

Rule of law infringement procedures A proposal to extend the EU's rule of law toolbox

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Rule of law infringement procedures

A proposal to extend the EU's rule of law toolbox

Petra Bárd and Anna Śledzińska-Simon

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Abstract

In this contribution, we propose that the Court of Justice of the European Union (CJEU) introduce ‘rule of law infringement procedures’, having both a fast-track and a freezing component, as part of a wider ‘EU rule of law toolbox’. We show rule of law infringement procedures’ great potential in tackling rule of law backsliding in the Member States, provided that the following rules are applied. First, the European Commission should identify the rule of law problem explicitly. Second, it should not waste time and postpone its legal actions, while a Member State openly violates the rule of law. Third, the CJEU should automatically prioritise and accelerate infringement cases with a rule of law element to avoid more harm being done by those in power. Fourth, interim measures should be used to put an immediate halt to rule of law violations that can culminate in grave and irreversible harm. Fifth, EU institutions should establish a periodic rule of law review. It should help them to determine if there is a systemic threat to the rule of law in a given Member State, and provide additional legitimacy to the European Commission for initiating rule of law infringement actions and to the CJEU for ruling on such matters.

Executive summary

Under current treaty law, the EU has two main options to tackle rule of law violations in the Member States. It may initiate infringement proceedings or trigger the mechanism of Article 7 of the Treaty on European Union, relying predominantly on decisions by political institutions. We propose a way out of this conundrum, through ‘rule of law infringement procedures’, having both a fast-track and a freezing component, as part of a wider ‘EU rule of law toolbox’.

We argue that infringement procedures are underused in the enforcement of the rule of law. We also demonstrate that infringement actions are much better suited to addressing systemic violations of EU law than preliminary rulings. The former may end with a finding that certain laws or practices are not compatible with EU law, while the latter procedure usually leaves the final assessment to national authorities, which may not be in a position to adequately weigh the gravity of systemic rule of law problems.

We focus on the judicial phase of the infringement procedure and show its great potential to tackle rule of law issues in the Member States, provided that the following rules are applied. First, the European Commission should call a spade a spade, and identify the rule of law problem explicitly. Second, the European Commission should not waste time and postpone its legal actions, while a Member State openly violates the rule of law. Third, the Court of Justice of the European Union (CJEU) should automatically prioritise and accelerate infringement cases with a rule of law element to avoid more harm being done by those in power. Fourth, interim measures should be used to put an immediate halt to rule of law violations that can culminate in grave and irreversible harm. Fifth, European institutions should establish a periodic rule of law review. It should be devised as a regular, possibly annual supervision mechanism, based on contextual analysis of national laws and policies, a scientifically proven methodology, objective standards and equal treatment of all Member States. It should help EU institutions to determine if there is a systemic threat to the rule of law in a given Member State, and provide additional legitimacy to the European Commission for initiating rule of law infringement actions and to the CJEU for ruling on such matters.

The above propositions are premised on the understanding that rule of law backsliding poses a very different challenge to the EU legal order than other failures of Member States to fulfil their obligations stemming from the Treaties. It implies systemic violations of common principles and values, and for that reason, it should be tackled systemically – by all available means, both legal and political.

1. Problem setting

Today, one of the greatest challenges to the unity and stability of the European Union is posed by Member States violating the rule of law. In the EU, the rule of law is not only a common value, explicitly mentioned in Article 2 TEU, but also the foundation of the European integration process. Since 1993 it has been part of the Copenhagen (accession) criteria defining the eligibility of a country to join the European Union. Although it is often argued that the rule of law as a value, and a doctrinal concept, is far too general to be a basis for compliance assessment, some components of it recognised by all Member States are very specific. These core components were [listed](#) by the Council of Europe's Commission for Democracy through Law (the Venice Commission) and include legality, legal certainty, equality before the law and non-discrimination, and access to justice.

The phenomenon of rule of law backsliding received growing international and scholarly attention when blatant disregard of rule of law standards became evident in two Member States – Hungary (in 2010) and Poland (in 2015). Rule of law backsliding is defined 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” ([Pech and Scheppelé 2017a:10](#)). Clearly, these processes also destabilise the system of EU law, which is built on the understanding that both the EU institutions and the Member States respect the rule of law.

The key question for European institutions is how to distinguish cases involving rule of law violations from other cases in which Member States fail to fulfil their obligations under the Treaties. This paper posits that rule of law violations could be characterised by their systemic nature – they are caused by systemic changes of law and they cause systemic damage to the legal system of a Member State. Although these changes are officially justified by some ‘worthy purposes’, they disguise the main political objective of the ruling majority, which is consolidation and perpetuation of power. Thus, rule of law violations could be identified by their results – the removal of limitations on power and political capture of all public institutions, including constitutional courts, ordinary courts, the prosecutor’s office and public media. A potential rule of law violation is given in the example of laws threatening judicial independence in Poland (see Box 1).

Unlike other types of infringements of treaty law, rule of law violations consist of legal enactments in a Member State that authorise arbitrary decisions of the ruling majority with the effect of turning the rule of law into the rule of man. It is also emblematic that such enactments may seem to incorporate neutral or even benevolent changes if considered in isolation, or if compared with solutions in other Member States without a deeper understanding of constitutional traditions or existing practices (i.e. the system of judicial appointments or the role of judicial councils). However, if viewed in context or compared against the background of the internal system of checks and balances in other Member States, they appear to be intentionally designed to serve particularistic interests of the ruling majority. Therefore, we argue, the assessment of rule of law compliance in the EU needs to be based on objective

standards, the same for all Member States, but contextualised, taking into account the particularities of a given legal system, as well as unwritten conventions and practices that act as additional safeguards for the separation of powers.

Although each case involving a rule of law violation is different, what distinguishes such cases from other breaches of treaty law is that the government responsible for rule of law backsliding does not acknowledge a problematic legal measure or policy as a breach. Instead it is likely to call such a measure or policy part of the [national constitutional identity](#) (Śledzińska-Simon and Ziolkowski, 2017). Furthermore, what distinguishes rule of law violations from other ‘regular’ infringements of fundamental rights are the absolute lack of effective legal remedies to tackle the issue at the national level.

