



The Rule of Law as a Constitutional Mandate for the EU

Werner Schroeder¹

Accepted: 17 November 2022 / Published online: 8 December 2022
© The Author(s) 2022

Abstract

The rule of law and the other values contained in Article 2 of the Treaty on European Union (Art 2 TEU) comprise the constitutional identity of the European Union (Union). These values form part of the Union's very foundation. Art 3(1) and (6) TEU, in conjunction with Art 2 TEU, declare the Union's aim to promote and pursue the rule of law as one of its core values. These provisions indicate that the rule of law is not only a constitutional principle but gives the Union a mandate to shape its policies accordingly in order to create an enabling ecosystem for the rule of law in the Member States. The Union may counter internal threats to the rule of law, but it can and should also take positive legal action to strengthen and consolidate the rule of law in the Member States by making use of its sectoral law-making competences. Proactively, the rule of law must be implemented and specified through Union secondary law and made the yardstick for legislative, administrative and judicial activity in the Member States.

Keywords Rule of Law · European Union · Values · Principles · Constitution · Competences · Objectives · Mainstreaming

1 The Need to Strengthen the Rule of Law in the Member States

Whereas some time ago there was talk of a tendency towards the rule of law 'backsliding' in certain Member States regarding the *acquis* of the accession,¹ it can be no longer presumed that the EU is a Union of rule of law-based democracies, as its Treaties imply.² It has become obvious that the rule of law is under real threat in

¹ L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

² KL Scheppele, D Kochenov and B Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3, 5.

✉ Werner Schroeder
werner.schroeder@uibk.ac.at

¹ Professor, Department of European Law and Public International Law, University of Innsbruck, Innsbruck, Austria

certain Member States of the Union. This concerns Poland and Hungary in particular, but also to varying degrees other member states such as Romania, Bulgaria or Malta. The current rule-of-law deficits in these Member States threaten the Union's legitimacy³ and identity as a common legal order,⁴ which rest on its Member States' respect for the rule of law. If the rule of law systematically deteriorates in the Member States, the Union itself is also endangered. Therefore, the Union, within the framework of its competences, should be able to defend the rule of law by enforcing rule-of-law standards vis-à-vis Member States. Merely prohibiting those states from 'bringing about a reduction in the protection of the rule of law'⁵ does not solve the problem.

Art 7 TEU provides for a procedure to 'penalise' Member States for severe and persistent breaches of the values contained in Art 2 TEU, in particular, to compel those States to cease breaches by ultimately depriving them of voting rights.⁶ However, this instrument is also insufficient. Corresponding proceedings against Poland and Hungary have not progressed for years. The Council does not address the issues, and this situation is not expected to change in the foreseeable future. Nor have the Commission's numerous infringement proceedings brought against states such as Poland and Hungary before the European Court of Justice (ECJ) led to any significant improvement in those states' regard for the rule of law. The ECJ always decides on individual cases, and its decisions typically lag behind the systemic strategies pursued by these states.⁷

The rule of law in the Union can only be effectively guaranteed by consistent measures aimed at defending, restoring and strengthening it.⁸ The rule of law must therefore be mainstreamed across all policy fields. In Union law, there is a potential for such measures as the Union institutions and the Member States are committed to respect the common values referred to in Art 2 TEU as well as to promote and actively pursue them under Art 3(1) and (6), Art 4(3) and Art 49 TEU. Thus, the systematic realisation of the principle of the rule of law must become part of the decision-making programme for the Union's institutions.⁹

The Union had practised such an active rule-of-law policy for many years regarding candidate countries until it was legalised by the Amsterdam Treaty.¹⁰ It

³ A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 29 *Oxford Journal of Legal Studies* 549, 563f.

⁴ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, paras 127f; Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, paras 145f.

⁵ Case C-896/19 *Republika* ECLI:EU:C:2021:311, para 63; Case C-83/19 and Others *Asociația 'Forumul Judecătorilor din România'* ECLI:EU:C:2021:393, para 162.

⁶ See Case C-156/21 *Hungary v Parliament and Council* (n 4), para 170.

⁷ On the inefficiency of infringement procedures see Scheppele, Kochenov and Grabowska-Moroz (n 2) 41f.

⁸ See C Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in C Closa/D Kochenov (eds), *Reinforcing Rule of Law Oversight* (2016), pp. 59, 60 et seq.

⁹ W Schroeder, 'The Rule of Law As a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Berlin, Springer, 2021) 113f.

¹⁰ Now TEU, Art 49.

mandated that accession Member States must adhere to the rule of law as part of the enlargement requirements.¹¹ With a view to these requirements, the Commission examined the rule-of-law situation in candidate countries, assessing which states had to adapt their laws, including, for instance, the appointment of judges and election laws.¹² In the following, I will present a constitutional doctrine by which the Union can respond more effectively to rule-of-law deficits in the Member States. This doctrine understands values, including the rule of law principle, not only as a constitutional principle but also as a constitutional mandate for the Union through secondary legislation to set rule of law standards to be implemented and applied by Member States. A rule of law-based interpretation of the Union's competences will have practical implications for the use of its legislative powers. I will give concrete examples of how possible legislative acts of the Union could be inspired by the principle of the rule of law. The use of these instruments can contribute to strengthening the rule of law in the Union, in particular vis-à-vis its Member States.¹³ The introduction of the rule of law budgetary conditionality in Regulation (EU, Euratom) 2020/2092,¹⁴ under which the Union may withhold monies from Member States that do not observe the rule of law, is a first step in this direction. The Union must go further, however, systematically incorporating rule-of-law considerations into all its policies to actively promote, realise and sustain the rule of law throughout the Union.

