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The Protection and Promotion of the Rule of Law in the European Union: State of the Art, Criticalities and Future Perspectives

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Abstract

The contribution aims at assessing the role and scope of the rule of law in the EU legal order before and after the entry into force of the Lisbon Treaty. The investigation will consider both the internal and external dimensions of the principle with a view to appraise the current state of the art in terms of the applicable legal framework, single out its main criticalities, and review future perspectives for its affirmation and promotion.

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The rule of law acts as a fundamental value for the institutions and the Member States. It operates as a parameter of legality of EU acts and as a guiding principle, but it also represents an important leverage in terms of political pressure, both within and outside the Union.

On these premises, the remainder of this contribution is structured as follows. Firstly, the relevant legal framework is examined in light of the applicable case law. Secondly, the attention focuses on the protection of the rule of law when there is a clear risk of a serious breach by a Member State. Thirdly, the main instruments for the promotion of the rule of law in the context of the EU's external action are reviewed in order to assess the true potential of the principle in this area. Lastly, some final remarks summarize the current shortcomings and outline future perspectives for the protection and promotion of the rule of law in and outside the Union.

The legal framework for the protection of the rule of law in the European Union

The rule of law is enshrined in the preamble and Art. 6 TEU, as well as in the Preamble of the Charter of Fundamental Rights, as a general principle of the EU legal order. However, departing from the phrasing of most national constitutional provisions, the new Art. 2 TEU qualifies it as a value.¹ In this regard, Laurent Pech convincingly observes that “by distinguishing the rule of law from other foundational principles, Art. 2 TEU may seem to suggest the adoption of a narrow and predominantly formal understanding of the rule of law (i.e. judicial review, principle of legality, hierarchy of norms, etc.)”, but “an evolution towards a more expansive and substantive understanding can be

¹ Art. 2 TEU reads: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail” (emphasis added).

detected”.² In particular, the institutions, and Member States when implementing EU law,³ are required to respect more substantive requirements in exercising their respective competences, and most notably fundamental rights. Nevertheless, no exhaustive definition of the rule of law is offered in primary or secondary law.⁴

2 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, No 3 (2010), p. 359, at 368.

3 Pursuant to Art. 51 of the Charter of Fundamental Rights of the European Union [O.J. C 326, 26.10.2012, p. 391]: “The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties” (emphasis added). The expression “when they are implementing Union law” has been broadly construed by the Court of Justice. Cf. Case C-457/09 *Claude Chartry v Belgium* [2011] ECLI:EU:C:2011:101; Case C-40/11 *Yoshikazu Iida v Stadt Ulm* [2012] ECLI:EU:C:2012:691; Case C-617/10 *Aklagaren v Akerberg Fransson* [2013] ECLI:EU:C:2013:105; Case C- 206/13 *Cruciano Siragusa v Regione Sicilia* [2014] ECLI:EU:C:2014:126; Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and Others* [2014] ECLI:EU:C:2014:2 and Case C-117/14 *Poclava v Jose Mara Ariza Toledano* [2015] nyr. See also Filippo Fontanelli, “The implementation of European union law by member states under Article 51(1) of the Charter of Fundamental Rights”, *Columbia Journal Of European Law*, Vol. 20, No 2 (2014), p. 193 and Daniel Sarmiento, “Who’s Afraid of the Charter? The Court of Justice, National Courts and the new Framework of Fundamental Rights Protection in Europe”, *Common Market Law Review*, Vol. 50, No 5 (2013), p. 1267.

4 To be honest the rule of law is never precisely defined by national constitutions either. On the rule of law and its constitutional relevance, see generally (also for further references), Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*, Cambridge, Cambridge University Press, 2004 and Ricardo Gosalbo-Bono, “The Significance of the Rule of Law and its Implications for the European Union and the

The rule of law was not (expressly) mentioned in the original version of the treaties and was not codified until Maastricht.⁵ Primary law did, however, foresee the possibility to challenge acts adopted by the institutions, either directly or through the preliminary reference mechanism, and to review the compatibility of national measures and practices with EC law.⁶ Moreover, in compliance with (what are now) Arts. 258 and 259 TFEU, the European Commission or a Member State could bring a Member State directly before the Court of Justice contesting a breach of EU law.

