UNIO - *EU Law Journal*. Vol. 8, No. 2, March 2023, pp 17-31.

School of Law – University of Minho

What is the role of the infringement procedure in tackling rule of law backsliding in the EU?

Gonçalo Martins de Matos*

ABSTRACT: The rule of law is a foundational and fundamental value of the European Union, embodied by the complete and coherent system of legal remedies based on the fundamental right to effective judicial protection. In some Member States, the rule of law has been facing challenges and difficulties of varying degrees of severity, leading to what has been called a "rule of law backsliding" in those States. The urgency to tackle these challenges has led to the search for immediate solutions within the European Union's tools and mechanisms, which has increased the focus given to the infringement procedure, a judicial procedure whose goal is to review the behaviours of Member States and find breaches of European Union law committed by them. The past uses of this judicial mechanism by the European Commission and the decisions of the Court of Justice of the European Union ("CJEU") that followed have showed positive results and opened promising paths to follow in the fight to uphold the rule of law in the European Union.

KEYWORDS: Rule of law – rule of law backsliding – fundamental values of the EU – infringement procedure.

* Master in Judiciary Law by the School of Law of University of Minho.

Introduction

On 15 February 2023, the European Commission announced that it had decided to refer Poland to the CJEU for violations of EU law by the Polish Constitutional Court. This action is yet another in a series of infringement procedures concerning the soundness of the rule of law within the Polish State, specifically concerning the independence of the judiciary. Through the object of this last infringement procedure, it may not look like the issue concerns the rule of law, but, as we will see, the underlying issue is, in fact, the enforcement of this core value through the EU's judicial apparatus. The synergies between the EU's judiciary and the enforcement of its proclaimed values give rise to this article, which seeks to be both analytical and pedagogical. It is our aim to understand in what way the infringement procedure can play a role in enforcing the rule of law within the EU.

However, before we can analyse what is at stake when we discuss enforcement of the rule of law, we must first contextualise this last challenge by the Polish State to the EU's functioning in the broader process of "*rule of law backsliding*", underway in some Member States. For that, we shall look at the concept of "*rule of law backsliding*" and its past and recent materialisations. Against this backdrop, we shall look at EU litigation and its respective judicial mechanisms through the lens of effective judicial protection, crossing those with the urgency of enforcement demanded by the rule of law. Lastly, we shall observe how the infringement procedure presents itself as a judicial mechanism for enforcing the rule of law, analysing particularly how it has been deployed and what paths are opened by these dynamics.

1. The urgency to uphold the rule of law in the European Union

1.1. The rule of law as an integral part of the European Union

As a brief introduction, we shall look at what is the concept of rule of law, and what such notion entails. Although it may seem like it, the rule of law and its continental equivalent, the State of Law, are not the same concept. There are key differences between them, which we will not analyse due to the scope of this article. Nonetheless, we highly recommend studying the differences between the two concepts. We shall instead look at the similarities between them. The rule of law (and the State of Law as well) constitutes a way of limiting the exercise of public powers within the confines of the law. Adding to this formalist definition, the rule of law has a substantive dimension, which subjects both the public powers and the law itself to a series of values that emerged from the dawn of liberal democracy. That is why we can define the rule of law with the European Commission's formulation in COM (2019) 163 final: "*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*".[1]

[1] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council – Further strengthening the Rule of Law within the Union, COM(2019) 163 final, 3 April 2019, 1.

The rule of law[2] materialises in several principles that form the basis of the liberal democratic State. We resort again to the notion provided by the European Commission in the Communication under analysis, which, moreover, has been reused in all subsequent communications on the subject. The notion of rule of law, "*includes, among others, 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*".[3] Once again, analysing every one of these principles would be very interesting, but due to the scope of this article, we shall focus on the principles of effective judicial protection, separation of powers and independence of the judiciary once we examine the central place the rule of law holds in the European project.

Since its inception, the rule of law has been a founding value of the EU. As early as 1962, Walter Hallstein, first President of the European Commission (then, Commission of the European Communities), remarked that at the time the European Economic Community was a "*Community of law*",[4] in reference to the concept of the State of Law. Although some of the core aspects of the rule of law have been directly or indirectly mentioned in the CJEU's case law, the first time the expression "*Community based on the rule of law*" was used was in the landmark ruling, *Les Verts*, "*inasmuch as neither their 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*".[5] The transition from the European Communities to the EU as we know it today, brought about by the Treaty of Lisbon, saw the establishment of the rule of law as a core value of the EU, in Article 2 of the Treaty on European Union (TEU). The Community of law transitioned, thus, to a Union of Law, becoming one of the core principles of the EU, providing both "*a i) limit to the action of European institutions and Member States in the fields covered by Union law, as well as a ii) guarantee to the rights of individuals affected by European provisions*".[6]

The recognition of the EU as a Union of Law via *Les Verts* was based on the realisation that the Treaties establish "*a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions*".[7]

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[2] The notion of "rule of law" represents a complex and extensive reality. For that, we recommend expanding the knowledge of the concept with several readings, among which: Alessandra Silveira, "Horizontal integration and Union based on the rule of law", in *O Estado de direito na União Europeia - The rule of law in the European Union,* ed. Anabela Miranda Rodrigues, Jónatas Machado and Paulo Pinto Albuquerque (Coimbra: Instituto Jurídico - Faculdade de Direito da Universidade de Coimbra, 2022), accessed March 8, 2023, https://estudogeral.uc.pt/bitstream/10316/104159/1/RuleOfLaw_Livro.pdf; J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, 7th Editions (Coimbra: Almedina, 2003); Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011).