2 Relevant Rule of Law Standard

Thus far, the discussion about the content of the rule of law has been preoccupied with questions of judicial independence.¹⁵ This focus on the judiciary is understandable given that the main rule-of-law problems in the Union concern issues of judicial backsliding by Member States. However, the rule of law cannot be reduced simply to the situation of the judiciary. The Union rule of law includes formal elements and substantive standards.¹⁶ The current European perception is that the rule of law

¹¹ C Hillion, 'The Copenhagen Criteria and Their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (Oxford, Hart Publishing, 2004) 1f.

¹² D 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.

¹³ The paper cannot address the Union's own problems in meeting its value standards, critical in this regard Williams (n 3) 549f; R D Kelemans, The 'Democratic Deficits' of the US and the EU compared, in S Garben, I Govaere and P Nemitz (eds) *Critical Reflections on Constitutional Democracy in the European Union* (Oxford, Hart Publishing, 2019) 47 f.

¹⁴ Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1.

¹⁵ Case C-64/16 *Associação Sindical dos Juizes Portugueses* ECLI:EU:C:2018:117, para 41; Case C-619/18 *Commission v Poland* ECLI:EU:C:2019:531, paras 47f; Case C-896/19 *Republika* (n 6), para 51.

¹⁶ K Lenaerts, 'Die Werte der Europäischen Union in der Rechtsprechung des Gerichtshofs der Europäischen Union: eine Annäherung' (2017) 44 *Europäische Grundrechte-Zeitschrift* 639, 641; L Pech, The Rule of Law as a Well-Established and Well-Defined-Principle of EU Law (2022) *Hague J Rule Law*, <https://doi.org/10.1007/s40803-022-00176-8>; M Krygier, 'Rule of law' in M Rosenfeld and A

must impose an obligation for fairness and a prohibition of arbitrariness in the content of legal norms.¹⁷ This approach, based on the idea that the rule of law has not merely formal but also substantive components, has been employed by the institutions of the Union. The definition of the rule of law provided in Art 2(a) of the ‘conditionality’ Regulation (EU, Euratom) 2020/2092 refers to ‘the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law’. This broad understanding, which does not exceed the limits of the concept of the rule of law,¹⁸ assumes correctly that formal aspects of the rule of law may overlap with substantive content.

Therefore, the issue is whether the Union legislator has the right to define the meaning of the rule of law if it pursues an active rule-of-law policy and, in this context, articulates positive legal standards for the Member States employing secondary law. If not, must the legislator employ the constitutional concept enshrined in Art 2 TEU and defined by the ECJ? The Union legislator may try to escape this problem by stating that its definition is exclusively applicable to the specific piece of Union legislation and not meant to be exhaustive.

However, when making the rule of law the subject of systematic legislative treatment, the Union legislator might further develop its concept.¹⁹ The legislator is entitled to specify principles that form part of the rule of law by considering the case law of the ECJ. Such power to further develop a concept of primary law using secondary law also results from Art 3(1) and (6) TEU, which provide the Union’s institutions with a mandate to promote the value of the rule of law and to pursue it within the framework of its competences. In doing so, the Union institutions have a certain degree of discretion limited by the guidelines drawn by the ECJ based on Art 2 TEU.²⁰

Footnote 16 (continued)

Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford, Oxford University Press, 2012) 236f; Schroeder (n 9) 117f with further references.

¹⁷ See T Bingham, *The Rule of Law* (London, Allen Lane, 2010) 37; P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *PL* 467, 470f.

¹⁸ Case C-157/21 *Poland v Parliament and Council* (n 4), para 324.

¹⁹ The ECJ plays down the law-making character of such secondary law definition when it argues that it is merely declaratory, Case C-157/21 *Poland v Parliament and Council* (n 4), paras 224 and 323ff.

²⁰ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 231–237; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 324–328.

3 The Value-Function of the Rule of Law

Whether it is possible or even necessary for the Union to have an active rule-of-law policy depends not only on its content but above all on the function attributed to the rule of law.²¹

1. A Functional View of the Rule of Law

A consensus of opinion regards the most basic function of the rule of law as the institutionalised taming of the arbitrary use of public power.²² This idea, namely that it is at the core of the rule of law that citizens must be safeguarded against state abuse by limiting sovereign power, also has its place in Union law.²³ Similar to fundamental rights, the rule of law is traditionally conceived as a negative norm of competence that limits the exercise of powers by a sovereign entity.

Moreover, the rule of law also has a positive dimension. Rule of law is not merely about preventing or limiting the exercise of repressive power—it also entails a programmatic function.²⁴ This function can be seen by examining the rule of law in the Union order, which considers its realisation to be a constitutional objective. The insight that the rule of law also has a positive dimension may inform the interpretation of this concept by the Union's branches.