From the perspective of EU institutions, the most problematic aspect of rule of law backsliding concerns attacks by populist governments on the judiciary through measures dismantling the system of checks and balances that safeguard the independence of courts and judges. These attacks threaten the rule of law in two ways: first, they endanger the independence and impartiality of courts; and second, they put at risk the realisation of the right to a fair trial. The consequences of such attacks for EU law are twofold. The removal of certain institutional or procedural guarantees of the independence of courts and judges undermines the effective enforcement of EU law. Additionally, it undermines the effective protection of fundamental rights in the Member States to the extent that they hinge on judicial protection, and specifically on access to a fair trial by an independent court.

Box 1. Judicial independence in Poland

In recent years Poland’s Parliament has adopted several packages of new laws changing, among others, the procedure for judicial appointments, the disciplinary procedure for judges and the structure of the Supreme Court. It has also introduced a new retirement age for Supreme Court judges. These changes have allowed those in power (the executive or the parliamentary majority) to dominate the selection of members of the National Council of the Judiciary in charge of judicial appointments, take control of the disciplinary proceedings and de facto remove Supreme Court judges who reached the new retirement age, including the president of the Supreme Court.

It is obvious that all the above legislative changes have a systemic character and should be addressed as such (see [Matczak 2018](#)). Tackling only one selected issue, which is the adoption of national measures lowering the retirement age of Supreme Court judges in office (see pending case [C-619/18 R Commission v Poland](#)), clearly does not settle the systemic problem of the lack of de jure and de facto independence of judges. Although the European Commission has also sent a [formal notice](#) to the Polish government concerning the new disciplinary regime for judges, the root of the problem lies with the new rules of selection of judicial members for the National Council of the Judiciary, which have led to the politicisation of this body. Still, the challenge to the national system of judicial appointments seems to go beyond the competence of the EU, unless EU institutions examine these new rules in view of the common standards recognised by the Venice Commission, the European Networks of Councils for the Judiciary or the Consultative Council of European Judges, and establish their derogatory effects on judicial independence and the right to a fair trial.

Yet, the current approach of European institutions is either to deny that problems with the judicial independence in a Member State have implications for the protection of fundamental rights in the EU or to address them exclusively as a fundamental rights issue (see [C-286/12 Commission v Hungary](#)). We believe that European institutions should see the implications of fundamental rights protection in all alleged violations of the rule of law. At the same time, they should not view rule of law violations solely as an infringement of fundamental rights because this approach is often too narrow to show the harm done to the entire legal system.

We claim that the protection of fundamental rights is intrinsically related to the rule of law. First, and most importantly, limitations of fundamental rights need to be provided for by laws that meet the democratic standards of lawmaking. Second, individuals should be able to enjoy their rights without any discrimination. And third, to make fundamental rights work in practice, individuals should be able to avail themselves of legal (procedural) remedies to enforce them or challenge their limitations in courts. Although the ‘justiciability’ of legal rights, i.e. the ability to claim particular individual rights in courts, is not the only measure of their social (moral) value, it is clearly an important achievement of the modern era of human rights protection (see Osiatyński 2009:37).

The implication for fundamental rights protection in cases involving rule of law violations does not mean that the EU extends its powers under the Charter of Fundamental Rights of the European Union (contrary to the wording of Article 51(2) of the Charter). Instead it means that EU institutions may invoke the Charter in cases concerning rule of law backsliding to support the argument about the systemic effects of the infringement. Therefore, the invocation of the Charter in cases of rule of law violations does not expand application of the Charter beyond the scope of EU law, but substantiates the claim about the systemic character of a breach of Member States’ obligations stemming from the Treaties (such as the obligation to respect the rule of law under Article 2 TEU).

We propose to use rule of law infringement procedures against national measures that are relevant for the enforcement of EU law, even if they do not formally implement EU law. They could be applied to cases concerning media law or rules on electoral campaigns where the EU does not have legislative competences. Still, to the extent these areas are crucial for the enforcement of EU law, such as the organisation of elections to the European Parliament, and for the realisation of fundamental rights in the EU, the Member States need to follow the common standards – that is, to ensure legality, legal certainty, equality before the law and non-discrimination, and access to courts.

2. The EU's rule of law toolkit

Under current treaty law, the EU has two main options to tackle rule of law violations in the Member States. It may initiate infringement proceedings in pursuance of Article 258 of the Treaty on the Functioning of the European Union (TFEU) or trigger the mechanism of Article 7 TEU relying predominantly on decisions by political institutions. As noted by Advocate General (AG) Evgeni Tanchev in [C-619/18 R Commission v Poland](#), Article 7 TEU and Article 258 TFEU

could be invoked at the same time. They are separate procedures, set out in different provisions of the Treaties, based on a different scheme and serve a different purpose.

Article 7 TEU is essentially a ‘political’ procedure to combat a Member State’s ‘serious and persistent breach’ of the values set out in Article 2 TEU, subject to high thresholds, and may lead to the suspension of the Member State’s membership rights including its participation rights. Article 258 TFEU constitutes a direct ‘legal’ route before the Court for ensuring the enforcement of EU law by the Member States, and is aimed at obtaining a declaration of infringement and may also lead to the imposition of financial penalties in the procedure set out in Article 260 TFEU, with a view to encouraging the Member State concerned to terminate the infringing conduct. These differences reflect the autonomous, indeed complementary, nature of these procedures and that they may apply in parallel. ([Opinion](#), para. 50)

Infringement proceedings are simultaneously [narrower and broader](#) than Article 7 procedures. While the former must involve an EU law element, the latter may also cover matters falling outside the scope of EU law (see [Kochenov and Pech](#) 2015). However, the infringement procedure may be employed to tackle any failure within EU law of whatever gravity, whereas the Article 7 TEU mechanism is there to address a “serious” or a “serious and persistent” breach of values enshrined in Article 2 TEU, including the rule of law. Taking into account the nature of such a breach, [Hillion](#) (2016) talks about the complementarity of the two actions where “in the case of the infraction procedure, the failure is more limited and circumstantial, whereas in the context of Article 7 TEU, the breach becomes systematic”.

