

Chapter 6

The rule of law crisis and social policy: the EU response in the cases of Hungary and Poland

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Introduction

Beyond an economic union, the European Union (EU) is an entity based on common values. One of the foundational articles in the Treaties¹, Article 2 (TEU) declares that ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights [...]’. While the history of the rule of law in the EU framework has been a process of gradual entrenchment and formalisation (Pech 2020), there is a common understanding, in line with the long-standing case law of the Court of Justice of the European Union (CJEU), that the Union is a ‘community based on the rule of law’².

The definition of the rule of law is constantly being contested and questioned, defined and redefined, but is generally seen as a set of guiding principles, or ideals, for ensuring an orderly and just society where no one is above the law, everyone is treated equally and is held accountable to the same laws. The rule of law concept has multiple elements, of which the separation of powers, an independent judiciary, a transparent law-making process and the presumption of innocence are the most well-known and discussed.

In the last decade, however, rule of law backsliding has been taking place as part of the consolidation of dominant-party regimes in both Hungary and Poland, as well as in a more limited form in other EU Member States such as Bulgaria, Malta, Romania and Slovakia (Hegedüs 2019). While the EU has faced various institutional and political crises throughout its lifetime, this one has been described by some scholars as ‘arguably the only truly existential risk’ to the EU’s institutional survival (Kelemen 2019: 247). Of the several facets of this crisis, the one most discussed is the independence of the judiciary.

While there is already a vast amount of research and literature on the rule of law crisis in Europe, hardly any of it explores the ‘social policy’ context of the crisis. The research strand on judicial reforms and the lack of an independent judiciary has always been in the limelight (Moliterno and Čuroš 2021). This chapter aims to underline the linkages between rule of law backsliding and social policy by looking at the EU responses to the rule of law crisis. We also raise the question of its unintended effects on social policy. While, as already mentioned, rule of law breaches are geographically much broader phenomena, for space reasons we will only consider rule of law backsliding

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1. Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).
 2. CJEU, Judgment in C-294/83 *Les Verts v Parliament*, ECLI:EU:C:1986:166, para 23.

in Hungary and Poland, and only insofar as this helps readers to better understand EU-level responses. The focus is on those responses between 2018 and 2022, exploring the key legally-binding and judicial enforcement paths, such as the judicial actions taken by the CJEU both under the preliminary ruling procedure (Article 267 TFEU), as well as in application of three tools from the rule of law toolbox³: 1) triggering Article 7 TEU (allowing a Member State's rights, including its voting rights, to be suspended in the event of a serious breach of EU values such as the rule of law); 2) initiating infringement procedures (Articles 258 and 259 TFEU); and 3) applying the new rule of law conditionality mechanism.

The chapter unfolds as follows: Section 1 focuses on defining the rule of law as a concept, giving examples of rule of law crisis manifestations in Hungary and Poland. Section 2 describes the EU response to the rule of law crisis via existing mechanisms, namely the administrative and judicial enforcement of the tools available to the European Commission (hereafter referred to as 'the Commission') and to the CJEU. The last part of Section 2 focuses more specifically on the rule of law conditionality mechanism, the latest tool adopted in the EU response to the rule of law crisis, as well as on its potential implications for social policy. The chapter concludes by generalising the findings and raising a few questions for further research.

1. The rule of law crisis and its manifestations

Dating back to Socrates and Confucius, the rule of law concept has evolved and revived over the centuries, trending in the late 1990s and ever since (Licht et al. 2007). Scholars link its revival to the democratic opening of many countries and the consolidation of democracy in different parts of the world, as well as the developed respect for human rights in the second half of the 20th century (Carothers 1998). Given that the rule of law concept is more than 2000 years old (Burgess 2020), a vast amount of literature on it exists (ibid; Dickinson 2020; Pech 2022).

The rule of law can be defined in many different ways, depending on the approach and the angle from which it is looked at – whether from an economic, legal or political point of view (Møller and Skaaning 2014). In legal terms, Carothers (1998: 96) defines the rule of law along the following lines: 'a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century'. The author further outlines several of the key elements regarding the state institutions which transpose the rule of law concept into a concrete domestic context:

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3. The EU rule of law toolbox contains the following instruments: initiation of the infringement procedure, the triggering and application of Article 7, the rule of law conditionality mechanism and the rule of law framework. In addition, the EU Justice Scoreboard, the European Semester, the Cooperation and Verification Mechanism, and the withdrawal of EU funding in support of civil society or for structural reforms, are further tools aimed primarily at promoting the rule of law and detecting emerging problems at an early stage. Source: The EU's Rule of Law toolbox, Factsheet, April 2019, [https://ec.europa.eu/info/sites/default/files/rule_of_law_factsheet_1.pdf].

The central institutions of the legal system [...] are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. [T]he government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding. (Carothers 1998)

More broadly, the rule of law principle is closely tied to democracy and human rights; without one of them, the other cannot exist⁴ (Pech et al. 2020). Figure 1 sets out the core contents of the rule of law concept – an open, independent and impartial judiciary, the presumption of innocence, no legislative retroactivity, and open and transparent law-making are among its main elements. Hence the rule of law is certainly much more than independent courts and accountable, democratically elected governments. However, not all elements have received the same amount of scrutiny in recent public and scholarly debates focused on EU Member States.

Figure 1 Rule of law elements



Source: Rule of Law Education Centre, 2022.

4. See Recital 6 of the Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council: 'While there is no hierarchy among Union values, respect for the rule of law is essential for the protection of the other fundamental values on which the Union is founded [...] Respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights. There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.'

The rule of law concept has been vigorously revived in the last decade within the scholarly literature on EU governance and legal principles (Closa 2019; Kochenov and Pech 2016; Müller 2015; Pech 2020; Pech and Scheppele 2017; Smith 2019; Van Elsuwege and Gremmelprez 2020; von Bogdandy and Ioannidis 2014), provoked by the rule of law crisis first in Hungary, then in Poland and other EU Member States. However, the rule of law foundational value did not emerge from the crisis but was developed alongside the understanding of the EU as a constitutional order and the general principles of direct effect⁵ and supremacy of EU law⁶. In 1986, the CJEU for the first time explicitly mentioned the concept in its landmark judgement *Les Verts v Parliament*, arguing that ‘the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’⁷. The rule of law has been explicitly anchored in the Treaties since 1992 (although it was already there implicitly before), while the post-Lisbon-Treaty Article 2 TEU counts it among the values upon which Union is founded.