[3] COM(2019) 163 final, 1.

[4] Thomas von Danwitz, "The rule of law in the recent jurisprudence of the ECJ", *Fordham International Law Journal*, vol. 37, no. 5 (2014): 1312-1313.

[5] Judgement CJUE *Parti Écologiste "Les Verts" v. European Parliament*, 23 April 1986, Case 294/83, ECLI:EU:C:1986:166, recital 23.

[6] Alessandra Silveira et al., "União de direito para além do direito da União – as garantias de independência judicial no acórdão *Associação Sindical dos Juízes Portugueses*", *JULGAR Online* (2018): 4, accessed February 28, 2023, http://julgar.pt/uniao-de-direito-para-alem-do-direito-da-uniao-as-garantias-de-independencia-judicial-no-acordao-associacao-sindical-dos-juizes-portugueses/ (freely translated by the author).

[7] Silveira, et al., "União de direito", 4.

More than that, the EU establishes a "*complete and coherent system of judicial protection*":[8] "*'complete' in the sense that several remedies and procedures operate before the Community courts and the national courts to ensure the review of legality of the acts of the institutions*" and "*'coherent' in the sense that it defines the respective tasks of the Community courts and the national courts in conformity with the allocation of jurisdiction laid down in the Treaty*".[9] These manifestations of the rule of law provide the clues to the conclusion that this fundamental value has therefore always been intrinsic to the EU itself.

1.2. Rule of law backsliding in European Union Member States

An examination of the EU's recent history demonstrates a growing concern with the issue of the rule of law, which emerges from different reasons associated with various matters and events, ranging from problems relating to misuses of law and abuses of political power, which can be resolved by Member States' own internal systems, to problems so deep-seated that even Member States' own political-legal systems cannot cope. The latter form the most concerning set of problems, since they represent a "*general dismantlement or profound* ***undermining of the liberal democratic state***",[10] adding up to an overall crisis of the rule of law which materialises in a range of different phenomena, from new concepts such as the state of constitutional capture to recurring problems such as systemic corruption. There is a notion, conceived with the purpose to encapsulate all these phenomena, that is repeated across the literature on the subject, which is the term, "*rule of law backsliding*". We shall examine its definition in order to proceed with the analysis of its diverse practical manifestations and bearing in mind the purpose of our article.

The concept of rule of law backsliding refers to the process of constitutional capture at the base of a "*systemic undermining of the key components of the rule of law*".[11] The concept of "*constitutional capture*" is provided by Jan-Werner Müller, which is understood as the systematic weakening of the checks and balances of a State's legal system, and it may even go so far as to seriously hinder changes in political power, through control of the entire political system by vitiation of democratic processes and legal guarantees.[12] These processes of gradual constitutional capture form a "*well-organised script*"[13] through which rule of law backsliding encroaches and consolidates. The origins are well identified, in particular, the disenchantment of citizens with political party systems, which leads to the appearance of more radical political parties or political leaders in traditional parties, all armed with promises of radical and immediate change. Dissatisfied citizens elect these parties and leaders, who soon begin

[8] Koen Lenaerts, "The rule of law and the coherence of the judicial system of the European Union", *Common Market Law Review*, vol. 44, no. 6 (2007): 1626.
[9] Lenaerts, "The rule of law", 1626.
[10] Carlos Closa, Dimitry Kochenov and Joseph H.H. Weiler, "Reinforcing Rule of Law Oversight in the European Union", *EUI Working Paper RSCAS 2014/25* (2014): 4, accessed February 24, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2404260.
[11] Laurent Pech and Kim Lane Scheppele, "Illiberalism within: rule of law backsliding in the EU", *Cambridge Yearbook of European Legal Studies*, vol. 19 (2017): 6, accessed February 24, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009280.
[12] Jan-Werner Müller, "Rising to the challenge of constitutional capture: Protecting the rule of law within EU member states", *Eurozine*, March 21, 2014, accessed February 24, 2023, https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/. See also Jan-Werner Müller, "Should the EU protect democracy and the rule of law inside Member States?", *European Law Journal*, vol. 21, no. 2 (2015): 142.
[13] Pech and Scheppele, "Illiberalism within", 6.

to dismantle the pre-existing constitutional framework, through legalistic tricks that aim to strangle any means of opposition to their consolidation (such as independent courts, free media and other guarantee institutions of the democratic State). In addition to their capture of the electoral system as a whole, cunningly modified to guarantee the victories of the governing party and the defeat of the opposition (when they do not engage in the actual repression of any opposition), they also use means of deceiving public opinion, such as commissioned referendums, fake news and other methods of deception. As these parties consolidate political power, citizens awake far too late for the damage inflicted and are then no longer being able to use the guarantees they once enjoyed to limit the power of the State.