We claim that the two procedures not only could, and should, be invoked at the same time, but also that infringement procedures are to be applied to systemic violations of the rule of law. Overall, experience teaches that the infringement procedure is a much more effective tool than political actions in restraining a Member State involved in rule of law backsliding. In addition, taking into consideration the pool of possible legal actions, the infringement procedure is much better suited to addressing systemic violations of the rule of law than preliminary rulings. The former may end with a finding that certain laws or practices are not compatible with EU law, while the latter procedure usually leaves the final assessment to national authorities that may not be in a position to adequately weigh the gravity of the systemic problems.

In this regard, one could compare the potential of the infringement procedure in the Polish judicial purge case to tackle the issue of judicial independence discussed in the preliminary ruling in the *Celmer* case (see Box 2). In this case, the CJEU suggested a test for whether the principle of mutual recognition could be suspended due to judicial capture in Poland, but failed to adequately resolve the question referred by the Irish court. Against this background, we argue that judicial independence, as a crucial element of the rule of law, should be considered either existent or not, rather than left to the individualised assessments of national courts in other Member States.

Box 2 .The Celmer controversy

This issue emerged in the Celmer case ([C-216/18 PPU Minister for Justice and Equality v. LM](#)), referred to the CJEU by the Irish court with regard to a surrender request issued by a Polish court. In this case the CJEU had to consider whether the lack of judicial independence in Polish courts, threatening the realisation of the right to a fair trial, should lead to the postponement of surrenders. For AG Evgeni Tanchev, the lack of independence and impartiality of a court in a Member State can be regarded as amounting to a flagrant denial of justice only if it is so serious that it destroys the fairness of the trial. Whereas the CJEU did not follow the extremely high flagrant denial of justice test ([Bárd and van Ballegooij](#) 2018), it required case-by-case examination of whether there is a real risk of a breach of the right to a fair trial (and hence it followed the application of the two-stage test established earlier in *Aranyosi and Căldăraru*). Both positions imply that judicial independence is a matter of scale rather than a zero-sum game.

We disagree with the AG and the CJEU. Judicial independence can be implemented in many ways. One needs to acknowledge that the “[c]onstitutional design [of] the appointment, promotion, and removal of judges is surprisingly diverse and inconclusive” ([Sajó and Uitz](#) 2017:154). There is, however, a European consensus on a number of issues: critical for the institutional separation of the judiciary is the system of judicial appointments, advancement and disciplinary proceedings, as well as rules determining removal from office. Once there are no effective safeguards against incursions of the executive in these areas, it makes little sense, especially from the perspective of individuals seeking remedies in courts or facing a criminal trial, to determine how far a Member State restrains independence of courts and judges. In this vein, it is worrying that in the *Celmer* case, the CJEU made a categorical mistake: it interpreted the case solely as a violation of the right to a fair trial and asked the executing court deciding on a surrender to engage in an assessment of the degree of an infringement of this right.

Still, even the infringement procedure has its obvious shortcomings. It depends on the European Commission as to whether to initiate an action and how to formulate its claim. Paradoxically, in cases involving rule of law violations the initiation of the infringement procedure could already be regarded as irrefutable proof that legal problems could not have been remedied in the domestic setting because the institutions that were supposed to uphold the rule of law or serve as checks on those in power were not capable of doing so, possibly because they have been captured by the political majority. In other words, the judicial phase of the infringement procedure signals that the Commission and the Member State concerned are not on the same page as regards the foundational values they are supposed to share, respect and promote.

This observation reveals a further paradox – a legal action in cases involving rule of law violations puts the European Commission on an unequal footing vis-á-vis a Member State against which such an action is launched. In trying to restore respect for the rule of law in a Member State violating it, the European Commission needs to strictly abide by rule of law

standards, including the principle of legality, which requires that its own actions are based on law and do not exceed the powers granted by the Treaties.

3. A proposal on how to use the infringement procedure for rule of law violations

In this section, we argue that there is great potential in the infringement procedure to tackle rule of law issues in the Member States, provided that the following rules are applied.

First, the European Commission should call a spade a spade, and name the rule of law problem explicitly.

Second, the European Commission should not waste time and postpone its legal actions, while a Member State openly violates the rule of law. Whereas dialogue and tolerance are European virtues, experience teaches that there is no reason to engage in a lengthy discursive process with a government charged with rule of law backsliding (here we follow a definition of the concept as described by [Pech and Scheppele](#), 2017a), i.e. a government that neither shares the same vocabulary of democracy, the rule of law and fundamental rights, nor wants to engage in good faith in a constructive dialogue.

Third, the Court of Justice of the European Union (CJEU) should automatically prioritise and accelerate infringement cases involving a rule of law element. This proposition builds upon the pilot judgment procedure of the European Court of Human Rights. We argue that all infringement procedures in which the Commission invites the CJEU to deal with a systemic problem caused by a rule of law violation should be expedited to avoid more harm being done by those in power.

Fourth, interim measures may be used to put an immediate halt to rule of law violations that can culminate in grave and irreversible harm. We argue that even an accelerated process will often not be fast enough to prevent a systemic violation of the rule of law. In cases where an infringement procedure is pending, the European Commission should request, if relevant, interim measures to be ordered by the CJEU.

Fifth, we urge European institutions to establish a rule of law mechanism. It should be a regular, possibly annual supervisory mechanism, based on a contextual analysis of national laws and policies, a scientifically proven methodology, objective standards and equal treatment of Member States. It would relieve the European Commission and the CJEU of some legitimacy problems and help to determine whether there is a systemic threat to the rule of law in a given Member State.

3.1 Calling a spade a spade

Our first proposition is that rule of law issues must be named as such. An adequate formulation of a legal problem is already half its solution. And vice versa: asking the wrong legal question inevitably dooms the outcome of the case. When targeting individual issues, it is more difficult to recognise the systemic attacks on the rule of law. It would therefore be beneficial for the

Commission to take up [Scheppele's](#) (2015) suggestion and bundle cases with similar root causes. Or, the Member States should be invited to do the same along [Kochenov's](#) (2015) biting intergovernmentalism theory, which suggests using direct actions by Member States against other Member States violating the rule of law.