In that context, note that the Treaty of Lisbon rebranded the rule of law as a value, whereas it was formerly regarded as a principle. Some scholars dismiss the relevance of this linguistic turn and take the position that nothing has changed from the point of view of the legal discipline.²⁵ They rely on the case law of the ECJ, which has referred to the rule of law as a 'constitutional principle'.²⁶ However, the wording of Art 2 TEU was by no means altered accidentally. The inclusion of a canon of values in the TEU by the Treaty of Lisbon is evidence that the European integration process has deepened considerably over the years, manifesting the transformation of the Community from a single market organisation to a Union defined as a community of values.²⁷ The word 'value' in the context of the rule of law thus

²¹ See M Krygier, 'Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?' in JE Fleming (ed), *Getting to the Rule of Law* (New York and London, New York University Press, 2011) 65.

²² M Loughlin, *Foundations of Public Law* (Oxford, Oxford University Press, 2010) 336.

²³ See E Fuß, 'Zur Rechtsstaatlichkeit der Europäischen Gemeinschaften' (1964) 17 *Die Öffentliche Verwaltung* 577, 577f; T Holterhus, 'The History of the Rule of Law' (2017) 21 *Max Planck Yearbook of United Nations Law* 430, 463ff; Schroeder (n 9) 117.

²⁴ M Krygier, *Philip Selznick: Ideals in the World* (Stanford, Stanford University Press, 2012) 135f.

²⁵ See A von Bogdandy, 'Founding Principles' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2009) 22f; M Hilf and F Schorkopf, 'Art 2 EUV' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union*, 74th edn (Munich, C.H.Beck, September 2021) para 21.

²⁶ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, paras 281 and 285.

²⁷ See Lenaerts (n 16) 640; J Larik, 'From Speciality to a Constitutional Sense of Purpose: On the Changing Role of the Objectives of the European Union' (2014) 63 *ICLQ* 935; on the rule of law as 'common value' Case C-619/18 *Commission v Poland* (n 15), paras 42 and 43.

does not seem to be a meaningless formula²⁸ but rather indicates that the framers of the Lisbon Treaty wanted to associate the rule of law with a broader goal and strategy. Therefore, the rule-of-law notion has several potential functions. Originally, rule of law could be understood as a constitutional principle with an ordering function for the Union's constitutional structure.²⁹ At the same time, it is regarded as a programme for the Union.

2. A 'System of Values' Doctrine for the Rule of Law

Values are originally meta-legal norms that provide guidance in decision-making situations, articulating considerations based on which state of affairs is declared preferable in relation to another state of affairs.³⁰ While principles are associated with a sense of obligation, a sense of purpose is connoted by values.³¹ However, one cannot reduce the significance of the rule of law to 'an ideal, or at most a guiding standard, which is never fully achieved'.³² In the Union, values have acquired legal significance through their enshrinement in Art 2 TEU. The requirement to respect those values is legally binding and constitutes an obligation that flows from membership of the Union and which no Member State may disregard.³³

The idea that values may inform a constitutional system and, beyond that, an entire legal system stems from German constitutional theory. Developed during the Weimar period,³⁴ this theory later influenced post-war German constitutional jurisprudence and theory.³⁵ The theory indicates that a constitution provides a system of values (*Wertordnung*) that contains a material justice programme serving to identify and integrate a (state) community.³⁶ Fundamental rights enshrined in the constitution are a crucial expression of these values.³⁷ The 'system-of-values doctrine' tends to anchor the legitimacy of the polity largely in the constitution instead of seeking it in the political process. Such a reliance on the material force of a constitution

²⁸ See LD Spieker, 'Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crises' (2019) 20 *German Law Journal* 1182, 1199.

²⁹ von Bogdandy (n 25) 20.

³⁰ N Luhmann, *Soziale Systeme: Grundriß einer allgemeinen Theorie* (Frankfurt am Main, Suhrkamp Verlag, 1987) 433.

³¹ J Habermas, *Between Facts and Norms* (Cambridge, Polity Press, 1996) 255.

³² See the argument of Hungary in Case C-156/21 *Hungary v Parliament and Council* (n 5), para 200.

³³ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 231 and 232; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 282.

³⁴ In a reaction to the value relativism that prevailed, in particular, in Kelsen's Pure Legal Theory, see R Smend, *Verfassung und Verfassungsrecht* (Berlin, Duncker & Humblot reprints, 1928) 127f.

³⁵ See R Wahl, 'Die objektiv-rechtliche Dimension der Grundrechte im internationalen Vergleich' in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa, Band I: Entwicklungen und Grundlagen* (Heidelberg, C.F. Müller, 2004) § 19 para 10; D Rennert, 'Die verdrängte Werttheorie und ihre Historisierung' (2014) 53 *Der Staat* 31, 42.

³⁶ Critical, conjuring up a 'tyranny of values' C Schmitt, *Die Tyrannei der Werte*, 4th edn (Berlin, Duncker & Humblot, 2020) 35f.