Being an ‘essentially contested concept’, the rule of law scope, content and limits are not always clear-cut. This relative ambiguity is however, characteristic of practically all legal concepts and does not *per se* mean that the principle is difficult to apply. In the context of the EU, the CJEU has for example emphasised that the rule of law is a fundamental EU value, whose content can be determined by the EU legislator, and that it is a notion to be defined at EU rather than national level, with a common understanding across EU Member States (C-156/21 *Hungary v Parliament and Council*⁸ and C-157/21 *Poland v Parliament and Council*⁹).

The European Commission has defined the rule of law along the following lines:

Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law. (European Commission 2020)

The common importance of the rule of law concept to all EU Member States, and how it was to be upheld, first became a pertinent issue in the scholarly work of EU legal scholars and political scientists in the early 2010s when the first signs of democracy

5. Judgment in C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. ECLI:EU:C:1963:1.

6. Judgment in C-6/64, *Flaminio Costa v E.N.E.L*. ECLI:EU:C:1964:66.

7. Judgment in C-294/83 *Les Verts v Parliament*, ECLI:EU:C:1986:166

8. Judgment in C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97.

9. Judgment in C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.

backsliding in Hungary emerged (Bozóki 2011, 2012; Gyongyi 2012; Halmai 2012; Morlino and Palombella 2010; Pech 2012; Rupnik 2012; Uitz 2010).

Over the last decade, charges of breaching the rule of law have been levied against both Hungary and Poland by the European Commission, European Parliament, representatives from other Member States, CJEU and individuals bringing cases before the CJEU. The most discussed accusations were the amendments to and later replacement of the Hungarian Constitution introduced by the incumbent government¹⁰ which went against major constitutional definitions, such as the concept of ‘life’ and ‘family’ (in the case of Hungary) (Jakab and Sonnevend 2013; Kovács and Tóth 2011; Varju and Chronowsk 2015); the changes to the electoral framework in Hungary introduced in the run-up to the 2014 parliamentary elections, to the advantage of the then current majority in the Parliament (Scheppele 2014); the establishment of new judiciary chambers (in the case of the Polish Supreme Court) (Duncan and Macy 2020; Pech 2021; Spieker 2022; Zechenter 2019), as well as interference with judicial independence through the forced early retirement of judges and their substitution with judges close to the executive powers both in Hungary (Uitz 2019) and in Poland (Mastracci 2019; Kovács and Scheppele 2018); restricted funding for civil society organisations (Bárd 2020; Buyse 2018; Stanley 2022) and even the disruption of academic freedom in the case of Hungary (Halmai 2017a, 2018; Bugaric 2019), both of which were aimed at curbing all critical voices in the country.

Many of the illiberal reforms introduced by the incumbent governments in Hungary (Fidesz since 2009) and Poland (Law and Justice (PiS) since 2015) look alike and were aimed at undermining key democratic principles of country governance: the separation of powers and the impartial application of the law, i.e., rule of law principles. These constitutional and institutional changes, which at first sight may have looked inconsequential for average citizens in both countries, have substantially impacted individual and social rights as well as equality, as witnessed by Poland’s restrictive abortion law, the publicly proclaimed LGBT-free zones announced by Polish municipalities in Lublin, Łódź, Małopolska, Podkarpacie and Świętokrzyskie, protection of the institution of marriage as the union of a man and a woman in the amended Hungarian Constitution, the downgraded political representation of women (Ilonszki and Vajda 2019) in both countries, and overall the reduced rights of women (Fodor 2022). Examples with a social dimension include the pension reforms in Hungary (Szikra 2018; Zoltán and Simonovits 2019), the criminalisation of homelessness in Hungary¹¹, as well as reforms targeting specific professional groups, as in the case of the early retirement of judges in both Hungary and Poland.

Implemented reforms have also disrupted the work of civil society players and social partners, in favour of the government’s sole authority over default policy processes.

10. The amendments to the Hungarian Constitution under the Fidesz government were adopted by parliament on 18 April 2011 and entered into force on 1 January 2012.

11. The Seventh Amendment of the Fundamental Law criminalises homelessness by banning the use of public premises for habitation as part of the right to adequate housing. After the amendment of the Act on Misdemeanours, regularly sleeping in the streets becomes a misdemeanour, possibly leading to imprisonment for up to 60 days.

As Szikra (2018: 489) outlines, ‘while civil society, experts and trade unions found it increasingly difficult to follow legislation, tripartite negotiations and civil consultation have been cancelled altogether’. In addition, public employment security has been decreased in favour of nepotism (Ombudsman of Fundamental Rights, 2012 in Szikra 2014).

The Hungarian government has further operated beyond the law by declaring a state of emergency for an excessively long period, extended well beyond the Covid-19 pandemic peak. The latest state of emergency, in place as of 25 May 2022 (AFP 2022), was introduced to counter the economic crisis caused by the war in Ukraine. It allows the Prime Minister to rule by decree, bypassing Parliament. Last but not least, adjudication processes and law enforcement in both countries have been largely compromised by the judicial reforms.

The examples above illustrate how the rule of law crisis has impacted various aspects of individual and social rights in both countries, as would happen in any other country following the same model of rule of law backsliding. And yet, one could argue that these developments are a choice largely legitimised by the electorates of the respective countries, as witnessed by the high electoral support for Fidesz in Hungary and PiS in Poland. Nevertheless, these countries’ membership in the EU, which implies close relations with the other EU Member States, is also bound by a set of Treaties requiring respect of the rule of law and democratic principles as one of the foundations for the Union.

In the following section, we provide an overview of the EU response to the rule of law crisis from the perspective of social policy, raising questions about the intended and unintended effects of the adopted EU response on the social domain.

2. EU responses to rule of law backsliding from a social perspective

In recent times, one can distinguish between two key approaches by EU-level players to the threats to the rule of law in EU Member States. The first is enforcement (both administrative and judicial) via already existing processes and mechanisms; the second, the creation of new tools and mechanisms. Both approaches are aimed at keeping in check national-level developments. While the former is how the EU has traditionally approached breaches of EU law at Member State level (see Section 2.1), the latter is much more unusual. It is quite rare for the EU to create new control and enforcement tools specifically targeting concrete breaches of EU law (potentially limited in time and space) within such a comparatively narrow area of EU law as the rule of law¹². One example illustrating this more creative approach to the rule of law crisis is the recently adopted Rule of Law Conditionality Regulation¹³ (hereafter the ‘Regulation’; see Section 2.2).