As is well known, the first reference to the principle can be found in the 1986 *Les Verts* judgment.⁷ In this instance, the Court of Justice recognized that the European Economic Community was 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”.⁸

This precedent effectively opened a new era in the European integration process, as the Court progressively moved from a formal, “thin” conception to a more substantive, “thick” understanding of the rule of law.⁹

United States”, University of Pittsburgh Law Review, Vol. 72, No 2 (2010), p. 229-360.

⁵ Art. 6 TEU.

⁶ Cf. Arts. 263 and 267 TFEU.

⁷ Case 294/83 *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166

⁸ *Ibid.*, para 23.

⁹ On the distinction between thin and thick conception of the rule of law, the reader is referred to Tom Bingham, *The Rule of Law*, London, Allen Lane, 2010; Stephen Holmes, “Lineages of the Rule of Law”, eds. Jose Maria Maravall and Adam Przeworski, *Democracy and the Rule of Law*, Cambridge, Cambridge University Press, 2004, p. 19; Gerardo L. Munck, and Jay Verkuilen “Conceptualizing and Measuring Democracy. Evaluating Alternative Indices”, *Comparative Political Studies*, Vol. 35, No. 1 (2000), p. 5 and John Rawls, *A Theory of Justice*, Oxford, Oxford University Press, 1971.

Space constraints impede an exhaustive analysis of the relevant case law and how it impacted on the subsequent treaty reforms. Nonetheless, it appears useful to briefly outline the main criticalities which have emerged over time and to verify whether they have been successfully tackled. Among the many that could be addressed, the following discussion will focus on two aspects in particular, namely: judicial review and political control.¹⁰

As to the former, there are at least four innovations brought about by the Lisbon Treaty which are noteworthy for our present purposes: the repeal of the pillar structure, the binding force attributed to the Charter of Fundamental rights, the new formulation of Art. 263 TFEU and the possibility to challenge individual acts adopted in the field of Common Foreign and Security Policy (hereinafter, CFSP).

Proceeding in orderly fashion, with the expiry of the transitional period (1 December 2014) the unified structure of the Union has effectively attributed to the Court of Justice jurisdiction over former third pillar acts (on judicial and police cooperation in criminal matters), including rules for the abolition of controls on persons at the Union's internal borders.¹¹

Secondly, Art. 47 CFR guarantees individuals full and effective judicial protection and can be invoked to secure the rule of law

¹⁰ For a comprehensive review of the innovations introduced by the Lisbon Treaty, see J.C. Piris, *The Lisbon Treaty: A Legal and Political Analysis*, Cambridge, Cambridge University Press, 2010 and P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform*, Oxford, Oxford University Press, 2012.

¹¹ On the effects of Protocol No 36 and the intricate effects attaching to the expiry of the transitional period foreseen therein, cf. Steve Peers, "Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon", *Common Market Law Review*, Vol. 48, No 3 (2011), p. 661, at 685 and V. Mitsilegas, *EU Criminal Law*, Oxford, Hart, 2009, p. 36, at 41. See also the recent rulings by the Court of Justice (and the Opinion of AG Wahl) in Case 540/13 *European Parliament v Council of the European Union* [2015] nyr and Joined Cases 317/13 and 679/13 *European Parliament v Council of the European Union* [2015] nyr.

independently of *ad hoc* provisions in secondary legislation, or domestic law.¹²

Thirdly, natural and legal persons have been recognized standing when challenging acts of bodies, offices or agencies of the Union and, more generally, regulatory acts of direct concern to them and that do not entail implementing measures.¹³ Yet, individuals are prevented from contesting the validity of legislative measures with a general scope of application, save when they can demonstrate that they are individually concerned.¹⁴ This notwithstanding, the Union is believed to guarantee full and effective judicial protection. On the one side, judicial review can be limited without necessarily infringing the rule of law. On the other side, both the Court of Justice (hereinafter, CJEU) and the European Court of Human Rights consider that the objection of

¹² The provision has been applied in numerous occasions by the General Court and the Court of Justice (cf., *inter alia*). See also M. Borraccetti, “Fair trial, due process and the rights of defence in the EU legal order”, in G. Di Federico, *The Charter of Fundamental Rights. From Declaration to Binding Instrument*. Dordrech Heidelberg London New York, Springer, 2011, 95 and Michele Caianiello and D. Domenicucci, “Diritto a un ricorso effettivo e a un giudice imparziale”, in R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (eds.), *La Carta dei diritti fondamentali dell’Unione Europea*, Giuffré ed., forthcoming.

