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**Accession v Membership – Is the European  
Union Equally Demanding Concerning  
Compliance With Its Fundamental Values?**

**Joana Picolo**

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# European Union Law Working Papers

**Editors: Siegfried Fina and Roland Vogl**

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## **Abstract**

Although in theoretical terms the EU is a union of values, this thesis argues that practice dictates otherwise. According to the treaties, current Member States ought to comply with those values and prospective members are to follow the same trend if they wish to accede to the EU. This dissertation studies the cases of Poland and Hungary to demonstrate that certain Member States fail to abide by the said values and that the EU lacks the legal capacity to act effectively against non-compliance. Concerning aspiring members, Poland at the time of accession, Turkey, Serbia and Montenegro are analysed to illustrate how the EU overlooks flagrant failures of abidance. In practice, this thesis aims to establish that neither of the formerly mentioned is duly sanctioned. In detail, it endeavours to demonstrate that non-compliant Member States are targeted through flawed mechanisms, and that prospective members do not see their accession process being derailed. As also advanced by the present dissertation, the EU itself, in certain circumstances, does not respect its fundamental values. All in all, the conclusion of this study is problematic: a self-declared union of values that is devoid of them.

## Table of Contents

|  |    |
|--|----|
| 1. Introduction.....   | 1  |
| 2. What Values Underpin the EU?.....   | 2  |
| 2.1. Article 2 TEU <i>in fine</i> .....  | 2  |
| 2.2. Binding Nature of the EU Values .....   | 3  |
| 2.3. Human Dignity.....  | 5  |
| 2.4. Freedom .....   | 8  |
| 2.5. Democracy .....   | 9  |
| 2.6. Equality .....  | 11 |
| 2.7. Rule of Law.....  | 13 |
| 2.8. Human Rights .....  | 15 |
| 3. Relevance of the Fundamental Values: Accession and Membership .....                   | 16 |
| 4. Accession to the EU .....   | 16 |
| 4.1. Eligibility Criteria .....  | 16 |
| 4.2. Accession Procedure .....   | 18 |
| 4.3. Level of Compliance with Article 2 TEU .....  | 20 |
| 4.4. Is Article 2 TEU Only Theoretically Relevant?.....                                  | 21 |
| 4.5. Overlooking Candidate Country Failures .....  | 22 |
| 4.5.1. The Case for Poland.....  | 22 |
| 4.5.2. The Case for Turkey.....  | 23 |
| 4.5.3. The Case for Montenegro and Serbia.....   | 25 |
| 4.6. Vagueness of the Conditionality Criteria.....                                       | 27 |
| 4.7. Motivation Behind the Enlargement of the EU.....                                    | 28 |
| 4.8. Overall Assessment of Compliance with the Fundamental Values by Acceding Members... | 29 |
| 5. EU Membership .....   | 30 |
| 5.1. The Case for Hungary .....  | 30 |
| 5.2. The Case for Poland.....  | 37 |
| 5.3. The Case for the European EU.....   | 42 |
| 5.4. Response from the EU Towards Hungary and Poland.....                                | 43 |
| 5.4.1. EU v Hungary .....  | 43 |
| 5.4.2. EU v Poland .....   | 47 |
| 5.5. (In)effectiveness of the Mechanisms Used .....                                      | 54 |
| 5.5.2. Article 7(1) TEU .....  | 57 |
| 5.5.3. Rule of Law Framework .....   | 60 |
| 5.5.4. References for Preliminary Rulings .....  | 63 |
| 5.6. Overall Assessment of Compliance with the Fundamental Values by Member States ..... | 65 |

6. Conclusion .....65  
Bibliography..... 68

## List of Abbreviations

- **European Union:** EU
- **Charter of Fundamental Rights of the European Union:** Charter
- **Court of Justice of the European Union:** Court
- **European Commission:** Commission
- **European Parliament:** Parliament
- **Council of the European Union:** Council
- **Treaty establishing the European Economic Community:** Treaty of Rome
- **Treaty on the Functioning of the European Union:** TFEU
- **European Commission for Democracy through Law:** Venice Commission
- **European Convention for the Protection of Human Rights and Fundamental Freedoms:**  
Convention
- **National Council of the Judiciary led the European Network of Councils for the  
Judiciary:** ENCJ
- **Procedures Directive:** Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180.
- **Reception Conditions Directive:** Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180
- **Return Directive:** Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348
- **European Court of Human Rights:** ECtHR

## 1. Introduction

The European Union (hereinafter “EU”) declares itself to be a union of values.<sup>1</sup> It is true that the treaties honour such a rationale by requiring current members and prospective ones to comply with these values.<sup>2</sup> But it is also often said that (in practice) the EU is not sufficiently pressing towards neither of the previously mentioned. The present thesis argues that this is the case: as the EU is not sufficiently demanding towards current and aspiring members, it is a union of shared values only in theoretical terms. Several cases seem to illustrate and sustain such a conclusion, but not solely. They also illustrate how relevant it is to study the topic at hand. It is imperative for the EU to grasp the consequences of its acts (or their problematic absence), and it is for the reader to be aware of the seriousness of what is at stake. As it will be established, to disrespect the values of the EU entails practical consequences given that it directly and negatively impacts individuals and their human and fundamental rights.

The present dissertation argues that the EU is indeed equally pressing towards current Member States and prospective ones on compliance with its cornerstone values. Not because it is pressing towards both, but because it is not pressing towards either. To reach such a conclusion, several sections will be addressed, the first of which lies on the scope of the values themselves. Overall, and regarding the said values, the particular framework surrounding current Member States and the one surrounding prospective members will be studied. Bearing in mind that the EU is more than the sum of its parts, space is also made to assess the fulfilment of the values by the EU itself. The latter aids grasping its apparent underperformance towards current and future members. Touching upon the methods, thorough research has been conducted to show (first) how both Member States and acceding members fail to comply with the said values, and (second) how the EU disregards such failures and itself fails to abide by its values.

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<sup>1</sup> Gideon Rachman, ‘Europe is an alliance, not a union of values’ Financial Times (21 January 2019) <[https://www.law.ox.ac.uk/sites/files/oxlaw/oscola\\_4th\\_edn\\_hart\\_2012.pdf](https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf)> accessed 6 June 2021.

<sup>2</sup> Consolidated Version of the Treaty on European Union [2012] OJ C326/01, articles 2 and 49 (TEU).



The thesis is structured as follows, section two construes the scope of the values of the EU so that the reader may better understand their violation, and it also includes reference to their binding nature. Following, section three addresses the relevance of those same values for both current and acceding members. Whereas section four solely analyses compliance by aspiring members, section five exclusively focuses on compliance by current Member States. At the end of each of the latter, a brief general assessment of abidance is made, thus drawing the overall conclusions.

## **2. What Values Underpin the EU?**

First and foremost, the common fundamental values of the EU are present in Article 2 TEU. In this section, the scope of such values will be individually construed and reference will be made to their binding nature. This way one may better understand, at a later stage, how these values seem to be breached by current and aspiring Member States.

### **2.1. Article 2 TEU *in fine***

Article 2 TEU is composed of two sentences. Whereas the first sentence expressly qualifies human dignity, freedom, democracy, equality, the rule of law and respect for human rights as fundamental values of the EU, the second sentence establishes that those values are shared by all Member States in an EU society characterized by gender equality, non-discrimination, solidarity, tolerance, and pluralism. The fact that Article 2 TEU contains two sentences is a source of ambiguity. Whereas certain voices argue that only the values included in the first sentence are part of the cornerstone values of the EU, other scholars advocate that irrespective of its structure, all values of Article 2 TEU (including those referred to in the second sentence) qualify as such.<sup>3</sup> Unsurprisingly, there

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<sup>3</sup> Cristina Fasone, Daniele Gallo and Jan Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?' (2020) 5 *European Papers* 255, 258  
<[https://www.europeanpapers.eu/en/system/files/pdf\\_version/EP\\_eJ\\_2020\\_1\\_15\\_SS2\\_Articles\\_Jan\\_Wouters\\_00376.pdf](https://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2020_1_15_SS2_Articles_Jan_Wouters_00376.pdf)> accessed 16 April 2021.

are strong arguments supporting both positions. On the one hand, it is not feasible that the treaties would ascribe values to the Member States and that Member States altogether would create a new society thereby.<sup>4</sup> More so, if all mandates present in Article 2 TEU are to be seen as fundamental values, it is difficult to understand the reason behind the overlaps between the two sentences. For instance, while equality is mentioned in the first sentence, non-discrimination is included in the second. Likewise, the first part of the Article at hand refers to the rule of law, and the second to justice.<sup>5</sup> On the other hand, the remarkable relevance of the principles contained in the second sentence for the EU legal system is undeniable. In the same vein, because non-discrimination and equality between men and women are backbones of the EU identity, it is hard to argue that they are not fundamental values.<sup>6</sup>

## **2.2. Binding Nature of the EU Values**

In order to fully grasp the nature of the values laid down in Article 2 TEU, an historic remark is to be made. The Treaty of Amsterdam introduced an enumeration of principles of the EU. It included liberty, democracy, compliance with human rights and fundamental freedoms, and the rule of law.<sup>7</sup> The Lisbon Treaty, however, renamed such principles as values of the EU and added human dignity, equality, and a particular reference to rights of minorities to the previously referred set.<sup>8</sup> The fact that the Lisbon Treaty put forward a list of values and not a list of principles prompted deep discussion concerning the nature of the former. Certain scholars disregard the terminological change and perceive these values as legally binding principles.<sup>9</sup> In fact, some treaty provisions refer

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<sup>4</sup> Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *The Treaties and the Charter of Fundamental Rights - A Commentary* (Oxford University Press 2019), 25.

<sup>5</sup> Ibid.

<sup>6</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 258.

<sup>7</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C340, article 1(8).

<sup>8</sup> TEU, article 2.

<sup>9</sup> European Parliamentary Research Service, 'Protecting EU common values within the Member States - An overview of monitoring, prevention and enforcement mechanisms at EU level' (September 2020) <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS\\_STU\(2020\)652088\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652088/EPRS_STU(2020)652088_EN.pdf)> accessed 13 April 2021.

to these values as principles; Article 21 TEU covers the principles of namely human dignity, rule of law and democracy, Article 9 TEU enshrines the principle of equality, and Article 6 TEU addresses the recognition and endorsement of fundamental rights as a principle of EU law. Likewise, the preamble of both the Charter and the TEU perceive democracy and the rule of law as principles. Nevertheless, the former also advances solidarity, human dignity, freedom, and equality as values. Such a differentiation is inconsequential considering that for example Article 23 Charter enshrines equality as a principle. In this regard, it is also to note that the Court did not yet consider the matter at hand and refers to Article 2 TEU without great terminological concern. For instance, whereas in the *Junqueras Vies* judgement the Court considered democracy as a value,<sup>10</sup> in the *Shindler* ruling it scrutinized it as a principle.<sup>11</sup>

Irrespective of the terminological discussion, it is undeniable that Article 2 TEU has a normative character, i.e., is legally binding. Numerous factors allow for such a conclusion. First and foremost, these values are present in the operative part of the treaty and not only in its preamble. More so, both acceding members and current Member States are required by the treaties (hence by law) to comply with such values, and will face consequences in case of non-compliance, specifically non-accession and sanctions provided for in Article 7 TEU, respectively. The practical extent of Article 2 TEU is also to be noted in connection to its binding nature. Broadly, not only it commits Member States by reason of Article 49 TEU and Article 7 TEU, but also the EU and its institutions. In fact, according to Article 3(1) TEU the promotion of the fundamental values is one of the objectives of the EU, and as put forward by Article 13(1) TEU the institutions of the EU have a duty to do so. Importantly, the normative nature of these values has been endorsed by the Court. In harmony with the latter, the common understanding that all Member States respect such values is the cornerstone

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<sup>10</sup> Case C-502/19 *Junqueras Vies* [2019] ECLI:EU:C:2019:1115, para 63.

<sup>11</sup> Case T-458/17 *Shindler and Others v Council* [2018] ECLI:EU:T:2018:838, para 70.

of the principle of mutual trust, i.e., that the EU values are complied with and so is the EU law that implements them.<sup>12</sup>

Given that respect for the foundational values stipulated in Article 2 TEU is a pre-condition for full membership to the EU, scholars go as far as arguing that such values bind Member States in all domains of activity, even those beyond the competence of the EU itself.<sup>13</sup> The Commission and the Parliament seem to follow such a rationale. On the one hand, the Commission has established that the scope of Article 7 TEU is not restricted to areas covered by EU law. Here, as put forward by the Commission itself, the EU may act not only if a breach of the foundational values is linked to an area of EU law, but also if such a breach is connected to a field where Member States may act autonomously.<sup>14</sup> In turn, the Parliament has referred to that understanding of the Commission, apparently endorsing a similar view.<sup>15</sup>

### **2.3. Human Dignity**

Human dignity is the first fundamental value to be listed in Article 2 TEU,<sup>16</sup> and is also present in Article 1 Charter of Fundamental Rights of the European Union (hereinafter “Charter”).<sup>17</sup> The latter advances human dignity as inviolable and as an instance that ought to be respected and safeguarded. In fact, as it derives from the preamble of the Charter, besides being a fundamental right in itself, human dignity is the foundation of, and underpins, all rights enshrined in the Charter.<sup>18</sup> In spite of its recognition as substantially relevant, the content of such a value remains

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<sup>12</sup> Case C-284/16 *Achmea* [2018] ECLI:EU:C:2018:158, para 34.

<sup>13</sup> Armin von Bogdandy ‘Common Principles for a Plurality of Orders: A study on public authority in the European legal area’ (2015) 12 *International Journal of Constitutional Law* 980, 997.

<sup>14</sup> Commission, ‘Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based’ COM (2003) 0606 final.

<sup>15</sup> European Parliamentary Research Service (n 9).

<sup>16</sup> TEU.

<sup>17</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (Charter).

<sup>18</sup> Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

difficult to draw. Here, Article 1 Charter and Article 2 TEU are not of great contribution as although they mention human dignity, they do not provide for a definition of such a concept. Since the purpose of the present research project does not directly concern the definition of human dignity, it is only to be noted that it lies on the immediate worth of all human beings as human beings, regardless of their beliefs, religion, social background, nationality, culture and other qualitative factors alike.<sup>19</sup> More so, the case law of the Court of Justice of the European Union (hereinafter “Court”) tends to link human dignity to material and social conditions liable to allow persons to make decisions freely.<sup>20</sup>

Perhaps because the Court links human dignity to the integrity of all persons,<sup>21</sup> its violation expands to several fields. In the *Alimanovic* judgement, minimum subsistence costs were perceived by the Court as essential to dignify one’s existence.<sup>22</sup> This is directly connected with the criminalisation of homelessness. As of 2015, total bans on begging were in place in Hungary, Romania, and Greece, being that other Member States regulated specific conditions under which begging was forbidden.<sup>23</sup> Because criminalising homelessness precludes one from fulfilling his or her most basic needs, the European Court of Human Rights (hereinafter “ECtHR”) has upheld that it amounts to a breach of human dignity.<sup>24</sup> But human dignity is not only present in questions related to such a topic. It is also frequently referred to in connection with asylum matters. Here, material conditions of reception of asylum seekers linked to living and sanitary facilities have been considered as crucial for one not to be deprived of its own dignity.<sup>25</sup> In the same vein, shall a Member State or a prospective member fail to provide housing, clothing and food or financial

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<sup>19</sup> European Parliamentary Research Service (n 9).

<sup>20</sup> Ibid.

<sup>21</sup> Case C-377/98 *Netherlands v Parliament and Council* [2015] ECLI:EU:C:2001:523, para 70.

<sup>22</sup> Case C- 67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597, para 45.

<sup>23</sup> Feansta, ‘Criminalising homeless people - banning begging in the EU’ (*Criminalising homeless people - banning begging in the EU*, February 2015) <[https://www.feantsa.org/download/2015-02-07\\_draft\\_criminalisation\\_policy\\_statement-38703600034690521366.pdf](https://www.feantsa.org/download/2015-02-07_draft_criminalisation_policy_statement-38703600034690521366.pdf)> accessed 7 June 2021.

<sup>24</sup> *Lăcătuș v. Switzerland* App no 14065/15 (ECtHR 19 January 2021).

<sup>25</sup> Case C-233/18 *Haqbin* [2019] ECLI:EU:C:2019:956, para 46.

allowances to cover the latter, it breaches EU law and disrespects the most basic needs of the person concerned, i.e. his or her human dignity.<sup>26</sup> More so, the objective conditions of the various reception centres are often a topic of discussion. Although not exclusively, countries such as Austria, Belgium, Cyprus, and Italy have been criticized for offering overcrowded facilities to those seeking asylum. As a mere example, the Austrian Ombudsman issued a report pointing out the questionable and far from healthy conditions at Carinthia's and Burgenland's reception centres. In neighbouring Italy, the situation is not better. Asylum seekers are oftentimes accommodated in containers with no shower units or sheets.<sup>27</sup> This is why the ECtHR held that it is not unfounded to accept that asylum seekers arriving to Italy find no accommodation or overcrowded facilities where their privacy is annulled, hygiene neglected, and physical integrity risked.<sup>28</sup> Needless to repeat, besides the reception of asylum seekers and the criminalisation of homelessness, human dignity is present in an extensive array of areas, being that its enumeration does not aid the purpose of this thesis. It is only to be noted that the paradigm of sufficient social and material conditions goes hand in hand with the one apparently adopted by the Charter. In fact, references to human dignity therein, notably concerning the rights of the elderly and those of workers seem to sustain that human dignity is linked to a set of objective conditions.<sup>29</sup>

Notwithstanding, despite the fact that Article 2 TEU considers human dignity to be a common value throughout the EU, Member States do not share a uniform understanding of how human dignity ought to be protected.<sup>30</sup>

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<sup>26</sup> Ibid, para 32.

<sup>27</sup> Refworld, 'Reception and Detention Conditions' (Reception and Detention Conditions of applicants for international protection in light of the Charter of Fundamental Rights of the EU, January 2015) <<https://www.refworld.org/pdfid/5506a3d44.pdf>> accessed 7 June 2021.

<sup>28</sup> *Tarakhel v Switzerland* App no 29217/12 (ECtHR 4 November 2014), para 115.

<sup>29</sup> European Parliamentary Research Service (n 9).

<sup>30</sup> Case C-36/02 *Omega* [2004] ECLI:EU:C:2004:614, paras 34 et seq.

## 2.4. Freedom

The concept of freedom is as challenging as that of human dignity. Throughout time, many theories have been put forward concerning its real meaning and content. These will not be addressed as for the purpose of the present thesis such doctrines are not relevant. Instead, it is to acknowledge that the freedoms enshrined in the Charter, notably in its Chapter II entitled “freedoms”, operationalises the reference to freedom in Article 2 TEU.<sup>31</sup> The case law of the Court seems to confirm this logic. As an example, in the *Tele2 Sverige* judgment, it upheld the connection between the freedom of expression guaranteed by Article 11 Charter and freedom as a value within the meaning of Article 2 TEU.<sup>32</sup> More so, freedom is often referred to in relation to other values, specifically human dignity, equality and democracy. Alongside human dignity, freedom shall entail one’s autonomy and free personal development.<sup>33</sup> In turn, it is to be equally recognized to all persons. In connection with democracy, and according to the European Commission (hereinafter “Commission”), the so-named democratic freedoms encompass (although not exclusively) political pluralism, free and fair elections, the recognition of the role of the opposition, independent judicial authorities, and the freedoms of expression and of religion.<sup>34</sup> Notwithstanding, by reason of the lack of reference to freedom in itself and independently of other mandates, its exact content is yet to be drawn, notably whether it goes beyond that of the freedoms enshrined in the Charter.