12. In fact, this is the only case we can recall where a whole enforcement mechanism has not been created for a whole area of EU law, or for certain groups (workers, posted workers, consumers), but rather for one, albeit central element of EU primary law. It would have been less unusual if the Conditionality Regulation had been adopted for all values embedded in Article 2 TEU rather than only for the rule of law.

13. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1-10.

While we focus on the actions of the Commission and the CJEU, other institutional players, such as the European Parliament, have also been vocal in condemning the rule of law breaches both through their participation in the enforcement mechanisms and in establishing rule of law conditionality, as well as through their own opinions and hearings (European Parliament 2021; European Parliament 2022a; European Parliament 2022b)¹⁴. However, here we have decided to look at the legal pathways used for enforcing the rule of law and at identifying links with the social policy domain (hence, looking at the actions taken by the Commission and the CJEU).

2.1 The use of existing tools for administrative and judicial enforcement

2.1.1 Administrative enforcement

Two main mechanisms have been employed to deal with rule of law breaches. The first is the triggering of the Article 7 TEU process, while the second is the use of infringement procedures.

- Article 7 TEU

Article 7 TEU sets out a process whereby, on a reasoned proposal from the European Commission, the European Parliament or one third of the Member States, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, can determine that there is a clear risk of a serious breach by a Member State of the values set out in Article 2 TEU (for example, the rule of law). Following such a decision, the Member State in question is invited to explain its actions and the Council can address recommendations to rectify or prevent the serious breach. The second option (under Article 7(2)-(5) TEU) is for the Council to unanimously determine the existence (as opposed to mere risk) of a serious breach and to ask for explanations. If such a decision is reached, the Council, acting by a qualified majority, can suspend certain rights (i.e., voting rights) of the Member State until the breach has been rectified (Sadurski 2010).

This process is a sort of emergency brake, up to now little used due to its gravity and also the significant quorums and unanimity needed. While its use has been discussed several times (for example, against the right-wing populist government in Austria in the early 2000s or in response to the French government's expulsion of thousands of Roma in 2009), it was triggered for the first time ever by the European Commission against Poland on 20 September 2017 and against Hungary by the European Parliament on 12 September 2018 (Michelot 2015).

However, besides hearings before the General Affairs Council¹⁵ and certain recommendations (Michelot 2015), any further action to deprive Poland or Hungary of their voting rights would require a unanimous Council decision, a step not taken due

14. MEPs recognise Hungary as no longer being fully democratic.

15. The General Affairs Council is mainly made up of European home affairs ministers from all EU Member States.

to the expected vetoes of Poland and/or Hungary and possible opposition from other Member States.

As part of the implementation of Article 7 TEU, the European Commission introduced a new annual rule of law reporting process in 2020. This is ‘a yearly cycle to promote the rule of law and to prevent problems from emerging or deepening and to address them, looking at all Member States equally’ (European Commission 2021). These reports assess four aspects: a) a country’s justice system; b) its anti-corruption system; c) media pluralism and freedom; and d) other institutional issues linked to checks and balances. The first report was issued in 2020 (European Commission 2020), followed by reports in 2021 and 2022. They seem to be aimed at taking stock of rule of law developments in the Member States and identifying potential challenges rather than addressing these.

In the published national assessments, aspects related to labour law and social policy are difficult to find. If present, they are looked at through the lens of constitutional aspects of the rule of law, for example, the increase in judges’ salaries to promote their independence in Hungary (European Commission 2020a), the obligation for judges in Poland to disclose their membership in associations (including trade unions) as a breach of the right to private life rather than of the collective right to association (European Commission 2020b). Finally, the reports considered at length the consequences of the Covid-19 pandemic and the accompanying measures, with an emphasis on the ‘states of emergency’ introduced in many Member States and the way these measures were adopted (rushed political process) (European Commission 2021). The reporting leads to a yearly general overview of national-level developments associated with the rule of law. The objective seems clearly to monitor and recommend rather than assess in detail, prosecute, or punish. The process is a form of soft law, with the outlined recommendations not legally binding. However, there is a distant possibility of the information contained in the reports being used for taking decisions under Article 7 TEU to limit a Member State’s voting rights.

- Infringement procedures

The second mechanism the European Commission has in its arsenal to prosecute any breaches of EU law by Member States are infringement procedures. These essentially consist of three stages – an informal, formal and judicial stage. The first stage involves the Commission requiring an informal explanation from the EU Member State in question. If the response is unsatisfactory, the second stage is triggered. A letter of formal notice requesting further information is sent. Here again, if the response is unsatisfactory, a reasoned opinion, i.e., a formal request to comply with EU law, is sent. Finally, if the Member State does not take action to rectify the breach alleged by the Commission, the third stage involves the Commission referring the matter to the CJEU (Articles 258 and 259 TFEU)¹⁶. While the European Commission has broad political

16. The judgments handed down by the CJEU in infringement procedures are discussed in the following section. They constitute an inherent part of CJEU case law.

discretion regarding application of the procedure, it has been used very actively against rule of law violations¹⁷.

Looking solely at the last four years, the European Commission has initiated more than 20 infringement procedures dealing with certain tenets of the rule of law¹⁸. The key infringement procedures initiated against Poland concern the disciplinary regime for domestic judges¹⁹, the violation of EU law by the legislative changes affecting the judiciary²⁰, and the violation of Article 19(1) TEU read in conjunction with Article 47 Charter of Fundamental Rights of the European Union (CFREU) by the new law on the Supreme Court²¹. Extremely unusual is the infringement procedure started in 2021 on a further violation of EU law, especially Article 19(1) TEU) and the general principles of EU law, by the Polish Constitutional Tribunal²². The infringement procedure was brought against its rulings considering the EU Treaties as incompatible with the Polish Constitution (European Commission 2022a). While this is hardly the first time a highest national court has refused to follow and/or has questioned the validity of EU law²³, this is the first time in recent years that the European Commission has targeted a Member State and a specific court about such case law via an infringement procedure.

Further infringement procedures associated with rule of law breaches initiated against both Hungary and Poland fall within the broader scope and understanding of the rule of law's association with infringements of human rights. In this respect, there have been several infringement procedures against Hungary concerning the rights of asylum seekers²⁴ and some concerning such aspects as racial discrimination²⁵.