In view of the recent proactive role of the European Parliament in tackling rule of law backsliding, the possibility of initiating legal proceedings in such cases might also be granted to the only democratically elected EU institution. But even in the absence of such an approach, the rule of law element, when present, should be expressly acknowledged and accordingly tackled. The misconstruction of the Hungarian judicial capture (see Box 3) as a case of age discrimination serves as an illustration of the mistake of not calling rule of law backsliding by its name.

Box 3. The Hungarian judicial retirement case

In Hungary, in 2011, the judicial retirement age of 70 was lowered to the general retirement age. At the time, judges who reasonably expected that they could work until 70 were forced to retire at the age of 62 with immediate effect, and – unlike in other professions – without the discretion of the employer. Towards the end of 2012, upon pressure from the Hungarian Constitutional Court, the Venice Commission and the CJEU, the government agreed to rehire retired judges between 62 and 70 if they wished to continue working. At the same time, judges who had been forced to retire illegally received compensation for the period of their forced retirement and if they opted for staying in retirement, they also benefited from compensation equalling 12 months of their last salary. Most judges were financially considerably better off by opting for the latter option. This was the reason why most judges went for the compensation scheme. After this settlement the matter was essentially mute. While EU officials – including then EU Justice Commissioner Viviane [Reding](#) – praised Hungary for respecting the judgment of the CJEU, holding that the mandatory early retirement of Hungarian judges had amounted to age discrimination (see [C-286/12 - Commission v Hungary](#)), in reality the most experienced judges were ultimately removed from the judiciary.

Technically – since the Commission wanted to play safe in terms of legal grounds – the case was misconstrued as an age discrimination case, without any mention of Article 19(1) TEU or Article 47 of the Charter of Fundamental Rights, albeit the controversy was essentially about judicial independence, and thus the rule of law. In the end, court packing was finalised in broad daylight, the proceedings in front of the EU institutions went on for 10 months and the infringement procedure could neither prevent nor remedy the situation.

3.2 No room for a discursive approach

Whatever procedure is followed to enforce the rule of law, we argue that there is no reason to waste too much time by deliberation, debate and discussion, once the problem areas have been established in a thorough, contextual, qualitative analysis, along with objective assessment, equal treatment of the countries and scientific rigour. The government in question

should of course be given time to present its arguments and interpretation of the problems, but prolonged procedures with extended deadlines after the previous ones have been ignored by a Member State concerned do not make much sense.

As the application of the rule of law framework vis-à-vis Poland proved, there is no reason to presume the good intentions of a power capturing state institutions to engage in a sunshine approach involving a dialogue and soft measures. Such a government is unlikely to return to the concept of limited government ([Sajó, 1999](#))— a notion that those in power wished to abandon in the first place. Even though we focus on infringement procedures in the present paper, the lessons learned from the rule of law framework (see Box 4) should be taken into account in all types of procedures tackling rule of law backsliding.

Box 4. The rule of law framework

The [EU rule of law framework](#), a preliminary step before triggering Article 7 TEU, was created by the Commission back in 2014. As EU law scholars predicted (see [Kochenov and Pech 2015](#) or [Bárd and Carrera 2017](#)), the application of the framework was bound to fail mostly because of its underlying faith in a discursive approach to tackle rule of law backsliding. Upholding and promoting EU values through a “sunshine policy” as [Toggenburg and Grimheden \(2016\)](#) proposed, “which engages and involves rather than paralyses and excludes”, presupposes that Member States in question will act in good faith and play by the rules, i.e. accept the validity of European norms and values and the power of European institutions to supervise these. If this is not the case, the procedure will just turn into a “dialogue of the deaf” as [Pech and Scheppelle \(2017b\)](#) put it, and what is more, it will allow the rogue government to gain more time to implement its masterplan of judicial capture and create irreversible facts on the ground. After months of fruitless negotiations, the Commission formalised its concerns in its [Opinion](#) of 1 June 2016, and a [complementary recommendation](#) was adopted on 21 December 2016, which gave the Polish government another two months to comply. Unsurprisingly, the Polish government failed to respect EU demands; instead it challenged the legitimacy and objectivity of the process, downplayed its importance and crucially entirely captured the Constitutional Tribunal. Another seven months later, on 26 July 2017, the Commission could only [report](#) that the recommendations had been disregarded and several other measures had been introduced to capture ordinary courts, too.

3.3 Expedited rule of law procedures

Even if rule of law problems are tackled as such, and no redundant ‘dialogue’ is conducted, wasting time will help governments to complete constitutional capture. But court proceedings are often protracted. Slowness is in their nature. The Luxembourg court is no exception. The average duration of preliminary ruling proceedings, for example, is about [15-16 months](#), but infringement proceedings – which are relevant for rule of law matters – on average take [40 months](#).

This is a major drawback given the gravity of the harm that can be done to a legal system of the Member State. The forcible judicial retirement cases addressed by the Court thus far have been tackled in expedited procedures, but not all rule of law infringement cases are accelerated. In some cases, urgency could have helped, especially in conjunction with interim relief (see the next point), either by offering appropriate (interim) remedies or by making the violations obvious, thus offering ammunition for other types of rule of law mechanisms.

We therefore argue that the European Commission and, if the case reaches the judicial phase, the CJEU should automatically take into account the gravity of the possible consequences of rule of law violations, the scale of its effects and the fact that time is on the side of those violating the rule of law. In the democratic world, procedural law takes the gravity of the problem and the importance of time into consideration in various types of special proceedings. Should someone be detained, or if the controversy involves children who are by nature more vulnerable, processes are accelerated or given priority.

Our reasoning is similar: the considerable delay in rendering judgments in rule of law-related cases may culminate in irreversible and severe harm by rule of law backsliding, which the final judgment rendered in the far future would not be able to remedy. Once the constitution is rewritten, institutions that were supposed to serve as checks on the those in power are weakened and individuals loyal to the government are appointed to key positions, it becomes extremely difficult to make a U-turn and restore the rule of law, and even more challenging to explain the necessity of this change to the people. It is also questionable whether a new government would return to the rule of law, or keep at least some elements of the system that enable abuse of power.