Taking these patterns and processes into consideration, Laurent Pech and Kim Lane Scheppele present a definition for rule of law backsliding, which has been adopted in the literature produced on the subject: it is "*the process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party*".[14] Rule of law backsliding differs from "mere" structural deficiencies of the rule of law, such as endemic corruption or insufficient administrative or judicial resources, in the sense that the former is "*a deliberate strategy pursued by public authorities with the goals of fundamentally undermining pluralism*".[15]

The paradigmatic examples of rule of law backsliding – Hungary and Poland – clearly reveal why the concern about the rule of law is raised: "*[b]acksliding implies that a country was once better, and then regressed*", particularly "*where this retrogression is a deliberate strategy of a ruling party*".[16] The cases of Hungary and Poland are particularly serious, as they represented the first flagrant cases of unprecedented rule of law backsliding. Despite adopting different paths, both countries follow the same "recipe" for dismantling the guarantees of the rule of law. In the Hungarian case, the ruling party has used the constitution and constitutional amendments in order to reshape the system in line with Viktor Órban›s political ambitions, with an unprecedented attack on the rule of law and the checks and balances of the Hungarian system upon adoption of the constitution currently in force. The case of Poland differs from that of Hungary, insofar as the PiS government did not enjoy a majority capable of promoting constitutional changes, having dedicated itself to reversing the rule of law through legal subterfuges, exploring the "*back door*" of the law,[17] seeking to dismantle the checks and balances of the Polish system. In both cases, at different speeds, but in a consistent and identical way, the parties in power embarked on a general dismantling of the systems of guarantees of their respective States, with the aim of installing an illiberal form of State, whether for purely political reasons or concentration of powers, as in the Hungarian case, or for ideological reasons, as it appears to be in the Polish case.[18]

[14] Pech and Scheppele, "Illiberalism within", 7.
[15] Pech and Scheppele, "Illiberalism within", 8.
[16] Pech and Scheppele, "Illiberalism within", 8-9.
[17] Dimitry Kochenov and Petra Bárd, "Rule of Law Crisis in the New Member States of the EU: The Pitfalls of Overemphasising Enforcement", *RECONNECT Working Paper*, no. 1 (2018): 9, accessed February 27, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3221240.
[18] Kochenov and Bárd, "Rule of Law", 9.

1.3. The implications of rule of law backsliding for the European Union and the urgency to uphold it

Rule of law backsliding is an issue of paramount importance for the EU, as this phenomenon affects all European citizens: (i) the citizens of the backsliding Member State; (ii) the citizens of other Member States residing in that State, and, more indirectly, (iii) all European citizens residing outside that State. The latter case is due to the fact that backsliding Member States participate in EU decision-making processes and in the adoption of acts that are binding on everyone within the Union. On the other hand, equally relevant, the seizure of judicial power by an illiberal government "*poses a threat to the correct, consistent and effective application of EU law within the affected […] Member State*",[19] in addition to also contaminating the use of Union mechanisms aimed at guaranteeing the interpretation and consistent application of EU law. It is the very essence of the Union that is at stake with the problem of rule of law backsliding, which is why it is urgent that the EU acts to uphold the fundamental principle of the rule of law. Dimitry Kochenov goes as far as to claim that rule of law backsliding "*potentially calls the Union as such into question*",[20] seeing that the EU seems powerless in the face of the fact that some Member States are not complying with its fundamental principles, which undermines "*pretty much all the logical fabric of thick assumptions which made the very idea of the EU operational*".[21] Although Kochenov's view is somewhat fatalistic, it illustrates well the sense of urgency in upholding rule of law within the EU, which is why, more than ever, it is urgent to work with what is effectively available to the EU to build the defence of the values enshrined in article 2 TEU and, particularly, the rule of law.

And it is on the EU that falls the duty to protect and enforce this fundamental principle. Carlos Closa and Dimitry Kochenov densify this duty with three normative arguments on which to base EU intervention in backsliding Member States. The first relates to an "*all-affected principle*",[22] according to which the effects of the illiberal drift of individual Member States affects all other Member States and occur at two levels: first, European citizens have every interest in illiberal states not joining the EU, since they will have a seat in the Council and the European Council, that is, at least indirectly participating in the lives of all EU citizens; second, all Member States have an equal interest in none of the others acting independently – in the current state of European integration prevails the presumption that each Member State "*is at least as good as any other in terms of the governance, democracy and the Rule of Law standards*",[23] and it is by ensuring that this presumption is true, the mutual trust between Member States is assured, a trust which is essential for the functioning of the Union and the Internal Market. The second normative argument concerns the supranational nature of the EU, namely with regard to its role of protecting the very rights it creates for its citizens, a protection that is independent of the Member States.