In order to illustrate how freedom as a value is breached in practice, the freedom of expression and of information enshrined in Article 11 Charter will be considered. Although the latter mandates that pluralism of the media ought to be respected, the reality on the ground seems to dictate otherwise.<sup>35</sup> Hungary and Poland appear to epitomise perfect examples of how the freedom of

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<sup>31</sup> European Parliamentary Research Service (n 9).

<sup>32</sup> Case C-203/15 *Tele2 Sverige* [2016] ECLI:EU:C:2016:970, para 93.

<sup>33</sup> Case C-13/94 *P v S and Cornwall County Council* [1996] ECLI:EU:C:1996:170, para 22.

<sup>34</sup> Commission, ‘Agenda 2000 - For a stronger and wider Union. Document drawn up on the basis of COM (97) 2000 final, 13 July 1997. Bulletin of the European Union, Supplement 5/97’ COM (97) 2000 final.

<sup>35</sup> RSF Reporters Without Borders, ‘2021 World Press Freedom Index’ (*Ranking*, 2021) <<https://rsf.org/en/ranking>> accessed 17 June 2021.

expression and of information may be infringed as both score remarkably low on the 2021 World Press Freedom Index.<sup>36</sup> In Poland, the ruling party intends to regulate the privately-owned media outlets to control what is presented to the public. Several instances are of concern. In the 2020 presidential election, the state-owned media not only outspokenly supported President Duda but also launched efforts to discredit the opposition. More so, Orlen (a state-owned oil company) acquired 20 of the 24 regional newspapers published by Polska Press. And lastly, a novel tax on advertising is seen as another step towards censorship.<sup>37</sup> In turn, Hungary took advantage of the pandemic to curb the freedom of journalists. The unlimited power of the government to rule during the pandemic threatened media professionals with charges on dissemination of fake news and the creation of obstacles to counter the health crisis.<sup>38</sup>

## **2.5. Democracy**

Not surprisingly, albeit democracy is presented as one of the fundamental values of the EU, its definition is not advanced by the treaties. This is problematic considering that to identify the precise boundaries of democracy as a concept is remarkably challenging. Throughout time, a multitude of understandings have been proposed, and none is unanimously accepted to the detriment of others. In this regard, practical instruments that allow for the analysis of the level of democracy in a particular State (the so-called indexes) may come in handy. This is because to scrutinise a country's level of democracy, such indexes consider particular indicators. Those indicators allow one to grasp what democracy is and what it encompasses, at least at its core. For the purpose of the present thesis, two indexes will be addressed: the democracy index annually put forward by the Freedom House, and that yearly elaborated by the Economist Intelligence Unit. The former rates the national

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<sup>36</sup> Ibid.

<sup>37</sup> RSF Reporters Without Borders, “‘Repolonising’ means censoring’ (*Poland*, 2021) <<https://rsf.org/en/poland>> accessed 7 June 2021.

<sup>38</sup> RSF Reporters Without Borders, “U’s alternative, repressive model’ (*Hungary*, 2021) <<https://rsf.org/en/hungary>> accessed 7 June 2021.



and local governance, the electoral process, the existence of independent media and corruption conduct, civil society, and the judicial framework and independence.<sup>39</sup> Along similar lines, the democracy index drawn by the Economist Intelligence Unit scrutinizes 60 indicators grouped into five categories, i.e. electoral process and pluralism, functioning of government, political culture, political participation, and civil liberties.<sup>40</sup> It is also to be noted that contrary to what has been submitted by certain scholars, these indexes presuppose that democracy is not a dichotomous concept. The spectrum of possible results underlines that democracy is further complex than just recognizing a State as democratic or not democratic.

It follows from the foregoing, that (albeit not exclusively) regular, fair, and free elections is a *sine qua non* for any democracy to qualify as such.<sup>41</sup> At the level of the EU, it is clear from the texts of the treaties that a model of representative democracy has been endorsed (Articles 10(1) and 10(2) TEU). As upheld by the Court, the adoption of such a model is the materialisation of democracy as a value within the meaning of Article 2 TEU.<sup>42</sup> Whereas the citizens of the EU are represented in the European Parliament (hereinafter “Parliament”), Member States of the EU are represented in the European Council by their heads of State and in the Council of the EU (hereinafter “Council”) by their governments (Article 10(2) TEU). Considering that both the will of EU citizens and that of the Member States are taken into account, the EU is grounded on a dual legitimacy. Additionally, Article 10(2) TEU requires national governments to be democratically accountable to the national parliament or citizenry. I.e., it makes express reference to democracy as a value to be respected by each Member State in its internal order, just as put forward by Article 2 TEU.<sup>43</sup> Nonetheless, because Member States score differently in the priorly mentioned indexes, democracy is far from

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<sup>39</sup> Freedom House, ‘Democracy Index’ (*Freedom House*, 2020) <<https://freedomhouse.org/countries/nations-transit/scores?sort=dese&order=Country>> accessed 18 April 2021.

<sup>40</sup> The Economist Intelligence Unit, ‘Democracy Index 2020 In sickness and in health?’ (*The Economist Intelligence Unit*, 2020) <<https://www.eiu.com/n/campaigns/democracy-index-2020>> accessed 18 April 2021.

<sup>41</sup> Commission (n 14).

<sup>42</sup> *Junqueras Vies* (n 10) para 63.

<sup>43</sup> European Parliamentary Research Service (n 9).

present throughout the EU, at least not in the same terms. For instance, in harmony with the Economist Intelligence Unit, Hungary is a flawed democracy whereas Germany is a full one.<sup>44</sup> According to the Freedom House, while Hungary qualifies as a transitional or hybrid regime, Czech Republic is seen as a consolidated democracy.<sup>45</sup>

## 2.6. Equality

The paradigms of equality and non-discrimination were already present in the founding treaties. In detail, discrimination on the basis of nationality was precluded by Article 7 Treaty establishing the European Economic Community (hereinafter “Treaty of Rome”), and equal pay for equal work regardless of gender was advanced by Article 119 Treaty of Rome. Nowadays, it is enshrined in Articles 18 and 19 Treaty on the Functioning of the European Union (hereinafter “TFEU”).<sup>46</sup> As advanced by the Court, equality means that whereas equal situations are to be treated equally, diverse situations are to be treated differently unless an objective justification allows otherwise.<sup>47</sup> In its case law, the Court has visited numerous aspects of equality. Notably, equality before the law, religious equality, and the prohibition of sex discrimination.<sup>48</sup> Hungary and Poland appear to be examples of what not to do in order to comply with equality. As it seems, both fail to recognise same-sex unions in the form of marriage,<sup>49</sup> and both engage in other forms of discriminatory

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<sup>44</sup> The Economist Intelligence Unit (n 40).

<sup>45</sup> Freedom House (n 39).

<sup>46</sup> Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/01 (TFEU).

<sup>47</sup> Case C-106/83 *Sermide* [1984] ECLI:EU:C:1984:394, para 28.

<sup>48</sup> Case C-292/97 *Karlsson* [2000] ECLI:EU:C:2000:202, Case 130/75 *Prais v Council* [1976] ECLI:EU:C:1976:142, and Case C-149/77 *Defrenne v Sabena* [1976] ECLI:EU:C:1976:56, respectively.

<sup>49</sup> BBC News, ‘Hungary bans same-sex couples from adopting children’ *BBC News* (Budapest, 15 December 2020) <<https://www.bbc.com/news/world-europe-55324417>> accessed 10 June 2021. Adam Easton, ‘LGBT Rights: New threat for Poland’s ‘rainbow families’’ *BBC News* (Warsaw, 17 March 2021) <<https://www.bbc.com/news/world-europe-56412782>> accessed 10 June 2021.

treatment against the LGBT community. Whereas the former enacted a law precluding same sex couples from adopting,<sup>50</sup> the latter prompts small towns to declare themselves free LGBT zones.<sup>51</sup> Further, the Court has upheld equality to be a general principle of EU law.<sup>52</sup> Besides qualifying as a principle and a value, equality is also an objective of the EU,<sup>53</sup> and a fundamental right.<sup>54</sup> Perhaps the fact that it embodies an aim in itself is what led the Court to establish the lawfulness of any differential treatment as long as it is intended to promote equality.<sup>55</sup> In turn, chapter III of the Charter entitled “equality” has a crucial role in construing the scope of equality as a fundamental right. In what concerns the status of Member States before the treaties, equality is linked to the principle of solidarity, i.e., to a balance of rights and obligations by reason of membership.<sup>56</sup> To this day, inequality is present throughout the EU. Once again, Hungary and Poland appear to show how. In Hungary, transsexual people have been impeded from accessing legal recognition, same-sex marriage has been excluded from the constitution, same-sex adoption has been precluded, and to be homosexual is often referred to by the government as a form of aberration.<sup>57</sup> In Poland, the situation on the ground is not remarkably different. Some of its local authorities have gone as far as declaring themselves LGBT ideology-free zones.<sup>58</sup>

As any other EU value, equality extends to a variety of areas. Another topic of interest is equality between genders. Although it is frequently regarded as a ruling principle of the EU, it seems to be far from fully established within all Member States. The 2020 edition of the Gender Equality Index

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<sup>50</sup> DW News, ‘LGBT rights: Hungary passes law banning same-sex adoption’ *DW News* (Budapest, 15 December 2020) <<https://www.dw.com/en/lgbt-rights-hungary-passes-law-banning-same-sex-adoption/a-55947139>> accessed 10 June 2021.

<sup>51</sup> Lucy Ash, ‘Inside Poland’s LGBT-free zones’ *BBC News* (Warsaw, 21 September 2020) <<https://www.bbc.com/news/stories-54191344>> accessed 10 June 2021.

<sup>52</sup> Joined Cases C-117/76 and 16/77 *Ruckdeschel* [1977] ECLI:EU:C:1977:160, para 7.

<sup>53</sup> TEU, article 3.

<sup>54</sup> Charter, article 20 et seq.

<sup>55</sup> Case C-104/09 *Roca Álvarez* [2010] ECR I-08661, paras 33 et seq.

<sup>56</sup> Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (n 4) 22 et seq.

<sup>57</sup> Rachel Savage, ‘Political backlash’ blamed for halting LGBT+ rights gains in Europe’ *Reuters* (London, 17 May 2021) <<https://www.reuters.com/article/us-europe-lgbt-rights-idUSKCN2CY0HN>> accessed 7 June 2021.

<sup>58</sup> BBC News, ‘EU declared ‘LGBT freedom zone’ in response to Poland’s ‘LGBT-free zones’’ *BBC News* (Warsaw, 11 March 2021) <<https://www.bbc.com/news/world-europe-56366750>> accessed 7 June 2021.

illustrates this (quite strait-forwardly) given that no country scores perfectly.<sup>59</sup> Even Sweden, often deemed as a pioneer in terms of gender equality, is awarded a score of 83.8 in a scale of 1 to 100.<sup>60</sup>

## 2.7. Rule of Law

Throughout time, several scholars have proposed diverse understandings of the rule of law as a concept. Considering that the scope of the present thesis does not directly concern such doctrines, these will not be analysed. It is only to note that, overall, the rule of law may be perceived as a set of mandates liable to bind governmental authorities in procedural and substantive terms.<sup>61</sup>

First and foremost, the EU is based on the rule of law.<sup>62</sup> In harmony with the Court, the latter entails several principles. The rule of law has been invoked by the Court in connection with the principle of legality namely to preclude authorities from applying penalties beyond the boundaries of what is permitted by law.<sup>63</sup> In fact, the Court emphasises that a EU based on the rule of law encompasses adherence to the principles of legality,<sup>64</sup> and of legal certainty,<sup>65</sup> i.e., the governing ideal that legal rules ought to be clear and precise. Such a rationale seeks to ensure foreseeable outcomes on all scenarios covered by EU law, and includes the principle of protection of legitimate expectations and that of the authority of *res judicata*.<sup>66</sup> Touching upon the concept of rule of law as construed by the Court, equality before the law as prescribed by Article 20 Charter is also to be mentioned.<sup>67</sup>

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<sup>59</sup> European Institute for Gender Equality, 'Index Score for the European Union for the 2020 Edition' (*Gender Equality Index*, 2021) <<https://eige.europa.eu/gender-equality-index/2020>> accessed 7 June 2021.

<sup>60</sup> European Institute for Gender Equality, 'Index Score for Sweden for the 2020 Edition' (*Gender Equality Index*, 2021) <<https://eige.europa.eu/gender-equality-index/2020/SE>> accessed 7 June 2021.

<sup>61</sup> Manuel Kellerbauer, Marcus Klammert and Jonathan Tomkin (n 4).

<sup>62</sup> Case C-294/83 *Les Verts* [1986] ECR I-01339, para 23.

<sup>63</sup> Case C-310/16 *Dzivev* [2019] ECLI:EU:C:2019:30, paras 34 et seq.

<sup>64</sup> Case C-496/99 *P - Commission v CAS Succhi di Frutta* [2019] ECR I-03801, para 63.

<sup>65</sup> Case C-212/80 *Meridionale Industria Salumi and Others* [1981] ECR I-02735, para 10.

<sup>66</sup> Joined Cases C-542/18 RX-II and 543/18 RX-II *Réexamen Simpson v Council* [2020], Opinion of AG Sharpston, para 90.

<sup>67</sup> Case C-550/07 *P - Akzo Nobel Chemicals and Akros Chemicals v Commission* [2010] ECR I-08301, para 54.

Likewise, the rule of law prescribes the prohibition of arbitrariness by the executive,<sup>68</sup> effective judicial protection by independent and impartial judges,<sup>69</sup> and effective judicial review.<sup>70</sup>

As it was established by the Commission, recent case law of the Court epitomises a significant contribution to reinforce and realise the rule of law, and to assert the EU as a union of values.<sup>71</sup>

Curiously, the previously mentioned components of the rule of law go hand in hand with the ones identified as such by the ECtHR and by the European Commission for Democracy through Law (hereinafter “Venice Commission”).<sup>72</sup> The Venice Commission identified the following elements as comprising the scope of the rule of law: legality, legal certainty, preclusion of arbitrariness, non-discrimination and equality before the law, respect for human rights, and access to justice including guarantee of independent and impartial judges.<sup>73</sup> In 2016, those components were redesigned by the Venice Commission into five and the role of human rights as the cornerstone of the rule of law was strongly highlighted.<sup>74</sup> As a result of the overlapping between the Commission’s understating of the rule of law and that of the Venice Commission, there is a consensus concerning its core within the European arena.<sup>75</sup> Consensus, however, does not mean uniformity as the implementation of such a common approach may vary (and does vary) amidst Member States.<sup>76</sup>

Hungary and Poland appear to illustrate how the rule of law may be violated. The ideal of non-discrimination and equality before the law is a perfect way to start. It was previously mentioned that both countries fail to treat homosexual and heterosexual couples in equal terms, thus opposing such a mandate. More so, Hungary and Poland seem to disrespect the so needed independence of

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<sup>68</sup> Case C-682/15 *Berlioz Investment Fund* [2017] ECLI:EU:C:2017:373, para 51.

<sup>69</sup> Case C-64/16 *Associação Sindical dos Juizes Portugueses* [2018] ECLI:EU:C:2018:117, paras 31, 37 and 41.

<sup>70</sup> Case C-72/15 *Rosneft* [2017] ECLI:EU:C:2017:236, paras 73.

<sup>71</sup> Commission, ‘Further strengthening the Rule of Law within the Union: State of play and possible next steps’ (Communication) COM (2019) 163 final.

<sup>72</sup> Laurent Pech, Joelle Grogan and others ‘Meaning and Scope of the EU Rule of Law’ (RECONNECT - Reconciling Europe with its Citizens through Democracy and Rule of Law, 2020) 36.

<sup>73</sup> European Commission for Democracy through Law (Venice Commission), 86th Plenary Session 25-26 March 2011, ‘Report on the Rule of Law’ (4 April 2011) 512/2009, CDL-AD(2011)003rev.

<sup>74</sup> European Commission for Democracy through Law (Venice Commission), 106th Plenary Session 11-12 March 2016, ‘Rule of Law Checklist’ (18 March 2016) 711/2013 CDL-AD(2016)007rev.

<sup>75</sup> Laurent Pech, Joelle Grogan and others (n 73) 38.

<sup>76</sup> Commission (n 34).

the judiciary. Whereas in Hungary legal amendments increased the power of the President over the appointment of judges to the supreme court,<sup>77</sup> in Poland sanctions are applicable to judges who question the ruling party.<sup>78</sup>

## 2.8. Human Rights

The relevance of fundamental rights is rooted in its advancement as a cornerstone value within the meaning of Article 2 TEU, and in the Charter being an instrument of EU primary law as prescribed by Article 6(1) TEU. Whereas it is true that fundamental rights as a value may be operationalized by reference to the content of the Charter,<sup>79</sup> it may even go beyond it. Indeed, Article 51 Charter limits the application of the Charter itself to a scenario in which a Member State applies law of the EU. Irrespective, certain scholars have proposed that Article 2 TEU imposes obligations upon Member States even in exclusively domestic situations as long as these concern the essence of the fundamental rights present in the Charter. Such an understanding begs for the differentiation between the essential content of a right and its peripheral or additional one.<sup>80</sup>

In theoretical terms, the violation of one or more of the other values is liable to (additionally) breach human rights. Considering the treatment of the LGBT community by Hungary and Poland as an example, it is easy to understand how the preclusion of same sex marriage and adoption amounts to an infringement of their right to self-determination, besides violating the principle of equality.

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<sup>77</sup> Amnesty International, 'Legal Changes have to Guarantee the Independence of the Judiciary in Hungary' (*Status of the Hungarian Judiciary*, 2021)

<<https://www.amnesty.org/download/Documents/EUR2736232021ENGLISH.PDF>> accessed 8 June 2021.

<sup>78</sup> Allyson K. Duncan and John Macy, 'The Collapse of Judicial Independence in Poland: A Cautionary Tale' (2021) 104 *Judicature* 41, 41 <<https://judicature.duke.edu/wp-content/uploads/2020/12/DUNCANv2-compressed.pdf>> accessed 8 June 2021.

<sup>79</sup> European Parliamentary Research Service (n 9).

<sup>80</sup> Armin von Bogdandy, Carlino Antpöhler, Michael Ioannidis, 'Protecting EU Values - Reverse Solange and the Rule of Law Framework' (2016) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-04, 3 <[https://apps.eui.eu/EUI\\_API/EVENTSV2/Attachments/Index?id=12848](https://apps.eui.eu/EUI_API/EVENTSV2/Attachments/Index?id=12848)> accessed 16 April 2021.

Touching upon human dignity, to accommodate asylum seekers in overcrowded and insalubrious reception centres breaches (namely) their right to privacy.<sup>81</sup>

### **3. Relevance of the Fundamental Values: Accession and Membership**

Albeit the exact boundary of these values is blurred, they are extremely relevant for both Member States and prospective members of the EU. Following Article 2 TEU in connection with Article 7 TEU, the fundamental values of the EU ought to be commonly shared and respected by current Member States. More so, as stipulated by Article 49 TEU, for a given country to apply for accession to the EU it ought to comply with, and promote, the cornerstone values stipulated in Article 2 TEU. Albeit both premises imply that the EU itself is demanding concerning compliance with its values, it is unclear whether the EU is equally pressing towards current and acceding members. As that is the scope of the present thesis, the following sections will be dedicated to studying compliance with the said values by prospective members and current EU Member States, respectively.

### **4. Accession to the EU**

To fully understand how demanding the EU is towards aspiring members concerning compliance with its foundational values, several aspects ought to be addressed. Because accession to the EU is linked to both the procedure of accession and the Copenhagen criteria, these will be examined in the following sections. Subsequently, the effectiveness of that same conditionality will be analysed.