All in all, the European Commission has been quite active in using the administrative enforcement mechanisms at its disposal to deal with rule of law backsliding in both Hungary and Poland. It is especially striking when compared to the Commission's laggardness regarding Member State infringements of EU social and labour law, where infringement procedures are few and far between (Unterschütz 2022).

17. This is not typical since the Commission maintains significant discretion as to whether to use the infringement procedure. The fact that the procedure has been used for prosecuting rule of law breaches illustrates the political importance of the rule of law in the EU.

18. Data gathered from the European Commission search engine on infringement decisions, available at [https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en] (accessed 20 Sep 2022). The data is collected by exploring all infringement procedures brought against Poland and Hungary between 1 January 2018 and 20 September 2022 and extracting those dealing with rule of law breaches.

19. Decision by the Commission, No INFR(2019)2076.

20. Decision by the Commission, No INFR(2020)2182.

21. Decision by the Commission, No INFR(2017)2121.

22. Decision by the Commission, No INFR(2021)2261.

23. Solange I and Solange II, BVerfGe decision in the PSPP case where the German Constitutional Court ruled that both the CJEU judgment in C-493/17 and the ECB's public sector purchase programme (PSPP) were ultra vires; see also Danish Supreme Court where the Court refused to follow the CJEU ruling in the Mangold case (C-144/04) (Ajos ruling - C-441/14).

24. Commission decision no. INFR(2019)2193, Commission decision no. INFR(2015)0433, and Commission decision no. INFR(2020)2310, among others.

25. Commission decision no. INFR(2016)2078 and Commission decision no. INFR(2021)2073.

2.1.2 Judicial enforcement

In recent years, the CJEU has extensively fleshed out the rule of law concept in its case law, whether in judgments pertaining to issues arising in Hungary and Poland, or in those concerning other countries.

The thematic focus of this chapter does not permit an analysis of any more than a sample of the key judgments handed down by the CJEU on rule of law backsliding linked to social policy matters. A much broader overview, albeit with a general rather than social policy focus, can be found in Pech and Kochenov (2021). It is broadly agreed in the literature analysing the vast *acquis* of CJEU case law that the CJEU has been at the forefront, if not the spearhead, of ensuring that the rule of law has been converted from a lofty phrase in the Treaties to a functioning legal concept (Pech and Kochenov 2021).

Overall, there are three groups of cases belonging to the rule of law family. First, there are those dealing directly with the independence of judges and the judiciary²⁶. Second, there are those ‘associated’ with the deterioration of fundamental rights in the context of rule of law backsliding. Most cases here are those dealing with the rights of asylum seekers²⁷, the European Arrest Warrant²⁸, protection of NGOs²⁹ and academic freedom³⁰. Finally, the third group concerns the procedural side, namely the attempts by Poland and Hungary to challenge the ongoing reform of the rule of law protection framework at EU level. This group includes cases such as the challenge to the Conditionality Regulation (Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, discussed in more detail in the following section)³¹, or the questioning of the legality of the Article 7 TEU Resolution³². While judgments linking rule of law and social policy are rare, social policy aspects, such as the prohibition of discrimination, have served as the basis for the CJEU to engage in the debate over the rule of law³³.

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26. CJEU judgment in C-286/12 *Commission v Hungary*, ECLI:EU:C:2012:687; CJEU judgment in C-564/19 SI, ECLI:EU:C:2021:949; CJEU judgment in joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság*, ECLI:EU:C:2020:367; CJEU judgment in C-896/19 *Republika*, ECLI:EU:C:2021:311; CJEU judgment in C-192/18 *Commission v Poland*, ECLI:EU:C:2019:924; Order of the CJEU in C-522/18 *Zakład Ubezpieczeń Społecznych*, ECLI:EU:C:2020:42; CJEU judgment in C-637/18 *Commission v Hungary*, ECLI:EU:C:2021:92; CJEU judgment in C-558/18 *Miasto Łowicz*, ECLI:EU:C:2020:234; CJEU judgment in C-585/18 A. K., ECLI:EU:C:2019:982; Joined cases C-624/18, C-625/18 and C-585/18 CP et al (not yet decided); CJEU judgment in case C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531; Order in case C-623/18 *Prokuratura Rejonowa w Ślubicach*, ECLI:EU:C:2020:800 and others.
27. CJEU case C-718/17 *Commission v Hungary* (not yet decided); CJEU Judgment in case C-406/18 PG, ECLI:EU:C:2020:216; CJEU Judgment in case C-564/18 *Bevándorlási és Menekültügyi Hivatal*, ECLI:EU:C:2020:218; CJEU judgment in case C-808/18 *Commission v Hungary*, ECLI:EU:C:2020:1029.
28. CJEU judgment in joined cases PPU C-561/21 and PPU C-562/21 *Openbaar Ministerie*, ECLI:EU:C:2022:100; CJEU Judgment in case C-354/20 PPU *Openbaar ministerie*, ECLI:EU:C:2020:1033; CJEU case C-412/20 PPU *Openbaar Ministerie* (not yet decided).
29. CJEU judgment in case C-78/18 *Commission v Hungary*, ECLI:EU:C:2020:476.
30. CJEU judgment in case C-66/18 *Commission v Hungary*, ECLI:EU:C:2020:792.
31. CJEU judgment in case C-156/18 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97; CJEU judgment in case C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:98.
32. CJEU judgment in case C-650/18 *Hungary v European Parliament*, ECLI:EU:C:2021:426.
33. CJEU judgement in case C-286/12, *Commission v Hungary*, ECLI:EU:C:2012:687.

The case law situation related to the rule of law differs greatly when it comes to Hungary and Poland. While Hungary has been cited before the CJEU mainly for cases related to its handling of asylum-seekers, Polish cases relate mainly to the independence of the judiciary. Both countries submitted annulment procedures concerning the Rule of Law Conditionality Regulation which were recently rejected by the CJEU³⁴. These two judgments will be incorporated in the analysis in the next section where conditionality mechanisms and their relation to social policy are discussed. We start our analysis with the CJEU ruling on the Portuguese judges' case³⁵, which is often taken as the starting point for the judicial construction of the content of the rule of law framework in recent CJEU case law. This judgment is a telling example of how social policy, in this case labour law, can serve as the entry to the debate on the independence of courts and, by association, the rule of law debate.