In its turn, the third argument concerns a principle of congruence, which has an external and an internal dimension. In an external dimension, the principle of

[19] Pech and Scheppele, "Illiberalism within", 8.
[20] Dimitry Kochenov, "Europe's Crisis of Values", *University of Groningen Faculty of Law Research Paper Series*, no. 15/2014 (2014): 9, accessed February 27, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443363.
[21] Dimitry Kochenov, "Europe's Crisis", 9.
[22] Carlos Closa, Dimitry Kochenov and Joseph H.H. Weiler, "Reinforcing Rule of Law", 5.
[23] Carlos Closa, Dimitry Kochenov and Joseph H.H. Weiler, "Reinforcing Rule of Law", 5-6.

congruence concerns the type of requirements that the Union normally imposes for cooperation with third parties, especially with regard to the protection of fundamental rights, democracy and the rule of law, with the example invoked by Closa and Kochenov being paradigmatic: for the sake of congruence, the EU should impose on Member States, which have already joined the Union, the same high standards of democracy and legality that it sets for candidate countries during the pre-accession phase. On an internal dimension, the principle of congruence dictates that respect for democracy and the rule of law should not be seen just as a prerequisite for membership, but as a requirement for continued membership. This principle of congruence, as we can observe, leads to an improvement in the EU's position, increasing its internal and external credibility in the defence of fundamental rights and the rule of law.

It is through arguments of this nature that we manage to seek and, as we will see, find answers in the already established EU judicial mechanisms. If the EU is legitimised to resort to its judicial means, the protection and defence of the fundamental values of the Union, and of the Rule of Law, becomes more achievable. With this context in mind, we will look at how one mechanism in particular, the infringement procedure, materialises the appropriate answer to the urgency in upholding the rule of law. For that, we will consider the action itself, contextualised within the principle of effective judicial protection, and how (and why) it has already been used as a means to tackle rule of law backsliding.

2. The infringement procedure: brief characterisation and relation to the rule of law

The structuring of the EU as a Union of Law, insofar as its institutions are subject to review of the conformity of their acts with the Treaties, presupposes that its functioning is subject to a principle of legality, in the sense that strict rules govern the organisation and activity of the European institutions, their relations with each other, their relations with the Member States and among the Member States, the definition of the competences of the Union and of the Member States, as well as the position of individuals vis-à-vis the EU and the States. As a result, "*all legal relationships established within the framework of the Union fall under the control of independent jurisdictional bodies*".[24] Furthermore, in recognising that the Treaties also established "*a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions*",[25] the CJEU added that the EU, by structuring itself as a Union of Law, subject to the principle of legality, also ensures the guarantee of effective judicial protection.

The principle of effective judicial protection is endorsed in the second paragraph of in Article 19(1) TEU, which provides that Member States shall provide sufficient remedies to ensure effective legal protection in the fields covered by Union law. In addition, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 47 of the Charter of Fundamental Rights of the EU, enshrine the right to an action before an impartial and independent court

[24] João Mota de Campos, António Pinto Pereira and João Luiz Mota de Campos, *O Direito Processual da União Europeia: Contencioso Comunitário*, 2nd edition (Lisbon: Fundação Calouste Gulbenkian, 2014), 93 (freely translated by the author).
[25] Judgement *Les Verts*, *supra*, note 5.

for the defence of one's rights and freedoms, which is not only a general principle of Union law,[26] but also a fundamental right of EU citizens.[27] The principle of effective judicial protection has a complex nature, which unfolds in a set of sub-principles that materialise it. However, we will focus on the right of access to the Law, due to its relevance in the context of the present section.

It is important, however, to briefly frame the right of access to the Law in the broader context of the right to action. It can be deduced from the wording "*right to action*" that "*individuals can judicially enforce the rights conferred by [EU] law and the corresponding right to judicial review*",[28] which translates into a right to an effective judicial remedy, articulating the right to effective remedies and forms of protection that interested parties seek to obtain from the court, as well as the corresponding right to effective procedural means of action and defence. Naturally, the right to action necessarily implies a right of access to the law, or, in other words, the right of access to justice and to impartial courts, in the sense that the existence of fundamental rights inherent to citizens means that they must be guaranteed the possibility of going to the courts to enforce their rights before other individuals, the State and any public entities. Read together, these principles translate into the well-known notion that with each right, there is a way to enforce it in court, which can be used as well to define the notion of effective judicial protection itself. Translated into the EU, the principle of effective judicial protection is materialised in a network integrated by the judicial means established by EU law and its application before the courts of the Union's legal order, whether they are organically European (CJEU) or functionally European (national courts) courts. It is among these judicial means that we find the infringement procedure.

The infringement procedure (also, action for failure to fulfil obligations) of Union law "*constitutes a direct action brought before the Union judicature by which to ensure the enforcement of Union law as part of the system of judicial protection enshrined in the Treaties*",[29] whose purpose is the "*judicial review of breaches of obligations assumed by Member States under the Treaties*",[30] by assessing the compliance of a Member State's behaviour with EU law. Provided in Articles 258 to 260 of the Treaty on the Functioning of the European Union (TFEU), its function is expressed in a double aspect: it is the function of the infringement procedure to assess Member States' behaviour regarding the fulfilment of the obligations deriving from Union law, as well as the correct interpretation of that same law.