#### **4.1. Eligibility Criteria**

According to Article 49 TEU, for a particular country to apply for accession to the EU, it ought to comply with three mandates. Firstly, it must be a European State; secondly it ought to respect and

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<sup>81</sup> Refworld (n 27).

commit to the EU values as put forward by Article 2 TEU; and thirdly it shall fulfil the criteria for accession stipulated by the European Council, specifically the Copenhagen European Council in 1993 and the Madrid European Council in 1995.<sup>82</sup> Importantly, the former introduced the so-called Copenhagen criteria, a set of political and economic standards to be acknowledged and observed by prospective Member States.<sup>83</sup> These are to be satisfied before candidate countries can become actual members of the EU, i.e., they embody accession conditions.<sup>84</sup> In the economic sphere, aspiring members are to establish a functioning free market economy and are to be capable of subsisting considering the competition framework and all market forces within the EU. Future members are also to accept the *acquis*, i.e., are to incorporate policies, standards and rules that compose the whole body of EU law.<sup>85</sup> The Madrid European Council strengthened the latter. It stipulated that candidate countries must be capable of accepting and effectively implementing EU law through judicial and administrative structures.<sup>86</sup> Indeed, whereas it is undeniably relevant that the candidate country transposes the whole body of EU law, it is further important that the legislation itself is effectively applied.<sup>87</sup> Politically, candidate countries ought to establish stable institutions liable to safeguard democracy, the rule of law, and human rights including the protection of minorities. It is relevant to note that for negotiations to be opened, the political criteria shall be fulfilled.<sup>88</sup> Such a paradigm was introduced by the Helsinki European Council in 1999 which also stressed the need for a given country to comply with all the arms of the Copenhagen

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<sup>82</sup> Publications Office, 'Treaty on European Union - Joining the EU' (*Summaries of EU legislation*, 17 January 2020) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:l14536>> accessed 19 April 2021.

<sup>83</sup> Danijela Dudley, 'European Union membership conditionality: the Copenhagen criteria and the quality of democracy' (2020) 20 *Southeast European and Black Sea Studies* <<https://www.tandfonline.com/doi/full/10.1080/14683857.2020.1805889>> accessed 19 April 2021.

<sup>84</sup> Dren Gerguri and Afrim Hoti, 'The Copenhagen Political Criteria for joining the EU: The case of Kosovo' (2017) 54 *Teorija in Praksa* 1008, 1010 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3097791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3097791)> accessed 20 April 2021.

<sup>85</sup> Danijela Dudley (n 83).

<sup>86</sup> Publications Office (n 82).

<sup>87</sup> Dren Gerguri and Afrim Hoti (n 84) 1011.

<sup>88</sup> Publications Office, 'Accession Criteria (Copenhagen Criteria)' (*Glossary of Summaries*) <[https://eur-lex.europa.eu/summary/glossary/accession\\_criteria\\_copenhagen.html](https://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html)> accessed 20 April 2021.



criteria in order to accede to the EU.<sup>89</sup> The fact that the Copenhagen criteria included a political realm implies two key ideas. Firstly, EU values are of utmost importance and are to be observed by all aspiring members. Secondly, such values are beyond the EU *acquis*. In fact, should they be covered by the *acquis*, the political criteria would be simply redundant. As a result, if a certain country implements the whole body of EU law, there is no *per se* guarantee that it respects the cornerstone values of the EU.<sup>90</sup> Considering its overlap with the EU values, in the upcoming sections reference will be mostly made to the political domain of the Copenhagen criteria. Yet, one shall note that the fundamental values transcend it.

#### **4.2. Accession Procedure**

Since the eligibility criteria has been put forward, an overview of the accession process is in order. The priorly referred entails five phases: application, opinion by the Commission, candidate status, negotiations, and accession.<sup>91</sup>

First and foremost, the prospective European country which acknowledges and observes Article 2 TEU shall lodge a formal application with the Council. Subsequently, the Parliament, Commission and national governments of current Member States are informed of the application at hand. The second phase of the accession process is initiated when, upon consultation with the Council, the Commission issues an opinion concerning the relevant application for membership. These official opinions encompass an extensive evaluation concerning improvements that have occurred in the applicant State, financial aspects, respect for the EU agreements and progresses to be registered in

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<sup>89</sup> Erich Hochleitner, 'The Political Criteria of Copenhagen and their application to Turkey' (OIES 2005) <<https://www.aies.at/download/2005/hochleitner4.pdf>> accessed 21 April 2021.

<sup>90</sup> Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3, 32 <<https://academic.oup.com/yel/article/doi/10.1093/yel/yeaa012/6064852>> accessed 20 April 2021.

<sup>91</sup> Publications Office (n 82).

the years to come.<sup>92</sup> Following the previous, the Council acting unanimously grants the relevant country the status of candidate. Such a step precedes negotiations.<sup>93</sup> These are open if the Council unanimously so decides, and endeavour to ensure that the country concerned complies with the accession conditionality, i.e., the formerly addressed Copenhagen criteria. The EU values are already relevant at this stage considering that negotiations may not be open if the aspiring member fails to comply with such values.<sup>94</sup> More so, negotiations concern both the conditions under which the particular State will accede to the EU and the acceptance and implementation of the *acquis*.<sup>95</sup> In this regard, the *acquis* is grouped into 35 policy areas or chapters and the Council is allowed to set benchmarks based on screening reports regarding each individual chapter.<sup>96</sup> The conclusion of the screening report embodies a recommendation from the Commission to launch negotiations or to require the country concerned to satisfy a set of criteria instead.<sup>97</sup> The screening exercise is jointly conducted by the Commission and the candidate country and embodies a detailed analysis of the *acquis*. It endeavours not only to allow aspiring members to become familiarised with the body of EU law and to demonstrate their capacity to implement it, but further to isolate the domains where progress ought to be made.<sup>98</sup> The screening exercise is, at least in theoretical terms, another moment where the values of the EU are of relevance. However, as it will be established below, although attention is drawn to the Copenhagen criteria, the cornerstone values of the EU are often disregarded.<sup>99</sup> Still concerning the negotiations stage, it is a responsibility of the Commission to

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<sup>92</sup> Jill Parker, 'West Meets East: A Discussion of European Union Enlargement and Human Rights' (2003) 11 *Tulsa Journal of Comparative and International Law* 603, 607 <<https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1210&context=tjcil>> accessed 20 April 2021.

<sup>93</sup> *Ibid.*

<sup>94</sup> Publications Office (n 88).

<sup>95</sup> Publications Office, 'Accession Negotiations' (*Glossary of Summaries*) <[https://eur-lex.europa.eu/summary/glossary/accesion\\_negotiations.html](https://eur-lex.europa.eu/summary/glossary/accesion_negotiations.html)> accessed 20 April 2021.

<sup>96</sup> Publications Office (n 82).

<sup>97</sup> European Commission, 'Steps Towards Joining' (*European Neighbourhood Policy And Enlargement Negotiations*) <[https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining_en)> accessed 21 April 2021.

<sup>98</sup> Publications Office, 'Screening' (*Glossary of Summaries*) <<https://eur-lex.europa.eu/summary/glossary/screening.html>> accessed 20 April 2021.

<sup>99</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3).

assess and monitor the implementation of the *acquis* by the relevant country in the pre-accession phase, and to assist it with funding instruments. In turn, for a certain chapter of the *acquis* to be provisionally closed, it is crucial that the acceding member demonstrates that it has implemented the *acquis* of that same chapter or that it will implement it by the date of accession.<sup>100</sup> As such, once all 35 chapters have been closed, negotiations are deemed as complete. This is the moment when an accession treaty is finalised by a drafting conference of the current Member States. More so, the said treaty ought to be unanimously approved by the Council and to receive the consent of the Parliament. Only then the accession treaty is signed and ratified by all Member States of the EU and the acceding country.<sup>101</sup>

#### **4.3. Level of Compliance with Article 2 TEU**

A set of essential aspects derive from the foregoing. Primarily, Article 49 TEU requires prospective members to observe and commit to the fundamental values advanced in Article 2 TEU. Considering that a given country ought to comply with the latter in order to lodge an application,<sup>102</sup> commitment and observance of the cornerstone values is of utmost relevance. More so, the political realm of the Copenhagen criteria stresses the need to respect such values. It is to recall that this conditionality requires aspiring members to establish stable institutions liable to safeguard democracy, the rule of law, human rights, and respect for and protection of minorities.<sup>103</sup> Indeed, there is a clear overlap between the aforementioned and the foundational values, although importantly the latter go beyond the former. In this regard, it is to be noted that the political arm of the Copenhagen criteria ought to be complied with before negotiations are open.<sup>104</sup> It seems (at least theoretically) that the EU has a well delineated system liable to avoid and halt the accession of countries which do not comply

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<sup>100</sup> Publications Office (n 82).

<sup>101</sup> Ibid.

<sup>102</sup> TEU, article 49.

<sup>103</sup> Publications Office (n 88).

<sup>104</sup> Ibid.

with its fundamental values. In fact, it seems quite simple. I.e., if compliance with the values is key for a country to access the EU, non-compliance ought to be equivalent to its non-accession. But, as it will be presented in the following sections, such a system seems to be flawed and far away from being respected. The EU appears to disregard the mandates of Article 2 TEU and to overlook failures of applicant countries. Regarding the enlargement of the EU, its geopolitical incentives are often primarily considered, in comparison to diffusion of its fundamental values. Last but not least, the apparent vagueness of the Copenhagen criteria creates serious doubts concerning compliance.

#### **4.4. Is Article 2 TEU Only Theoretically Relevant?**

Albeit Article 49 TEU expressly demands compliance with the values enshrined in Article 2 TEU for a given country to become an actual member of the EU, the screening reports carried by the Commission seem to disregard it.<sup>105</sup> The screening report of the Commission on Serbia serves as an example. In fact, although the 2011 Commission's opinion mentions Article 49 and Article 2 TEU, it only assesses compliance with the Copenhagen criteria.<sup>106</sup> As previously stated, there is an overlap between the political arm of the Copenhagen criteria and the fundamental values as put forward by Article 2 TEU, however Article 2 TEU is broader than such criteria. Besides the rule of law, human rights, respect for and protection of minorities, and democracy, it includes human dignity, justice, non-discrimination, equality, freedom, plurality, solidarity, tolerance, and gender equality.<sup>107</sup> Similar logic applies to the regular assessment reports compiled by the Commission throughout the accession negotiations.<sup>108</sup> For instance, its 2016 report on Turkey addresses the political realm of the Copenhagen criteria, but fails to include reference to the other values present in Article 2 TEU.<sup>109</sup>

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<sup>105</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 264.

<sup>106</sup> Commission, 'Commission Opinion on Serbia's application for membership of the European Union' COM (2011) 0668 final.

<sup>107</sup> TEU, article 2.

<sup>108</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 264.

<sup>109</sup> Ibid.

Such a reality begs for the question whether respect for Article 2 TEU (as undoubtedly stipulated by Article 49 TEU) goes beyond the theoretical realm. Problematically, the answer seems to be negative.

#### 4.5. Overlooking Candidate Country Failures

It is rare for a particular country intending to accede to the EU to simply and expressly reject the conditionality imposed by the latter. Oftentimes, such a country formally complies with that criteria but fails to implement it in practice. Yet, the EU appears to prompt these superficial acts by not holding prospective members responsible and by allowing them to move forward in the accession procedure.<sup>110</sup> Four examples of such a reality ought to be presented: Poland, Turkey, and Serbia and Montenegro.

##### 4.5.1. The Case for Poland

Primarily, as formerly mentioned, the Helsinki European Council in 1999 highlighted the need for all arms of the Copenhagen criteria to be fulfilled prior to accession.<sup>111</sup> One of these arms rests on compliance with the *acquis*, i.e., the whole body of EU law. Such a requirement was stressed by the Commission itself.<sup>112</sup> However, at the moment of accession, Poland had failed to implement more than 250 directives.<sup>113</sup> More so, it is to recall that the Madrid European Council added the need to for candidate countries to effectively implement the *acquis* through administrative and judicial structures.<sup>114</sup> Nonetheless, merely one year prior to accession, a disparity between the

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<sup>110</sup> Danijela Dudley (n 83) 529.

<sup>111</sup> Erich Hochleitner (n 89).

<sup>112</sup> Commission, 'Towards the Enlarged Union Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries' COM (2002) 700 final.

<sup>113</sup> Paulina Rezler, 'The Copenhagen Criteria: Are they Helping or Hurting the European Union?' (2011) 14 *Touro International Law Review* 390, 399  
<<https://heinonline.org/HOL/LandingPage?handle=hein.journals/touint14&div=14&id=&page=>> accessed 22 April 2021.

<sup>114</sup> Publications Office (n 82).

adoption of legislation by Poland and its administrative capacity to implement such laws was noted.<sup>115</sup> In connection with the fundamental values, certain remarks ought to be made. Concerning the rule of law and democracy, the Commission stressed the absence of an adherence to the *acquis* regarding the fight against corruption and fraud.<sup>116</sup> Here, emphasis shall be added as corruption behaviours were simultaneously seen as being steadily increasing from an already high level. Not surprisingly, in 2003, little progress had been registered concerning counter-corruption practices.<sup>117</sup> In turn, touching upon human rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “Convention”) must be mentioned. Poland had failed to enforce legal aid mandates as prescribed by the said Convention. As held by the Commission, the 2003 Polish legal aid system lacked transparency and was under-developed, thus leading citizens to be uninformed of their own rights.<sup>118</sup> Altogether, it seems that Poland presented clear deficits in areas strongly connected to the fundamental values of the EU. Yet so, Poland acceded to what is seen as a union of values.

#### **4.5.2. The Case for Turkey**

As it was held by the Helsinki European Council in 1999, fulfilment of the Copenhagen political criteria is fundamental for negotiations to be launched.<sup>119</sup> In this regard, Turkey expressly addresses non-compliance by the EU with such a paradigm. First and foremost, it is to note that the 2004 Commission report on Turkey embodies the basis of the decision to open negotiations.<sup>120</sup> A set of aspects included in this report shall be addressed. In 2004, albeit the Commission referred to Turkey as a stable democracy based on free elections, its domestic electoral law required 10% of

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<sup>115</sup> Commission, ‘Comprehensive monitoring report on Poland's preparation for membership’ SEC (2003) 1027 final.

<sup>116</sup> Tanja Marktler, ‘The Power of the Copenhagen Criteria ’(2008) 2 *Croatian Yearbook of European Law and Policy* 343, 351 <<https://www.cyelpl.com/index.php/cyelpl/article/view/23>> accessed 26 April 2021.

<sup>117</sup> Commission (n 115).

<sup>118</sup> *Ibid.*

<sup>119</sup> Publications Office (n 88).

<sup>120</sup> Erich Hochleitner (n 89).

the votes for a certain party to be represented in the Parliament. In practice, large parts of the population did not have parliamentary representation. In 2002, AKP (Justice and Development Party) achieved 66% of all parliamentary seats with only 34.2% of the votes. CHP (Republican People's Party) held the remaining 34% of parliamentary seats, after being voted by 19.4% of the population. As a result, around 46% of the Turkish population was not represented in the assembly. Also to note, Turkey allows for alterations to the constitution without the need for a referendum provided that 360 parliamentary votes so decide, and AKP gathered 363 seats.<sup>121</sup> Regarding the rule of law, the Commission has duly noted that albeit the principle of judiciary independence is enshrined in the Turkish constitution, its actual implementation is undermined by constitutional provisions.<sup>122</sup> In turn, the Commission also registered the need for additional measures in the realm of human rights. In 1950, Turkey became a member of the Council of Europe and (albeit often with reservations) it committed to closely all international and European conventions on human rights. Nevertheless, from October 2003 to August 2005, the ECtHR found 132 infringements of the Convention, thus clearly showing deficits in such a domain.<sup>123</sup> Still concerning human rights, as of 2004, torture by police officers, arbitrary and harmful imprisonment of activists, journalists and lawyers as well as discrimination and violence against women were registered.<sup>124</sup> More so, in the same year, Turkey was deemed as a partly free State.<sup>125</sup> In a partly free State, while basic political rights and civil liberties are theoretically safeguarded, these are eroded by reason of corruption and a flawed rule of law.<sup>126</sup> Considering the foregoing, it is hard to understand the reason behind the Commission's recommendation for the opening of negotiations.<sup>127</sup> Notably, to disregard, diminish and undermine the Copenhagen criteria sets a dangerous precedent. Ultimately, the EU's credibility

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<sup>121</sup> Staff and agencies, 'Islamic party wins Turkish general election' *The Guardian* (London 4 November 2002) <<https://www.theguardian.com/world/2002/nov/04/2>> accessed 22 April 2021.

<sup>122</sup> Commission, '2004 Regular Report on Turkey's progress towards accession' COM (2004) 656 final.

<sup>123</sup> Erich Hochleitner (n 89).

<sup>124</sup> *Ibid.*

<sup>125</sup> Freedom House (n 39).

<sup>126</sup> *Ibid.*

<sup>127</sup> Commission (n 122).

is imperilled as it sends a clear message that albeit the Copenhagen criteria are formally valid and relevant, material enforcement seems to be absent.<sup>128</sup> To make matters worse, ensuring compliance after membership was granted is further arduous.<sup>129</sup>

#### **4.5.3. The Case for Montenegro and Serbia**

At the present time, Montenegro and Serbia endeavour to accede to the EU. Whereas Montenegro was awarded candidate country status in 2010, Serbia acquired equal connotation in 2012. In turn, negotiations were launched in June 2012 and January 2014 respectively.<sup>130</sup> However, from 2006 (when the independent republics of Serbia and Montenegro were established) to the very moment when both States were deemed as applicant countries, the quality of democracy recorded minor developments and in specific domains it even deteriorated.<sup>131</sup> In this regard, immediately prior to the dissolution of the State Union of Serbia and Montenegro, the country was ranked as free by the Freedom in the World rating with a total average score of 2.5 points.<sup>132</sup> Simultaneously, Serbia and Montenegro were recognized as semi-consolidated democracies amidst Nations in Transit, scoring 3.71 points and 3.89 points out of 7 respectively.<sup>133</sup> Likewise, both countries were considered to be flawed democracies by the Economist Intelligence Unit. In detail, while Serbia scored 6.52 points in the overall assessment of democracy, Montenegro scored 6.57 points.<sup>134</sup> This was the framework prior to the beginning of the accession procedure. Fast forward to 2010, right when Montenegro was officially recognized as an applicant country, its overall assessment of democracy had decreased to 6.27, its Nations in Transit score had changed to 3.79, and its freedom rating had

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<sup>128</sup> Paulina Rezler (n 113) 410.

<sup>129</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 266.

<sup>130</sup> Danijela Dudley (n 83) 532.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Freedom House, 'Fragile Frontier Democracy's Growing Vulnerability in Central and Southeastern Europe' (*Freedom House*, 2012) <<https://freedomhouse.org/sites/default/files/2020-02/NIT%202012%20Booklet.pdf>> accessed 22 April 2021.