There are also collateral issues. By the time the potentially negative assessment is published, the state scrutinised might have changed its laws or practices, and require another analysis and evaluation. The new laws adopted or practices introduced may be equally substandard, and continue to harm the legal system until yet another assessment becomes public. Also, the legal consequences attached to a negative assessment may lose their impact over time. Criminal lawyers and criminologists are well aware of the fact that it is not the gravity of the criminal sanction but its inevitability and proximity to the crime committed that have a deterrent effect. The same applies to states. Just as criminal sanctions, determinations of rule of law infringements should have a dissuasive effect.

Accordingly, we propose the following. Once an infringement case has an identifiable rule of law element, it should automatically be decided in an accelerated proceeding. Technically, such a process should be triggered if the Commission invokes Article 2 TEU. At a minimum, if Article 2 in conjunction with Article 19 TEU on the principle of effective legal protection to be afforded by Member States under EU law is invoked, the special procedural rules discussed above should apply. This also corresponds to the CJEU's judgment in the case of [*Associação Sindical dos Juízes Portugueses*](#), which as [*Laurent Pech and Sébastien Platon*](#) (2018) put it, is "the most important judgment on the rule of law since [*Les Verts*](#), where the Court essentially establishes a general

obligation for Member States to guarantee *and* respect the independence of their national courts and tribunals”.

Nevertheless, this narrow approach to rule of law backsliding – albeit safe in terms of legal grounds – will not address its spillover effects on fundamental rights and freedoms. One should not lose sight of attacks on public watchdog organisations, such as the press or NGOs, academic freedom and mass surveillance, just to name a few real-life examples from EU Member States that accompany rule of law backsliding.

Accelerating cases involving any potential rule of law violation has the danger of being overbroad, and constructing cases vaguely related to the rule of law as rule of law cases. But given the fact that infringement procedures are typically initiated by the Commission, some self-restraint could be expected. Every year, the Commission publishes its [annual report](#) on monitoring the application of EU law. Based on their analyses dating back to 2010, 2017 was the only year in which the Commission launched infringement procedures with reference to a violation of the rule of law. Out of the 48 new infringement cases initiated that year in the field of ‘justice and consumers’, only [2 were associated with the rule of law](#) as the main policy matter. These cases are related to Poland, for having breached EU law when reorganising the court system on the one hand (infringement number 20172119), and to Hungary for having imposed administrative burdens on foreign-funded civil society organisations on the other (infringement number 20172110). Though the 2018 report is not yet available, Poland has a strong chance of being mentioned under the heading of the rule of law again for the alleged violation of the independence of the Supreme Court. Another important aspect of the 3 cases mentioned is that they all affect the Charter of Fundamental Rights.

Box 5. Lex CEU

The Hungarian government’s attacks on academic freedom serve as a sad illustration showing how time is on the side of those responsible for rule of law backsliding. The 2017 modification to the law on higher education can be seen as a general attack on academic freedom in Hungary, but practically it is singling out and targeting the Central European University (CEU). CEU is now about to fall victim to the Hungarian government’s illiberal project and the prime minister’s personal vendetta against the university founder, George Soros, a philanthropist promoting the concept of an open society. As with most tools used in state capture, the means to chase CEU out of Hungary also have a veneer of legality. The law referenced in the press as Lex CEU incorporates a number of requirements. Let us examine one of them.

Lex CEU was passed to make sure that foreign universities – and CEU is originally accredited in the US – will only be able to function in Hungary if the operation is backed by an intergovernmental agreement between Hungary and the respective other country where its programmes are accredited. CEU satisfied all the conditions of the law, but the above-mentioned requirement is beyond its control. The issue of whether CEU could continue its operations in Hungary is thus at the mercy and the political discretion of two governments – one of which is openly hostile to the university, and which refuses to sign the respective agreement. Since no agreement was reached by the government within its self-imposed deadline, the national Educational Authority can withdraw the foreign educational institution’s licence any time.

The Commission started an infringement procedure in relation to the law, and decided to [refer it to the CJEU](#) in December 2017, but no judgment has been rendered since then, nor have interim measures been requested. The case is essentially mute, since – lacking an international agreement supporting its continued operation in Budapest – in December 2018 [CEU declared that it will be forced to launch most of its programmes in Vienna in September 2019.](#)

Possible legal bases for fast-track rule of law procedures

The Statute of the CJEU (in Article 23(a)) and the CJEU's Rules of Procedure make acceleration of court proceedings possible. The expedited procedure for preliminary rulings (Articles 105-6 Rules of Procedure), the expedited procedure for direct actions (Articles 133-136 Rules of Procedure) and the urgent preliminary ruling procedures in the area of freedom, security and justice (Articles 107-114 Rules of Procedure) deserve attention. In addition, priority treatment (Article 53(3) Rules of Procedure) should be referenced.

The accelerated or expedited procedures, as the names indicate, simply accelerate the speed of the ordinary proceedings. The president of the Court sets a deadline of a maximum of 15 days for written observations. The president may also restrict the matters that parties may address to points of law. The expedited procedure for preliminary rulings and that for direct actions are very similar, except that the former may be requested by the referring court, while the latter by the applicant or defendant. They can both be applied to urgent cases: the referring court needs to show that a decision within a short period of time is necessary, so as to avoid a risk that could incur if the ordinary procedure were applied.

Court practice has acknowledged the urgency in cases where there has been a risk of irreversible consequences that could be avoided if the procedure were accelerated, if these were of significance at the EU level or if the national procedure had been accelerated. Irreversible harm has been acknowledged by the courts in cases involving deprivation of liberty, limitations to the right to family life and cases where the enjoyment of an EU right could be rendered ineffective due to the lapse of time. The EU element has been recognised in a variety of cases, when the economic and monetary union has been at stake; with regard to the European arrest warrant regime; the fight against terrorism; and asylum, immigration and border control.