¹³ In Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* [2013] ECLI:EU:C:2013:625 the Court clarified that the expression “regulatory act” should be understood as a non-legislative act of general application (paras 45-61).

¹⁴ Cf. Case 25-62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECLI:EU:C:1963:17; Case C-50/00P, *Unión de Pequeños Agricultores (UPA) v Council* ECLI:EU:C:2002:462 and Case 263/02P *Commission v Jégo-Quéré & Cie SA* [2004] ECLI:EU:C:2004:210. See also Anthony Arnall, “The Principle of Effective Judicial Protection in EU Law: An Unruly Horse”, *European Law Review*, Vol. 36, No 1 (2011) p. 51.

illegality and the preliminary ruling procedure are capable of remedying this deficit.¹⁵

Fourthly, although CFSP provisions, as well as acts adopted on the basis of those provisions, are excluded from the jurisdiction of the CJEU, Art. 275(2) TFEU empowers the Court of Justice to scrutinize the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the CFSP.

That being said, it is now time to turn our attention to the second aspect mentioned above, i.e. political control. The 1997 Treaty of Amsterdam – mainly in view of the enlargement process – inserted a new Art. 7 TEU allowing the Council, meeting in the composition of the Heads of State or Government on a proposal by 1/3 of the Member States or by the Commission, to unanimously determine, with the assent of the European Parliament, a serious and persistent breach of the principles of democracy and the rule of law, as well as of fundamental rights on the part of a Member State even outside the areas covered by EU law. Subsequently, acting by a qualified majority the Council could suspend certain of the rights (but not the obligations) deriving from the application of this Treaty to the Member State in question, including the voting rights in the Council.¹⁶

As a consequence, a new Art. 49 TEU subjected membership to the respect of these principles. Following the notorious ‘Haider affair’¹⁷, the Nice Treaty (2000) extended the application of Art. 7

¹⁵ Cf. Case C-50/00P, *Unión de Pequeños Agricultores (UPA) v Council* ECLI:EU:C:2002:462, para 40 and *Bosphorus v. Ireland* [2005], Application no. 45036/98, paras 159-165.

¹⁶ For the sake of completeness it should be noted that within the institutional framework designed by the Lisbon Treaty this power has been transferred to the European Council.

¹⁷ On that occasion EU leaders resorted to fourteen bilateral coordinated moves, including the suspension of contacts with Austrian government officials, the withdrawal of EU support for Austrian applications for senior positions in international organizations, and the absence of contacts with Austrian ambassadors. See further Lucia S. Rossi, “La ‘reazione comune’ degli Stati membri dell’Unione europea nel caso Haider”, *Eine Europäische Erregung- Die “Sanktionen” der Vierzehn*

TEU to situations where there is *a clear risk of a serious breach by a Member State* of EU values. This prevention mechanism, activated on a reasoned proposal by 1/3 of the Member States, the Commission or the European Parliament, requires a 4/5 majority within the Council and the approval of the European Parliament.

When elaborating the provision, however, the Member States deliberately limited the Court's jurisdiction to the sole review of the 'purely procedural stipulations' in Article 7.¹⁸ This second aspect (i.e. political control) is worthy of further consideration and will be resumed shortly hereafter.

To complete these preliminary remarks, it should not be forgotten that since 1992, the rule of law also represents a key objective of the Union's foreign policy and is an integral part of the Development cooperation policy.¹⁹ And the Lisbon Treaty has made the consolidation and support of the rule of law and human rights a core objective of the CFSP. In this sense, a sort of parallelism has been created between the internal and external dimensions of the principle, insofar as

the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.²⁰

gegen Oesterrach im Jahr 2000 Analysen und Kommentare, eds. Erhard Busek und Martin Schauer, Boehlau, Verlag, 2003 p. 379.

¹⁸ Art. 269(1) TFEU.

¹⁹ Cf. former Arts. J.1(2) TEU and 130U TEC.

²⁰ Art. 21(1) TEU. This provision has been examined extensively in legal literature. See, *inter alia*, Peter Van Elsuwege, "EU External Action After the Collapse of the Pillar Structure: in Search of a New Balance Between Delimitation and Consistency", *Common Market Law Review*, Vol. 47, No 4 (2010), p. 987 and Steven Blockmans and Martina Spornbauer, "Legal Obstacles to Comprehensive EU External Security Action", *European Foreign Affairs Review*, Vol. 18, No 4 (2013), p. 7.

