

By agreeing on the EU budget and the regulation coming into force, Hungary and Poland, contrary to their earlier claims, have in practice *legally* recognised that the EU does have a role in the enforcement of the rule of law in the member states. Nevertheless, while the regulation is part of the ordinary legislation process, Hungary and Poland successfully managed to have the arguments they make to limit EU involvement in the national rule of law written into the European Council conclusions which finalised the EU-budget negotiations.

These conclusions state that breaches of the rule of law under Article 2 TEU are supervised by the Article 7 TEU procedure, a procedure where the European Council has the decisive role and the EU Court no (substantive) role at all. In addition, the conclusions state that the constitutional identity of member states needs to be protected. They also state that the Commission needs to work out guidelines in consultation with the European Council on how the regulation is to be used, and this only after following an EU Court ruling on the regulation. While the European Parliament is planning to prevent delay and restrictions of the use of the regulation, it seems the European Commission is for now ready or forced to accept ‘guidance’ by the European Council, which could allow Hungary and Poland to redraw the EU’s rule of law ideal in practice.

The EU’s rule of law

According to Article 2 TEU, the EU 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” and “these values are common to the member states”. Both the EU and the member states are thus guided and bound by these values and principles.

Even though there is no comprehensive Treaty definition of what Article 2 values concretely entail, the EU’s rule of law ideal is not vague. Put differently, the EU’s rule of law is not set out in

2 A preamble (8) of the Regulation states: “Sound financial management can only be ensured by the member states if public authorities act in accordance with the law, if cases of fraud, including tax fraud, tax evasion, corruption, conflict of interest or other breaches of the law are effectively pursued by investigative and prosecution services, and if arbitrary or unlawful decisions of public authorities, including law enforcing authorities, can be subject to effective judicial review by independent courts and by the Court of Justice of the European Union”.

detail in one single place. Hungary and Poland use this as an argument to see different things in the ‘rule of law’ (in the same way as the ‘duck-rabbit’ picture) or ‘nothing’ at all. However, when connecting the dots, a picture does emerge. The EU-budget conditionality regulation is part of a process inscribing European values more firmly in EU legislation.

Firstly, an EU discourse on the legal *principle* of the rule of law in connection with democracy and fundamental rights does exist.³ European law in effect deals with various sub-components of the rule of law, which demands compliance with a number of core principles in order to guarantee among other things that governments are subject to the law and, more generally, that national legal systems give full effect to fundamental rights and that democratic principles can be ascertained. This existing discourse on the rule of law was conveyed, or at the least communicated, to member states acceding to the Union.⁴

Secondly, empirical evidence points to convergence and consensus in relation to the *principle* of democracy and rule of law originating from national legal traditions in Europe. *Variation* mainly exists in relation to the *concrete institutional* set-up of the rule of law. Importantly, the EU does not prescribe the constitutional identity or institutional set-up of a member state in detail.⁵

The EU is currently in the process of articulating this shared European legal principle and tradition derived from its member states more strongly in political and legal terms.

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Developing the EU's rule of law

In 1973, the member states made it politically clear that the “fundamental elements of the European identity” were principles such as “the rule of law”. In 1986, the EU Court of Justice made it explicit that the EU was a community based on the rule of law. Member states, as ‘Masters of the Treaties’, embraced multiple references to it in the Maastricht Treaty, the Amsterdam Treaty and the current Lisbon Treaty.

The rule of law requires that all public powers act within the constraints set out by law. As the EU Court of Justice has interpreted and ruled in concrete cases over the years, the rule

3 See for example, Pech, L., Grogan, J. et al (2020) ‘Unity and Diversity in National Understandings of the Rule of Law in the EU’, Work Package 7 – Deliverable 1, RECONNECT (<https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf>).

4 See for example, Janse, R. (2019) ‘Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement’, 17(1) *CON*, pp. 43,46,57,58,60.