Pursuant to the first paragraph of Article 258 TFEU, it's up to the European Commission to start the pre-litigation phase of the action of infringement if it considers that a Member State has failed to fulfil an obligation under the Treaties. However, this formula does not strictly define the notion of infringement for the purposes of

[26] Judgement CJEU *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, 15 May 1986, Case 222/84, ECLI:EU:C:1986:206, recital 18.

[27] Judgement CJEU *Unión de Pequeños Agricultores v. Council of the European Union*, 25 July 2002, Case C-50/00 P, ECLI:EU:C:2002:462, recitals 39-41.

[28] Maria José Rangel de Mesquita, "Artigo 47.º", in *Carta dos Direitos Fundamentais Comentada*, ed. Alessandra Silveira and Mariana Canotilho (Coimbra: Almedina, 2013), 538 (freely translated by the author).

[29] Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford: Oxford University Press, 2014), 159.

[30] Maria Luísa Duarte, *Direito do Contencioso da União Europeia* (Lisboa: AAFDL Editora, 2021), 232 (freely translated by the author).

this procedure, thus such densification depended on the CJEU's jurisprudence; the notion of infringement is not reduced to a breach in the Treaties, consisting, in a broader sense, in the "*violation by state authorities of mandatory rules, norms and principles of [EU] Law*".[31] As for the concept of failure to act for these purposes, the CJEU also stated that there has been a failure to fulfil obligations when it comes to the approval, adoption and maintenance of legislative, regulatory, or administrative measures by a Member State that are incompatible with Union law, as well as non-execution or incomplete or late execution of obligations imposed on it by EU law. The key idea is that the breach can result in an action or an omission on the part of the non-complying State: an example of an infringement arising from an act may consist in the adoption, by the Member State, of an act or a set of specific internal acts incompatible with Union law; in turn, an example of a failure to act is the paradigmatic case of "*a failure by a Member State to implement a directive in national law*",[32] which is even the "*most common form of violation of European Union law*".[33]

From what we have seen so far, the infringement procedure will be filed against the State, as a whole, to which the infringement is charged. In turn, the active legitimacy will fall upon the European Commission or any Member State. Currently, the TFEU does not enshrine the possibility of individuals to file an infringement procedure, but this does not deny them access to this jurisdictional mechanism. It is possible for them to file a complaint before the Commission, which can make them responsible for this European institution paying attention to that infringement and being able to address it using this procedural solution. The infringement procedure varies depending on whether it is initiated by the Commission or by a Member State. During the pre-litigation phase of this action, the European Commission plays a pivotal role, and has the discretionary power to decide whether or not to initiate it. This discretionary power is a demonstration of the role of "*guardian of the Treaties*" that falls upon the Commission, arising from Article 17(1) TEU, which is also reflected in its ability not to bring the infringement procedure to the CJEU if it judges that the Member State is already in compliance with the violated obligations.

After the litigation phase, the infringement procedure ends with the issuing of a judgment, by the CJEU, in which it declares whether or not a certain Member State has failed to fulfil its obligations under the Union's law. From the outset, the merely declaratory nature of this decision is verified, from which results, on the one hand, the competence of the CJEU being exhausted in verifying the infringement and, on the other hand, the CJEU not being able to indicate to the non-complying State, the measures necessary to put an end to the infringement nor being able to substitute itself for the State concerned in the adoption of those measures. Despite this, the fact is that the merely declarative character of the judgment is not as restrictive as it appears to be, not ceasing to have the binding force of res judicata, even though it does not have condemnatory force. The practical effect of the infringement declaration is "*similar to the annulment of national provisions, as they can*

[31] Fausto de Quadros and Ana Maria Guerra Martins, *Contencioso da União Europeia* (Coimbra: Almedina, 2009), 228 (freely translated by the author).
[32] Lenaerts, Maselis and Gutman, *EU Procedural Law*, 168-169.
[33] Joana Covelo de Abreu, *Inconstitucionalidade por Omissão e Ação por Incumprimento: A Inércia do Legislador e suas Consequências* (Lisboa: Editorial Juruá, 2011), 43 (freely translated by the author).

no longer be applied by national authorities",[34] adding the fact that, pursuant to Article 279 TFEU, the CJEU may issue provisional measures "*intended to safeguard the useful effect of the decision*",[35] imposing strong injunctions on Member States, so it would be inconceivable that the final decision unfavourable to the defendant State had "*a weaker binding force than that of the provisional decision*".[36]

Once the infringement has been declared, the non-complying Member State is obliged to adopt concrete measures to comply with the Court's judgment. If it does not do so, Article 260(2) TFEU empowers the Commission to initiate a second infringement procedure, based on non-compliance with the first infringement judgment, in which the Commission indicates the amount of the lump sum or penalty payment to be paid by the Member State, sanctions endowed with "*coercive force*"[37] and that aim at having a deterrent effect in order to avoid recurrence of non-compliance with the CJEU's judgments. In addition, the hypothesis that non-compliance constitutes the basis for Member State liability[38] is accepted.