³⁷ Elementary to 'Wertordnung' (system of values) which the fundamental rights of the Basic Law establish: BVerfG, Judgement of 15 January 1958—1 BvR 400/51; BVerfGE 7, 198, 205f—Lüth.

appears necessary when complementary means of legitimation, particularly a supporting legitimation narrative of popular sovereignty, are unavailable.³⁸

This model of immanent legitimacy also lends itself to other polities endowed with little natural legitimacy, as is the case with the Union. Indeed, against this background, the designation of the rule of law and other norms as values in Art 2 TEU might appear to be an attempt to compensate for the existing legitimacy deficits of the Union.³⁹ However, this attempt can only be successful if the Union's values are substantiated. Only if the rule of law, along with the other values, is endowed with a significant constitutional presence and occupies a central position within the Union's policies will it be able to contribute to the legitimacy of the Union.⁴⁰

Recent case law seems to embrace this position and, with a view to the new role of values under the Treaties, to ascribe a broader significance to the rule of law than before. The Court of Justice perceives the values of Art 2 TEU (and above all the rule of law) as specific characteristics of the Union, forming part of its foundations and defining the Union's identity.⁴¹ Consequently, it becomes apparent that the ECJ regards the Union as a community of values, one of whose tasks is to actively protect and defend these values within the limits of its powers.⁴² This objective applies to both the institutions of the Union⁴³ and the Member States.⁴⁴

The parallels between this case law and the German system-of-values doctrine are obvious. They become even more apparent when the ECJ implicitly characterises the Union as a form of militant democracy,⁴⁵ which 'cannot be criticised for implementing in defence of its identity, which includes [its] values ..., the means necessary to protect' it.⁴⁶ In my view, this statement of the Court about the Union's right to use its competences to defend and protect its values is of general and fundamental importance and does not only refer to the use of the Union's budget. This becomes clear when one puts it in relation to other assertions of the Court in the

³⁸ As was the case in the start-up phase of the Federal Republic of Germany, see Rennert (n 35) 42.

³⁹ See U Di Fabio, 'Grundrechte als Werteordnung' (2004) 59 *JuristenZeitung* 1; P Allott, 'Epilogue: Europe and the Dream of Reason' in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (Cambridge, Cambridge University Press, 2003) 202.

⁴⁰ Williams (n 4) 552, 555 and 560f; critical, while referring to C Schmitt, A von Bogdandy, 'Towards a Tyranny of Values? Principles on Defending Checks and Balances in EU Member States' in A von Bogdandy and others (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Berlin, Springer, 2021) 75.

⁴¹ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 127f; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 145f.

⁴² Case C-156/21 *Hungary v Parliament and Council* (n 4), para 127; Case C-157/21 *Poland v Parliament and Council* (n 4), para 145.

⁴³ Case 294/83 *Les Verts v Parliament* ECLI:EU:C:1986:166, para 23.

⁴⁴ Case C-83/19 and Others *Asociația 'Forumul Judecătorilor din România'* (n 5), para 185.

⁴⁵ See JW Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141; in German Constitutional theory, the doctrine of militant democracy is intertwined with the system of values doctrine, see H-J Papier and W Durner, 'Streitbare Demokratie' (2003) 128 *Archiv des öffentlichen Rechts* 340, 348.

⁴⁶ Case C-157/21 *Poland v Parliament and Council* (n 4), para 268.

conditionality judgments about the constitutional importance of the Union's values in defining its identity.⁴⁷

3. Negative and Positive Obligations Emanating From the Rule-of-Law Value

The system of values theory has gained practical relevance by conceiving parts of the constitution as a positive order that sets standards for the entire legal order. This applies in particular to fundamental rights but is also true of the principle of the rule of law.⁴⁸ The aim of value theory is not only to limit the sovereign's scope of action but also to derive an obligation from the constitution to protect the sphere of freedom for its citizens, including from interference by third parties.⁴⁹

This concept also seems to be relevant for Union law and the value of the rule of law. In particular, it is based on the insight that the active protection of rights must respond to a changed situation that no longer consists only of a bipolar confrontation between citizen and state. To protect the rule of law in the Union, this idea holds just as it does for fundamental rights. Potential threats to the rule of law may originate from the Union itself but also the Member States. Against this background, it makes sense to assume that the rule of law as a fundamental value must permeate the entire Union legal order and all legal relations between the institutions, the Member States and the citizens of the Union.⁵⁰ This objective function of the rule of law must then also give rise to an obligation on the part of the Union to actively protect by all legal means the subjects of Union law against threats to the rule of law.

The idea that substantive parts of a constitution such as the rule of law contain positive obligations, including the need to protect and enforce certain aspects of a constitution, is certainly rooted in a broader European tradition. Positive obligations have also become an important element of the European fundamental rights doctrine.⁵¹ Note that the European Court of Human Rights (ECtHR) has derived positive obligations from the substantive content of the human rights guarantees⁵² enshrined in the ECHR.⁵³ The ECtHR has consistently emphasised that the ECHR

⁴⁷ See n 42 and 43.

⁴⁸ Krygier (n 24) 134f.

⁴⁹ H Jarass, 'Grundrechte als Wertentscheidungen bzw. objektivrechtliche Prinzipien in der Rechtsprechung des Bundesverfassungsgerichts' (1985) 110 *Archiv des öffentlichen Rechts* 363, 395.

⁵⁰ W Schroeder, 'The European Union and the Rule of Law—State of Affairs and Ways of Strengthening' in W Schroeder (ed), *Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation* (Oxford and Portland, Hart Publishing, 2016) 15f.

⁵¹ H Krieger, 'Positive Verpflichtungen unter der EMRK: Unentbehrliches Element einer gemeineuropäischen Grundrechtsdogmatik, leeres Versprechen oder Grenze der Justiziabilität?' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 187, 189f.

⁵² *Airey v Ireland* Series A No 32 (1979) 2 EHRR 305, para 32; *Siliadin v France* ECHR 2005-VII 289 (2006) 43 EHRR 16, para 89; see AR Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford, Hart Publishing, 2004) 221.

⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950).

may demand effective legislative, administrative and judicial measures from the Member States to ensure effective freedom.

4 The Promotion of the Value of the Rule of Law as a Constitutional Mandate

Values must not be confused with objectives. The Union's objectives, as mentioned in Art 3 TEU, are directives referring to policy goals of the Union and providing orientation to its action.⁵⁴ However, the references to the values in Art 3(1) and (6) TEU, which oblige the Union 'to promote' those values as its primary objectives and to 'pursue' them 'by appropriate means', underline that the Treaty also assigned the rule of law a functional role. A systematic reading of Art 2 and 3 TEU reveals that values such as the rule of law may not be understood merely as constitutional principles but also as a constitutional mandate and work order.

In practical terms, linking the rule of law with the objectives of the Union signifies that the rule of law informs the Union's institutional framework and pertains to the decision-making programme of the Union's institutions. Like other Treaty objectives, the obligation of the Union to promote its values in Art 3(1) TEU is a legally binding policy directive.⁵⁵

The normative surplus stemming from the reference of the values in connection with the objectives of Art 3(1) TEU is the apparent obligation of the Union to take positive action to fully realise the values in the process of making and enforcing Union law.⁵⁶ Therefore, the linking of Art 2 and Art 3(1) TEU increases the normativity of the Union's values as a legal mandate addressed to all institutions of the Union. Art 3(1) and (6) TEU ensure that legal action on the part of the Union must ultimately consider the Treaties' objectives and values.

In general, the ECJ has accepted the policy of the Union to actively implement the rule of law using secondary law. A prominent example of Union legislation intended to protect and enhance the rule of law is the 'conditionality' Regulation (EU, Euratom) 2020/2092 which the ECJ has declared lawful. In particular, it is now clear that the sanctioning procedure in Art 7 TEU does not constitute an exclusive legal mechanism, barring an active rule-of-law policy pursued by the Union legislator. Legislative measures aimed at promoting and protecting the rule of law differ in their aim and subject matter from the procedure laid down in Art 7 TEU, which is

⁵⁴ Similar provisions can be found in several Member States' constitutions, J Larik, 'Shaping the International Order as a Union Objective and the Dynamic Internationalisation of Constitutional Law' (2011) CLEER Working Papers 2011/5, 21f.

⁵⁵ See for previous objectives in Art 2 EEC Treaty, Opinion 1/91 *European Economic Area* ECLI:EU:C:1991:490, paras 16f.

⁵⁶ J Terhechte, 'Art 3 EUV' in E Grabitz, M Hilf and M Nettesheim (eds), *Das Recht der Europäischen Union*, 74th edn (Munich, C.H.Beck, September 2021) para 21.

designed to penalise serious and persistent breaches of the values, and may not be regarded as an improper ‘parallel procedure’ to Art 7 TEU.⁵⁷

Constitutionally, the recalibration of the objectives under Art 3 TEU and their systematic linkage with the values of the Union contained in Art 2 TEU has far-reaching implications. In this way, the value orientation of the Union’s constitution is interwoven with the teleology of its legal order. Art 3 TEU shows that functionalism remains relevant as a *method for effective implementation of the objectives under the Lisbon Treaty*. As a factor in the output legitimacy of the Union, however, a functionalism that perceives the objectives as the *raison d’être* for the Union and its constitution⁵⁸ has forfeited its relevance. Under Art 2 TEU, the Union’s identity, as has been shown above, is characterised by its values. This restructuring of the Union by the Lisbon Treaty reflects a ‘value order functionalism’, according to which the values are part of the Union’s foundation and must be complied with in all areas of the Union’s action.⁵⁹

5 Union Competences for Promoting the Rule of Law?

To be sure, an invocation of values may not per se create legal competences for the Union institutions.⁶⁰ Art 3(6) TEU states that the efforts of the Union to pursue its values and other objectives must be limited to ‘means commensurate with the competences which are conferred upon it in the Treaties’. Therefore, any policy aimed at protecting the rule of law through legislative action presupposes that the Union acts within the limits of its powers as laid down by the Treaties (principle of conferral).⁶¹

That said, even under the Treaty of Lisbon, neither the TEU nor the TFEU⁶² ascribes a general power to the Union to enact provisions to implement the rule of law internally. This competence deficit has also been identified as a problem concerning human rights within the Union. Neither have the Treaties bestowed the Union with the general legal competence to develop an internal human rights policy.⁶³ To be sure, this has not barred the Union from gradually integrating human

⁵⁷ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 168–174; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 199, 206f and 213.

⁵⁸ According to this doctrine the Treaties are ‘only means for attaining those objectives’, Opinion 1/91 *European Economic Area* (n 55), para 18; see HP Ipsen, *Europäisches Gemeinschaftsrecht* (Tübingen, Mohr, 1972) 176f.

⁵⁹ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 123–128.

⁶⁰ B de Witte, ‘Conclusions: Integration clauses—a comparative epilogue’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (London, Routledge, 2018) 182.

⁶¹ TEU, Art 5(2).

⁶² Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ L326/47.