5 For example, the European Commission stating: “the precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State’s constitutional system”, the ECHR also recognising “judicial appointment processes in different jurisdictions across Europe – all with their own rules and practices” or the opinion of Advocate General Hogan at the EU Court that EU law does not preclude national constitutional provisions under which the executive power or one of its members plays a role in the process of the appointment of members of the judiciary.

of law requires, in particular, that the principles of legality, legal certainty, prohibition of arbitrariness of the executive powers, separation of powers, and access to justice and effective judicial protection before independent and impartial courts are respected.

In 2018, the EU Court of Justice painted a concrete picture of the rule of law in Article 2 TEU especially, using the colours of established case law, European law and notably Article 19 TEU, which states among other things that the Court “shall ensure that in the interpretation and application of the Treaties the law is observed” and that “member states shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. To provide effective legal protection in the fields covered by Union law, member states have the responsibility but also the obligation to establish and maintain independent national courts (which deal or at some point could deal with EU law) to ensure EU law is observed. “Effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law”, the Court noted, and effective judicial protection is “a general principle of EU law stemming from the constitutional traditions common to the member states” and enshrined in Article 6 and 13 of the European Convention on Human Rights and Article 47 of the EU Charter of Fundamental Rights.

In its duty granted by the member states to ensure that EU law is observed, the Court reasoned that it must then also be able to review, based on principles from EU law, whether national measures also endanger the independence of courts, as this could hinder the observance of EU law. Based on earlier case law, relevant criteria include whether the court is established by law, whether it applies rules of law and whether it is independent. Independence presupposes that the court exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or taking orders from any source whatsoever, and that it is protected against external interventions or pressure liable to impair the independent judgment of its judges and to influence their decisions, including (arbitrary) changes in remuneration or removal from office.

The EU Court reasoned it could further clarify the adequate conditions regarding the independence, impartiality and irremovability of judges in concrete cases, following sudden and radical changes in the judicial structure of Poland. Arbitrarily lowering the retirement age of prosecutors and judges in ordinary courts and the Supreme Court while giving the minister of justice or the president discretionary powers to authorise extension of their duties without the possibility of judicial review in court was found to be against EU law principles. In addition, the EU Court ordered Poland to immediately suspend the activities of a new disciplinary chamber, pending a final judgment by the EU Court. The disciplinary chamber, staffed by judges appointed via a new National Council of the Judiciary that was set up and dominated by the ruling political party, subjects judges to disciplinary proceedings. The mere prospect of disciplinary proceedings by a disciplinary tribunal whose independence cannot be guaranteed affects the independence of those proceedings, the Court reasoned, and therefore an interim ruling was warranted to avoid serious and irreparable harm to the EU's legal order.

The European Court of Human Rights in Strasbourg, whose jurisdiction EU member states (also) need to accept, recently gave an important ruling in an Icelandic case, which is relevant notably for Hungary and Poland (to a lesser degree discussion about judicial appointments in

other member states also exists, such as in Spain). Judicial appointment procedures, seemingly in compliance with national rules and national court rulings, could still produce results contrary to an independent judiciary and to the right of a fair trial. In addition, rulings by judges who are appointed under irregular circumstances could systematically be illegitimate, as the damage of (public) trust in the judiciary could be too severe.

It is thus no coincidence that the following 'picture' was painted in the preamble of the EU-budget conditionality regulation: "The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality including a transparent, accountable and democratic process for enacting law, legal certainty, prohibition of arbitrariness of the executive powers, separation of powers, access to justice and effective judicial protection before independent and impartial courts are respected".

In sum, the EU-budget conditionality regulation is based on European law and case law. While the aim of this regulation is merely protection of the EU budget,⁶ the inclusion of "endangerment of the independence of the judiciary" as a breach of the rule of law could prove important. The ultimate question regarding the use of the regulation is whether a political capture of the courts will be considered enough of a threat to the EU budget to suspend those funds until judicial independence is restored.