Before we proceed to the analysis of the role the infringement procedure plays in safeguarding the rule of law, we will first look at how this action and violations of the rule of law intersect. As we know, Article 2 TEU establishes a set of fundamental values upon which the EU is founded. CJEU case-law and most of the doctrine identify these values with the fundamental principles of the EU, an identification that almost came to fruition during the Constitutional Treaty, which, in its draft version, enshrined the principles of the EU in the context of the Community of values. The Treaty of Lisbon opted for the reference to common values, wording that has been widely criticised for the terminological confusion, in addition to the legal implications such preference entails. Most of the doctrine finds that Article 2 indiscriminately establishes as values an amalgam of values and principles, whose legal functions are very different from each other. While values are qualified, in a very rough way, as "*desirable ideals*", principles correspond, also very roughly, to "*binding rules*".[39] The consequent replacement of the term "p*rinciples*" by the term "*values*" operated by the Treaty of Lisbon is, therefore, unfortunate, being preferable and more appropriate a "*distinction between the Union's fundamental moral values (human dignity, freedom, etc.) on which the Union is founded, and the structural constitutional principles (democracy, the rule of law, etc.) on the basis of which the Union must function*".[40] Despite these issues, the reality is that the rule of law is conceived as a foundational and structural principle of the EU, either by doctrine or by jurisprudence, which is not affected by its designation as a "*value*". Now, if the fundamental principles of the Union, including the rule of law, are also EU law, then their disrespect implies a violation of Union law. And a violation of Union law, as we have seen so far, constitutes a situation of non-compliance. In other words, non-compliance with

[34] Quadros and Martins, *Contencioso*, 252 (freely translated by the author).
[35] Abreu, *Inconstitucionalidade*, 74 (freely translated by the author).
[36] Campos, Pereira and Campos, *O Direito*, 605 (freely translated by the author).
[37] Lenaerts, Maselis and Gutman, *EU Procedural Law*, 212.
[38] Judgement CJEU *Commission of the European Communities v. Italian Republic*, 7 February 1973, Case 39/72, ECLI:EU:C:1973:13, cited by Lenaerts, Maselis and Gutman, *EU Procedural Law*, 207, among others.
[39] Dimitry Kochenov, "The Acquis and Its Principles: The Enforcement of the 'Law' versus the Enforcement of 'Values' in the European Union", in *The Enforcement of EU Law and Values*, ed. András Jakab and Dimitry Kochenov (Oxford: Oxford University Press, 2017), 9.
[40] Laurent Pech, "'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law", *European Constitutional Law Review*, vol. 6 (2010), 366-367.

fundamental EU principles constitutes the basis for an infringement procedure against the Member State in breach of those same principles, since, by committing the infringement, the Member State violated EU law.

In addition, rule of law backsliding, and the violations that this entails, do not relate exclusively to a political matter (as some States often attempt to limit it to) but, above all, to a legal matter. The reasoning, synthetised by Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, is relatively simple, from a logical point of view: rule of law backsliding affects the fundamental values of the EU; adherence to these values is essential to ensure the consistent application of Union law; thus, the fundamental values enshrined in Article 2 TEU, and particularly the rule of law, must be monitored by the CJEU, in the context of the Member States' obligations arising from the Treaties.[41] In this way, it is possible to state, without a great deal of doubt, that the infringement procedure, as enshrined in Articles 258 to 260 TFEU, can (and must) be used for the protection of the rule of law in the EU and, like this, of the remaining fundamental principles on which the Union is based.

All this potential was until recently hidden in plain sight: as Hungary descended rapidly into an illiberal-type regime, the European Commission's reactions were slow and delayed, and only a handful of scholars, practitioners and politicians realised the possibilities represented by a judicial reaction via the infringement procedure. Then, as the Commission started tackling the issues raised by backsliding Member States, the way forward became clear: the infringement procedure presented itself as a short-term response to the urgency in upholding the rule of law. The Commission recognised this in its 2014 Communication on the new framework for the rule of law, stating that the infringement procedure "*has proven to be an important instrument in addressing certain rule of law concerns*",[42] but raising the main issue with this procedure: its requirement of a breach of a specific provision of EU law in order to be triggered. Since this particular issue is beyond the scope of our article, we shall not address it, but a reference should be made to the solutions many scholars have suggested to optimise the infringement procedure, the main one being the refocusing of this procedure to the systemic nature of the breaches in the rule of law, brought forth by Kim Lane Scheppele, referred to as the "*systemic infringement procedure*".[43] Scheppele's contribution presented a perfectly conceivable short-term solution to the main issues concerning the objective nature of the infringement procedure, and to that extent, we strongly recommend reading the papers and opinions of Scheppele and other scholars on the subject.[44]

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[41] Kim Lane Scheppele, Dimitry Kochenov and Barbara Grabowska-Moroz, "EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union", *Yearbook of European Law*, vol. 39 (2020): 41.

[42] European Commission, Communication from the Commission to the European Parliament, the European Council and the Council – A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final, 11 March 2014, 5.

[43] Kim Lane Scheppele, "What Can the European Commission Do When Member States Violate Basic Principles of the European Union? The Case for Systemic Infringement Actions", *Verfassungsblog*, November 1, 2013, accessed March 3, 2023, https://verfassungsblog.de/wp-content/uploads/2013/11/scheppele-systemic-infringement-action-brussels-version.pdf.