<sup>134</sup> Laza Kekic, 'The Economist Intelligence Unit's Index of Democracy' (*The Economist Intelligence Unit*, 2007) <[https://www.economist.com/media/pdf/democracy\\_index\\_2007\\_v3.pdf](https://www.economist.com/media/pdf/democracy_index_2007_v3.pdf)> accessed 22 April 2021.



not registered alterations. More so, when negotiations were launched, the overall democracy level had decreased to 6.05, the Nations in Transit score raised to 3.82 and the freedom rating remained unaltered. Similar rationale holds true concerning Serbia. In 2012, when it became a candidate country, its overall assessment of democracy had lowered to 6.33, its Nations in Transit score had decreased to 3.64 and its freedom score had further declined to 2. Later in 2014, when official negotiations were opened, the scores did not show great progress. Whereas the overall democracy level increased to 6.71, its Nations in Transit and freedom scores did not change. Even nowadays neither Montenegro nor Serbia have registered remarkable developments. Quite the opposite, Montenegro's quality of democracy has deteriorated. The Freedom House ranks it as partly free, its Nations in Transit score is 4.14 and its overall level of democracy is 5.65, the equivalent of a hybrid regime. Similar logic applies to Serbia. It is also deemed as partly free, it scores 4.04 in its Nations in Transit democracy assessment and its overall democracy level is at 6.41.<sup>135</sup>

Montenegro and Serbia illustrate a set of remarks that ought to be stressed. The previously referred Turkish scenario is a perfect way to start. Indeed, if negotiations are only to be launched when the political Copenhagen criteria is fulfilled it is hard to grasp what motivated its opening considering the democracy deficits that both countries presented at the relevant time. Further intriguing, the accession process endeavours to allow the aspiring member to adapt and modify its domestic rules, institutions, and infrastructures in order to be able to fulfil its responsibilities as a Member State.<sup>136</sup> It expressly follows from Article 2 TEU read in connection with Article 7 TEU that the values of the EU are to be complied with by all Member States. Not surprisingly, these entail democracy. It is thus to assess not only why negotiations were open, but also why the EU did not delay (or cease) the accession procedure until the needed requirements were met. In fact, that same procedure is often erroneously perceived as a one way straight-forward path, when truly it ought to be seen as a

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<sup>135</sup> Danijela Dudley (n 83) 532.

<sup>136</sup> European Commission (n 97).

bumpy road with the possibility of return. Additionally, the absence of a right to expel current Member States shall be considered by the EU throughout the whole process.<sup>137</sup> In other words, the EU shall bear in mind that once a country becomes a Member State, the only way to lose such a status is if it voluntarily wishes to do so. Here, the EU presents itself as a community of shared values, thus it is in its interest that its members comply with them. Yet, it simultaneously seems to fail to delay the accession of, or refuse access to, countries which through the accession procedure show that they are unable to implement those fundamental values.

#### 4.6. Vagueness of the Conditionality Criteria

The arms of the Copenhagen criteria have been formerly presented. One characteristic unites them: vagueness.<sup>138</sup> Irrespective, reference will solely be made to its political domain. One shall recall that politically the Copenhagen conditionality requires prospective members to protect democracy, the rule of law, and human rights including the rights of minorities.<sup>139</sup> However, to construe the scope of such concepts is at least challenging. Further details were not provided by the 1997 Copenhagen European Council, and to this day diverse theoretical doctrines have been put forward intending to define for instance democracy and the rule of law. Same logic applies to the rights of minorities, these may be perceived as a negative as well as a positive right, and there are no clear benchmarks concerning compliance or non-compliance.<sup>140</sup> Copenhagen-related documents provide a general overview of these concepts but whereas the Commission takes several pages to assess the economic conditionality and the adoption of the *acquis*, solely two to three pages are

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<sup>137</sup> TEU, article 50.

<sup>138</sup> Paulina Rezler (n 113) 404.

<sup>139</sup> Publications Office (n 88).

<sup>140</sup> Gwendolyn Sasse, 'Gone with the Wind? Minority Rights in Central and Eastern Europe before and after EU enlargement' (2006) *Ethnic Mobilization in the New Europe*, 1, 5  
<[https://www.researchgate.net/publication/228461902\\_Gone\\_with\\_the\\_Wind\\_Minority\\_Rights\\_in\\_Central\\_and\\_Eastern\\_Europe\\_before\\_and\\_after\\_EU\\_enlargement](https://www.researchgate.net/publication/228461902_Gone_with_the_Wind_Minority_Rights_in_Central_and_Eastern_Europe_before_and_after_EU_enlargement)> accessed 25 April 2021.

reserved to the political criteria.<sup>141</sup> The reader is thus left with little insight on the latter. More so, it follows from the said papers that the Commission combines democracy and the rule of law, although these are separate terms.<sup>142</sup> Under their umbrella, the Commission regards five main areas: elections, the functioning of the executive, legislature and judiciary, and counter-corruption measures. These entail a further generalist approach than one would expect.<sup>143</sup> Concerning the minority criterion, the Commission monitors a set of values and assesses compliance with namely the United Nations Declarations and the Convention.<sup>144</sup> The absence of clear, precise, and determined concepts awards accession officials a wide margin of interpretative discretion. The outcomes are problematic and allow for the conclusion that such a criteria as broadly drawn is not sufficient to serve as a measurement tool for accession purposes.<sup>145</sup> Primarily, the conditionality criteria is inconsistently applied towards different countries.<sup>146</sup> Secondly, officials in charge of the accession procedure may be less demanding than necessary as it is ultimately up to them to determine what is the core of the criteria and if in the relevant case these are (or not) satisfied. All in all, the absence of an established framework of definitions and objective standards to be observed by prospective members enhances uncertainty and may promote the creation of lower thresholds to be met.

#### **4.7. Motivation Behind the Enlargement of the EU**

It derives from the previous sections that the EU seems to disregard compliance with its values. As a result, it does not come as a surprise that previous enlargements were not (solely) motivated by

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<sup>141</sup> Tanja Marktler (n 116) 349.

<sup>142</sup> Ibid.

<sup>143</sup> Dimitry Kochenov, 'Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law '(2004) 8 European Integration Online Papers 1, 2 <[https://www.researchgate.net/publication/26587695\\_Behind\\_the\\_Copenhagen\\_facade\\_The\\_meaning\\_and\\_structure\\_of\\_the\\_Copenhagen\\_political\\_criterion\\_of\\_democracy\\_and\\_the\\_rule\\_of\\_law](https://www.researchgate.net/publication/26587695_Behind_the_Copenhagen_facade_The_meaning_and_structure_of_the_Copenhagen_political_criterion_of_democracy_and_the_rule_of_law)> accessed 25 April 2021.

<sup>144</sup> Gwendolyn Sasse (n 140) 5.

<sup>145</sup> Dimitry Kochenov (n 143) 14.

<sup>146</sup> Paulina Rezler (n 113) 405.

the dissemination of such foundational values. Instead, the EU is deeply moved by geopolitical interests. Especially touching upon the Balkans region and Turkey.<sup>147</sup> To accept a politically driven accession process is to undermine and minimise the relevance of the existent conditionality. In other words, conditionality is voided of any practical relevance if applicant countries are awarded membership even in case of non-compliance. For the EU to be able to legitimately assert itself as a union of values, that same accession process shall be merit-based and not part of a geopolitical strategy.<sup>148</sup>

#### **4.8. Overall Assessment of Compliance with the Fundamental Values by Acceding**

##### **Members**

It derives from the previous sections that the EU is not as demanding as it should be concerning compliance with its cornerstone values. Ultimately, this is the reason why prospective members gravitate towards non-compliance. In other words, the absence of consequences imposed by the EU in case of disregard prompts candidate countries to not observe those values. In fact, their failures seem to be insufficient to derail the accession procedure. Altogether, aspiring members do not pose great efforts to respect the cornerstone values of Article 2 TEU because practically they appear not to have to.<sup>149</sup> Alongside dismissing candidate country failures, non-compliance with the said values is also strongly related to the vagueness of the conditionality criteria and the growing politicization of the accession process. On the one hand, objective benchmarks alongside precise definitions would promote consistency and enhance an effective enforcement. On the other hand, should the enlargement be strictly and exclusively connected to the dissemination of the values of the EU, compliance would certainly be secured.

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<sup>147</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 267.

<sup>148</sup> Ibid.

<sup>149</sup> Danijela Dudley (n 83) 529.

## 5. EU Membership

Albeit Article 2 TEU proclaims the values of the EU to be commonly shared by current Member States, the EU is currently facing a crisis of values.<sup>150</sup> As it will be illustrated, Hungary and Poland contribute greatly to such crisis, although not exclusively.<sup>151</sup> It is widely known that in these countries the fundamental values are often disregarded. What comes as an unfortunate surprise is the EU's apparent inertia to react. It begs for the question whether the EU itself respects its so-called fundamental values, and whether it is equipped with sufficient and effective mechanisms to do so. Touching upon the latter, the noble theoretical proposals for novel responsive tools sustain a negative response. Without further ado, all these topics will be covered below.

### 5.1. The Case for Hungary

As early as in 2011, José Manuel Durão Barroso (the then president of the Commission), criticised Hungary for failing to commit to the values of the EU.<sup>152</sup> Such a criticism concerned new media laws enacted by the Hungarian government. In detail, a media council appointed by the government was awarded the prerogative to assess if future publications were in line with what was deemed as balanced and moral reporting. According to its assessment, such council could also issue fines.<sup>153</sup> More so, time dedicated to crime related coverage was limited and journalists could now be forced to disclose their sources. Needless to say, such a legal framework undermined cornerstone ideals of the EU, specifically the principle of media freedom and pluralism,<sup>154</sup> and ultimately democracy.

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<sup>150</sup> The Economist Times, 'European Union hit by new crisis, this time over money and values' *The Economist Times* (Budapest, 19 November 2020) <<https://economictimes.indiatimes.com/news/international/business/european-union-hit-by-new-crisis-this-time-over-money-and-values/articleshow/79303721.cms>> accessed 25 June 2021.

<sup>151</sup> Ibid.

<sup>152</sup> José Manuel Durão Barroso, 'Commission Statement by President Barroso at the press conference following the meeting of the European Commission with the Hungarian Presidency' (European Commission, 2011) <[https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_11\\_4](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_4)> accessed 26 April 2021.

<sup>153</sup> Stefan Bos, 'Hungary Introduces Europe's Most Restrictive Media Law' *VOA* (Hungary, 30 December 2010) <<https://www.voanews.com/europe/hungary-introduces-europes-most-restrictive-media-law>> accessed 26 April 2021.

<sup>154</sup> José Manuel Durão Barroso (n 152)

In fact, for a democratic State to qualify as such it ought to respect the former.<sup>155</sup> Here, the law at hand led journalists to conduct self-censorship and to feel pressured to decline revenues resulting from private and public advertising.<sup>156</sup> Also to note, these media laws were not publicly discussed with all stakeholders prior to being presented to the parliament.<sup>157</sup> And as simple as that, the world witnessed the first step towards the Hungarian crisis of values. Since then, numerous instances illustrate how Hungary continues to disregard Article 2 TEU.

First and foremost, it is relevant to recall that the separation of powers<sup>158</sup> alongside independent and impartial judges,<sup>159</sup> are fundamental mandates of the rule of law and democracy. Nonetheless, in April 2011, irrespective of international concerns regarding the absence of sufficient checks and balances between the executive and the legislature, Hungary approved a new constitution. Such a fundamental law was exclusively voted by the centre-right ruling party Fidesz.<sup>160</sup> Notoriously, its rules restricted the powers of the constitutional court, and enabled the State's president to dissolve the parliament in case the national budget was not approved.<sup>161</sup>

Even prior to the enactment of the new constitution, Hungary had endeavoured to limit the powers of its constitutional court. In August 2011, lawmakers designed a novel and worrisome process of nominating judges. A nominating committee which composition mirrored that of the parliament was established, thereby ensuring majority of the ruling party.<sup>162</sup> One month later, the number of sitting judges was raised to 15, thus allowing such a committee (and ultimately the ruling party) to

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<sup>155</sup> Freedom House (n 39).

<sup>156</sup> Human Rights Watch, 'Assessing the Impact of Hungary's New Constitution and Laws' (*Wrong Direction on Rights*, 16 May 2013) <<https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws>> accessed 26 April 2021.

<sup>157</sup> Katrin Nyman-Metcalf, 'Analysis of the Hungarian Media Legislation' (*Organization for Security and Co-operation in Europe Office of the Representative on Freedom of the Media*, 28 February 2011) <<https://www.osce.org/files/f/documents/b/3/75990.pdf>> accessed 28 April 2021.

<sup>158</sup> Dimitry Kochenov (n 143) 2.

<sup>159</sup> *Associação Sindical dos Juizes Portugueses* (n 69) paras 31, 37 and 41.

<sup>160</sup> Judy Dempsey, 'Hungarian Parliament Approves New Constitution' *New York Times* (Berlin, 18 April 2011) <<https://www.nytimes.com/2011/04/19/world/europe/19iht-hungary19.html>> accessed 26 April 2021.

<sup>161</sup> *Ibid.*

<sup>162</sup> Human Rights Watch (n 156).

appoint five judges.<sup>163</sup> All these changes linked to the composition of the constitutional court itself entered into force prior to the new constitution. According to the latter and also problematic, from January 2012 onwards the retirement age for judges was forcefully lowered from 70 to 62 years.<sup>164</sup> More so, its jurisdiction was severely limited in matters relating to budget and taxes.<sup>165</sup> For the purpose of the present thesis, it is to note that consequently the court's ability to rule on laws that may encompass an impact on human rights was dramatically narrowed.<sup>166</sup> But the changes did not stop here. Hungarian citizens were deprived of their right to initiate constitutional reviews *actio popularis*. In other words, the establishment of a real connection between an alleged violation and the claimant was now key for the latter to resort to public interest litigation. Not surprisingly, NGOs and other civil society bodies alike were severely affected.<sup>167</sup> The 2013 amendments eliminated the power of the constitutional court to consider the substance of the constitution, and laws that were priorly held unconstitutional by that court were introduced as amendments to the constitution.<sup>168</sup> One may easily grasp how the independence of the judiciary was now imperilled. The 2013 amendments to the constitution entailed other (worthy of attention) matters. Notoriously, they defined family restrictively to mean the one founded on marriage between men and women or on the link between a parent and their offspring. Not surprisingly, they clearly discriminated against same sex and unmarried families.<sup>169</sup> In December 2020, adoption became precluded for same sex couples. In May 2020, a novel bill prohibited transgender and intersex individuals from altering their gender in identity documents.<sup>170</sup> In this regard, both human rights, equality and the protection

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<sup>163</sup> Ibid.

<sup>164</sup> Chris Bryant, 'Hungary approves new constitution' *Financial Times* (Vienna, 18 April 2011) <<https://www.ft.com/content/004ac47c-68ed-11e0-9040-00144feab49a>> accessed 26 April 2021.

<sup>165</sup> Judy Dempsey (n 160).

<sup>166</sup> Human Rights Watch (n 156).

<sup>167</sup> Ibid.

<sup>168</sup> Human Rights Watch, 'Hungary: Constitution Changes Warrant EU Action' (*Human Rights Watch*, 12 March 2013) <<https://www.hrw.org/news/2013/03/12/hungary-constitution-changes-warrant-eu-action>> accessed 26 April 2021.

<sup>169</sup> Ibid.

<sup>170</sup> Lindsay Isaac and Sharon Braithwaite, 'Hungary passes anti-LGBTQ law effectively barring same-sex couples from adopting' *CNN* (Budapest, 15 December 2020) <<https://edition.cnn.com/2020/12/15/europe/hungary-lgbtq-adoption-ban-intl/index.html>> accessed 28 April 2021.

of minorities as stipulated by Article 2 TEU were challenged. Diversely, by restricting political campaigns to the State broadcaster, the said constitutional amendments allowed the government to ban broadcasting of the latter in commercial radio and television. Once again, touching upon media, both democracy and the rule of law ought to be invoked. It is also to note that the Hungarian constitutional court had formerly upheld the unconstitutionality of similarly worded family and media laws.<sup>171</sup>

In December 2011, the Hungarian parliament adopted a new law on the central bank. It removed the president's right to appoint deputies, it broadened the rate-setting monetary council, and it created a novel vice-president placement. Should the central bank be combined with the financial regulator, a diverse law allowed for the demotion of the former's president.<sup>172</sup> Monetary policy was left under the influence of the government and the independency of the domestic central bank was curtailed.<sup>173</sup> In 2012, it breached EU law by dismissing the head of the national data protection agency. In harmony with the Court, enabling supervisory authorities to serve their respective terms in office is a mandate of their independence.<sup>174</sup>

The 2014 Hungarian parliamentary election is worthy of mention. It was previously held that for a given democracy to qualify as such, free and fair elections ought to be conducted.<sup>175</sup> Nevertheless, by reason of restrict campaign mandates and biased media, the 2014 parliamentary election offered the ruling party an unjust advantage.<sup>176</sup> Such a trend directly counters the need for fair elections.

Touching upon equality, human rights, and the protection of minorities, the Roma ethnic minority is to be invoked. For years, Romani background individuals have been subjected to racial violence

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<sup>171</sup> Ibid.

<sup>172</sup> Bloomberg News, 'Hungary Passes Central Bank Rules Despite Risk to Bailout' *New York Times* (Budapest, 30 December 2011) <<https://www.nytimes.com/2011/12/31/business/global/hungary-passes-central-bank-rules-despite-risk-to-bailout.html>> accessed 26 April 2021.

<sup>173</sup> Charlotte Chelsom-Pill, 'Hungary adopts controversial banking laws' *DW News* (Budapest, 31 December 2011) <<https://www.dw.com/en/hungary-adopts-controversial-banking-laws/a-15638245>> accessed 26 April 2021.

<sup>174</sup> Robin Emmott, 'Hungary's Orban broke EU law by firing data chief, EU court rules' *Reuters* (Brussels, 8 April 2014) <<https://www.reuters.com/article/us-eu-hungary-idUSBREA370TX20140408>> accessed 26 April 2021.

<sup>175</sup> Commission (n 34).

<sup>176</sup> Office for Democratic Institutions and Human Rights, 'Hungary Parliamentary Elections 6 April 2014: OSCE/ODIHR Limited Election Observation Mission Final Report' (*Office for Democratic Institutions and Human Rights*, 11 July 2014) <<https://www.osce.org/files/f/documents/c/0/121098.pdf>> accessed 27 April 2021.



and persecution. Problematically, efforts to promote equality continue to be imperilled by school segregation. It materialises in diverse forms. The majority of Roma children are precluded from accessing to local public schools, and legal action promoted by civil society bodies (as NGOs) is their only hope in securing a place that is rightfully theirs. Most Roma students attend segregated classes whether in State schools or in Roma dominated schools located in disadvantaged districts and neighbourhoods. Others are even wrongfully placed in schools built for children with special needs. The issue is particularly acute as educational segregation promotes future overall societal segregation. In other words, Roma citizens are further and further left out of mainstream society.<sup>177</sup> Also concerning education (although not linked to the Roma ethnic minority), Hungary adopted the so-called new higher education act in 2017. According to it, foreign universities operating in the territory of Hungary shall be accredited and establish a campus in their country of nationality, i.e., their home country. Straight-forwardly, the law specifically targeted the Central European University. Indeed, although it was formally based in the United States it did not have a campus and it did not offer classes therein, but solely in Hungary.<sup>178</sup> From all the 28 foreign universities represented in Hungary, the Central European University was the only that did not comply with the said law.<sup>179</sup> Not surprisingly, the founder of the affected university, George Soros is a widely known ideological opponent of prime minister Viktor Orban.<sup>180</sup> Amidst other instances, the legal instrument infringed the right to education as prescribed by the Charter.<sup>181</sup> More recently, attacks on free expression and academic freedom have been registered. In September 2020, a novel bill transferred ownership over the University of Theatre and Film Arts from the State to a private

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<sup>177</sup> Nadir Redzepi, 'The segregation of Hungarian Roma children must end' *New Europe* (Budapest, 4 December 2017) <<https://www.neweurope.eu/article/segregation-hungarian-roma-children-must-end/>> accessed 27 April 2021.

<sup>178</sup> DW News, 'Thousands rally in Budapest against government education law' *DW News* (Budapest, 22 May 2017) <<https://www.dw.com/en/thousands-rally-in-budapest-against-government-education-law/a-38929419>> accessed 27 April 2021.