⁶³ Opinion 2/94 *ECHR I* ECLI:EU:C:1996:140, para 27; see the critique from P Alston and JHH Weiler, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights’ (1998) 9 *European Journal of International Law* 658.

rights concerns into many of its internal policies.⁶⁴ Similar questions and challenges arise in relation to the rule-of-law situation, characterised by the Union's recent efforts to strengthen its ability to ensure that Member States respect the rule of law.⁶⁵

In practice, the Union seems to have a limited arsenal of legal instruments available to implement and strengthen the rule of law in the Member States. In principle, for pursuing an objective of the Union, such as the promotion of the rule of law by Union institutions, the 'residual powers' provision of Art 352 TFEU could be used as a legal basis. Filling a gap left by the Treaty, this provision is designed to confer powers to act on Union institutions when such powers appear necessary to enable the Union to attain one of the objectives laid out by the Treaty. The Union institutions have had recourse to the residual powers clause of Art 352 TFEU as a legal basis for some rule of law and human rights-related measures,⁶⁶ such as the establishment of the Union's external program for the consolidation of democracy, the rule of law and human rights⁶⁷ and the European Union Agency for Fundamental Rights under Regulation (EC) 168/2007.⁶⁸ Art 352 TFEU thus allows for institutional arrangements in the area of the rule of law and the adoption of substantive provisions in these areas. Expanding the tasks of the Fundamental Rights Agency according to Art 3 Regulation (EC) 168/2007 concerning the rule of law would undoubtedly be advisable but requires a unanimous decision of the Council.

6 Mainstreaming the Rule of Law as a Union Task

Against this background, it makes more sense for the Union institutions to implement and actively promote the rule of law in sectoral policies covered by the Treaties.

1. Extending the Scope of Rule-of-Law Conditionality

The first step in this direction is the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget. The

⁶⁴ See O De Schutter, 'Mainstreaming Human Rights in the European Union' in P Alston and O De Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford, Hart Publishing, 2005) 37f.

⁶⁵ Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2021:974, Opinion of GA Campos Sánchez-Bordona, para 78.

⁶⁶ Opinion 2/94 *ECHR I* (n 63), paras 30 and 34f has not ruled out the use of Art 235 TEC, the predecessor provision of Art 352 TFEU, for achieving a human rights policy of the Union in general.

⁶⁷ Council Regulation (EC) No 975/1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms [1999] OJ L120/1.

⁶⁸ Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1; see A von Bogdandy and J von Bernsdorff, 'The EU Fundamental Rights Agency within the European and international human rights architecture: The legal framework and some unsettled issues in a new field of administrative law' (2009) 46 *CML Rev* 1035, 1044f.

regulation establishes a ‘conditionality mechanism’ that makes the receipt of funds from the Union budget subject to a Member State’s respect for the rule of law insofar as this relates to the implementation of the Union budget.⁶⁹ The idea expressed therein—that respect for the rule of law may be required in the context of a conditionality mechanism established by secondary legislation—is compatible with the Treaties. It should be extended from budgetary policy to all other policy areas of Union law.

The Union could make active enforcement of the rule of law a cross-cutting task, drawing on existing sectoral competences. It has always been part of the integration doctrine that the effective achievement of the Union’s objectives may require a broad interpretation of the existing legal competences. Where a provision of the Treaty confers a specific competence on the Union, it provides it, at the same time, with powers indispensable for carrying out the objectives enshrined in the Treaties. This, in turn, presupposes that the objectives and values of the Union can be integrated into the law-making process.⁷⁰ That is, the realisation of these objectives is a cross-sectional task that obliges all Union institutions within the scope of their activities. In this sense, the Union could streamline its actions to promote the rule of law more effectively.

The Treaties do not mention a general requirement to explicitly integrate the rule of law into the Union’s sectoral policies like they do in the ‘integration clauses’. These clauses include Art 8–13 TFEU and Art 114(3) TFEU concerning other Treaty goals, such as the protection of social rights, consumer interests and the environment.⁷¹ It is possible, however, to assume an implicit obligation of the Union institutions to pursue a values-driven policy when legislating in the internal market or the areas of freedom, security and justice. This obligation can also extend to other areas, such as budgetary law, as seen in the ‘conditionality’ Regulation (EU, Euratom) 2020/2092. This responsibility to implement an integrated rule-of-law policy in all sectors is precisely what Art 3(1) and (6) TEU aim to encourage when they express the obligation of the Union ‘to promote’ and ‘pursue’ the value as an objective.

The Union’s mandate to promote and pursue the values and Treaty objectives within the framework of its competences as prescribed by Art 3(1) and (6) TEU dispels doubts as to whether the Union legislator may pursue other objectives in addition to those set out in the specific competence norms relied upon in the law-making process. The mandate clarifies that it is legitimate as a sectoral policy measure for the Union legislator to include requirements stemming from the general objectives or—in a broader sense—from the values of the Union.⁷² Provided that the conditions

⁶⁹ Definition of conditionality in Case C-157/21 *Poland v Parliament and Council* (n 4), paras 140 and 151; see further V Vită, ‘Revisiting the Dominant Discourse on Conditionality in the EU: The Case of EU Spending Conditionality’ (2017) 19 *Cambridge Yearbook of European Legal Studies* 116.

⁷⁰ See F Ippolito, ME Bartoloni and M Condinanzi, ‘Introduction: Integration clauses—a prologue’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (London, Routledge, 2018) 1.

⁷¹ Case 281/85 and Others *Germany v Commission* ECLI:EU:C:1987:351, para 28.