The so-called urgent preliminary ruling procedure enables the Court to deal with a preliminary reference that addresses issues in the frame of the area of freedom, security and justice in an urgent procedure. The exceptional process can be initiated by the national court referring a case to the Court or by the Court itself. The urgent preliminary ruling procedure has three distinctive features as compared with the accelerated procedure. First, only the parties to the case, the Member State of the referring court, the Commission and other institutions concerned by the case may participate in the written procedure. Since these do not have language barriers, i.e. understand the language of the parties, the procedure can be faster than the ordinary one. Second, cases are dealt with by a chamber of the Court specifically designated

for these purposes. Third, communication, as a general rule, is conducted via electronic channels.

According to a [2011 report](#) on the use of the urgent preliminary ruling procedure, on average cases were decided within 66 days, and there was no case where the procedure exceeded 3 months. Two types of cases can be singled out where the Court delivered its judgments within the shortest possible times: where there was a risk of irreparable damage to a parent–child relationship, and where a person was being detained and further detention depended on the Court’s answer to a legal issue. In other words, where there is irreversible harm or gross human rights limitations (and by definition detention cases qualify as such) the urgent preliminary ruling procedure is used.

Finally, priority treatment may be granted to certain cases by the president of the Court if special circumstances apply. Although priority may be given to any type of proceeding before the CJEU, the procedural rules are not modified in any way in such cases. Whereas the average length of the expedited procedure is about 6 months (even though it has been steadily growing in recent years) and that of the urgent preliminary ruling procedure a little more than 2 months, priority treatment is much less advantageous, since its average length is 1.5 years, but given the diverse nature and complexity of cases prioritised, they can last anytime between 8 and 48 months.

3.4 Interim measures

Typically, even a fast-track infringement procedure will not be prompt enough to prevent the harm that rule of law violations may cause to a legal system. Therefore, interim measures should be ordered in infringement procedures involving a rule of law element. [Carrera and Faure Atger](#) (2010) proposed this back in 2010 in relation to prevention of the political conflict over the so-called Roma affair between the EU institutions and a Member State. They called for

a new ‘freezing enforcement procedure’ (complementing existing ones), in cases where there is evidence that certain national measures are in violation of EU law and the EU Charter of Fundamental Rights. This pre-emptive procedure would have the effect of immediately freezing the practical application of the contested national practice until the European Commission had decided upon the formal launching of the infringement and/or fundamental rights proceedings and had reached a formal decision on their lawfulness and compatibility with European law and fundamental rights.

In mutual recognition cases, scholars like [Carrera and Mitsilegas](#) (2018) pushed for a freezing mechanism and indeed in *Aranyosi and Căldăraru and Celmer* ([C-216/18 PPU Minister for Justice and Equality v LM](#)) the CJEU also allowed and even obliged national executing courts to suspend surrender, until the potential human rights violations in the issuing state are confirmed or rebutted. So as not to overburden the judiciary, [Bárd and van Ballegooij](#) (2018) went one step further and argued that surrender cases should be frozen by the national courts, “awaiting

a resolution of the matter from political actors in accordance with the procedure provided for in Article 7 TEU or the [DRF monitoring and enforcement mechanism](#) called for by the European Parliament” (see section 3.5).

An interim measure has been invoked in a recent infringement case, in the infamous Białowieża forest affair for logging trees at the UNESCO-protected NATURA 2000 site. In *Białowieża*, pending the judgment in the main proceedings, the [CJEU ordered Poland to stop the logging](#). The Polish response was an intensified cutting of trees, and additionally, the government even asked for the forest in question to be removed from the UNESCO World Heritage List. In order to create more incentives for Poland to follow the interim measure, the CJEU decided that penalty payments would be imposed on Poland if the government failed to comply with the interim measure immediately and fully. As [Konciewicz](#) (2018) argued, the case “shows that the Treaties do contain legal tools to respond to the recalcitrant member states riding roughshod over the core values and principles of the EU legal order”.

In order to prevent more harm being done to the rule of law, and in line with the precautionary principle, we argue for interim measures suspending the given national policies under the threat of dissuasive fines, putting a halt to rule of law violations until corresponding cases are decided on their merits (see Box 6). The precautionary principle is a policy-making strategy: whenever an activity might result in harm or injustice, measures should be taken to prevent this, even if the exact effect of the discussed steps on the possible harm are not fully established scientifically.

In Poland there are currently no domestic remedies that could be effectively used to counteract unconstitutional laws, policies or practices. That is because the ruling majority has captured a majority of judges on the Constitutional Tribunal, which has turned into an ally of the government (see [Sadurski](#), 2018), while the constitutional accountability of current officeholders remains out of the question for political reasons (at least during this parliamentary term). Hence, all constitutionally dubious legal acts – such as the amended Act on the National Council of the Judiciary, the Act on the Supreme Court and the Act on the system of ordinary courts – enjoy the presumption of constitutionality and remain legally valid. While their legitimacy is at the lowest ebb, they are part of binding law. As a result, they are followed and abided by those who remain faithful to the rule of law (like some of the judges who silently accepted their removal or requested the president of Poland to extend their service). The remedy may thus only come from EU institutions.

Box 6. Interim measures in case C-619/18 R and the national response

The Commission initiated its infringement action against Poland in October 2018 and asked the CJEU to order interim measures before rendering a judgment. In this case – [C-619/18 R Commission v Poland](#) – the Commission alleged that the lowering of the retirement age for Supreme Court judges to 65 without a meaningful transitional period and granting the president of Poland the discretion to extend the active judicial service of Supreme Court judges was a violation of EU law. The legal claim was based on Article 19(1) TFEU and Article 47 of the Charter

of Fundamental Rights. Hence, unlike the Hungarian case of early judicial retirement, the Polish modifications to the law were not constructed as a case concerning age discrimination of judges, but as a violation of fundamental rights of those who are “recipients of justice” delivered by courts.

On 19 October 2018 the Court issued its (provisional) interim order. It mandated a retrospective suspension of the Act on the Supreme Court with regard to the first president of the Supreme Court, as well as to the forcibly retired judges of both the Supreme Court and the Supreme Administrative Court.