To this end the Union shall define and pursue common policies and actions, as well as develop relations and partnerships with third countries, and international, regional or global organizations.²¹

Protecting and promoting the rule of law within the European Union

To resume our discussion on political control and Art. 7 TEU, we turn to the existence of disquieting internal situations posing a threat to the founding principles of Art. 2 TEU. In this respect, Greece, Romania, Bulgaria and, last but certainly not least, Hungary represent perhaps the most visible examples. Structural weaknesses due to organized crime, corruption, or a weak judiciary can be said to be the common denominator.²² With specific reference to Hungary, the Orban government removed the four-fifths vote rule to approve constitutional amendments in Parliament with a two-thirds majority of all MPs with the following results: the number of constitutional judges was increased from eight to fifteen with seven new positions filled with ‘friendly’ candidates; the Constitutional Court is only allowed to review procedural validity of new amendments; the Election Commission, entrusted with the power to control referendum initiatives, was re-shaped; the Media Council was created to assist the Media Authority (which had previously been set up under EU law to protect pluralism) and the president of the latter was substituted with an affiliated individual. The list could be expanded.²³

21 Art. 21(2) TEU. On the relations between the EU and the UN, see generally Stephan Keukeleire and Tom Delreux, *The Foreign Policy of the European Union*, London, Palgrave Macmillan, 2014, 309 ff.

22 Cf. Report from the Commission to the European Parliament and the Council, On Progress in Bulgaria under the Cooperation and Verification Mechanism, Brussels, 18 July 2012, COM(2012)411 final and Report from the Commission to the European Parliament and the Council, On Progress in Romania under the Cooperation and Verification Mechanism, Brussels, 18 July 2012 COM(2012)410 final.

23 A detailed analysis of the constitutional reforms in Hungary is offered by Bojan Bugarič, “Protecting Democracy and the Rule of Law in the

This state of affairs undermines the very foundations of the EU legal order. As stressed by the European Commission in the Communication of 2014 “A new EU Framework to Strengthen the Rule of Law”: “the confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into an area of freedom, security and justice without internal frontiers. This confidence will only be built and maintained if the rule of law is observed in all Member States”.²⁴

So how did the EU react to the deficiencies? In 2012 the Commission initiated a number of proceedings under Art. 258 TFEU against Hungary and expressed serious concern “over the compatibility of the Fourth Amendment to the Hungarian Fundamental Law with EU legislation and with the principle of the rule of law”.²⁵ In July 2013 the European Parliament adopted the so-called Tavares report, which heavily criticizes the state of fundamental rights in Hungary and recommends the establishment of an independent mechanism (i.e. a high level expert body) to monitor the development of fundamental rights and report back to institutions and member states on the level of compliance with EU values.²⁶ In addition, the Foreign Ministers of Denmark, Finland, Germany and the Netherlands sent a letter to the Presidency of the Council stating that:

At this critical stage in European history, it is crucially important that the fundamental values enshrined in the European treaties be vigorously protected. The EU must be extremely watchful whenever they are put at risk anywhere within its borders. And it

European Union: the Hungarian Challenge”, LEQS Paper No. 79 (2014),

<<http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper79.pdf>> (access date: 23 July 2015).

²⁴ Communication from the Commission to the European Parliament and the Council, COM(2014)158 final.

²⁵ Ibid., at 4.

²⁶ Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) [2012/2130(INI)] - Committee on Civil Liberties, Justice and Home Affairs. Rapporteur: Rui Tavares (A7-0229/2013).

must be able to react swiftly and effectively to ensure compliance with its most basic principles.²⁷

However, no use was made of the mechanism set up in Art. 7 TEU. In truth, while the infringement action and the preliminary ruling mechanism are far too case-specific, the procedure designed in Art. 7 TEU is *in concreto* of little or no avail. On the one side, it requires a threat of particular gravity – the notion of which, however, remains far from clear – and duration on the other, the majorities prescribed therein are very difficult to reach.

Hence, what could be done to ensure a more effective control over internal axiomatic and systemic deviances without impinging on the principles of conferral and subsidiarity and without breaching the obligation to respect national constitutional identities? Firstly, it is worth considering the institutional perspective.