In this case, the Portuguese legislator had temporarily reduced the remuneration of public sector employees, including the judges of the Court of Auditors³⁶. The trade union representing judges (*Associação Sindical dos Juizes Portugueses*) brought the case before national court, questioning the compatibility of this reduction with the principle of judicial independence (Articles 19(1) TEU and 47 of the Charter in particular). The national court in turn referred the matter to the CJEU³⁷. While a reduction of remuneration could essentially be seen as a matter for labour law, in the context of this case the CJEU directly proceeded to the constitutional aspects of the dispute. After establishing an important general obligation that each and every Member State must ensure that courts meet requirements of effective judicial protection (para 37), the CJEU ruled that Article 19(1) TEU does not preclude general salary reduction measures such as those litigated in the dispute³⁸. Such linking of essentially social policy and labour law reforms with the question of independence of judges and the rule of law more broadly has been a characteristic approach for the CJEU's entrance into the rule of law debate.

The CJEU stance in the ruling on the Portuguese judges was followed through in the joined cases C-585/18, C-624/18 and C-625/18 A.K. These cases were brought by judges on the Polish Supreme Court who were concerned by the lowering of the retirement age. The cases concerned an array of matters. The central question, as formulated by the requesting national court in the preliminary ruling procedure, was whether the new Disciplinary Chamber of the Supreme Court could be considered 'independent' for the purposes of Article 267 TFEU (read in conjunction with Article 19(1), Article 2 TEU and Article 47 CFREU). In this case, the judges had brought a case alleging discrimination based on age. The question was whether they were entitled to have this case dealt with by an 'independent court' (they argued that the Disciplinary Chamber was not such) and whether a national court could disapply a national provision requiring the transfer of jurisdiction to a tribunal that could not be considered independent.

34. CJEU judgments in cases C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97 and C-157/21 *Poland v Parliament and Council*, ECLI:EU:C:2022:97.

35. CJEU judgment in case C-64/16 ASJP, ECLI:EU:C:2018:117.

36. *Ibid*, para 11.

37. *Ibid*, para 13.

38. *Ibid*, para 53.

The CJEU argued that Article 9(1) of Directive 2000/78, the scope of which covers *inter alia* discrimination based on age, requires that Member States ensure that all persons (including Supreme Court judges) who consider themselves wronged by a failure to apply the principle of equal treatment can enforce their rights before independent courts, while the national court is required to disapply any national provisions requiring the opposite³⁹. Here again the gist of the case lay in the procedural rules and the question of what constitutes an independent court; however, the CJEU went as far as setting out procedural guarantees in an essentially labour law dispute to contain the requirement that any court deciding such cases should be ‘independent’, in line with the criteria set forth at EU level. Thus, the CJEU went further than mere procedural autonomy⁴⁰ when it came to the judicial enforcement of age discrimination cases.

The CJEU approach has usually been to enter the debate on the content of the rule of law principle in cases that could also be seen as primarily concerning labour and social law. What is remarkable in these judgments is how little reasoning the CJEU assigns to the actual interpretation of EU social law; its foremost concern is the interpretation of EU constitutional law, and more precisely the rule of law framework on the independence of courts. The CJEU prefers to interpret general primary law rather than secondary social law in rule of law cases – a reasonable choice even if in most other cases more specific (secondary) law is interpreted and applied before more general (primary) law. Indeed, one could wish for broader entrenchment of rule of law elements in the social law *acquis per se*.

An exception to this approach is a much earlier Hungarian case, decided way before the rapid development of the CJEU’s rule of law case law. In its judgement, the CJEU ruled that, by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of 62, the country had failed to fulfil its obligations under Article 2 and 6(1) of Directive 2000/78/EC (General Framework Directive)⁴¹. Instead of engaging in constitutional law interpretation and the debate on the content and limits of the rule of law protection in general and the independence of the judiciary in particular, the CJEU relied here entirely on EU secondary law on non-discrimination. Even though the facts of the case were very similar to the later Polish cases, this early case gave precedence to solving the matter within the realm of EU social rather than constitutional law. Whether this or the current approach is more welcome depends on one’s perspective. More specific law has priority over more general law, though this does not mean that the development of constitutional principles should be entirely left aside.

Even though the CJEU’s docket is typically dominated by preliminary references (Article 267 TFEU)⁴², rule of law protection is something of an exception. The number of infringement procedures brought before the CJEU against violating Member States

39. CJEU Judgment in joined cases C-585/18, C-624/18 and C-625/18 A.K., para 172.

40. Principle that the EU law should be enforced at national level in the same way as national law.

41. CJEU judgment in case C-286/12 *Commission v Hungary*, ECLI:EU:C:2012:687, para 82.

42. This is a judicial procedure under which domestic courts in EU Member States can send questions to the CJEU concerning the interpretation and/or validity of EU law.

reveals the significant role played both by the CJEU and the European Commission in addressing the rule of law crisis. The European Commission has so far brought five infringement procedures before the CJEU to ensure that national courts meet the requirements of effective judicial protection: four against Poland and one against Hungary. Four of the cases have already been decided⁴³.

In all these cases Hungary and Poland were found to be in violation of EU law (mainly Article 19(1) TFEU), though the approach to the social rights aspects differed in the judgments. Two judgments illustrate the CJEU's different approaches.

In the case *Commission v Poland* (C-619/18) the legality of reducing the retirement age (and subsequent dismissal) of Polish Supreme Court judges was questioned⁴⁴. The Polish government argued that the changes were made in order to balance judges' retirement age with that of the general population and also to improve the age balance among Supreme Court members⁴⁵. Diving straight into an interpretation of Article 19(1) TFEU, the CJEU evaluated the situation based on the principle of independence of judges rather than by (also) looking into the EU law on the prohibition of discrimination based on age. This can be considered a lost opportunity to rely on the broader rather than narrow interpretation of the rule of law principle⁴⁶. But it is very much in line with the more recent CJEU case law analysed in the previous paragraphs, where clear priority is assigned to assessing the rule of law (based on primary law) rather than compliance with EU (secondary) law on social policy requirements.