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The EU's rule of law reality: Hungary and Poland

Hungary

Many reports, studies, indicators and (EU) court judgments have registered the radical constitutional transformation of the Hungarian state. This transformation has led the European Parliament to trigger Article 7 of the EU Treaty to protect the Article 2 values, and it has led the Eu-

⁶ Israel Butler argued that the Common Provisions Regulation (CPR), read in light of the Charter of Fundamental Rights and the case law of the Court of Justice, already allows the Commission to suspend EU funds where a member state does not uphold the rule of law. Article 142(a) of the CPR provides that payments of EU structural funds may be suspended if "there is a serious deficiency in the effective functioning of the management and control system of the operational programme, which has put at risk the Union contribution to the operational programme and for which corrective measures have not been taken" (<https://www.liberties.eu/en/news/european-values-fund-two-proposals-mff/14471>).

ropean Commission as well as the Council of Europe to raise critical issues concerning judicial independence, anti-corruption, human rights, media freedom, and the quality and transparency of the legislative process in Hungary. Election monitors from the Organization for Security and Cooperation in Europe (OSCE) described the Hungarian electoral processes in 2014 and 2018 as free but not fair.⁷ The NGO Freedom House has declared Hungary a hybrid regime⁸ and the research institute V-Dem has called it an (electoral) authoritarian regime.⁹ Scholars have described Hungary's constitutional transformation process as 'rule of law backsliding',¹⁰ 'autocratic legalism'¹¹ and the creation of a 'Frankenstate'¹² including 'constitutional abuse',¹³ a 'competitive authoritarian regime'¹⁴ and an 'externally constrained hybrid regime'.¹⁵

In short, after Viktor Orbán's Fidesz party gained two thirds of the seats in the 2010 parliamentary elections, it pushed through new rules allowing the constitution to be amended with only a two-thirds majority instead of the previously required four-fifths majority. Consequently, via a process of nine constitutional amendments, Fidesz gained considerable influence in numerous state institutions that until then had served as independent checks on the executive. In addition, in 2015, a "state of crisis" was declared because of alleged mass migration, and this state of crisis has been renewed regularly ever since. Since the beginning of the Covid-19 pandemic, additional "states of danger" have been declared, leading to the further centralisation of power by the executive even in fields not (directly) related to the Covid-19 crisis.¹⁶ The latest constitutional amendment and change in the electoral laws has raised new criticism: further limiting (LGBTI) rights by reserving child adoption mainly for (heterosexual) married couples and banning it for LGBTI people, as well increasing the criteria for political parties to qualify for a national party list in the parliamentary elections (nearly doubling the number of constituencies required to put forward a candidate in order for their party to establish national party lists).

Two concrete examples illustrate well how Hungary has influenced the EU's rule of law

7 For 2014: www.osce.org/odihr/elections/hungary/121098. For 2018: [/www.osce.org/odihr/elections/hungary/373603](http://www.osce.org/odihr/elections/hungary/373603).

8 <https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade>.

9 www.v-dem.net/en/news/liberal-democracy-index-in-east-central-europe/.

10 See Pech, L. and Lane Scheppelle, K. (2017) 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies*, Vol. 19:3.

11 Scheppelle, Kim L. (2018) 'Autocratic Legalism', *University of Chicago Law Review*, Vol. 85:2, Article 2. <https://chicagounbound.uchicago.edu/uclrev/vol85/iss2/2>.

12 'Not Your Father's Authoritarianism: The Creation of the "Frankenstate"', *European Politics and Society Newsletter* 5-9 (winter 2013).

13 Halmi, G. (2019) 'Populism, authoritarianism and constitutionalism', *German Law Journal*, Vol. 20:3, pp. 296-313. And Halmi, G. (2018) 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E (2) of the Fundamental Law', *Review of Central and East European Law*, Vol. 43.

14 Daniel Kelemen, R. (2020) 'The European Union's authoritarian equilibrium', *Journal of European Public Policy*, 27:3, pp. 481-99.

15 Bozóki, A. and Hegedűs, D. (2018) 'An externally constrained hybrid regime: Hungary in the European Union', *Democratization*, 25:7, pp. 1173-89.