[44] Among others, see: Scheppele, Kochenov and Grabowska-Moroz, "EU Values Are Law" (cited above, note 40); Pech and Scheppele, "Illiberalism within" (cited above, note 10); Closa, Kochenov and Weiler, "Reinforcing" (cited above, note 9).

The key idea to retain from this section is that the infringement procedure has a relevant role to play in tackling rule of law backsliding, and since 2014 that role has become more prevalent than ever, to the point that the European Commission has been acting more rapidly when challenges to the rule of law arise from Member States. The following section serves precisely that purpose. We shall look at what the Commission and the CJEU have been doing with the infringement procedure to tackle rule of law backsliding and what paths lie ahead on that subject.

3. The defence of the rule of law through the infringement procedure: current state and ways forward

The European Commission and the CJEU have been very active in defending the rule of law against its opponents. The Commission has been organising hearings and reports on the topic, addressing the issues observable in several Member States, and bringing forth suggestions of solutions to tackle the identified issues. The major example of the Commission's commitment to upholding the rule of law is the annual report on the rule of law,[45] on which it summarises the past year and the issues raised and proposes the following steps. Among these steps, the European Commission has repeated the key idea that the infringement procedure is the best short-term judicial solution to the challenges to the rule of law. That is where the CJEU comes in. The Court of Justice has been equally committed to tackling rule of law backsliding, whenever it receives an infringement procedure on the subject from the Commission. Not limited to that specific procedure, the CJEU has been actively defending the fundamental principles of the EU,[46] embodying the notion of the courts as the legal systems' last line of defence. Other EU bodies have been also attentive to the issues raised, but with far less direct implications.

Several judgments emerging from infringement procedures have been relevant in the upholding of the rule of law. Hungary and Poland have been the most referred Member States, as the level of backsliding in them has reached a perilous point of no return (less severe in the case of Poland, nevertheless). For the purposes of this study, we will focus on these two Member States, but other Member States have also been the subject of infringement procedures for rule of law deficiencies.

When the Hungarian government interfered with the retirement age of the judiciary, the European Commission brought an infringement procedure against the Hungarian State on the basis of the breach of Articles 2 and 6(1) of Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment,[47] identifying in this action a discrimination on grounds of age, and not a relatively obvious case of violation of the guarantee of independence of the courts, a key aspect of the rule of law. Although the CJEU ruled in favour of the Commission's arguments, condemning Hungary, it was nothing more than a Pyrrhic victory; the Hungarian government did not reinstate hardlyany of the dismissed judges, since it offered them monetary compensation, a "*reasonable remedy in*

[45] The rule of law reports can be consulted in the European Commission's website, at https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en#rule-of-law-report.

[46] The landmark judgements and major advancements in the issues raised can bee consulted in the annual reports of the CJEU, available at https://curia.europa.eu/jcms/jcms/Jo2_7000/pt/.

[47] Judgement CJEU *European Union v. Hungary*, 6 November 2012, Case C-286/12, ECLI:EU:C:2012:687.

a discrimination case",[48] while changing the law so that a pension was denied to judges who returned to active duty, leading many to choose to receive it. In other words, the European Commission claimed victory, but Hungary nevertheless managed to change the structure of its judiciary and dismantle the guarantees of judicial impartiality. We chose this case specifically to point out that rule of law backsliding dates back as far as 2012, and that between then and the judgment, we will look at whathas changed in the Commission's perspective.

In the infringement procedure moved against Poland in 2018,[49] the European Commission demonstrated that it understood the seriousness of the situation and decided to be more incisive when it comes to violations of the rule of law. The facts are very similar to those of the action against Hungary. The Polish government changed the retirement age of judges of the Supreme Court of Poland, reducing it from 70 to 65 years, with the possibility of an extension of exercise beyond retirement age by arbitrary decision of the President of the Polish Republic. The Commission and the CJEU, in this case, decided to tackle "*the issue of principle at the heart of the matter: adherence to the Rule of Law via honouring judicial independence and irremovability*",[50] doing so through Article 19(1) second paragraph TEU and Article 47, second paragraph of the Charter of Fundamental Rights of the European Union, which enshrine the principle of effective judicial protection and the principle of judicial independence and impartiality, thus concluding that the Polish Republic had breached its obligations emerging from the Treaties.

Between the first judgment and this one, the CJEU had issued the landmark decision *Associação Sindical dos Juízes Portugueses,*[51] which is a highly pertinent judgment to examine, though, unfortunately, it falls outside the scope of our article. We must, however, mention what was innovative about this decision. The base procedure was a preliminary ruling on the compatibility of wage reduction measures resulting from measures to contain the excessive budget deficit with the guarantee of judicial independence as a requirement for effective judicial protection within the scope of EU law. The CJEU's judgment went beyond the apparent technical issue, linking criteria and principles of secondary EU law with the fundamental principles contained within primary EU law.