In the case *Commission v Poland* C-192/18, which dealt with the retirement age of the judges (different for women and men) sitting on ordinary courts, the approach was very different, especially since the Polish Government itself argued that the situation fell outside the scope of Directive 2006/54/EC. The CJEU took the opportunity to interpret the General Discrimination Directive in relation to Article 157(1) TFEU (the principle of equal pay for male and female workers for equal work or work of equal value). The CJEU argued that the situation fell within the scope of Article 157 TFEU and Directive 2006/54 on equal opportunities and equal treatment of men and women in matters of employment and occupation⁴⁷, ruling that the national law directly introduced discriminatory conditions based on sex into the pension schemes for judges of ordinary courts and public prosecutors, contrary to Article 157 TFEU and Articles 5(a) and 9(1) (f) of Directive 2006/54/EC⁴⁸. Hence in this case the CJEU interpreted the reforms as potentially threatening the independence of the judiciary not only as an issue of the rule of law and independence of the courts, but also under EU secondary law on non-discrimination. This example well illustrates how rule of law concerns are intrinsically

43. CJEU judgment in C-619/18 *Commission v Poland*, ECLI:EU:C:2019:531; CJEU judgment in case C-192/18 *Commission v Poland*, ECLI:EU:C:2019:924; CJEU judgment in case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596.

44. C-619/18 *Commission v Poland*.

45. *Ibid*, para 80.

46. *Ibid*, especially, paras 71-97.

47. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

48. *Ibid*, especially, para 137.

linked with social rights, such as the prohibition to discriminate based on age, which is a right recognised not only in EU secondary law but also in the CFREU. Both this case and the one discussed in the previous paragraph deal with lowering the retirement age. According to the CJEU, such a move could not be justified and resulted in an endangerment of the rule of law principle. Nevertheless, in the latter case the CJEU preferred to base the operative part of its judgment on the more specific equality law rather than the more general rule of law constitutional framework.

The only case not dealing with the question of independence of judiciary but related to the social realm, and more precisely to the right to freedom of association is the case *Commission v. Hungary* (C-78/18). The case challenged the Hungarian Transparency Law subjecting organisations that receive support from abroad exceeding a certain threshold to registration, declaration and publication requirements, in contrast to organisations that do not receive such support⁴⁹. The Court ruled that this law breached Article 63 TFEU and Articles 7, 8 and 12 CFREU⁵⁰. The CJEU's reasoning referred to the European Court of Human Rights' case law, while the judgment was partly based on the right to private life (Article 7 of the Charter and Article 8 ECHR) and freedom of association (Article 11 ECHR and Article 12(1) of the Charter)⁵¹. The CJEU *inter alia* argued that the obligation for civil society organisations established in Hungary to declare financial support granted by natural or legal persons established abroad limited the right to respect for private and family life⁵². Interestingly, while this case is seen as constituting part of rule of law case law (Pech and Kochenov 2021)⁵³ and as rule of law backsliding in Hungary, it was not linked to Article 2 TEU by the CJEU. Instead, the Court argued the case based on human rights and so-called social rights provisions as laid out in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. This aptly illustrates the close link between rule of law protection and social rights.

To sum up, while 29 rule of law cases have been brought against Poland (not counting the joined ones)⁵⁴ and 16 against Hungary⁵⁵, in only four judgments has the CJEU established the connection between fundamental social rights and the rule of law, despite many of them posing an opportunity for the CJEU to connect the dots. Multiple cases concerning the independence of the judiciary could also have been assessed in the light of social law (prohibition to discriminate, unlawful dismissal, limits to disciplinary measures against workers and others). One could thus argue that in some cases there has been a lost opportunity to see rule of law protection as being embedded in and expressed by EU secondary law and in its larger setting in connection with the protection of human rights.

49. CJEU judgment in C-78/18 *Commission v Hungary*.

50. *Ibid.*, para 145.

51. *Ibid.*, para 132.

52. *Ibid.*

53. See also the rule of law dashboard. Available at: [<https://euruleoflaw.eu/rule-of-law-dashboard-new/>].

54. *Ibid.*

55. *Ibid.*

Some academics have criticised the CJEU for not taking a firmer stance on the rule of law issue (Halmai 2017b), arguing that the CJEU should have focused only on EU primary law requirements concerning the independence of the judiciary (Article 2 TEU, Article 19(1), Article 47, etc.) rather than venturing into EU equality legislation⁵⁶. In contrast to this opinion, however, the social policy and equality legislation not only provided the CJEU with a door-opener for developing an EU-level protective framework for the rule of law, but also broadened our understanding of the rule of law, linking the debate to the more tangible issues faced by such professional groups as judges, and illustrating the interconnectedness between protection of rule of law and social rights.

2.2 The newly designed rule of law conditionality mechanism: is there a social aspect?

Conditionality mechanisms are a tool which the European Commission has often used to ‘discipline’ EU Member States or to promote compliance with EU values and principles by candidate countries. For example, negative conditionality is one of the main instruments used in the accession process for candidate countries applying to join the EU club (Schimmelfennig and Sedelmeier 2004; Steunenberg and Dimitrova 2007; Sedelmeier 2011). One of the major points of the so-called Copenhagen criteria⁵⁷ concerns the ‘stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities’.

Similar conditionality mechanisms have been introduced as tools in the EU financial domain. In the 2014–2020 Multiannual Financial Framework (MFF), the measure of ex ante conditionalities was set as an element of the cohesion policy reform. Moving towards an increased role of conditionality mechanisms not just in EU external policies but also in internal matters was disputed by some scholars as moving away from the inherent nature of the EU – instead of ‘lead[ing] towards an increased solidarity (not conditionality) within the EU’, the Union finds its way towards ‘a de facto conditional solidarity’ (VIŤÁ 2017). In this MFF case, the conditionality mechanism was aimed at ensuring ‘the effective delivery of Europe 2020 objectives and targets through cohesion policy’ (European Commission 2011). It covered the European Structural and Investment Funds, namely the European Regional Development Fund, European Social Fund, the Cohesion Fund, European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund. Regulation (EU) 1303/2013⁵⁸ explicitly included ex-ante conditionalities with regard to achieving specific thematic objectives,

56. The case was adjudicated on the basis of Directive 2000/78/EC with regard to gender equality rights.

57. Accession criteria (Copenhagen criteria), available at: [<https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>].

58. Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

including some in the social policy domain⁵⁹, through requiring that specific measurable criteria be met (see Regulation (EU) 1303/2013).