⁷² See de Witte (n 60) 184.

for recourse to a sectoral competence norm are fulfilled, the Union may rely on that legal basis while carrying out its task of safeguarding the general interests recognised by the Treaty.⁷³ Against this backdrop, it is clear that secondary law aiming to enhance and realise the rule of law in specific areas of Union law is compatible with primary law.⁷⁴ A particular connection or even a genuine link between respect for the rule of law on the one hand and the efficient implementation of specific sectoral Union policies on the other is not required for such a mechanism.⁷⁵

2. Mainstreaming the Rule of Law

However, the approach described above also allows for extending the integration of rule-of-law criteria into the sectoral activities of the Union beyond a conditionality mechanism. Conditionality aims at mere compliance with the rule of law. Integrating the rule of law into the process of Union law-making must go further and target ‘mainstreaming’ the rule of law into all policy areas of the Union.

Mainstreaming is intended to ensure that an objective or value is fully respected across all Union policies. It has been pursued in particular relating to implementing fundamental rights and anti-discrimination law.⁷⁶ Taking a page from these policy contexts, rule-of-law mainstreaming should provide for systematic, deliberate and transparent incorporation of rule-of-law considerations into all Union policies and practices at all stages—from planning and legislation to execution and enforcement as well as funding.⁷⁷

This mainstreaming policy, which is in line with the obligation to promote and pursue the rule of law under Art 3(1) and (6) TEU, naturally involves the obligation of further realising the policy, which extends beyond merely ensuring compliance.⁷⁸ The idea that the rule of law must be systematically considered across all policy fields of the Union is of paramount importance to this approach. This view indicates that the Union’s institutions need to consider rule-of-law implications for any laws they produce.

⁷³ Case C-482/17 *Czech Republic v Parliament and Council* ECLI:EU:C:2019:1035, paras 30f regarding internal market law.

⁷⁴ Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 125–127; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 148f and 165; see also Opinion 2/94 *ECHR I* (n 63), para 32 on human rights.

⁷⁵ Unlike it is the case of a horizontal budget-oriented conditionality regime established by Regulation (EU, Euratom) 2020/2092, see Case C-156/21 *Hungary v Parliament and Council* (n 4), paras 125–127; Case C-157/21 *Poland v Parliament and Council* (n 4), paras 142–146.

⁷⁶ See Commission, ‘Incorporating Equal Opportunities For Women and Men Into All Community Policies and Activities’ (Communication) COM (96) 67 final 2; De Schutter (n 64) 43f; V Kosta, ‘Fundamental rights mainstreaming in the EU’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (London, Routledge, 2018) 13f.

⁷⁷ D Halberstam and W Schroeder, ‘In Defense of Its Identity: A Proposal to Mainstream the Rule of Law in the EU’ (*Verfassungsblog*, 17 February 2022) verfassungsblog.de/in-defense-of-its-identity/.

⁷⁸ Kosta (n 76) 21.

3. Implementing the Rule of Law within the Framework of the Union's Competences

Several internal policy areas mainstream rule-of-law concerns and thus apply to a rule of law-driven policy. This concerns, in particular, the Union's legislation in the areas of freedom, security and justice.⁷⁹ Art 67(1) TFEU makes it dependent on the respect for fundamental rights and the different legal systems and traditions of the Member States, including respect for the rule of law. However, systematic mainstreaming will reveal that numerous other provisions in the Treaties have untapped potential that can be exploited to allow rule of law to influence the Union's internal policies if the competence norms are interpreted in the light of the values as suggested above.

First, the Union legislator can ensure that substantive standards set in legal harmonisation include rule-of-law elements and specify the requirements implied by the rule of law. This may apply, for instance, to the Union's provisions that have been enacted based on the Union's competences in the area of data protection (Art 16(2) TFEU),⁸⁰ the internal market (Art 114 TFEU) or competition policy (Art 103 TFEU).⁸¹

In addition, when harmonising the law of Member States within the framework of its competences, the Union legislator could enact procedural standards for the administrative and judicial enforcement of Union law that specify requirements regarding the rule of law. Under the Framework Decision 2002/584/JI,⁸² for example, a European arrest warrant must be issued by a 'judicial authority'. Secondary law based on Art 82 TFEU and inspired by Art 2 TEU could impose requirements concerning such authorities' independence and institutional structure based on rule-of-law criteria.⁸³

Moreover, in areas where the principle of mutual recognition applies, such as the internal market or the areas of freedom, security and justice, the Union legislator could adopt rules imposing specific requirements for the mutual recognition⁸⁴ of legal acts of Member States from the perspective of the rule of law. Mutual recognition of all legal acts, judgments, administrative decisions or documents by the Member States should be prohibited by secondary legislation if there are serious and systemic flaws in the rule of law in the issuing Member State. After all, such

⁷⁹ See the examples given by KL Scheppele, 'Escaping Orbán's Constitutional Prison: How European Law Can Free a New Hungarian Parliament' (*Verfassungsblog*, 21 December 2021) [verfassungsblog.de/escaping-orbans-constitutional-prison/](https://www.verfassungsblog.de/escaping-orbans-constitutional-prison/).

⁸⁰ See the Directive (EU) 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132; Case C-817/19 *Ligue des droits humains* ECLI:EU:C:2022:65, Opinion of GA Pitruzzella.

⁸¹ On the relevance of the Art 2 TEU for the interpretation of Union competition law, see Case T-791/19 *Sped-Pro v Commission* ECLI:EU:T:2022:67, paras 84–88; see also Art 4 Directive (EU) 2019/1 of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2020] OJ L 11/3.