16 For example, an Operational Staff and Economic Operational Staff operates outside Cabinet with no obligations to report to Parliament or others. Occasionally parts of the pandemic emergency response, originally announced as temporary, have been incorporated into law. The redirection of tax revenues from a county council controlled by the opposition to a county council controlled by the governing party has now been made permanent by statute. A law criminalising the distribution of 'fake news' is still in place, and the packed constitutional court found it constitutional. At least 130 arrests have been made under this law (www.euractiv.com/section/justice-home-affairs/opinion/the-moment-for-lies/).

ideal in practice. First, in 2012 Fidesz lowered the retirement age of judges and prosecutors, leading to the forced early retirement of hundreds of judges and prosecutors. The Commission and the EU Court found an infringement of EU law by the national law. However, the case by the Commission was primarily based on age discrimination, which could be settled by financial compensation or reinstatement in other (lower) positions in the judiciary. New judges had already taken seat and their removal could violate the irremovability of judges. Orbán thus legally lost the case in court but won in practice: the senior judges and prosecutors were replaced. Second, in 2017 Fidesz implemented a new law on higher education, targeting the Central European University (CEU) in Budapest. The EU Court found infringements of law, such as academic freedom, freedom of establishment, the free movement of services and the freedom to conduct a business. However, the ruling came three years after the Hungarian law and one year after the CEU had already moved out of the country: due to legal obstruction by the Hungarian government, the university could no longer operate properly.¹⁷

Two other examples illustrate that in a context of national rule of law deficiencies, abuse of EU funds will occur without consequence. Investigations by the European Anti-Fraud Office had pointed to irregularities of the management of EU funds in which the son-in-law of prime minister Viktor Orbán was involved. However, the Hungarian prosecutor, appointed by Fidesz, saw no wrongdoing in the relevant tender procedure or by the company: it did not prosecute the abuse.¹⁸ More recently, a Hungarian administrative authority rejected EU funding to an NGO on the basis of a Hungarian NGO law, but the EU Court had ruled the Hungarian law as being contrary to EU law. In other words, EU funds can illegally be denied to one, and fraudulently provided to another.

Poland

Structural changes have also been observed in Poland, particularly in the field of the judiciary, the media and human rights. The European Commission triggered the Article 7 procedure after a series of laws by the ruling Law and Justice (PiS) party in Poland radically changed the judicial system. These changes were deemed as systematically threatening the rule of law. The European Network of Councils for the Judiciary has suspended the Polish National Judicial Council as it is no longer perceived as independent or capable of delivering justice. The European Parliament made condemning statements and the Council of Europe assessed the changes as being akin to changes during communist regime times. Freedom House has downgraded Poland in its index from a 'democracy' to a 'semi-consolidated democracy'. Scholars such as Sadurski have observed constitutional breakdown and abuse in Poland.¹⁹

17 The CEU had to meet new requirements by the law, but when it actually did, the Hungarian government stalled and refused to sign an agreement with the State of New York, which was one of the requirements. See for example, Petra Bárd's analysis (<https://reconnect-europe.eu/blog/a-strong-judgment-in-a-moot-case-lex-ceu-before-the-cjeu/>).

18 After continuous EU-criticism the Hungarian government in the end did not use the EU funds but used Hungarian taxpayer money instead to foot the bill (<https://english.atlatszo.hu/2019/05/11/this-is-how-authorities-sabotaged-the-fraud-investigation-against-orbans-son-in-law/>).

19 For example, Sadurski, W. (2019) 'Poland's Constitutional Breakdown', *Oxford Scholarship Online*, July.

After winning the presidential and parliamentary elections in 2015 and 2016, the Law and Justice party pushed through its own judges in the constitutional court, against a ruling of the Polish Constitutional Tribunal. The ruling party then embarked on a radical reorganisation and politicisation of the courts by reforming the Council of the Judiciary, dominated now by judges chosen by the ruling party's members parliament due to a change in appointment rules, which is tasked with proposing new judicial appointments in courts. A new disciplinary chamber prosecutes judges who criticise these changes or who maintain dialogue with the EU Court to test and apply EU law against these changes.