According to Article 279 TFEU, the CJEU may prescribe any necessary interim measures in any case before it. However, the interim measure ordered against Poland is a special kind. ([Sarmiento](#), 2018) First, it was issued to suspend a statutory act of a Member State, and not an act of EU institutions. Second, it was issued in an urgent procedure based on Article 160(7) of the Rules of Procedure of the CJEU, which allows the president of the Court to grant the application of an interim measure before hearing the party concerned. In pursuance of Article 278 TFEU, actions brought before the CJEU do not have suspensory effect, unless the Court orders that application of the contested act is suspended. The interim measure decision was also particular because, contrary to the established case law, it was meant to restore the status of judges from before the infringement action was lodged (and a final decision of the Court rendered).

Needless to say, the above-mentioned particularities sparked controversy at the domestic level on whether, when and how the interim measure should be complied with. Several politicians contested the legal basis of the interim measure, and urged the government to [disregard](#) it. For example, Krystyna Pawłowicz, an MP from the Law and Justice Party (PiS), called the CJEU decision “[an attack on \[the\] sovereignty of a Member State](#)”. In her view, the interim measure contravened the EU Treaties, as it intended to invalidate the statutory law of a Member State. She argued that interim measures could only have prospective effects and apply to individual measures rather than statutory acts. Others, such as the deputy director of the Chancellery of the President of the Republic claimed that the interim order was [not self-executory](#). This position was also shared by Marcin Warchał, the Deputy Minister of Justice, who stated that application of the interim measure requires a [new statute](#).

Taking the opposite stance are several renowned constitutional experts, like Professors [Ewa Łętowska](#), [Mirosław Wyrzykowski](#) or Zbigniew Kmiecik, who recognise that the interim measure binds all Polish authorities and needs to be [immediately applied](#), while its direct effect is a consequence of the primacy of EU law.

In spite of these controversies, the interim measure had a domestic influence. For a start, the first president of the Supreme Court and the president of the Supreme Administrative Court called the judges who had been forced to retire to return to their offices and they followed this call. However, the government proceeded with amendments to the Act on the Supreme Court, in pursuit of which some judges did not resume work because they chose to take advantage of a preferable pension regime (securing 100% of their salaries). In addition, the National Council of the Judiciary has agreed to suspend the pending competition for positions on the Supreme Court that were forcibly vacated. Yet this means that the Council has interpreted the obligations stated

in the interim measure very narrowly – [as an obligation not to fill the vacancies](#) created by the challenged Act on the Supreme Court.

On 21 November 2018, the PiS submitted a bill regarding the law on the Supreme Court in order to comply with the interim order. It restores the previous retirement age (70 instead of 65) for judges appointed before April 2018. Most importantly, the bill does not require the renewed appointment of judges who were forced to retire but declares that their service has not been interrupted. The bill also removes the power to grant permission to continue judicial service after judges reach the age of 65 from the president of Poland.

The Polish justice minister considered that bill as a move to fulfil obligations stemming from EU law. “At the same time, we are pushing forwards with our changes in the justice system”, he also [added](#). In a similar vein, the PiS chairman of the parliamentary justice committee stated: “Sometimes you have to take [one step back to take two steps forwards](#). The reform will certainly be completed.” The bill was adopted in record speed (3.5 hours in the Lower Chamber, and approved in the Senate on the same day), and was signed into the law by the president.

Today it is evident that the immediate response of the Polish government was a tactic used to please the moderate electorate of the PiS before the local government elections. In April 2019 the government completed another phase of this project by introducing new amendments to the Act on the Supreme Court and to the disciplinary procedure for judges, by additionally curbing the rights of judges to a fair trial.

It is pertinent that EU institutions not only remain vigilant and continue to closely follow the Polish government’s steps in complying with the interim measure, but also with its reconstruction of the judiciary in general. As [Koen Lenaerts](#), President of the CJEU noted: a failure to comply with the Court’s decision is a step towards secession from the EU. A vision of ‘Polexit’ is not as distant as it seems, given the recent move by Zbigniew Ziobro, the Minister of Justice and Prosecutor General, who requested the subservient Constitutional Tribunal to review the compatibility of Article 267(3) TFEU with the Polish Constitution, in order to pre-empt further preliminary questions from Polish courts on issues related to judicial independence. ([Biernat and Kawczyńska](#), 2018) From a substantive perspective, this would indeed serve as evidence that the foundational values enshrined in Article 2 TEU are no longer shared by Poland, but such a disregard is fatal also procedurally, as the EU thus far has not tested any other tools (and Article 7 TEU is too burdensome) to prevent the dismantling of the EU from within.

3.5 An EU mechanism to enforce the rule of law

When assessing whether a Member State is engaged in rule of law backsliding, the judiciary is overburdened, whereas political institutions – because of the high political threshold an Article 7 TEU procedure requires – escape responsibility in enforcing common values altogether. Therefore, an EU mechanism on democracy, the rule of law and fundamental rights – as proposed by the [European Parliament](#) and [earlier](#) by one of the authors of the present paper –

should be brought to life. A regular, possibly annual supervisory mechanism, based on a contextual analysis of national laws and policies, a scientifically proven methodology, objective standards and equal treatment of Member States, should be established.

With such a mechanism in place, the EU could rely on its own sources to determine whether a Member State is in breach of common values. It could then warn the respective Member State in due time and request a return to these values. Also, if a Member State has already breached these values, EU institutions would not have to wait for external actors (like the European Court of Human Rights or the Venice Commission) to indicate generic problems with the rule of law but could use their own scoreboard system.

The rule of law mechanism should follow a precautionary approach and be based on solid evidence and valid qualitative analysis. It could indicate when to start rule of law infringement procedures or whether it is necessary to request interim measures. Furthermore, it would allow the EU to act promptly and suspend the application of EU laws based on mutual recognition, and thus relieve courts of this burden. It could also indicate when mutual trust can be re-established instead of leaving to the judiciary case-by-case decisions on this matter. It could establish higher standards than required by other international organisations, such as the Council of Europe, which includes countries with poor human rights records.