In the aforementioned 2014 Communication, the Commission proposed a framework to be activated whenever national “rule of law safeguards” do not seem capable of effectively addressing those threats. In the presence of clear indications of a systemic threat to the rule of law in a Member State, the Commission could initiate a structured exchange with that Member State. The process would comprise three phases: 1) assessment of the situation on the basis of information collected by specialized bodies such as the Agency for Fundamental Rights, and of the dialogue with the Member State concerned, in compliance with the principle of equal treatment of Member States (assessment – “rule of law opinion”); 2) if necessary, indication of swift and concrete actions to address the systemic threat and to avoid the use of the mechanism laid down in Art. 7 TEU (reasoned recommendation); 3) verification of compliance with the indicated solutions (follow-up). In the event of no satisfactory follow-up to the recommendation by the Member State concerned within the

²⁷ The full text of the letter can be found at: <www.rijksoverheid.nl/bestanden/documenten-en-publicaties/brieven/2013/03/13/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme/brief-aan-europese-commissie-over-opzetten-rechtsstatelijkheidsmechanisme.pdf> (access date: 25 July 2015).

time limit set, the Commission would then assess the possibility of activating one of the mechanisms set out in Art. 7 TEU.²⁸

Despite the potential added value of the Communication, the Legal Service of the Council excluded the possibility to create a new procedure outside the existing framework of the treaties. This assessment was endorsed by the Council in its Conclusion of 16 December 2014, which, however, accepted the complementary nature of the two instruments and underlined the need to engage in a friendly discussion with the Member State concerned.²⁹ As a matter of fact, an annual dialogue will be established “among the Member States within the Council to promote and safeguard the rule of law in the framework of the Treaties”. The conclusions, nonetheless, cautiously signal that the dialogue: a) will be based on the principles of objectivity, non-discrimination and equal treatment of all Member States; b) will be conducted on a non-partisan and evidence-based approach; c) will be without prejudice to the principle of conferred competences; d) will respect the national identities of the Member States; e) shall observe the principle of sincere cooperation.

Secondly, in a *de iure condendo* perspective, it is useful to review some of the most prominent doctrinal positions on how to enhance the protection of the rule of law within the Union. Lucia Serena Rossi, for instance, suggests that the European Council, acting by a qualified majority upon a proposal of 1/3 of the Member States or the Commission, should be allowed to issue binding decisions indicating the concrete measures to be adopted in order to remedy systemic deficiencies in the domestic legal order. Failure to respect such a decision could lead to an infringement procedure (with the possibility to impose financial sanctions on the interested Member State pursuant to Art. 260 TFEU) and, in the worst possible scenario, to expulsion

²⁸ The European Parliament and the Council would be kept regularly and closely informed of progress made in each of the stages. In addition, the Commission would, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission.

²⁹ Council of the European Union, General Affairs, 16 December 2014, doc. 16936/14, p. 21.

(although, for reasons of democratic legitimacy, national parliaments should also be involved).³⁰

According to Floris De Witte, instead, it would be advisable to establish an *ad hoc* Commission (so-called Copenhagen Commission), a body of experts empowered to make a binding proposal leading automatically to the opening of the procedure where the Court would be using a “Copenhagen Charter”, defining the minimum requirements for a functioning pluralist democracy; *de facto* a legal standard for assessing possible violations. Subsequently, the European Council and the European Parliament, would be called to vote on the matter and decide upon the applicable sanctions.³¹ In this regard, Müller argues that following a negative advice of the Copenhagen Commission, the European Commission “should be *required* to cut funds for state capital expenditure, for instance, or impose significant fines”.³²

Above and beyond their merits, these valuable and ambitious proposals would require a modification of the treaties and, thus, unanimity. But in a fairly recent contribution, with an appreciable attempt to put meat on the bones of Art. 7, von Bogdandy suggests that the reluctance to pursue ‘internal fundamental rights issues’ – opting for a more technical approach, essentially relying on internal market violations – could be compensated by an extensive reading of citizens’ rights. More concretely, building upon the *Zambrano* case law, so the argument goes, it would be possible for nationals of the Member States, even in the absence of movement, to contest before the CJEU, via the preliminary ruling mechanism, the deprivation of

³⁰ Lucia Serena Rossi, “Un nuovo soft instrument per garantire il rispetto della Rule of Law nell’Unione europea”, <<http://www.sidisil.org/sidiblog/?p=1437#more-1437>> (access date: 23 July 2015).