Unlike this conditionality mechanism applied to the European Structural and Investment Funds, the recently adopted rule of law conditionality mechanism is rather vague when it comes to setting specific objectives. At the same time, while the Regulation does not contain concrete objectives in different thematic areas, it highlights the importance of the rule of law not only as a foundational value crucial for sustaining democracy in EU Member States but also as an important element for their economic and social development and cohesion:

Respect for the rule of law is essential not only for Union citizens, but also for business initiatives, innovation, investment, economic, social and territorial cohesion, and the proper functioning of the internal market, which will flourish most where a solid legal and institutional framework is in place⁶⁰.

Thus, the Regulation highlights the various linkages between the rule of law and the ‘flourishing’ of certain domains, including the social policy domain, without, however, setting any meaningful concrete goals.

At the same time, the Regulation could be defined as surprisingly ‘narrow’ if aimed at defending a foundational principle such as the rule of law, due to its scope of application referring solely to irregularities in the EU budget expenditure of EU Member States⁶¹. This narrowness might be explained by the difficulties of reaching a compromise during the legislative process and the possible fear that a wider-ranging measure might give too much discretion to the European Commission in prosecuting rule of law breaches. An additional hurdle is that any objection to a national action must pursue the aim of protecting the Union’s budget⁶². However, where a breach is detected, the measures available to the Commission under this Regulation are wide-ranging:

- a. Where the Commission implements the Union budget and where a government entity is the recipient, the Commission can suspend payments, prohibit a Member State from entering into new legal commitments, suspend or reduce the economic

59. Objectives include promoting sustainable and quality employment, promoting social inclusion, combating poverty and any discrimination, as well as investing in education, training and vocational training for skills and lifelong learning.

60. Regulation (EU, Euratom) No 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, recital (11).

61. Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, recital (17).

62. Article 4(2): ‘breaches of the rule of law have to concern one or more of the following: a) the proper functioning of the authorities implementing the Union budget; b) the proper functioning of the authorities carrying out financial control, monitoring and audit [...]; c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, corruption or other breaches of Union law relating to the implementation of the Union budget; d) the effective judicial review by independent courts of actions carried out by authorities in (a)-(b); e) the prevention and sanctioning of fraud, corruption or other breaches of Union law; f) the recovery of funds unduly paid; g) the effective and timely cooperation with OLAF etc.; h) other situations or conduct of authorities that are relevant to the sound financial management of the Union budget’.

advantage under an instrument guaranteed by the Union budget, or prohibit a Member State from entering into new agreements on loans or other instruments guaranteed by the Union's budget (Article 5(1)(a));

- b. Where the Commission implements the Union budget under shared management with Member States, the Commission may suspend the approval of programmes or amendments, suspend commitments, reduce commitments, reduce pre-financing, interrupt payment deadlines or suspend payments (Article 5(1)(b)).

This general regime of conditionality for protecting the Union budget thus targets high-level corruption, strengthening regulatory and institutional mechanisms and structures where the rule of law crisis has direct links to mismanagement of EU funds (Tridimas 2020). The measure is expected to return results contributing to a more efficient and effective spending of EU funds and favouring any domain for which these funds are allocated, including the social policy domain. The European Social Fund Plus (ESF+), a major EU funding instrument for tackling the socio-economic crisis and for investing in social policy developments, is one of the EU funding schemes whose financial rules are covered by the Regulation⁶³. The ESF+ in addition supports implementation of the European Pillar for Social Rights in the areas of employment, education and skills as well as social inclusion. The main objectives of ESF+ funding are aimed at tackling social inequalities and poverty, youth unemployment, as well as at addressing poverty and child poverty, and at strengthening the capacities of social partners and civil society. Hence, using this Regulation to suspend or limit funding in the social domain could have tangible effects on Member States' funding of social policies.

On the other hand, there are concerns about the financial impact that this Regulation could have on the end beneficiaries if EU funds are reduced or suspended due to irregularities closely linked to rule of law breaches. The Regulation itself includes a safeguard clause for final recipients, stating that the Commission, in making any decisions, should take into account the potential impact on final recipients and beneficiaries (recital 19 of the Regulation).

Academics call into question the effectiveness of the conditionality instruments since instead of 'directly impacting the government', they usually impact the 'beneficiaries of EU programmes who are not responsible for government misbehaviour' (Heinemann 2018). Hungary and Poland were among the largest recipients of funds from the total EU economic, social and territorial budget distributed between 2015 and 2020 (see Figure 2 in annex). While Poland was the biggest beneficiary (as a percentage of the total funding under this scheme), Hungary – together with Czechia, Italy, Romania (in the early years) and Spain – also largely benefited from the funding (see Figure 2 in annex). These funds have been used in programmes important for implementing the European Pillar of Social Rights and European Semester recommendations, as well as for subsidising jobs growth and supporting initiatives such as the Youth Guarantee, the Youth Employment

63. The other funding schemes covered in the Regulation include the European Regional Development Fund, the Cohesion Fund, and the European Maritime and Fisheries Fund and the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument (Article 5).

Initiative, the Council Recommendation on Long-Term Unemployment and the Skills Agenda for Europe (all under the jobs, growth and investment flag). While the larger part of this funding does not necessarily reach end beneficiaries in cash, the financial resources are used for funding social programmes and infrastructure.

Commission President Ursula von der Leyen has announced that the rule of law conditionality mechanism will be triggered against Hungary but not Poland (The Greens/EFA 2022). On 18 September 2022, the Commission presented two proposals to the Council for cutting funding allocated to Hungary as part of the EU cohesion funding mechanism: ‘A suspension of 65% of the commitments for three operational programmes under cohesion policy’ and ‘A prohibition to enter into legal commitments with the public interest trusts for programmes implemented in direct and indirect management’ (European Commission 2022b). These are to be voted on by the Council within one month of the Commission’s proposal. Since the Council can pass the measure with a qualified majority, what was initially seen as a vague threat for Hungary has become a rather real scenario for substantial cuts in EU funding.

Having sensed the potential threat of budgetary losses under the Regulation, both Hungary and Poland unsuccessfully challenged its legality before the CJEU. The Court stressed that the Union budget is one of the principal instruments for giving practical effect to the principle of solidarity and for implementing the principle of mutual trust⁶⁴. However, the CJEU also somewhat restricted the Regulation’s applicability by ruling ‘in the first place, the contested regulation allows the EU institutions to examine situations in the Member States only in so far as they are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union and, in the second place, appropriate measures can be adopted under that regulation only where it is established that such situations involve a breach of one of the principles of the rule of law which affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way’⁶⁵. The phrase ‘in a sufficiently direct way’ means that a genuine link must be established between a breach and such an effect or serious risk of an effect⁶⁶. Finally, the Commission must always assess the proportionality of the measures imposed, in accordance with an evidence-based approach respecting the principles of objectivity, non-discrimination and equality of Member States before the Treaties⁶⁷. This potentially restricts the Commission’s scope of discretion. It now remains to be seen what Hungary will do in the wake of the decision to trigger the Conditionality Regulation and to reduce funding. Most likely, if Hungary appeals against this decision, the question whether rule of law breaches have serious and sufficiently direct effect on the sound financial management and financial interests of the Union will be among those the CJEU will have to adjudicate on.