Overall, despite action by different EU actors, Poland and Hungary systematically redrew the EU's rule of law ideal in practice. The actions in Poland were much more visible for the EU than in Hungary. Lacking a parliamentary constitutional majority, Poland's Law and Justice party violated its own national constitution and national courts openly. The EU triggered the ultimate tool to protect European values, Article 7 TEU, towards Poland first, and not Hungary. This tool is now considered politically toothless, as Hungary and Poland support each other mutually to prevent effective sanctions which require unanimity. In addition, partisan interests play a role, particularly for Fidesz, which has maintained political influence in the largest European political party family, the EPP, and its concomitant influence in EU institutions. Furthermore, the economic interests of member states seem largely to have granted (in the short term) a 'free drawing board' on the rule of law.²⁰

While the EU Court has gained influence in the EU's rule of law ideal, systemic and repeated attempts to redraw the rule of law in Hungary and Poland take place. These countries' ruling parties also seek additional 'legal defences' by claiming respect for constitutional identity, by producing national constitutional court rulings, and/or by changing the constitution. For example, a recent constitutional change by Fidesz seems to limit the impact of the recently adopted EU-budget conditionality regulation by making it more difficult to trace disbursed EU funds in Hungary (and thus also abuse) by limiting the definition of public funds. The Polish Constitutional Tribunal has recently claimed supremacy, over courts in Poland at least, regarding the interpretation of European law, contrary to independent Polish and EU court interpretations.²¹ In doing this, the ruling parties in Hungary and Poland are practically pitting their judges against European and other national judges.

(Breakdown of) dialogue between judges in the EU

The EU's legal order depends on national courts applying EU law. They do this in collaboration with the EU Court of Justice via preliminary referrals (national judicial questions) and preliminary

20 For example, an 'authoritarian equilibrium' has been formed in the EU according to Daniel Kelemen, 'The European Union's authoritarian equilibrium'.

21 The Polish Tribunal ruled in April 2020 that judicial review of the new Council of the Judiciary (including judicial appointment procedures by the Polish Supreme Court in/after dialogue with the EU Court) was contrary to the Polish constitution and EU law.

rulings (EU Court answers on how to interpret EU law). The concrete cases coming before a national court are decided by national judges. This duty is entrusted to national courts based on “the fundamental premiss that member states share a set of common values on which the European Union is founded, as stated in Article 2 TEU”.²²

The ruling parties in Hungary, and particularly in Poland, have been obstructing genuine dialogue between national judges and the EU Court. Via their national constitutional courts, Poland and Hungary seek to claim a supreme interpretation of EU law and its relationship with national law. Fidesz and the Law and Justice party claim that EU decisions and legal intervention violate their so-called constitutional identity. Their claim has been heavily criticised by the president of the EU Court, and recently by the advocate general of the EU Court in a case against Poland.

Setting aside the merits of these legal arguments (including criticism that these EU Court actions violate Hungarian and Polish constitutionality itself), if the Hungarian and Polish constitutional courts, captured by their respective ruling parties, claim to see something completely different from the EU’s rule of law ideal, a workable rule of law becomes impossible, as does EU cooperation itself.

To refer to the analogy of the ‘duck-rabbit’ *Gestalt Switch* picture: you can *either* see a rabbit *or* a duck, but not both at the same time. The EU requires one common shared rule of law (ideal), which solidifies the mutual trust between different national authorities and judges, who are bound by EU law to cooperate with each other and mutually recognise their decisions.

National judges in the EU have started to lose trust Polish colleagues in particular. As stated earlier, the European Network of Councils for the Judiciary has suspended the Polish National Judicial Council, which is no longer perceived as independent or capable of delivering justice.²³ National judges, particularly in the Netherlands, have recently urged the EU Court for a response on what to do with European Arrest Warrants from Polish national courts and prosecutors. The EU, and in particular the EU Court, is confronted with the dilemma of upholding mutual recognition of decisions between national authorities to ensure European cooperation on the one hand, and the right of a fair trial for EU citizens in Polish courts on the other. With regard to European Arrest Warrants, Dutch and other judges in the EU are now required to analyse the systemic rule of law breakdown in Poland and assess a possible violation of an individual’s right to a fair trial by investigating which particular judge in which court is presiding

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²² Opinion 2/13, EU:C:2014:2454, paragraph 168.