³¹ Floris De Witte, “Less Constraint of Popular Democracy, More Empowerment of Citizens”, <<http://www.verfassungsblog.de/en/less-constraint-of-popular-democracy-more-empowerment-of-citizens/#.UX5E80a2iM8>>. The creation of an *ad hoc* body is also mentioned in the Tavares report, cited *supra*.

³² J. Werner Müller, “Should the EU Protect Democracy and the Rule of Law inside Member States?”, *European Law Journal*, Vol. 21, No. 2 (2015), p. 141, at 151 (emphasis added).

“the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union”³³ whenever “systemic deficiency” materializes in a given Member State. Space constraints impede an in-depth analysis of the reasoning conducted by the author. Suffice it here to report the following passage:

We are taking that jurisprudence one step further and propose to basically define this “substance” with reference to the essence of fundamental rights enshrined in Article 2 TEU. This standard applies to public authority throughout the European legal space. Consequently, a violation by a Member State, even in purely internal situations, can be considered an infringement of the substance of Union citizenship. In order to preserve constitutional pluralism, which is protected by Article 4(2) TEU, we suggest framing this as a “reverse” Solange doctrine, applied to the Member States from the European level. This can be put briefly as follows: beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental rights protection as long as it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as systemic, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts.³⁴

The presumption that assists the Member States could be rebutted only in presence of “major operational problems that lead to a systemic violation of European fundamental rights”.³⁵ In

33 Case C-34/09 Ruiz Zambrano v Office national de l’emploi, ECLI:EU:C:2011:124, para 42.

34 Armin Von Bogdandy, Matthias Kottmann, Carlino Antpöhler, Johanna Dickschen, Simon Hentrei, and Maja Smrkolj, “Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States”, *Common Market Law Review*, Vol. 49, No 2 (2012), p. 489, at 491.

35 Armin Von Bogdandy and Michael Ioannidis, “Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done”, *Common Market Law Review*, Vol. 51, No 1 (2014), p. 59, at 65.

other words, “simple and isolated fundamental rights infringements” would not qualify.³⁶

Although certainly suggestive, this solution seems to underestimate the impact of structural deficiencies on domestic courts and the risk of governmental non-compliance based on alleged breaches of the national identity pursuant to Art. 4(2) TEU.³⁷

That being said, nothing in primary law prevents the Commission, as the guardian of the treaties, to bring an infringement action against a Member State for breach of the values listed in Art. 2 TEU. While it can be argued that the procedure laid down in Art. 7 TEU operates as a *lex specialis*,³⁸ it is not impossible to construe the two enforcement mechanisms as additional and complementary; the latter being applicable only where the former “becomes insufficient to address a systematic threat to the values of Art. 2 TEU”.³⁹ As previously seen, the Commission and the Member States appear to share this interpretation. This is why, at least for the time being, von Bogdandy’s suggestion – albeit politically very demanding, merely additional, and not necessarily effective – is perhaps the more practicable response to the current value-control impasse.

The European Union as an ‘exporter’ of the rule of law at the international level

Let us now briefly dwell on the external dimension of the rule of law. As a foreign policy objective, the principle operates as a mild

³⁶ Ibid., p. 513. See also J. Werner Müller, “Should the EU Protect Democracy...”, p. 155.

³⁷ Cf. J. Werner Müller, “Should the EU protect democracy...”, p. 148.

³⁸ This view is supported by the fact that the CJEU has only been assigned limited jurisdiction over serious violations of such values.

³⁹ See to that effect, Editorial Comments, “Safeguarding EU Values in the Member States – Is Something Finally Happening?”, *Common Market Law Review*, Vol. 52, No 3 (2015), p. 619, at 627.

(or soft) ideal.⁴⁰ This is mainly due to the lack of any formal definition in primary law and in EU policy reports. Moreover, there is no codified list of minimum requirements to be met and no general benchmarks or indicators to carry out the relevant compatibility assessments.

Despite these important legal vacuums, in order to export the rule of law abroad the Union relies on both soft instruments and legally binding unilateral and bilateral instruments. Pursuant to Art. 21 TEU (and in line with the principle of coherence affirmed therein), the idea is to promote a thick and holistic understanding of the rule of law, which ultimately requires: effective and accessible means of legal redress; independent and impartial tribunals; an institutional framework ensuring that governments are subject to the law; the repression of corruption and fraud; and, from a more substantive viewpoint, the effective protection of fundamental rights.