<sup>179</sup> DW News, 'Hungarian PM Orban: Soros-backed Central European University has been 'cheating'' *DW News* (Budapest, 31 March 2017) <<https://www.dw.com/en/hungarian-pm-orban-soros-backed-central-european-university-has-been-cheating/a-38240791>> accessed 27 April 2021.

<sup>180</sup> Ibid.

<sup>181</sup> Aidan O'Neill, 'Brexit, Democracy and the Rule of Law' (2020) *European Law Journal* 1, 13 <[https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12375?saml\\_referrer](https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12375?saml_referrer)> accessed 27 April 2021.

foundation whose members are linked to the Hungarian prime minister and its government.<sup>182</sup> Similarly, another controversial law diminished the independence of the Hungarian Academy of Sciences. In this regard, the establishment of a governing body whose members are partially nominated by Viktor Orban and majorly appointed by the government is to be noted. This board is responsible for key decisions concerning funding and the appointment of directors for each research institute.<sup>183</sup> Also to be duly registered, the Hungarian government banned gender studies from public universities.<sup>184</sup> All these political maneuvers are part of a generalised and greater effort to limit academic practices that counter the conservative agenda of the government itself.<sup>185</sup>

Also in 2017, Hungarian lawmakers adopted another worrisome law. Opposed to the protection of private life and personal data as enshrined in the Charter, the legislative act indirectly discriminated against foreign-funded civil society bodies.<sup>186</sup> In detail, it forced civic groups (including NGOs) to disclose their donors and to register with the Hungarian authorities in case such donations surpassed a given threshold.<sup>187</sup>

Non-compliance with Article 2 TEU by Hungary requires further mention to the freedom of religion alongside non-discrimination. In 2011, a novel bill widely known as church law deprived more than 300 faiths of their legal recognition as churches. According to the latter, it is now for the parliament to define which faiths qualify and are to be acknowledged as churches. While churches are accorded a set of benefits, including of financial nature, faiths which lose that status may

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<sup>182</sup> Lydia Gall, 'Hungary Continues Attacks on Academic Freedom' (*Human Rights Watch*, 3 September 2020) <<https://www.hrw.org/news/2020/09/03/hungary-continues-attacks-academic-freedom>> accessed 28 April 2021.

<sup>183</sup> Lydia Gall, 'Hungary Renews its War on Academic Freedom' (*Human Rights Watch*, 2 July 2019) <<https://www.hrw.org/news/2019/07/02/hungary-renews-its-war-academic-freedom>> accessed 28 April 2021.

<sup>184</sup> Lydia Gall, 'Hungary's hypocritical war on universities' (*Human Rights Watch*, 6 November 2018) <<https://www.hrw.org/news/2018/11/06/hungarys-hypocritical-war-universities>> accessed 28 April 2021.

<sup>185</sup> Lydia Gall (n 182).

<sup>186</sup> Aidan O'Neill (n 181) 13.

<sup>187</sup> DW News, 'EU takes legal steps against Hungary over NGO law' *DW News* (Budapest, 18 February 2021) <<https://www.dw.com/en/eu-takes-legal-steps-against-hungary-over-ngo-law/a-56611879>> accessed 27 April 2021.

witness their assets being confiscated. Irrespective of its 2018 amendments, the law under scrutiny did not cease to be discriminatory.<sup>188</sup>

To finalize Hungary's analysis, it is essential to study its disproportionate asylum practices and legal framework. In 2018, policymakers conducted an amendment to Hungary's criminal code in order to criminalise assistance to migrants when provided by foreign-funded NGOs. Additionally, those who were not EU citizens and found themselves in Hungarian territory were precluded from applying for international protection.<sup>189</sup> Moreover, all applications from asylum seekers who had crossed a safe transit country before arriving to Hungary were deemed inadmissible by the relevant authorities.<sup>190</sup> In turn, Hungary continuously deported asylum seekers to neighbouring Serbia. Just in January of the present year, that was the fate of close to 3000 asylum seekers.<sup>191</sup> It does not come as a surprise that these restrictions do not go in line with the right to asylum as enshrined in the Charter.<sup>192</sup>

Altogether, it is not hard to grasp how compliance with Article 2 TEU seems to barely qualify as a reality in Hungary.

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<sup>188</sup> Erika Schlager, 'Minority Firths under the Hungarian Religion Law' (*Minority Firths under the Hungarian Religion Law*, 16 July 2019) <<https://www.csce.gov/international-impact/minority-faiths-under-hungarian-religion-law>> accessed 28 April 2021.

<sup>189</sup> ANSA, 'EU takes legal action against Hungary over NGO law' *InfoMigrants* (Budapest, 22 February 2021) <<https://www.infomigrants.net/en/post/30384/eu-takes-legal-action-against-hungary-over-ngo-law>> accessed 27 April 2021.

<sup>190</sup> Sertan Sandarsen, 'ECJ advocate recommends sanctioning Hungary for anti-migrant laws' *InfoMigrants* (Budapest, 26 February 2021) <<https://www.infomigrants.net/en/post/30536/ecj-advocate-recommends-sanctioning-hungary-for-anti-migrant-laws>> accessed 27 April 2021.

<sup>191</sup> DW News, 'How Hungary is violating EU law on refugees' *DW News* (Budapest, 9 February 2021) <<https://www.infomigrants.net/en/post/30148/how-hungary-is-violating-eu-law-on-refugees>> accessed 27 April 2021.

<sup>192</sup> Charter, article 18.

## 5.2. The Case for Poland

The 2015 electoral presidential and parliamentary victory of the Law and Justice Party led Poland to witness a set of deep political changes.<sup>193</sup> One may effortlessly guess Poland's fate by party's leader Jarosław Kaczyński's promise of a Budapest to be established in Warsaw.<sup>194</sup>

The independence of the judiciary is a perfect way to initiate the analysis of Poland's case. Here, it is to recall how the independence of the judiciary is intricately connected to democracy and the rule of law. In 2018, the lower house of the Parliament (controlled by the ruling party itself) was deemed indirectly responsible for the selection of judges. Specifically, it was now to nominate the members of the council whose function is to appoint judges. In response, Poland's supreme court issued a resolution challenging the independence of judges selected by the previously mentioned council.<sup>195</sup> However, a controversial law was adopted allowing for sanctions towards judges who criticise the judiciary reforms.<sup>196</sup> The new Polish disciplinary chamber is also entitled to withdraw the immunity of judges.<sup>197</sup> Another bill lowered the retirement age of judges from 67 to 60 and 65 if the judge was a woman or a man, respectively. More so, it equipped the minister of justice with the prerogative to decide if a particular judge could continue exercising its professional functions after reaching the retirement age.<sup>198</sup> While that regards ordinary judges, a diverse law endeavoured to govern supreme court judges. According to it, the retirement age of the latter was lowered from 70 to 65, being that the State's president may extend their mandates if the person is considered to

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<sup>193</sup> Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding' (Sydney Law School Research Paper No. 18/01, 2018) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3103491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491)> accessed 28 April 2021.

<sup>194</sup> Andrew Byrne, Neil Buckley and Henry Foy, 'Poland's new government finds a model in Orbán's Hungary' *Financial Times* (6 January 2016) <<https://www.ft.com/content/0a3c7d44-b48e-11e5-8358-9a82b43f6b2f>> accessed 28 April 2021.

<sup>195</sup> BBC News, 'Poland judges: Parliament and Supreme Court issue rival rulings' *BBC News* (Warsaw, 23 January 2020) <<https://www.bbc.com/news/world-europe-51226100>> accessed 29 April 2021.

<sup>196</sup> DW News, 'EU opens legal case against Poland over judicial reform' *DW News* (Warsaw, 29 April 2020) <<https://www.dw.com/en/eu-opens-legal-case-against-poland-over-judicial-reform/a-53279806>> accessed 28 April 2021.

<sup>197</sup> Mehreen Khan and James Shotter, 'Brussels requests Poland suspend disciplinary action against judges' *Financial Times* (Warsaw, 31 March 2021) <<https://www.ft.com/content/c57b3bdf-2044-4867-892d-73355e6c9545>> accessed 29 April 2021.

<sup>198</sup> BBC News, 'Retirement age: Poland broke EU law with ruling on judges' *BBC News* (Warsaw, 5 November 2020) <<https://www.bbc.com/news/world-europe-50302102>> accessed 29 April 2021.

be worthy.<sup>199</sup> The constitutional court was not immune to these reforms. As early as in 2015, the law on the constitutional tribunal was altered to allow the parliament to annul the nominations of three judges previously appointed by the former parliament, and to nominate their own.<sup>200</sup>

Apart from the judiciary reforms, Poland underwent worrisome changes regarding media. In 2016, a newly adopted bill allowed the government to appoint ministers responsible for State news organizations.<sup>201</sup> In Poland, countering independent media surpasses the legislative field. Indeed, its main focus is the acquisition of private media companies through state-owned and controlled enterprises. In 2020, the Law and Justice party gained control over 20 out of the 24 regional newspapers.<sup>202</sup> Yet, other bodies of (still) independent media are frequently subject to arbitrary fines, licensing changes, tax penalties, and to antimonopoly investigations in order to counter mergers. Likewise, much needed revenues from public advertising are simply cut.<sup>203</sup> Concerning the conduct of journalists, although freedom of expression is protected by the constitution, it does not go hand in hand with the criminalisation of insults towards a State symbol, religion, or senior public officials.<sup>204</sup> Touching upon their safety, six alerts were issued by the Council of Europe in 2020 due to harassment of journalists and conducts liable to restrict media freedom. Occasionally, Polish journalists are surveilled by the police and intelligence services, and their internet data is used without prior notification.<sup>205</sup> Regarding freedom of expression alongside activists, charges of theft and burglary were filed against two of those for replacing advertisements with posters

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<sup>199</sup> Alistair Walsh, 'What are Poland's controversial judicial reforms?' *DW News* (Warsaw, 5 November 2019) <<https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>> accessed 29 April 2021.

<sup>200</sup> *Ibid.*

<sup>201</sup> DW News, 'Poland signs controversial media law despite EU concerns' *DW News* (Warsaw, 7 January 2016) <<https://www.dw.com/en/poland-signs-controversial-media-law-despite-eu-concerns/a-18965669>> accessed 29 April 2021.

<sup>202</sup> Jamie Wiseman, 'Democracy Declining: Erosion of Media Freedom in Poland' (International Press Institute, 2020) 4 <[https://ipi.media/wp-content/uploads/2021/02/20210211\\_Poland\\_PF\\_Mission\\_Report\\_ENG\\_final.pdf](https://ipi.media/wp-content/uploads/2021/02/20210211_Poland_PF_Mission_Report_ENG_final.pdf)> accessed 29 April 2020.

<sup>203</sup> *Ibid.*, 5.

<sup>204</sup> Commission, 'Commission Staff Working Document: 2020 Rule of Law Report Country Chapter on the rule of law situation in Poland' SWD (2020) 320 final.

<sup>205</sup> *Ibid.*

criticising the government's coverage of the pandemic.<sup>206</sup> Quite recently, a well-known Polish writer has been charged for referring to president Andrzej Duda as a “moron” on social media.<sup>207</sup> Likewise, by reason of using posters illustrating Virgin Mary next to a rainbow, pro-gay rights activists have been charged for desecrating and offending religious beliefs.<sup>208</sup>

Following Hungary's steps, a proposed bill requires NGOs to declare foreign funding. More so, if it amounts to 10% of their total funding, NGOs are to indicate it on their websites and to register with the ministry of justice. In turn, if it amounts to 30%, NGOs shall determine how specific activities are funded. In case of non-compliance, NGOs may be subjected to the payment of fines and may even lose their NGO status.<sup>209</sup>

Regarding human rights as a value, it is to note that Poland is currently taking steps to withdraw from the Istanbul Convention. According to Polish representatives, besides disrespecting religion, it prompts and enhances controversial gender ideologies and beliefs.<sup>210</sup> Notwithstanding, such a convention endeavours to counter violence against women by virtue of posing a legally binding framework of prevention, protection of victims, and prosecution of offenders.<sup>211</sup> Still remarkably linked to human rights, policies governing abortion deserve to be mentioned. Recently, Poland posed a near-total ban on the latter, only allowing it in case of incest, rape, or threat to the life of the mother. A ruling of the constitutional court upheld the unconstitutionality of the 1933 law

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<sup>206</sup> Amnesty International, ‘Poland 2020’ (*Amnesty International*) <<https://www.amnesty.org/en/countries/europe-and-central-asia/poland/report-poland/>> accessed 29 April 2021.

<sup>207</sup> Euronews, ‘Jakub Zulczyk: Writer charged for calling Poland's president Andrzej Duda a ‘moron’’ *Euronews* (Warsaw, 24 March 2021) <<https://www.euronews.com/2021/03/23/jakub-zulczyk-writer-charged-for-calling-poland-s-president-andrzej-duda-a-moron>> accessed 29 April 2021.

<sup>208</sup> Euronews, ‘Poland clears LGBT activists over putting rainbow on Roman Catholic icon’ *Euronews* (Warsaw, 2 March 2021) <<https://www.euronews.com/2021/03/02/poland-clears-lgbt-activists-over-putting-rainbow-on-roman-catholic-icon>> accessed 29 April 2021.

<sup>209</sup> Juliette Bretan, ‘Polish ministers propose law making NGOs declare foreign funding and creating public register’ (*Notes from Poland*, 9 August 2020) <<https://notesfrompoland.com/2020/08/09/poland-seeks-to-make-ngos-declare-foreign-funding>> accessed 29 April 2021.

<sup>210</sup> Sandrine Amiel, ‘Istanbul Convention: Poland moves a step closer to quitting domestic violence treaty’ *Euronews* (Warsaw, 1 April 2021) <<https://www.euronews.com/2021/04/01/istanbul-convention-poland-moves-a-step-closer-to-quitting-domestic-violence-treaty>> accessed 29 April 2021.

<sup>211</sup> Jasmin Bauomy, ‘Istanbul Convention: What is the domestic violence treaty and has it had an impact?’ *Euronews* (Warsaw, 22 March 2021) <<https://www.euronews.com/2020/07/27/istanbul-convention-what-is-the-domestic-violence-treaty-and-has-it-had-an-impact>> accessed 29 April 2021.

authorising abortion if severe and permanent fetal abnormalities were registered. In practice, 98% of all carried abortions were due to the previous reason.<sup>212</sup> Here, the ministry of justice went as far as awarding an honour to a pro-life activist who prevented an abortion by informing the soon-to-be mother's parents.<sup>213</sup>

Human rights, equality and the protection of minorities is also to be invoked alongside the LGBT community. For the past years, dozens of Polish towns and municipalities have declared themselves free of LGBT ideology and supportive of traditional marriage as that linking a man and a woman. The anti-LGBT rhetoric by the Polish right-wing government, local communities and the catholic church led ambassadors to Poland and organizations to call the need for efforts towards equality, tolerance and acceptance.<sup>214</sup> More so, according to a further politicised Polish court, campaigns linking homosexuality to pedophilia are seen as informative and educational.<sup>215</sup> July 2020 marks the signature of the "Family Charter", i.e., an anti-LGBT pamphlet proposing the preclusion of LGBT marriage, adoption and education in schools.<sup>216</sup>

The asylum framework ought to be addressed recalling human rights as a value. Routinely, national authorities in Poland preclude asylum seekers at its border with Belarus from making an application for international protection. More so, domestic authorities immediately return those asylum seekers to Belarus, i.e., a territory where they will be endangered.<sup>217</sup> This repeated practice led the ECtHR to uphold an infringement of the mandates contained in the Convention. In detail, Poland

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<sup>212</sup> BBC News, 'Poland enforces controversial near-total abortion ban' *BBC News* (Warsaw, 28 January 2021) <<https://www.bbc.com/news/world-europe-55838210>> accessed 29 April 2021.

<sup>213</sup> Agnieszka Wądołowska, 'Polish government honours pro-life activist who stopped teen having abortion by informing her family' (*Notes from Poland*, 18 May 2018) <<https://notesfrompoland.com/2020/05/18/polish-government-honours-pro-life-activist-who-stopped-teen-having-abortion-by-informing-her-family/>> accessed 29 April 2021.

<sup>214</sup> Euronews, 'LGBT in Poland: Ambassadors from 50 countries and organizations appeal for acceptance' *Euronews* (Warsaw, 28 September 2020) <<https://www.euronews.com/2020/09/28/lgbt-in-poland-ambassadors-from-50-countries-and-organisations-appeal-for-acceptance>> accessed 29 April 2021.

<sup>215</sup> Daniel Tilles, 'Polish court rules campaign linking LGBT and paedophilia is "informative and educational"' (*Notes from Poland*, 20 February 2020) <<https://notesfrompoland.com/2020/02/20/polish-court-anti-lgbt-stop-paedophilia-campaign-is-informative-and-educational/>> accessed 29 April 2021.

<sup>216</sup> Amnesty International (n 206).

<sup>217</sup> Human Rights Watch, 'Poland: Asylum Seekers Blocked at Border' (*Human Rights Watch*, 1 March 2017) <<https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border>> accessed 29 April 2021.

disrespected the prohibition of collective expulsion (Article 4 Protocol 4 Convention), the prohibition of torture or inhuman and degrading treatment (Article 3 Convention), and the rights to an effective remedy and to an individual petition (Articles 13 and 34 Convention).<sup>218</sup> Also on asylum, irrespective of the 2015 migration crisis, Poland failed to relocate asylum seekers, thusly breaching its obligations under EU law.<sup>219</sup>

Directly touching upon the rule of law and democracy, the flawed legislative procedure and faulty electoral law are to be invoked. On the one hand, the established expedite legislative procedure does not allow for the participation of all stakeholders and interested parties and undermines the role of the opposition.<sup>220</sup> On the other hand, the 2019 parliamentary elections were characterized by biased media coverage and intolerant dialogue. Albeit administratively well prepared, the 2019 voters were precluded from making an informed decision.<sup>221</sup> Same issue was registered *vis a vis* the 2020 Polish presidential election. In harmony with the Office for Democratic Institutions and Human Rights, the State-run broadcaster TVP was misused as a campaign tool in support for president Andrzej Duda. Presidential opponent Rafal Trzaskowski petitioned the supreme court to declare the election null, however the Law and Justice Party (ally of Andrzej Duda) altered the composition of the court so that the judges appointed by it were the ones responsible for considering

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<sup>218</sup> Council of Europe, 'Judgments on a temporary camp of asylum-seekers in France and Poland's return of people from Chechnya to Belarus' (*Council of Europe*, September 2020) <[https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-september-2020/-/asset\\_publisher/cVKOAoroBOtI/content/judgments-on-a-temporary-camp-of-asylum-seekers-in-france-and-poland-s-return-of-people-from-chechnya-to-belarus?\\_101\\_INSTANCE\\_cVKOAoroBOtI\\_viewMode=view/](https://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/newsletter-september-2020/-/asset_publisher/cVKOAoroBOtI/content/judgments-on-a-temporary-camp-of-asylum-seekers-in-france-and-poland-s-return-of-people-from-chechnya-to-belarus?_101_INSTANCE_cVKOAoroBOtI_viewMode=view/)> accessed 30 April 2021.

<sup>219</sup> Jonas Ekblom, 'Poland, Hungary broke EU laws by refusing to host migrants: court adviser' *Reuters* (Brussels, 31 October 2019) <<https://www.reuters.com/article/us-europe-migration-court-idUSKBN1XA1S5>> accessed 30 April 2021.

<sup>220</sup> Commission (n 204).