²³ “It is a condition of ENCJ membership that institutions are independent of the executive and legislature and ensure the final responsibility for the support of the judiciary in the independent delivery of justice. The ENCJ became concerned that as a result of the recent reforms in Poland the KRS no longer fulfilled this requirement” (<https://www.encj.eu/node/495>).

over the case. An arduous task, which is further hindered by Polish authorities that refuse to give insight and by the uncertainty created by the ruling Law and Justice party as to which court or judge will actually take up a given case.²⁴

In general, the EU, and in particular the European Council and the European Commission, are criticised for doing too little to solve this crisis on the rule of law. In other words, they are criticised for not forcing Hungary and Poland to abide by Article 2 TEU values – something which was previously (and still is) taken for granted – and thus for not restoring trust. The Commission is urged to launch more expedited infringement procedures, to request interim rulings and financial penalties (which are possible under EU law) to enforce and articulate the rule of law more profoundly via EU Court rulings, not only in the field of judicial independence but also European values more broadly. Interim rulings and financial penalties for violations can prevent actual damage being done prior to a final EU Court ruling. The Dutch parliament has recently urged the Dutch government to bring Poland before the EU Court with other member states due to the failure by the Commission to enforce an (interim) EU Court decision regarding the Polish disciplinary chamber.

Does the EU violate the rule of law?

No EU actor should forget to reflect critically on its own (in)action. However, the EU itself also appears to have violated principles of the rule of law. One example is the forced earlier leave of Advocate General Eleanor Sharpston from the EU Court under the banner of Brexit. Member states, until now with the complicity of the EU Court, dismissed her allegedly contrary to EU primary law, implying illegal intervention in the composition of a court by the member states collectively. Another example is the adoption of the European Council conclusions concerning the EU-budget conditionality regulation. In an attempt to strengthen the rule of law, the EU is criticised for having violated it by accepting the European Council's political hijack of an ordinary legislative procedure, and by accepting that the Commission, the 'independent Guardian of the Treaties', receive guidance from the European Council in the Commission's use of the regulation.

Furthermore, in the context of a gap between the EU's rule of law ideal and its reality, the EU (Court)'s supremacy claim could turn out to be problematic. For example, the EU Court has refused scrutiny of EU law by the European Court of Human Rights in Strasbourg, as it prefers its own autonomy, which is based on the assumption that all member states adhere to core European values. In addition, the EU Court has recently shut down bilateral investment treaties tribunals. These (alternative) legal avenues and legal oversight mechanisms could nevertheless provide a check when the EU itself allows, or cannot prevent, fundamental rights violations.

24 The Court in Amsterdam mentioned information about the latest order from the Polish minister of justice to Poland's courts and prosecutors not provide information to foreign authorities about suspects and (changes in) Polish law (<https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Amsterdam/Nieuws/Paginas/IRK-stelt-nadere-vragen-aan-Poolse-rechters-over-de-Poolse-rechtsstaat.aspx>).

In sum, through the process of a *Gestalt Switch* by Hungary and Poland and the inaction of the EU, national judges and authorities in member states could become trapped in an EU snare where they need to apply EU law while the EU (law) fails to protect the EU rule of law's ideal itself.

Conclusion

Both Hungary and Poland – not solely, but in particular – are putting the rule of law under pressure in the EU. The latest EU-budget conditionality regulation is an example of the EU expressing its rule of law ideal as a principle more clearly in practice. But only considerable and swift legal and political action can establish a firm constitutional picture of the rule of law in the EU and its member states. Each institution can, however, pull its weight to make this happen: the Commission, the Council and the Parliament can propose new EU legislation and undertake political action. The Commission and member states can launch (expedited) infringement procedures in the spirit of European values, request interim rulings and financial penalties at the EU Court for perceived violations, including rule of law violations. National judges all over Europe can make preliminary referrals to the EU Court. If one does not pull their weight, others will, and they could continue to make their (obfuscating) marks on the EU's rule of law, either in picture or in practice. The rule of law requires constant maintenance by all, otherwise it will fade.