⁸² Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

⁸³ See on such requirements Joined Cases C-508/18 and C-82/19 *PPU OG and PI* ECLI:EU:C:2019:456, paras 73f.

⁸⁴ See Opinion 2/13 *ECHR II* ECLI:EU:C:2014:2454, paras 191f.

recognition is based on the mutual trust of Member States in their respective legal, administrative and judicial systems.⁸⁵

The Union legislator is increasingly signalling the use of this option to integrate rule-of-law considerations into legal acts adopted in these policy areas.⁸⁶ For example, according to Art 11(1)(f) of Directive 2014/41/EU,⁸⁷ the recognition or execution of a European Investigation Order on gathering evidence for criminal proceedings issued by the authorities of one Member State may be rejected by the authorities of other Member States where there are substantial grounds to believe this could be incompatible with Art 6 TEU and the FRC.⁸⁸ Additionally, Art 3 para 2 sub-para 2 of Regulation (EU) 604/2013⁸⁹ obliges the Member States, when determining which Member State is responsible for examining an application for international protection, to check whether ‘there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in [another] Member State’. This approach could be extended to the mutual recognition of civil judgements under Regulation (EU) 1215/2012.⁹⁰ Moreover, the approach could even be applied to the mutual recognition of documents in the internal market under Regulation (EU) 2019/515⁹¹ on the mutual recognition of goods or under Directive 2005/36/EC⁹² on the recognition of professional qualifications. In principle, it can no longer be assumed that any decisions taken at the legislative, judicial or administrative level in a Member State facing serious rule-of-law deficiencies will have been made according to objective criteria.

4. Improving the Enforcement of the Union Rule of Law

The proactive approach advocated here, by which the rule of law is implemented and specified through secondary law and made the yardstick for legislative, administrative and judicial activity, has several advantages. Such proactive measures may help prevent the inevitable under-enforcement of rights when individuals, Union institutions and even an occasional Member State are left to challenge rule-of-law

⁸⁵ Joined Cases C-187/01 and C-385/01 *Gözütok and Brüggel* ECLI:EU:C:2003:87, para 33.

⁸⁶ See Schroeder (n 11) 115.

⁸⁷ Directive 2014/41/EU of the European Parliament and of the Council regarding the European Investigation Order in criminal matters (European Investigation Order) [2014] OJ L130/1.

⁸⁸ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁸⁹ Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III) [2013] OJ L180/31.

⁹⁰ Regulation (EU) No 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation) [2012] OJ L351/1.

⁹¹ Regulation (EU) 2019/515 of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 (Mutual Recognition Regulation) [2019] L91/1.

⁹² Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications (Professional Qualifications Directive) [2005] OJ L255/22.

deficiencies in court.⁹³ This proactive approach eliminates ambiguities that may arise when courts struggle to apply the general principle of the rule of law to secondary law.⁹⁴ Additionally, it is questionable whether the rule of law as mentioned in Art 2 TEU is precise and sufficiently clear to entail a direct effect.⁹⁵ Incorporating the rule of law into secondary legislation with specific provisions might help national authorities and courts apply and enforce the rule of law in Member States.

7 Conclusion

The Union's case for the rule of law cannot be won through court rulings. Ultimately, court rulings only address the individual shortcomings of the Member States as they relate to the rule of law. Instead, and more structurally, adherence to the rule of law 'requires an enabling ecosystem' in the Member States.⁹⁶ Such an ecosystem can only be established and maintained if the Union takes positive action to strengthen the rule of law. The Union must systematically integrate rule-of-law issues into all its policies, specifically mobilising them to realise and promote the rule of law.

For the Union, as a community of values, there is no realistic alternative to this policy. The destruction of the rule-based international order with Russia's invasion of Ukraine in February 2022 has by no means rendered the above objective obsolete. On the contrary, it illustrates how vulnerable the rule of law, democracy and human rights can be in Europe. This situation makes it all the more important to strengthen the structures that are indispensable for the identity of the Union as a common legal order and community of values. In this context, a systematic internal rule-of-law policy may contribute significantly to the Union's external resilience.

Funding Open access funding provided by University of Innsbruck and Medical University of Innsbruck.

Data availability Not applicable.

Declarations

Conflict of Interest I declare that I have not any financial or non-financial interests that are directly or indirectly related to the work submitted for publication.

⁹³ Halberstam and Schroeder (n 77).

⁹⁴ See Joined Cases C-562/21 PPU and C-563/21 PPU *X and Y* ECLI:EU:C:2022:100, paras 50–53; Joined Cases C-354/20 PPU and C-412/20 PPU *L and P* ECLI:EU:C:2020:1033, paras 50f which require national courts to apply a two-step test when systematic or general deficiencies affect the right to a fair trial before they may refuse to execute a European arrest warrant.

⁹⁵ Case C-896/19 *Repubblika* (n 5), para 63 implies that it must be given more specific expression in Union law; but see Case C-83/19 and Others *Asociația 'Forumul Judecătorilor din România'* (n 5), para 250 regarding subprinciples which may impose 'on the Member States a clear and precise obligation'.

⁹⁶ See Commission, '2020 Rule of Law Report: The rule of law situation in the European Union' (Communication) COM(2020) 580 final 5.

Open Access This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

Publisher's Note Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.