<sup>221</sup> OSCE Office for Democratic Institutions and Human Rights, 'Polish parliamentary elections were prepared well, but marred by intolerant rhetoric and bias in public media, international observers say' (*OSCE Organization for Security and Co-operation in Europe*, 14 October 2019) <<https://www.osce.org/odihr/elections/poland/435941>> accessed 30 April 2021.



the validity of elections.<sup>222</sup> It does not come as a surprise that Poland's supreme court rejected the opposition claims.<sup>223</sup>

The foregoing allows for the conclusion that Poland seems to fail to comply with Article 2 TEU.

### 5.3. The Case for the European EU

The previous sections shed light on the lack of compliance with the fundamental values by Member States. This section focuses on the lack of compliance by the EU itself. Prior to analysing if the EU does or not react towards the infringement of its values by current members, it is to note that the EU appears to fail to respect the values it deems as fundamental.

The 2015 migration crisis seems to illustrate such a rationale as the EU outsourced its humanitarian responsibilities to countries oftentimes mentioned for disrespecting human rights, in detail Turkey and Libya.<sup>224</sup> According to the asylum deal arranged between the EU and Turkey, irregular migrants or asylum seekers who travel from Turkey to Greece and whose applications for asylum are seen as inadmissible (on the basis of Turkey being a safe third country or the first country of asylum) will be immediately returned. In turn, the EU will resettle an equal number of Syrian asylum seekers and will financially aid Turkey. To enforce that agreement, just between March 2016 and June 2016, Greece returned 462 individuals to Turkey.<sup>225</sup> However, to consider Turkey a safe third country or a first country of asylum means more than simply asylum seekers being safe from war or persecution if returned. In practice, it requires that refugees are entitled to a set of

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<sup>222</sup> Marcin Gocłowski, 'Polish opposition seeks re-run of presidential election' *Reuters* (Warsaw, 23 July 2020) <<https://www.reuters.com/article/us-poland-election-protest-idUSKCN24O1SD>> accessed 30 April 2021.

<sup>223</sup> Euronews, 'Poland's top court rejects opposition claims of irregularities in July's presidential election' *Euronews* (Warsaw, 3 August 2020) <<https://www.euronews.com/2020/08/03/poland-s-supreme-court-to-rule-on-validity-of-july-presidential-election>> accessed 30 April 2020.

<sup>224</sup> Gurminder K. Bhambra, 'The current crisis of Europe: Refugees, colonialism, and the limits of cosmopolitanism' (2017) 23 *European Law Journal* 395, 397 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/eulj.12234>> accessed 30 April 2021.

<sup>225</sup> European Commission, 'Implementing the EU-Turkey Statement - Questions and Answers' (*European Commission*, 15 June 2016) <[https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_16\\_1664](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_16_1664)> accessed 30 April 2021.

social rights such as the right to work, health and education. The real problem is that in Turkey these seem not to be a reality for refugees.<sup>226</sup> Similar logic applies to Libya. Backed by the EU, Italy reached a deal with Libya to fund the Libyan coastguard. The latter is responsible for intercepting boats headed to Italy and return asylum seekers to what is frequently regarded as a war zone.<sup>227</sup> The majority of reports involve unsanitary conditions, torture, rape, overcrowded facilities, malnutrition and poor quality of food and water.<sup>228</sup>

Irrespective of the reasons put forward to justify the latter approaches, the practical results of each one appear to devoid them of any legitimacy. A EU that proclaims itself to be based on fundamental values may not seem to disrespect them so overtly. Should reality be as priorly referred, whereas the EU should be setting an example, it is setting a dangerous precedent instead.

#### **5.4. Response from the EU Towards Hungary and Poland**

Albeit its response appears to be insufficient to tackle the crisis of values that Hungary and Poland are currently undergoing, the EU did and does act. For the sake of clarity, its response towards both countries will be addressed separately in the sections below.

##### **5.4.1. EU v Hungary**

The EU's response is twofold. Initially, it resorted to infringement procedures. Later on, it relied on Article 7(1) TEU. In other words, the EU started by addressing each unlawful and illegitimate

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<sup>226</sup> Human Rights Watch, 'EU: Don't Send Syrians Back to Turkey' (*Human Rights Watch*, 20 June 2016) <<https://www.hrw.org/news/2016/06/20/eu-dont-send-syrians-back-turkey>> accessed 30 April 2021.

<sup>227</sup> Sally Hayden, 'The EU's deal with Libya is sentencing refugees to death' *The Guardian* (Libya, 5 February 2019) <<https://www.theguardian.com/commentisfree/2019/feb/05/eu-deal-libya-refugees-libyan-detention-centres>> accessed 30 April 2021.

<sup>228</sup> Human Rights Watch, 'No Escape from Hell: EU Policies Contribute to Abuse of Migrants in Libya' (*Human Rights Watch*, 21 January 2019) <<https://www.hrw.org/report/2019/01/21/no-escape-hell/eu-policies-contribute-abuse-migrants-libya>> accessed 30 April 2021.

event as a separate breach of the *acquis*.<sup>229</sup> The Commission (as guardian of the treaties)<sup>230</sup> brought a set of Hungarian-related matters before the Court.<sup>231</sup> One of these was the law on NGOs. To recall, it imposed registration, declaration, and publication obligations on all foreign-funded organizations.<sup>232</sup> In 2020, it was held by the Court that such a paradigm infringed the respect for private life (Article 7 Charter) and personal data (Article 8 Charter), as well as the freedom of association (Article 12 Charter).<sup>233</sup> Yet Hungary failed to amend its law. As such, in February 2021, a letter of formal notice was sent requiring it to implement the relevant ruling within two months. If not, fines would be imposed.<sup>234</sup> In April 2021, the Hungarian policymakers finally presented a draft bill that ought to replace the previous one. However, this one is equally flawed. It allows the State audit office to conduct yearly financial inspections of civil society bodies which revenues surpass a particular threshold. All these efforts aim to enhance monitoring over the work pursued by such organizations, and to obstruct it.<sup>235</sup>

Another matter brought to the Court's attention regards the law on higher education.<sup>236</sup> In practice, it forced the Central European University to relocate,<sup>237</sup> and as held by the Court in October 2020 it infringed the right to education (Article 14 Charter), the freedom of the arts and science (Article 13 Charter) and that to conduct a business (Article 16 Charter).<sup>238</sup> It is true that justice minister

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<sup>229</sup> Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3, 8 <<https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/abs/illiberalism-within-rule-of-law-backsliding-in-the-eu/BCC592F6AA3CC1E0642F9B9F05371CB5>> accessed 1 May 2021.

<sup>230</sup> Erich Hochleitner (n 89).

<sup>231</sup> Aidan O'Neill (n 181) 13.

<sup>232</sup> Case C-78/18 *Commission v Hungary (Transparency of associations)* [2020] ECLI:EU:C:2020:476, para 65.

<sup>233</sup> *Ibid*, para 143.

<sup>234</sup> Gabriela Baczynska, 'EU gives Hungary two months to change NGO law, or face fines' *Reuters* (Brussels, 18 February 2021) <<https://www.reuters.com/article/uk-eu-hungary-ngo-idUKKBN2A11H9>> accessed 2 May 2021.

<sup>235</sup> Lydia Gall, 'Hungary's Scrapping of NGO Law Insufficient to Protect Civil Society' (*Human Rights Watch*, 23 April 2021) <<https://www.hrw.org/news/2021/04/23/hungarys-scrapping-ngo-law-insufficient-protect-civil-society>> accessed 2 May 2021.

<sup>236</sup> Case C-66/18 *Commission v Hungary (Enseignement supérieur)* [2020] ECLI:EU:C:2020:792.

<sup>237</sup> DW News, 'ECJ rules against Hungary's higher education law' *DW News* (Budapest, 6 October 2020) <<https://www.dw.com/en/ecj-rules-against-hungarys-higher-education-law/a-55170214>> accessed 2 May 2021.

<sup>238</sup> *Commission v Hungary (Enseignement supérieur)* (n 236).

Judit Varga affirmed Hungary's intention to comply with the ruling.<sup>239</sup> But it is also true that at the time of the ruling itself the Central European University had already moved to Vienna.<sup>240</sup>

Hungarian asylum policies were also considered by the Court.<sup>241</sup> The Commission brought the case and it argued that Hungary had breached its obligations under the Asylum Procedures Directive,<sup>242</sup> the Return Directive,<sup>243</sup> and the Reception Conditions Directive.<sup>244</sup> Touching upon the Procedures Directive, it is the view of the Commission that the Hungarian border procedure did neither respect the maximum 4 week duration for detention in a transit zone (Article 43 Procedures Directive) nor the guarantees provided for vulnerable applicants (Article 24(3) Procedures Directive). More so, it is the Commission's understanding that Hungary failed to provide actual and effective access to asylum procedures given that irregular migrants were not given the possibility to apply for asylum. In detail, by imposing applications for asylum to be lodged in person, and solely in two transit zones (Tompá and Rösztke), Hungary was acknowledged by the Commission as breaching Articles 3 and 6 Procedures Directive. The procedural guarantees established in the Reception Conditions Directive (Articles 8, 9 and 11 Reception Conditions Directive) were also not respected and return decisions did not observe the standards advanced by the Return Directive (Articles 5, 6(1), 12(1), 13(1) Return Directive).<sup>245</sup> All the formerly mentioned applications were supported by the Court in December 2020.<sup>246</sup> Yet again, Hungary did not observe the ruling. Strictly contrary to it, it did

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<sup>239</sup> Hungary Today, 'ECJ on 'Lex CEU': Hungarian Law on Higher Education Breaches EU Law' *Hungary Today* (Budapest, 6 October 2020) <<https://hungarytoday.hu/ecj-lex-ceu-hungarian-law-higher-education-breaches/>> accessed 2 May 2021.

<sup>240</sup> Shaun Walker, 'Classes move to Vienna as Hungary makes rare decision to oust university' *The Guardian* (Vienna, 16 November 2019) <<https://www.theguardian.com/world/2019/nov/16/ceu-classes-move-to-vienna-orban-hungary-ousts-university>> accessed 2 May 2021.

<sup>241</sup> Case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* [2020] ECLI:EU:C:2020:1029.

<sup>242</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L 180 (Procedures Directive).

<sup>243</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348 (Return Directive).

<sup>244</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L 180 (Reception Conditions Directive).

<sup>245</sup> Aidan O'Neill (n 181) 13.

<sup>246</sup> *Commission v Hungary (Accueil des demandeurs de protection internationale)* (n 218) para 315.

not cease to remove asylum seekers, especially to Serbia.<sup>247</sup> Concerning detention conditions, the Court held in May 2020 the unlawfulness of Hungarian border prison-like reception sites.<sup>248</sup> Surprisingly, changes did follow. Hungary moved asylum seekers and closed certain border detention centres.<sup>249</sup> Also touching upon asylum and as upheld by the Court, Hungary did not comply with the relocation decision adopted by the Council by failing to indicate the number of asylum seekers who could be relocated to its territory.<sup>250</sup> In turn, by declaring asylum applications inadmissible for grounds other than those referred to in the Procedures Directive, Hungary did not comply with Article 33(2) of the same directive. Lastly, it is the Commission's view that Articles 8(2), 12(1)(c) and 22(1) Procedures Directive and Article 10(4) Reception Conditions Directive have been breached by Hungary. This is because it criminalised any activity directed at aiding asylum seekers who failed to satisfy the domestic asylum criteria to initiate and carry out asylum procedures.<sup>251</sup>

The Hungarian law which content lowered the retirement age of judges was also considered by the Court.<sup>252</sup> In its perspective, the forceful retirement of judges constitutes discrimination based on age in direct violation of Articles 2 and 6(1) Directive 2000/78.<sup>253</sup> A diverse matter also brought to the Court's attention was the dismissal of the data protection commissioner.<sup>254</sup> As upheld by the Court, the independence requirement laid down in Article 28(2) Directive 95/46 encompasses the

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<sup>247</sup> Monika Pronczuk and Benjamin Novak, 'E.U. Border Agency Pulls Out of Hungary Over Rights Abuses' *The New York Times* (Brussels, 27 January 2021) <<https://www.nytimes.com/2021/01/27/world/europe/frontex-hungary-eu-asylum.html>> accessed 3 May 2021.

<sup>248</sup> DW News, 'Hungary illegally held asylum-seekers, ECJ rules' *DW News* (Budapest, 15 May 2020) <<https://www.dw.com/en/hungary-illegally-held-asylum-seekers-ecj-rules/a-53431848>> accessed 3 May 2021.

<sup>249</sup> Benjamin Novak, 'Hungary Moves to Close Border Camps After E.U. Court Ruling' *The new York Times* (Budapest, 22 May 2020) <<https://www.nytimes.com/2020/05/22/world/europe/hungary-migrant-camps.html>> accessed 3 May 2021.

<sup>250</sup> Case C-718/17 *Commission v Hungary (Temporary mechanism for the relocation of applicants for international protection)* [2020] ECLI:EU:C:2019:917, Opinion of AG Sharpston.

<sup>251</sup> Case C-821/19 *Commission v Hungary (Incrimination de l'aide aux demandeurs d'asile)* [2021] ECLI:EU:C:2021:143, Opinion of AG Rantos, para 57.

<sup>252</sup> Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687.

<sup>253</sup> *Ibid*, para 81.

<sup>254</sup> Case C-288/12 *Commission v Hungary* [2014] ECLI:EU:C:2014:237.

duty to allow supervisory authorities to serve their full mandate and only to vacate the relevant office if the scenarios prescribed by law materialize.<sup>255</sup>

Besides infringement procedures, the preventive mechanism present in Article 7(1) TEU has been triggered by the European Parliament in September 2018. The latter addresses systematic breaches that amount to a clear risk of values backsliding, instead of simple individual situations.<sup>256</sup> Amidst the concerns of the European Parliament one finds reference to the now endangered separation of powers, the lack of independence of the judiciary, the high level of corruption and the low level of governance effectiveness, novel legislation on media, universities, NGOs and churches, and the lack of protection of minorities.<sup>257</sup> Hungary brought an action against the Parliament due to uncertainties concerning the required qualified majority.<sup>258</sup>

#### **5.4.2. EU v Poland**

The response of the EU towards Poland presents similarities and disparities in comparison to that of Hungary. Whereas infringement procedures and Article 7(1) TEU have also been used to tackle Poland's failures in the matter of values, the rule of law framework and references for preliminary rulings ought to be mentioned.<sup>259</sup>

The rule of law framework is first in order. As a reactive tool, it seeks to prevent the escalation of threats to the rule of law in a certain Member State and the consequent triggering of Article 7 TEU. More so, it allows for a dialogue between the Commission and that Member State.<sup>260</sup> In the case of Poland, motivated by the assault on the constitutional court and the novel rules governing media,

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<sup>255</sup> Ibid, para 55.

<sup>256</sup> European Parliamentary Research Service (n 9) 37.

<sup>257</sup> European Parliament, 'Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded' (12 September 2018) P8\_TA(2018)0340.

<sup>258</sup> Case C-650/18 *Hungary v Parliament* [2019] ECLI:EU:C:2019:438.

<sup>259</sup> European Parliamentary Research Service (n 9) 37.

<sup>260</sup> European Commission, 'Rule of Law Report 2020' (*European Commission*, 30 September 2020) <[https://ec.europa.eu/info/sites/default/files/rule\\_of\\_law\\_mechanism\\_factsheet\\_en.pdf](https://ec.europa.eu/info/sites/default/files/rule_of_law_mechanism_factsheet_en.pdf)> accessed 6 May 2021.

in January 2016 the Commission initiated rule of law proceedings.<sup>261</sup> Its first stage was only finalized in June 2016 when a formal opinion was issued.<sup>262</sup> Subsequently, between July 2016 and December 2017, the Commission adopted four recommendations. Yet, neither was the dialogue with Warsaw successful, nor did the rule of law situation in Poland register any improvements.<sup>263</sup> This is why the Commission advanced in its fourth recommendation the triggering of the mechanism enshrined in Article 7(1) TEU. It did so by submitting a reasoned proposal for a council decision concerning the existence of a clear risk of a serious infringement of the rule of law by Poland.<sup>264</sup> The decision was endorsed by the European Parliament.<sup>265</sup> In January 2018, Jarosław Kaczyński declared its intention to continuously pursue the ongoing changes, and as so he shattered any hopes of compliance with the EU's values.<sup>266</sup> In fact, more than two months after Article 7(1) TEU had been triggered, Poland had not stepped back on any of its contended judicial reforms.<sup>267</sup> Roughly three years later, the reasons to trigger Article 7(1) TEU are still present.<sup>268</sup> All in all, the rule of law framework did not slow down the fast paced constitutional destruction of Poland. While Poland was under scrutiny for the purpose of the dialogue, it was also actively capturing public

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<sup>261</sup> Konrad Niklewicz, 'Safeguarding the rule of law within the EU: lessons from the Polish experience' (2017) SAGE Journals 281, 282 <<https://journals.sagepub.com/doi/pdf/10.1007/s12290-017-0452-8>> accessed 6 May 2021.

<sup>262</sup> Ibid, 283.

<sup>263</sup> Maïa de La Baume, 'Brussels puts Warsaw on path to sanctions over rule of law' *Politico* (Warsaw, 20 December 2017) <<https://www.politico.eu/article/frans-timmermans-brussels-puts-warsaw-on-path-to-sanctions-over-rule-of-law/>> accessed 6 May 2021.

<sup>264</sup> European Commission, 'Rule of Law: European Commission acts to defend judicial independence in Poland' (*European Commission, Rule of Law: European Commission acts to defend judicial independence in Poland*, 20 December 2017) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_17\\_5367](https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367)> accessed 6 May 2021.

<sup>265</sup> Maïa de La Baume, 'MEPs back triggering Article 7 against Poland' *Politico* (Warsaw, 1 March 2018) <<https://www.politico.eu/article/european-parliament-triggering-article-7-poland-judicial-reform-voting-rights/>> accessed 6 May 2021.

<sup>266</sup> Judith Mischke, 'Poland's Kaczyński: We won't slow down our reforms' *Politico* (Warsaw, 26 January 2018) <<https://www.politico.eu/article/polands-kaczynski-we-wont-slow-down-our-reforms/>> accessed 6 May 2021.

<sup>267</sup> Maïa de La Baume and David M. Herszenhorn, 'Poland seeks to play long game in battle with Brussels' *Politico* (Warsaw, 27 February 2018) <<https://www.politico.eu/article/poland-brussels-eu-fight-warsaw-plays-long-game/>> accessed 6 May 2021.

<sup>268</sup> Reuters, 'EU rule of law action against Hungary, Poland to continue: Germany' *Reuters* (Brussels, 22 September 2020) <<https://www.reuters.com/article/us-eu-democracy-hungary-poland-idUSKCN26D29B>> accessed 6 May 2021.

media, the constitutional court, the supreme court and ordinary courts, civil service, and the prosecutor's office.<sup>269</sup>

In its fourth recommendation of December 2017, the Commission did more than triggering Article 7(1) TEU. It also expressed its intention to launch a first infringement procedure against Poland.<sup>270</sup>

In total, and regarding the Polish judiciary reforms, the Commission has until this moment initiated four infringement procedures.<sup>271</sup> In 2019, the Court considered a set of measures aimed at lowering

the retirement age of supreme court judges, and at allowing the Polish president to discretionarily extend their terms in office.<sup>272</sup> In harmony with the Court, both limbs infringe Article 19(1) TEU,

i.e., the independence of the judiciary.<sup>273</sup> The lowering of the retirement age of judges that forces the latter to prematurely cease their functions contradicts the principle of irremovability.<sup>274</sup>

Likewise, considering that the novel prerogative of the President of Poland did not follow objective, transparent and verifiable criteria, it was liable to give rise to reasonable doubts on the neutrality of judges.<sup>275</sup> In response, Poland reinstated all the affected 23 judges.<sup>276</sup>

Also in 2019 but now touching upon Polish ordinary courts, the Court examined the gender-varying retirement ages for judges and public prosecutors, as well as the power of the minister of justice to discretionarily extend the mandate of certain particular judges.<sup>277</sup> It was the Commission's view

that the introduction of different retirement ages for female and male judges and public prosecutors is discriminatory on the grounds of gender, thus precluded by Article 157 TFEU, and Articles 5(a) and 9(1)(f) Directive 2006/54.<sup>278</sup> Such a rationale was upheld by the Court.<sup>279</sup> In this regard, it is

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<sup>269</sup> Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz (n 90) 32.