64. CJEU judgment in case C-156/21 *Hungary v Parliament and Council*, ECLI:EU:C:2022:97, para 129.

65. *Ibid*, para 144.

66. *Ibid*, para 147.

67. *Ibid*, para 316.

Finally, the Commission's approach to the Resilience and Recovery Facility (RRF) constitutes a new and exciting nod to the rule of law conditionality beyond the realm of the existing conditionality mechanisms embedded in the legal framework discussed above. Though the RRF is not explicitly covered by the scope of the Regulation, rule of law conditionality was similarly applied. According to the Commission, the aim of the RRF is to mitigate the economic and social impact of the coronavirus pandemic and to make European economies and societies more sustainable, resilient and better prepared for green and digital transitions⁶⁸. While recently approving the Polish Recovery and Resilience Plan (RRP), the European Commission added three conditions with regard to rule of law compliance: dismantling the controversial disciplinary chamber for judges, reforming the disciplinary regime, and reinstating dismissed judges. At the time of writing (September 2022), no funding has yet been released and the Hungarian RRP remains under scrutiny

While the debate on cutting EU funds to Hungary in 2012 due to rule of law violations led to a political discussion on the potential negative impact of alienating Hungarian citizens from the EU, this debate took a different twist ten years later with the adoption of the rule of law conditionality mechanism. The main concern has been that EU citizens' taxes should not be spent on funding what the European Parliament calls a 'hybrid regime of electoral autocracy'⁶⁹. This is a rather remarkable *volte-face*. The most important question regarding the practical implementation of the mechanism is whether freezing EU funding under the conditionality mechanism is implementable in a way not impacting end beneficiaries, especially when these EU funds concern the social infrastructure, technical assistance, funding for jobs growth and re-skilling the unemployed, or funding for reducing youth unemployment. While financial sanctions are probably a last resort measure available to the EU to 'punish' domestic politicians, it is not clear in which direction the vehicle could turn.

Conclusions

While social policy has helped the CJEU to enter the rule of law debate in the case of both Hungary and Poland, there has not been much scholarly debate on the linkage between social policy and the rule of law. In this chapter, we aimed to highlight this relation. We also showed that the social context of the cases discussed is often promising and potentially brings a broader explanatory dimension to the CJEU's understanding and EU's notion of the rule of law. In addition, we concluded that, while there are various mechanisms available in the rule of law toolbox, their impact on Member State social policies and budgets remains to be seen.

68. Recovery and Resilience Facility, European Commission, available at: [https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en].

69. The European Parliament voted that Hungary shall be defined not as democracy but as 'hybrid regime of electoral autocracy' in a non-binding report on 16 September 2022.

Initially believed to be one of the ‘weak’ instruments available to the EU institutions (similar to Article 7 TEU, which was under discussion for almost a decade before action was taken to trigger it), the Commission recently triggered the rule of law conditionality mechanism with regard to Hungary. If given the green light by the CJEU, the Commission’s action promises to have a substantial budgetary impact on Hungary, including on its social policy budget. While it is far from clear whether this instrument will get the governments in Hungary and Poland to once again adhere to rule of law and democracy principles, at the same time the potential social impact of the rule of law conditionality mechanism’s application – direct with regard to final recipients of pruned EU funding as well as indirect with regard to the implications for the state budget – needs further scrutiny. Would suspending EU funding lead to a reallocation of budget spending in different domains, including in the social policy domain? In addition, while direct consequences are supposed to be prevented, could the state downscale such programmes? This is not clear. Moreover, since the Regulation is not backed by an impact assessment requirement, its potential consequences cannot be assessed in depth, at least not in a way that is transparent and accessible for the public. This chapter has aimed to raise the pertinence of this question for further research on the topic.

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Annex

Figure 2 Share (in %) of the total EU economic, social and territorial budget each of the EU countries received in the period 2015 – 2020

Year	EU-28	BE	BG	CZ	DK	DE	EE	IE	EL	ES	FR	HR	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
2015	50872,9	1%	3%	11%	0%	5%	0%	0%	6%	11%	5%	0%	10%	0%	1%	0%	0%	7%	0%	0%	1%	16%	2%	7%	1%	6%	0%	0%	4%
2016	37579,4	1%	3%	9%	0%	4%	1%	0%	6%	10%	3%	1%	12%	0%	1%	1%	0%	7%	0%	0%	0%	15%	4%	12%	0%	5%	0%	0%	3%
2017	29660,3	1%	2%	9%	0%	7%	1%	0%	5%	7%	4%	1%	6%	0%	1%	2%	0%	7%	0%	1%	0%	25%	8%	4%	0%	3%	1%	1%	2%
2018	46412,8	1%	2%	6%	0%	6%	1%	0%	3%	9%	5%	1%	7%	0%	1%	3%	0%	10%	0%	0%	0%	25%	7%	4%	1%	3%	0%	1%	2%
2019	47423,9	1%	2%	8%	0%	6%	2%	0%	4%	5%	5%	3%	7%	0%	2%	2%	0%	9%	0%	0%	1%	24%	6%	5%	1%	3%	0%	0%	4%
2020	55468,4	1%	2%	7%	0%	5%	1%	0%	7%	7%	5%	2%	7%	0%	1%	3%	0%	8%	0%	0%	0%	23%	6%	6%	1%	3%	0%	0%	2%

Note: For the analysis two datasets are used – EU spending and revenue, Data 2000-2020, 09 June 2021, available here: [https://ec.europa.eu/info/strategy/eu-budget/long-term-eu-budget/2014-2020/spending-and-revenue_en] and the Eurostat dataset GDP and main components (output, expenditure and income), [nama_10_gdp], last updated on 9 June 2022.

Data sources: EU spending and revenue (Data 2000-2020), 09 June 2021, and Eurostat dataset GDP, [nama_10_gdp]