All of this serves to point out that the upholding of the rule of law has been gaining traction through the EU's judicial system, and specifically through the infringement procedure, while reaffirming the urgency in tackling the adverse effects of rule of law backsliding. We will move on to the concluding paragraphs of our study, pointing out what paths appear to lie ahead. In order to do so, we will

[48] Scheppele, Kochenov and Grabowska-Moroz, "EU Values Are Law", 43.

[49] Judgement CJEU *European Commission v. Republic of Poland*, 24 June 2019, Case C-619/18, ECLI:EU:C:2019:531.

[50] Scheppele, Kochenov and Grabowska-Moroz, "EU Values Are Law", 45.

[51] Judgement CJEU *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, 27 February 2018, Case C-64/16, ECLI:EU:C:2018:117. Further reading on this ruling: Alessandra Silveira et al., "União de direito"; Alessandra Silveira and Sophie Perez Fernandes, "A Union based on the rule of law beyond the scope of EU law – the guarantees essential to judicial independence in Associação Sindical dos Juízes Portugueses", *Official Blog of UNIO - EU Law Journal*, 3 April 2018, https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law-the-guarantees-essential-to-judicial-independence-in-associacao-sindical-dos-juizes-portugueses/; Michał Krajewski, "Associação Sindical dos Juízes Portugueses: The Court of Justice and Athena's Dilemma", *European Papers*, vol. 3, no. 1 (2018), https://www.europeanpapers.eu/en/europeanforum/associacao-sindical-dos-juizes-portugueses-court-of-justice-and-athena-dilemma.

mention two infringement procedures, one against Poland and the other against Hungary, that are currently pending before the CJEU.

The first infringement procedure, against Poland, concerns the rulings by the Polish Constitutional Court of July and October 2021 that challenged the primacy of EU law, by declaring the provisions contained in the Treaties incompatible with the Polish Constitution. The pre-litigation phase of the infringement procedure has now passed and, on 15 February 2023, the European Commission decided to refer Poland to the CJEU, triggering the litigation phase. It is the Commission's understanding that the rulings by the Polish Constitutional Court breach "*the general principles of autonomy, primacy, effectiveness, uniform application of Union law and the binding effect of rulings of the Court of Justice of the European Union*".[52] Our projection is that the CJEU will consider that Poland has breached the cited principles, declaring the infringement.

The second procedure, moved against Hungary, has greater implications. Once again, after the pre-litigation phase, the European Commission, on 15 July 2022, decided to refer the Hungarian State to the CJEU over a Hungarian law that discriminates against people based on their sexual orientation and gender identity, thus breaching the principle of equality enshrined in Article 2 TEU.[53] This case is particularly important, because it is the first case in which the Commission decided to trigger an infringement procedure against a Member State directly based on breaches of the EU values contained in Article 2 TEU. If the CJEU uses this opportunity wisely (which we tend to think it will), the paradigm will change for the judicial protection of EU values. The point we are making when we state that it will shift the paradigm is that it will directly and finally consider what the scholars have been writing about all these years, which is that a violation of the fundamental values laid down in Article 2 TEU is a breach of EU law and, therefore, liable to constitute the basis for an infringement procedure. It is about time that the European Commission reclaims what was once a clear path to uphold the rule of law within the EU. It is in our interest to follow this case carefully and attentively, as it has the potential to be game changing.

Conclusions

Before we conclude, mention must be made of the extra-judicial defence of the rule of law. Naturally, the EU must deploy every available tool, whether judicial or extra-judicial, to uphold the rule of law. Among these we include the rule of law conditionality mechanism, the rule of law framework and all other initiatives by EU bodies that address the issues related to the challenges and the protection of the rule of law. Yet we reiterate, on the other hand, that we analyse the infringement procedure because of the urgency of addressing the issues identified when we mentioned rule of law backsliding, and the potential (and results) the infringement procedure has revealed so far.

Concluding this article, we take note of an increasing trend of stamina on the part of the major players in the defence of the rule of law in the EU. Until 2018 and

[52] European Commission, Press Release, 15 February 2023, accessed March 3, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.
[53] European Commission, Press Release, 15 July 2022, accessed March 3, 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2689.

2019, the defence of the rule of law appeared stagnant, in what could be interpreted as a stalemate between the defenders of the EU values and the Member States' illiberal governments. But that state of affairs at least appears to be changing, fortunately to the side of the rule of law and respect for the EU's fundamental values. Despite his muscular majority in the Hungarian parliament, Viktor Orbán is losing his EU policy-blocking influence, having to backtrack in a lot of key issues when confronted with the consequences of losing large parcels of his State's EU funding. Poland seems to be heading the same way, with each new poll showing the democratic, pro-European opposition gaining ground on the governing party, PiS. The fact of the matter is that these States depend more onF the EU than they care to admit, and that fragility is being exposed, showing to internal voters the hypocrisy of the anti-European and illiberal stance.

It is with great relief and a moderate amount of hope that we observe that the infringement procedure is finally being used as the effective tool it always revealed to be to defend and uphold the rule of law in the EU. Its role as a guarantor of the rule of law and other EU fundamental values is of great importance in the fight against the challenges of rule of law backsliding. The more we strive to uphold the rule of law in the EU, the more free, equal and prosperous we can become as citizens of a Union of values based on the rule of law.