<sup>270</sup> European Commission (n 264).

<sup>271</sup> European Parliamentary Research Service (n 9) 58.

<sup>272</sup> Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* [2019] ECLI:EU:C:2019:531.

<sup>273</sup> *Ibid*, para 124.

<sup>274</sup> *Ibid*, para 96.

<sup>275</sup> *Ibid*, paras 114 and 118.

<sup>276</sup> *DW News*, 'Poland backtracks on judicial reform, judges can return to work' *DW News* (Warsaw, 21 November 2018) <<https://www.dw.com/en/poland-backtracks-on-judicial-reform-judges-can-return-to-work/a-46388789>> accessed 6 May 2021.

<sup>277</sup> Case C-192/18 *Commission v Poland ((Independence of ordinary courts)* [2019] ECLI:EU:C:2019:924.

<sup>278</sup> *Ibid*, para 47.

<sup>279</sup> *Ibid*, para 84.



to note that the retirement pension of Polish judges and public prosecutors varies according to one's length of service, although not exclusively.<sup>280</sup> Thus, it is not surprising that the Court found the Polish laws concerned to infringe the principle of gender-equal pay protected by the previously provisions. In turn, the discretionary power accorded to the Minister of Justice is remarkably similar to the one recognized to the Polish President and poses equal concerns.<sup>281</sup> Following public outcry and prior to the judgement itself, Poland gender equalised the retirement age of judges and public prosecutors. However, judges forced into early retirement were not reinstated.<sup>282</sup>

Another matter brought to the Court's consideration was the novel disciplinary regime applicable to judges.<sup>283</sup> Albeit the judgement is still pending at the time of writing, interim measures were issued to ensure compliance with the principle of independence of the judiciary and EU law.<sup>284</sup> In detail, the Court agreed to suspend the applicability of the Polish provisions which stipulate the powers of the disciplinary chamber of the supreme court.<sup>285</sup> Although it suspended its activity concerning the disciplinary responsibility of judges, it is still active on other domains.<sup>286</sup>

Following, Polish policymakers adopted a new law on the justice system and its functioning on 20 December 2019.<sup>287</sup> According to the Commission, this legislative act jeopardised the independence of the judiciary, challenges the applicability and the primacy of EU law, and prevents preliminary rulings.<sup>288</sup> The Commission requested interim measures to safeguard the integrity of the judiciary.

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<sup>280</sup> Ibid, paras 63 et seq.

<sup>281</sup> Ibid, 124.

<sup>282</sup> Jennifer Rankin, 'Poland broke EU law by trying to lower age of retirement for judges' *The Guardian* (Warsaw, 5 November 2019) <<https://www.theguardian.com/world/2019/nov/05/poland-broke-eu-law-trying-lower-age-retirement-judges-says-court>> accessed 6 May 2021.

<sup>283</sup> Case C-791/19 *Commission v Poland (Régime disciplinaire des juges)* [2020] ECLI:EU:C:2020:277.

<sup>284</sup> Ibid, 114.

<sup>285</sup> European Commission, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland' (*Press Corner, Infringement to safeguard the independence of judges in PL*, 29 April 2020) <[https://ec.europa.eu/commission/presscorner/detail/EN/IP\\_20\\_772](https://ec.europa.eu/commission/presscorner/detail/EN/IP_20_772)> accessed 6 May 2021.

<sup>286</sup> European Parliamentary Research Service (n 9) 54.

<sup>287</sup> Adam Easton, 'Poland lower house approves controversial judges law' *BBC News* (Warsaw, 20 December 2019) <<https://www.bbc.com/news/world-europe-50874320>> accessed 6 May 2021.

<sup>288</sup> European Commission, 'Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures' (*Press Corner, European Commission refers Poland to the Court of Justice*, 31 March 2021) <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_1524](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524)> accessed 6 May 2021.

Specifically, it petitioned the suspension of the practical effects of decisions previously taken by the disciplinary chamber, and of provisions preventing judges from both requesting preliminary rulings and applying EU law on the judiciary. Moreover, the Commission requested the Court to declare the non-applicability of provisions enabling the disciplinary chamber to decide namely on the lifting of judicial immunity.<sup>289</sup>

The infringement procedures brought against Poland did not solely relate to its judicial reforms. In a diverse topic, the Court upheld that by failing to indicate an appropriate number of asylum seekers to be settled in its territory, Poland breached its relocation duties.<sup>290</sup>

Touching upon Poland, the Court was not exclusively visited by reason of infringement procedures. Here, references for preliminary rulings ought to be addressed. The Polish supreme court referred a set of questions to the European Court of Justice related to the independence and impartiality of the disciplinary chamber of the Polish supreme court.<sup>291</sup> It is true that the Court did not rule on the first question as it deemed it not necessary.<sup>292</sup> Yet, it is also true that the Court took such an opportunity to thoroughly elaborate on Articles 47 Charter and 19(1) TEU, and the right to an effective judicial protection as stipulated therein.<sup>293</sup> Indeed it accorded Poland's supreme court the final say,<sup>294</sup> but it also held that all factors combined (concerning the appointment, functioning, and jurisdiction of the disciplinary chamber and the role of the national council of the judiciary)<sup>295</sup> could be contradicting its independence.<sup>296</sup> Overall, a court is not independent if the subjects of law have legitimate doubts regarding whether that court is immune to external factors and interests.<sup>297</sup> Consequently, for a court to be independent and impartial, an array of rules on

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<sup>289</sup> Ibid.

<sup>290</sup> *Commission v Poland (Temporary mechanism for the relocation of applicants for international protection)* (n 250) para 193.

<sup>291</sup> Case C-585/18 A.K. (*Independence of the Disciplinary Chamber of the Supreme Court*) [2019] ECLI:EU:C:2019:982, paras 37 et seq.

<sup>292</sup> Ibid, para 71.

<sup>293</sup> Ibid, paras 81 and 82.

<sup>294</sup> Ibid, para 153.

<sup>295</sup> Ibid, paras 143 et seq.

<sup>296</sup> Ibid, 152.

<sup>297</sup> Ibid, para 171.

composition, the appointment of its members as well as length of service, reasons for dismissal, rejection and abstention is required.<sup>298</sup> According to the Polish constitution, the national council of the judiciary is the guardian of the independence of the courts and of the judges.<sup>299</sup> Its mandates include drafting proposals for the appointment of judges to both the supreme court and the newly created disciplinary chamber. As some of the final nominations are left to the President of Poland, those proposals are directed to him.<sup>300</sup> The national council of the judiciary is set by the constitution to be composed of 25 members. Prior to the 2017 reform, six of those were elected by the parliament, one by the President, another three were *ex officio*, and the remaining 15 were selected from, and by, the pool of Polish judges. The 2017 reform changed this structural paradigm. It interrupted the four-year term of the 15 judges and the parliament was vested with the selection of novel members.<sup>301</sup> As a result, 23 out of the 25 members are now elected by, or are in themselves, political figures.<sup>302</sup> Besides this factor, the Court called upon the referring court to consider other instances whenever making its final judgement. One of these was the potential irregularities liable to affect the appointment of members of the national council of the judiciary.<sup>303</sup> For instance, in contradiction with the principle of access to public information, the list of persons who backed specific candidates was not disclosed.<sup>304</sup> Notably, the perceived lack of independence of the national council of the judiciary led the European network of councils for the judiciary (hereinafter “ENCJ”) to exclude the Polish national judicial council of its activities and stripped it of its voting

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<sup>298</sup> Ibid, para 123.

<sup>299</sup> Ibid, para 13.

<sup>300</sup> Ibid, paras 20 and 27.

<sup>301</sup> Paweł Filipek, ‘The New National Council Of The Judiciary And Its Impact On The Supreme Court In The Light Of The Principle Of Judicial Independence’ 16 *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 177, 179 and 180

<[https://europeistyka.uj.edu.pl/documents/3458728/141910948/P.+Filipek\\_PWPM2018\\_pages-177-196.pdf](https://europeistyka.uj.edu.pl/documents/3458728/141910948/P.+Filipek_PWPM2018_pages-177-196.pdf)> accessed 9 May 2021.

<sup>302</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 291) para 143.

<sup>303</sup> Ibid.

<sup>304</sup> Paweł Filipek (n 301) 180.

rights.<sup>305</sup> Other factors to be born in mind by the referring court were the lack of judicial review of the decisions taken by the president on the appointment of judges to the supreme court,<sup>306</sup> and the fact that the disciplinary chamber was to be exclusively composed of newly appointed judges. In other words, those who were (at the time) already serving as supreme court judges were excluded from such a body.<sup>307</sup> Not less important, the ruling court was also to consider that while the disciplinary chamber was equipped with exclusive jurisdiction over cases related to employment, social security and the retirement of supreme court judges, a novel law (in opposition to the principle of irremovability)<sup>308</sup> lowered the retirement age of those with immediate effect.<sup>309</sup> Altogether, the independence of the disciplinary chamber could indeed be questioned,<sup>310</sup> but the referring court simply ruled that the latter does not qualify as a court within the meaning of Articles 47 Charter, 6 Convention and 45(1) constitution. In a different direction, the extraordinary review and public affairs chamber of the supreme court upheld, in January 2020, that the *A.K.* judgement should be interpreted as imposing proof of the lack of independence of isolated judges instead of the chamber as a whole. Also in January 2020, the civil, criminal and labour chambers of the Polish supreme court held that a supreme court panel is inappropriately formed if a judge nominated by the national council of the judiciary sits therein. In turn, a common court panel may be seen as unduly formed if the appointment itself contradicts the paradigm of independence. This resolution was challenged by the prime minister before the constitutional court which overtly established its unconstitutionality. According to it, the supreme court is not enabled to challenge the validity of judicial appointments made by the president. In harmony with the supreme administrative court, it

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<sup>305</sup> Euractiv, “‘Sad day ’as Poland banned from EU judicial body’ *Euractiv* (Brussels, 18 September 2018) <<https://www.euractiv.com/section/future-eu/news/sad-day-as-poland-banned-from-eu-judicial-body/>> accessed 10 May 2021.

<sup>306</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 291) para 145.

<sup>307</sup> *Ibid*, para 150.

<sup>308</sup> *Commission v Poland (Independence of the Supreme Court)* (n 272).

<sup>309</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 291) paras 148 and 149.

<sup>310</sup> *Ibid*, para 152.

is not sufficient that a panel includes a judge who has been appointed upon recommendation from the national council of the judiciary for that judge to be excluded.<sup>311</sup>

Later on, other two Polish courts referred questions to the Court concerning the novel disciplinary regime applicable to judges, the lack of independence and impartiality of disciplinary proceedings, and how both limbs directly relate to Article 19(1) TEU.<sup>312</sup> While highlighting the strict scope of application of preliminary rulings under Article 267 TFEU,<sup>313</sup> the Court rejected the reference at hand.<sup>314</sup> In its view, the questions referred did not satisfy the conditions of that provision because they were of general nature.<sup>315</sup> In other words, the settling of the substantive underlying cases did not require the interpretation of EU law by the Court.<sup>316</sup>

## **5.5. (In)effectiveness of the Mechanisms Used**

It derives from the foregoing that the EU does act when its values are being violated. Yet, to assess whether it is sufficiently reactive towards infringing Member States in order to ensure compliance, a note on the effectiveness of the mechanisms used is imperative. As it will follow, the EU seems to not be doing enough.

### **5.5.1. Infringement Procedures**

In harmony with Article 258 TFEU, the Commission is entitled to initiate infringement procedures against a particular Member State which did not fulfil its obligations under EU law, irrespective of it being primary or secondary law. Albeit they are designed to, and effective in, bringing Member States to meet their legal duties, they advance two shortcomings when used to respond to systemic

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<sup>311</sup> European Parliamentary Research Service (n 9) 54.

<sup>312</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 291) paras 6 and 7.

<sup>313</sup> European Parliamentary Research Service (n 9) 49.

<sup>314</sup> Joined Cases C-558/18 and C-563/18 *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* [2020] ECLI:EU:C:2020:234, para 60.

<sup>315</sup> *Ibid*, 53.

<sup>316</sup> *Ibid*, 50.

deficiencies related to the fundamental values of the EU, i.e. in ensuring compliance with those values.<sup>317</sup> On the one hand, they are subject to the discretion of the Commission.<sup>318</sup> On the other, they may only be launched if the conduct constitutes a breach of specific EU legislative acts.<sup>319</sup> As it selectively decides to prosecute and continue proceedings, both the initiation and pursuance of infringement procedures are open to the discretion of the Commission. It may even withdraw cases during their judicial stage.<sup>320</sup> As a result, politically sensitive topics (very much as all those Poland and Hungary advance) are often disregarded, overlooked, or postponed.<sup>321</sup> Problematically, if the Commission decides not to prosecute, and considering that Member States rarely use the infringement procedure themselves,<sup>322</sup> it is likely that the breach meets no reaction from the EU. In addition to the foregoing, infringement procedures may only be initiated if a Member State is violating specific provisions of EU law.<sup>323</sup> The fact that infringement procedures require a demonstrable and clear breach does not go hand in hand with the general nature of Article 2 TEU.<sup>324</sup> More so, the law of the EU does not cover everything that fundamental rights, democracy and the rule of law entail.<sup>325</sup> Not surprisingly, the results are problematic. Hungary seems to show how infringement procedures are not enough to answer to democracy and rule of law backsliding. First and foremost, Hungary did lower the retirement age of judges in an attempt to decapitate and politicise the judicial power. The Commission (in response) initiated an infringement procedure

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<sup>317</sup> European Parliamentary Research Service (n 9) 55.

<sup>318</sup> Michael Blauburger and R. Daniel Kelemen, 'Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU' (2017) 24 *Journal of European Public Policy* 321, 323 <<https://www.tandfonline.com/doi/pdf/10.1080/13501763.2016.1229357?needAccess=true>> accessed 10 May 2021.

<sup>319</sup> Commission, 'Communication From the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law' COM (2014) 0158 final.

<sup>320</sup> European Parliamentary Research Service (n 9) 61.

<sup>321</sup> Ibid.

<sup>322</sup> Dimitry Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (Jean Monet Working Paper No. 11, New York University School of Law 2015)

<[https://www.researchgate.net/publication/287419491\\_Biting\\_Intergovernmentalism\\_The\\_Case\\_for\\_the\\_Reinventio\\_n\\_of\\_Article\\_259\\_TFEU\\_to\\_Make\\_It\\_a\\_Viable\\_Rule\\_of\\_Law\\_Enforcement\\_Tool](https://www.researchgate.net/publication/287419491_Biting_Intergovernmentalism_The_Case_for_the_Reinventio_n_of_Article_259_TFEU_to_Make_It_a_Viable_Rule_of_Law_Enforcement_Tool)> accessed 10 May 2021.

<sup>323</sup> Commission (n 319).

<sup>324</sup> Michael Blauburger and R. Daniel Kelemen (n 318) 323.

<sup>325</sup> Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141, 147 <[https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12124?saml\\_referrer](https://onlinelibrary.wiley.com/doi/epdf/10.1111/eulj.12124?saml_referrer)> accessed 10 May 2021.

for age discrimination on the basis of Directive 2000/78. It is true that it won the case, but it is also true that it failed to address the real issue: a real and deep crisis of values.<sup>326</sup> Instead of being reinstated, the (prematurely retired) judges were awarded a compensation. Because compensation is perceived as a just and reasonable remedy for discrimination cases, the Hungarian government was allowed to avoid restoring judges while still complying with the ruling.<sup>327</sup> In the same vein, the Commission resorted to both the freedom of establishment and of services to respond to the governmental efforts to derail the Central European University.<sup>328</sup>

Some scholars reinvent Article 258 TFEU for it to better cope with Article 2 TEU and therefrom propose the so-called systemic infringement action. Through it, instead of submitting to the Court a breach of a specific legislative act, the Commission could submit a set of examples on how Article 2 TEU is supposedly being violated and how all examples combined allegedly amount to a systemic breach of EU values. In this regard, should the Court find an infringement of the said values, the Commission could bring another action on the basis of Article 260 TFEU, i.e., it could request the Court to apply financial sanctions towards the infringing Member State.<sup>329</sup> In this regard, it is to mention that a case may be brought by the Commission if an individual violation occurred or if a generalised and persistent breach materialized. In other words, the Court has upheld that indeed persistent and generalised violations of EU law may be tackled through Article 258 and Article 260 TFEU.<sup>330</sup> To do so, it is up for the Commission to demonstrate the seriousness, scale, and time of the violation.<sup>331</sup> However, critics stress how the so-regarded guardian of the treaties overly focuses

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<sup>326</sup> Ibid, 147 and 148.

<sup>327</sup> Luke Dimitrios Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis' (2019) 20 German Law Journal 1182, 1187  
<<https://www.cambridge.org/core/journals/german-law-journal/article/breathing-life-into-the-unions-common-values-on-the-judicial-application-of-article-2-teu-in-the-eu-value-crisis/92B416F605624733E8CB929FF53E49C9>> accessed 11 May 2021.

<sup>328</sup> Laurent Pech and Kim Lane Scheppele (n 229) 13.

<sup>329</sup> Carlos Closa, Dmitry Kochenov and J.H.H. Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (European University Institute Robert Schuman Centre for Advanced Studies 2014)  
<[https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS\\_2014\\_25\\_FINAL.pdf?sequence](https://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence)> accessed 10 May 2021.

<sup>330</sup> European Parliamentary Research Service (n 9) 55.

<sup>331</sup> Case C-494/01 *Commission v Ireland* [2005] ECR I-03331, Opinion of AG Geelhoed, para 115.

on concrete violations instead of addressing larger infringements of EU law.<sup>332</sup> Needless to say, the infringement procedures brought against both Poland and Hungary illustrate exactly this. Indeed, the Commission initiated a set of infringement procedures thus reacting to diverse policies and did not work on sole further robust cases.<sup>333</sup> To this day, neither has the Commission launched an infringement procedure exclusively on the basis of Article 2 TEU, nor has the Court considered an action alike.<sup>334</sup>

Altogether, as it was held by Barroso himself, infringement actions appear to fail to tackle illiberal governments when their actions contradict EU values effectively and properly.<sup>335</sup>

### **5.5.2. Article 7(1) TEU**

Article 7 TEU provides for three mechanisms tailored to safeguard the values of the EU, one of preventive nature and another two of enforcement sort.<sup>336</sup> Article 7(1) TEU enshrines the preventive arm and endeavours to address systemic breaches of the values instead of individual violations.<sup>337</sup> Two remarks are in order. First, Article 7(2) TEU should have been triggered instead of Article 7(1) TEU. Second, the effectiveness of Article 7(1) TEU appears to be questionable.

The assessment of a clear risk (carried by the European institutions) relates to all areas of activity irrespective of them falling within the competences of the EU. Because it may be launched when there is a (clear) risk of non-compliance, an actual infringement is not required. Yet, the ongoing procedures against Hungary and Poland show that its preventive scope is somewhat curtailed. In other words, Article 7(1) TEU was triggered against the formerly mentioned in a reactive fashion, i.e., as a response to a set of policies, decisions and legal reforms that jeopardise the values of the

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<sup>332</sup> Pål Wennerås, 'A New Dawn for Commission Enforcement Under Articles 226 And 228 EC: General and Persistent (Gap) Infringements, Lump Sums and Penalty Payments' (2006) 43 *Common Market Law Review* 31, 32 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1612286](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1612286)> accessed 11 May 2021.