Furthermore, the rule of law mechanism should ensure equal treatment of the Member States – something we do not see today, and for which the EU can justifiably be criticised. The regular reports would also keep the old topics alive. Now we are blinded by the ever more brutal attacks on EU values, and tend to forget that earlier problems have not been solved or sufficiently addressed.

Box 7. Another aspect of the Celmer controversy

The CJEU required the Irish court to seek evidence from Polish judges issuing a European arrest warrant to show that a fair trial can be ensured in a concrete case. This amounts to *probatio diabolica*. As [Bárd and van Ballegooij](#) (2018) have shown, the Court's demand not only gives rise to "Herculean hurdles" in proving the impact of judicial capture on individual suspects, but it "mixes up the responsibilities of the Commission as guardian of the rule of law, of the European Council – which is now given the sole power to suspend mutual trust – and of individuals, who do not possess an apparatus demonstrating risks to their fundamental rights". The actual Irish High Court [judgment](#) on Mr Celmer's surrender applying the Luxembourg test proves that there is no way to meet the high threshold the CJEU created: even if the executing court has no doubt that judicial independence has ceased to exist in the issuing country, it will be bound to surrender the suspect or convict.

Against this reasoning, a mere probability that a judge will act under pressure or the chilling effect of disciplinary proceedings related to the case at hand or other cases defies belief in judicial independence. Judges have to be and also need to *appear* to be independent. Unless a halt is put to the harm of judicial independence, the whole structure of adjudication at both the domestic and EU levels might be jeopardised. Most importantly, this probability should be

determined by an independent authority at the EU level (a special committee), and not a domestic court in another Member State. Once the committee establishes that a systemic problem with the rule of law exists which threatens the independence of courts and judges, surrender cases must be frozen, as proposed by [Carrera and Mitsilegas](#) (2018).

4. Conclusions

A mature constitutional system, built on the principles of democracy, the rule of law and fundamental rights, implies the existence of robust precautionary measures against anti-constitutional tendencies and forces. These are designed to protect democracy against a '*constitutional coup d'état*', which may replace a constitutional government with an autocratic one. The blueprint for rule of law backsliding entails that election laws are curbed, constitutional courts captured, ordinary judges unduly influenced, media pluralism destroyed, participatory democracy dismantled, civil society harassed and several fundamental rights denied. To prevent this from happening European institutions need to make use of preventive tools, because once a constitutional regime is captured, the chances are slim that it can be restored.

The concept of liberalism has been demonised in some Member States that want to claim their constitutional distinctiveness based on traditional ('illiberal' or conservative) values. But the EU should reject an understanding of respect for national constitutional identity that would include tolerating open disregard of the core principles of the rule of law. These principles underlie a concept of limited government, that is a government which respects the limits of the law. The concept of limited government is at odds with a party that denies the notion of liberal democracy and demolishes the internal system of checks and balances. Should a ruling majority in a Member State openly reject the concept of limited government, it is the beginning of the end of European integration.

Since there is little chance that rule of law backsliding will be stopped from within, it is expected that international actors will help to restore the rule of law. We believe that it is now the responsibility of the EU to call the Polish and Hungarian governments to account for rule of law violations in the European court, not least to set an example for other Member States on the path of rule of law backsliding. EU action is imperative not only for the sake of keeping democracy, the rule of law and fundamental rights alive in the respective Member States, but also for the EU as a whole.

Should judicial independence be under threat in some Member States, we might arrive at a situation where the EU harbours countries that would not qualify for EU membership if they applied today. In addition, as [Kochenov and Bárd](#) (2018) have demonstrated, basic EU principles, such as autonomy, primacy and mutual trust, will be jeopardised unless EU law embraces the rule of law as an institutional ideal and takes Article 2 TEU values to heart in the context of the day-to-day functioning of the Union.

We have argued that the effective use of Article 7 TEU is not a viable option to put a halt to rule of law violations. Instead we see great potential in infringement procedures to ensure respect of the common values enshrined in Article 2 TEU. But infringement procedures are slow and therefore we propose solutions that take into consideration the gravity of possible harm and the low chance of repair from within. We suggest that rule of law violations should be tackled as a special kind of failure of Member States to fulfil obligations under the Treaties that necessitates a prompt response.

In the above analysis we have come to the following conclusions. First, a rule of law violation should be named and legally addressed as such in the infringement procedure. Second, cases with a rule of law element should be dealt with promptly and automatically accelerated. Urgent preliminary proceedings may not be applicable to all rule of law issues, only to those relevant to the area of freedom, security and justice, whereas priority treatment does not in fact necessarily accelerate the process. Therefore, rule of law cases – those where the Commission invokes Article 2 TEU, or more specifically Article 2 TEU and relevant provisions of the Charter of Fundamental Rights – should automatically be expedited. We also advise the use of interim measures to prevent further action by the government responsible for rule of law violations.

When it comes to the actual assessment of the situation on the ground, we acknowledge that the rule of law can be achieved via various paths, but there is general agreement on when it is violated. In some cases, only a combination of acceleration and interim relief may be of help, while in others one of these measures may be sufficient. In the case of CEU, interim measures could not have helped, because there was nothing to be asked from the government, other than to suspend enforcement of the law curtailing academic freedom for another year or two. This would only have added more uncertainty about the future of the university. In this case, only a prompt EU response condemning attacks on academic freedom could have prevented the university from being chased out of Hungary.

In the Polish judicial retirement case, a combination of accelerated proceedings and interim measures was necessary. Still, the harm has already been done, as the new Act on the Supreme Court entered into force on 3 April 2018, before the EU started to tackle the issue via legal means. Moreover, the judicial phase of the infringement procedure could not have been accelerated enough so as to render a final judgment on the merits before the government packed the Supreme Court with new appointees. Therefore, the tools need to be selected on a case-by-case basis.

Finally, so as not to overburden the CJEU, and – borrowing from Judge [Allan Rosas](#) (2019) – to “honour its judicial mandate”, the rule of law toolbox should be extended by a rule of law mechanism that would help determine, against objective standards and a rigorous methodology, when a Member State engages in a systemic violation of the rule of law, giving the European Commission a green light to trigger ‘rule of law infringement procedures’ along the above proposed lines.

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