<sup>333</sup> European Parliamentary Research Service (n 9) 58.

<sup>334</sup> *Ibid.*

<sup>335</sup> Laurent Pech and Kim Lane Scheppele (n 229) 13.

<sup>336</sup> European Parliamentary Research Service (n 9) 42.

<sup>337</sup> *Ibid.*, 37.



EU. In this topic, as one may grasp from the reasoned proposal on Poland by the Commission, the decision to trigger Article 7(1) TEU was based on a set of measures enacted over a period of two consecutive years. Likewise, the reasoned proposal on Hungary by the Parliament justifies Article 7(1) TEU on an array of concerns that had already materialised at the time of its activation. It begs the question whether Article 7(1) TEU should not have been used in a prior moment, and whether Article 7(2) TEU should not have been triggered instead of its preventive counterpart.<sup>338</sup> Whereas Article 7(1) TEU enables the Council to declare that there is a clear risk of a serious breach of EU values by a given Member State, Article 7(2) TEU allows it to establish the existence of a serious and persistent infringement of those values. The difference between both limbs is on the actuality and persistency of the infringement, as the seriousness put forward by Article 7(2) TEU operates according to the same threshold present in Article 7(1) TEU. The actuality of the violation is exclusively related to it existing instead of it being a mere risk, while persistency may be expressed in a variety of forms and concerns the repetition of the practice over a period of time.<sup>339</sup> As previously pointed out, the fulfilment of the actuality of the infringements did not seem ambiguous when Article 7(1) TEU was activated against Poland and Hungary. Notably, it derives from both reasoned proposals that the reality on the ground already contradicted the values of the EU. More so, their persistency was also satisfied. The fact that the reasoned proposal on Poland addresses a set of policies enacted over a period of two years appears to show this quite straight-forwardly. However, perhaps because Article 7 TEU is seen as a last resort tool,<sup>340</sup> alongside the facts that there is no obligation to trigger the mechanisms therein,<sup>341</sup> and that Article 7(1) TEU is not as procedurally burdensome as Article 7(2) TEU,<sup>342</sup> the former (and not the latter) was activated. However, triggering Article 7(1) TEU rather than Article 7(2) TEU has practical implications.

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<sup>338</sup> Ibid.

<sup>339</sup> Commission (n 61).

<sup>340</sup> Ibid.

<sup>341</sup> European Parliamentary Research Service (n 9) 43.

<sup>342</sup> Ibid, 42

Here, while resorting to Article 7(2) TEU allows for sanctions to be enacted, launching Article 7(1) TEU does not.<sup>343</sup> It is true that the latter enables the Council to issue recommendations, but it is also true that a mechanism to enforce them is non-existent.<sup>344</sup>

To grasp the apparent ineffectiveness of triggering Article 7(1) TEU against Hungary and Poland, attention must be brought to its underlying procedure. As it follows from the wording of that provision, the mechanism may be activated by one-third of the Member States, the Commission, or the Parliament whenever a clear risk of a serious infringement of EU values materialises. While in Poland's case it was the Commission who initiated the procedure on 20 December 2017, in Hungary's case it was the Parliament on 12 September 2018.<sup>345</sup> Following its activation, the relevant Member State shall be heard by the Council, and only subsequently may the latter, by a majority of four fifths and with the consent of the Parliament, decide whether a clear risk of EU values does or not materialise.<sup>346</sup> Yet, the lack of deadlines imposed on the Council and the wording of Article 7(1) TEU seem to suggest the absence of an obligation upon the latter. In other words, there is no legal duty for the Council to establish that there is a clear risk of a serious breach of the values of the EU by a given Member State.<sup>347</sup> This is connected to the political nature of the Council in problematic terms. In this regard, the presidency of the Council rotates every six months.<sup>348</sup> In the second half of 2018, Austria held the presidency, and in January 2019 Romania took over the latter.<sup>349</sup> Unlike all of the same kind, the first meeting of the general affairs council conducted under the 2019 Romanian presidency did not touch on the rule of law.<sup>350</sup> In Romania's presidency

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<sup>343</sup> TEU, article 7.

<sup>344</sup> European Parliamentary Research Service (n 9) 43.

<sup>345</sup> Ibid, 45.

<sup>346</sup> TEU, article 7.

<sup>347</sup> European Parliamentary Research Service (n 9) 43.

<sup>348</sup> European Council, 'The presidency of the Council of the EU' (*Council of the European Union*, 12 January 2021) <<https://www.consilium.europa.eu/en/council-eu/presidency-council-eu/>> accessed 17 May 2021.

<sup>349</sup> European Council, 'Council rotating presidencies: decision on revised order' (*Council of the European Union*, 26 July 2016) <<https://www.consilium.europa.eu/en/press/press-releases/2016/07/26/council-rotating-presidencies-revised-order/>> accessed 17 May 2021.

<sup>350</sup> Alexandra Brzozowski, 'Poland gets a pass as Romanian presidency struggles with rule of law approach' *Euractiv* (Brussels, 9 January 2019) <<https://www.euractiv.com/section/justice-home-affairs/news/poland-gets-a-pass-as->

website, rule of law is not even portrayed as a value.<sup>351</sup> Irrespective of its presidency, no decision has been taken by the Council on either country,<sup>352</sup> thusly illustrating a lack of coordination and agreement between the EU institutions.<sup>353</sup> The reality on the ground also seems to show little to no improvement.<sup>354</sup> All in all, the ongoing procedures against Poland and Hungary appear to lack effectiveness.

### 5.5.3. Rule of Law Framework

Adopted in 2014, the rule of law framework intends to operate as a complementary tool in relation to all other available instruments, notably Article 7 TEU. As a preventive mechanism, it allows the Commission to initiate a dialogue with the relevant Member State to safeguard the rule of law and avoid its crisis. Following, it is to be triggered to respond to systemic threats to specifically the rule of law and not to isolated cases. The Commission sees it as an early warning tool, thus it is also its view that if no solution is found under such a framework, Article 7 TEU remains a viable option.<sup>355</sup> This is why it is frequently referred to as the pre-Article 7 TEU procedure.<sup>356</sup>

The rule of law framework entails three stages: the Commission's assessment, recommendation, and the follow-up to the latter. In the first phase, the Commission analyses the situation on the ground to evaluate if the rule of law is (or not) systemically threatened. If it finds that the rule of law is indeed endangered, the Commission initiates a dialogue with the relevant Member State by

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[romanian-presidency-struggles-with-rule-of-law-approach/?\\_ga=2.26469565.1683849710.1554990471-614916844.1554990471](https://www.institutdelors.eu/en/publications/trashed/#_ftn4)> accessed 17 May 2021.

<sup>351</sup> Martin Michelot, 'The "Article 7" proceedings against Poland and Hungary: What concrete effects?' (25 years of Europe Jacques Delors Institute, 6 May 2019) <[https://institutdelors.eu/en/publications/trashed/#\\_ftn4](https://institutdelors.eu/en/publications/trashed/#_ftn4)> accessed 17 May 2021.

<sup>352</sup> European Parliamentary Research Service (n 9) 46.

<sup>353</sup> Dimitri Kochenov, 'Busting the myths nuclear: A commentary on Article 7 TEU' (EUI Working Papers, European University Institute 2017) <[https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW\\_2017\\_10.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/46345/LAW_2017_10.pdf?sequence=1)> accessed 17 May 2021.

<sup>354</sup> European Parliamentary Research Service (n 9) 46.

<sup>355</sup> European Commission, 'European Commission presents a framework to safeguard the rule of law in the European Union' (European Commission, Press Corner, 11 March 2014) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_14\\_237](https://ec.europa.eu/commission/presscorner/detail/en/IP_14_237)> accessed 17 May 2021.

<sup>356</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 270.

issuing the so-called rule of law opinion. The said Member State is given the chance to respond and only if the matter is not satisfactorily settled does the procedure follow to its second stage. In that case, the Commission issues a recommendation where it prompts the Member State to resolve a set of issues previously identified within a certain time frame. In the final step, the Commission evaluates if the Member State complied with its prior recommendation.<sup>357</sup>

The fact that this framework is in itself a dialogue carries its biggest weakness. In practice, its non-binding nature leaves the Commission with no enforcement mechanisms. Most notably, the Polish authorities did not comply with any of the recommendations issued by the Commission. More so, a dialogue entails two parties willing to actively engage. If the Commission triggers the mechanism at hand, it is certainly open to a dialogue, but the same logic does not invariably apply to the Member State concerned. In fact, as the Commission sees it, Poland (i.e., the only country towards which this mechanism was activated) was not willing to be part of a real dialogue.<sup>358</sup>

On a diverse topic, the Commission's discretion does not come without practical consequences. In 2015, although the Commission was advised by the Parliament to initiate proceedings under the rule of law framework against Hungary, it decided not to do so. Curiously, in its view, such a country was not breaching the rule of law,<sup>359</sup> despite the outspoken violations of human rights against migrants, the flawed functioning of the constitutional court, the independence of the judiciary, and the high levels of corruption.<sup>360</sup>

But the freedom of the Commission is not only present in the decision to initiate or not to initiate proceedings. One may also see it in the absence of an obligation to carry on with them, and in the lack of precise time boundaries between their three stages.<sup>361</sup> Poland seems to be a clear example of this problematic discretion. On 31 January 2016, the rule of law framework was activated, but only on 1 June 2016 was an opinion issued by the Commission. On 27 July 2016, a first

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<sup>357</sup> Commission (n 295).

<sup>358</sup> European Parliamentary Research Service (n 9) 33.

<sup>359</sup> Cristina Fasone, Daniele Gallo and Jan Wouters (n 3) 270.

<sup>360</sup> Laurent Pech and Kim Lane Scheppele (n 229) 22.

<sup>361</sup> European Parliamentary Research Service (n 9) 30 et seq.

recommendation was addressed to Poland identifying all deficiencies and recognizing the latter with a three-month period to tackle those shortcomings. However, Poland did not comply. The Commission did not trigger Article 7(1) TEU after that deadline materialized, instead it issued three other recommendations between December 2016 and December 2017. Albeit all those included novel issues and deadlines to be respected, the Commission only triggered Article 7(1) TEU in its fourth recommendation, on 20 December 2017.<sup>362</sup> Notoriously, by the time the second recommendation was issued, the ruling party had managed to contradict the applicable procedural rules and appoint a judge to be the president of the constitutional court.<sup>363</sup> Not surprisingly, by the time the third recommendation was addressed to the Polish government, there had been a complete break down of the rule of law.<sup>364</sup> All in all, it seems to suggest that the Commission is unable to commit to the steps of its own procedure.<sup>365</sup> But not solely. It also illustrates that it was reluctant to push for the framework to move forward, even when apparently it had every reason to. To bear in mind, rather than implementing any of its recommendations or manifesting some interest in an active dialogue, Poland questioned the legality of the rule of law framework.<sup>366</sup> In the meantime, it did not cease to challenge the rule of law, by continuously undermining its constitutional court.<sup>367</sup> Certain scholars perceive the rule of law framework as a twin of Article 7(1) TEU, only without the involvement of other EU institution. Its practical effect would thus be delaying the deployment of Article 7(1) TEU. Maybe such a framework embodies the reason why Article 7(1) TEU was not triggered when it should have been.<sup>368</sup>

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<sup>362</sup> Ibid.

<sup>363</sup> Laurent Pech and Kim Lane Scheppele (n 229) 17.

<sup>364</sup> Ibid, 20.

<sup>365</sup> Dimitri Kochenov (n 353) 9.

<sup>366</sup> Laurent Pech and Kim Lane Scheppele (n 229) 15.

<sup>367</sup> Ibid, 16.

<sup>368</sup> Dimitri Kochenov (n 353) 9.

#### 5.5.4. References for Preliminary Rulings

Article 267 TFEU allows national courts to refer questions to the Court on the validity of acts of the EU and on the interpretation of EU law. Although the main objective of preliminary rulings is to promote a harmonized interpretation and application of EU law, they are further utilised to assess discrepancies between domestic law and EU law. To note, the values of the EU are relevant in both limbs, i.e., it is up for the Court to ensure a uniform reading of Article 2 TEU and to uphold any contradicting disparities between national laws and the said values.<sup>369</sup>

The first weakness of this procedure in responding to crisis of values lies in its scope of application. In other words, for a national court to resort to a preliminary ruling, a set of conditions shall be met. Firstly, the request ought to concern the interpretation or application of EU law. Secondly, EU law must apply to the substantive case at hand and the question referred must be key for the resolution of the case.<sup>370</sup> Lastly, the authority requesting a preliminary ruling ought to qualify as a court or tribunal. I.e., it shall be an independent and permanent body established by law and applying rules of law, whose procedure is *inter partes* and whose jurisdiction is compulsory.<sup>371</sup> Poland shows how pricy requiring all these conditions may be. While two Polish courts requested the Court to interpret Article 19(1) TEU, the Court bluntly refused for understanding that the requirements of Article 267 TFEU were not fulfilled.<sup>372</sup> In its view, the (needed) material link between the substantive cases and the interpretation of EU law, specifically Article 19(1) TEU, was missing.<sup>373</sup>

Another issue of using Article 267 TFEU to safeguard the values of the EU is that the procedure therein requires first that a case is brought before a national court and second that the same court

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<sup>369</sup> European Parliamentary Research Service (n 9) 49.

<sup>370</sup> Ibid, 50.

<sup>371</sup> Court of Justice of the European Union, 'Recommendations to national courts and tribunals, in relation to the initiation of preliminary ruling proceedings' (25 November 2016) OJ C 439.

<sup>372</sup> *Miasto Łowicz (Régime disciplinaire concernant les magistrats)* (n 314) para 60.

<sup>373</sup> Ibid, para 49.

acts, i.e., requests the preliminary ruling.<sup>374</sup> But in particular jurisdictions, Poland included, this may be an issue. By reason of the newly introduced disciplinary regime applicable to Polish judges, the latter are precluded from submitting preliminary questions on a set of matters.<sup>375</sup> In a similar vein, although preliminary rulings allow the Court to interpret and provide further insight on relevant provisions, a space of maneuver is left to the national court to apply such understanding. Once again, Poland shows how this may be problematic. Indeed, albeit the Court extensively elaborated on the challenges to the independence of the domestic disciplinary chamber,<sup>376</sup> the national court merely concluded that the latter did not qualify as a court as advanced by Articles 47 Charter, 6 Convention and 45(1) Constitution.<sup>377</sup> A fairly simple approach. Nevertheless, because preliminary rulings bind the Member State concerned and all others,<sup>378</sup> the whole issue lies in the discretion that the Court itself decides to award to the national court. If that discretion is limited, so is the final outcome. This is partly why preliminary procedures are said to be effective in bringing Member States into compliance with fundamental values.<sup>379</sup> In practice, every time the Court gives insight into the scope of those same values, it obliges Member States to comply with the upheld threshold. Here, there is a remarkably important “but”: if the Member State concerned or another Member State does not abide by the ruling, such a breach is not sanctionable through the preliminary ruling procedure.<sup>380</sup> Instead, it might be sanctioned under the infringement procedure, which (shall be recalled) presents a set of flaws when addressing fundamental values.

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<sup>374</sup> European Parliamentary Research Service (n 9) 53.

<sup>375</sup> European Commission (n 319).

<sup>376</sup> *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)* (n 291).

<sup>377</sup> European Parliamentary Research Service (n 9) 54.

<sup>378</sup> Joined Cases C-231/06 to C-233/06 *Jonkman* [2019] ECR I-05149, para 41.

<sup>379</sup> European Parliamentary Research Service (n 9) 52.

<sup>380</sup> *Ibid*, 53.

## **5.6. Overall Assessment of Compliance with the Fundamental Values by Member States**

As it has been formerly addressed, the EU does act when Member States do not comply with its fundamental values. Unfortunately, such an action seems to fall short in effectiveness. This is as such given that all tools deployed by the EU present their own shortcomings in bringing Member States into complying with the said values. Needless to say, this is (pretty much) why Poland and Hungary did not cease to disregard the mandates of Article 2 TEU. To this day, they continue to engage in novel forms of violation of the cornerstone values of the EU. This paradigm desperately calls for a reform of the current enforcement mechanisms. In other words, it demands the EU to adopt novel tools to respond to values backsliding.<sup>381</sup>

## **6. Conclusion**

As the cases studied above seem to suggest, the EU is a union of values although not always in practical terms. Albeit Articles 2 and 49 TEU require Member States and prospective Member States to comply with the cornerstone values of the EU, the EU itself appears to fall short in fully enforcing such a mandate at times. In fact, the EU really is equally demanding towards Member States and prospective members regarding respect for its fundamental values. But not for the good reasons. In practice, the EU is not sufficiently pressing towards either of the priorly mentioned. In what concerns future members of the EU, it often disregards failures of compliance. Poland at the time of accession, Turkey, Serbia, and Montenegro show it in clear terms. Most notably, Poland had yet to implement 250 directives when it became a EU Member State, negotiations were open with Turkey in spite of its non-abidance by the Copenhagen criteria, and Serbia and Montenegro continue on the run to become actual members of the EU although their lines of progress in terms of compliance with the said values are somewhat questionable. In the same vein, the vagueness of the accession criteria and the actual reason behind the enlargement of the EU strongly contribute

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<sup>381</sup> Ibid, 73.



for a lack of compliance. While the former creates uncertainty amid accession officials and prompts wide discretion in assessing if a country complies with the fundamental values, the former is known to overweight the geopolitical interest in place of the dissemination of those fundamental values. The underperformance of the EU towards current Member States follows a similar trend. The cases of Hungary and Poland suggest that the EU deploys flawed mechanisms in order to respond to values backsliding by Member States. All the tools used so far, i.e., infringement procedures, preliminary references, the rule of law framework and Article 7(1) TEU, present their own shortcomings when addressing violations of fundamental values. To be duly noted, infringement procedures are built to respond to individual violations of EU law and preliminary references, besides entailing a restrictive scope, depend upon the discretion of the national courts that become further politicised when values backsliding occurs. Also to acknowledge, the rule of law framework is characterized by the problematic discretion of the Commission to initiate and carry on proceedings and by the absence of enforcement tools. Last but not least, Article 7(1) TEU was only deployed twice, against Hungary and against Poland, and late. Even if it had been deployed in time, because Article 7(1) TEU is only used to declare that a country is at risk of breaching EU values and nothing else, it seems to provide little to no effectiveness. Notably, the migration agreements concluded with Turkey and Libya appear to illustrate that the EU also disrespects its own values. The result is quite problematic: a EU that affirms itself as a union of values is (in practice) devoid of them. At least regarding certain instances. Fortunately, a set of solutions have been proposed. These include, although not solely, the right to expel,<sup>382</sup> and the establishment of the Copenhagen Commission.<sup>383</sup> Touching upon the prior, the treaties allow Member States to voluntarily withdraw from the EU, but they do not stipulate the expulsion of current members by their counterparts. As practice shows, if the EU intends to be a union of values in practical terms instead of only

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<sup>382</sup> Jan-Werner Müller (n 319) 150.

<sup>383</sup> Ibid.

theoretically, the possibility to remove countries which do not abide by its values comes in handy. In turn, the Copenhagen Commission is supposed to be the guardian of the *acquis* and shall be equipped to offer political judgements.<sup>384</sup> If a given country is found to systematically infringe the values of the EU, it is for that Commission to investigate and launch a material warning that does not boil down to mere words. More so, it would be empowered to require the Commission to cut funds or impose fines.<sup>385</sup> Should these be adopted by the treaties and implemented, values would be further safeguarded.

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<sup>384</sup> Ibid.

<sup>385</sup> Ibid, 151.

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