Firstly, the Union intervenes via soft law instruments such as conclusions, resolutions and public declarations calling upon national governments to observe the EU's values, or simply acknowledging and praising them for developments in the relevant areas. Non-legally binding guidelines have also been issued.⁴¹ In addition, a number of so-called human rights dialogues (around forty at present) with third countries have been established.⁴²

Secondly, the EU intervenes on the international scene by means of unilateral trade instruments, which, *inter alia*, offer additional trade preferences in the case of ratification and implementation by the most vulnerable developing countries of international conventions on human and labor rights, environmental

40 The expression is borrowed from Laurent Pech, "Rule of Law as a Guiding Principle of the European Union's External Action", Cleer Working Papers, No 3 (2012), p. 7, at 12.

41 Council of the European Union, External Affairs, EU Human Rights Guidelines on Freedom of Expression Online and Offline, 12 May 2014, doc. 9647/14.

42 A complete list of the ongoing dialogues can be found at <http://eeas.europa.eu/human_rights/dialogues/index_en.htm>.

protection and good governance.⁴³ At the same time, temporary withdrawal of trade preferences is possible in the event of serious and systematic violations of the principles laid down therein, which, however, only implicitly refer to the rule of law.⁴⁴

Thirdly, the EU has resorted to technical and financial assistance instruments to contribute “to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental freedoms”.⁴⁵ These instruments also foresee suspension clauses. The latter can be activated by the EU Council for breach of the rule of law.⁴⁶

Fourthly, the EU has concluded with third countries and international organizations a number of trade, cooperation, dialogue, partnership or association agreements which contain a ‘human rights clause’. Normally, these agreements also include a suspension (or non-execution) in case of non-compliance or abuse. As a matter of fact, starting with the Cotonou agreement of 2000 with the African, Caribbean and Pacific Group of States (ACP countries) the rule of law has also become an ‘essential element’, together with democracy and respect for human rights, of any agreement of this type.⁴⁷ In accordance with the latter Agreement (as last amended in 2010⁴⁸), which is assumed to be

43 Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ 2012 L 303, p. 1. A reformed GSP law was adopted on 31 October 2012 providing for additional export opportunities. The new preferences apply as of 1 January 2014.

44 This occurred, for instance, with Myanmar/Burma and Belarus.

45 Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, OJ 2014 L 77, p. 85, art. 1.

46 Ibid., art. 21.

47 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, OJ 2000 L 317, p. 3.

48 Council Decision 2010/648/EU on the signing, on behalf of the European Union, of the Agreement amending for the second time the Partnership Agreement between the members of the African, Caribbean

the model for all (substantive) human rights clauses, either party may withdraw from the agreement or take ‘appropriate measures’ when the other party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law (the agreement’s ‘essential elements’) or in the case where a party is guilty of a serious violation of one of these essential elements. For countries such as China, the prospect of including such a clause in any new partnership-cooperation agreement with the EU has put on hold the conclusion of a new treaty on Economic and Cooperation Agreement.⁴⁹

More recently, the EU Council released the Action Plan on Human Rights and Democracy 2015-2019.⁵⁰ The document underlines the improved “mainstreaming of human rights across the EU’s external action”, but also calls for further efforts in “strengthening good governance and the rule of law through support to the separation of powers, independence and accountability of democratic institutions”. Most notably, the EU Council insists on the need, by 2016, to:

(e) improve coherence in the application of human rights clauses which are systematically included in all new EU international agreements.

(f) support the ongoing development of human rights indicators undertaken by the OHCHR with a view to: (i) facilitating measurement of the realisation of human rights, including online publication of indicators at global level, and (ii) systematising compilation and use of HR and surveying good practices and lessons learned.

and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, as first amended in Luxembourg on 25 June 2005, OJ 2010 L 287, p. 1.

49 Cf. Council Regulation (EEC) No 2616/85 and Trade and Economic Cooperation Agreement between the European Economic Community and the People's Republic of China, OJ 1985 L 250, p.1.

50 Council of the European Union, Conclusions on the Action Plan on Human Rights and Democracy 2015-2019, 20 July 2015, doc. 10897/15.

(g) engage systematically with the UN and with the regional organisations (e.g. AU, OAS, LAS, CoE, OSCE, ASEAN, SAARC, PIF) on best practices for human rights and the strengthening of democracy in all regions.⁵¹

This passage of the Action Plan demonstrates that the EU Council is well aware of the current limits affecting the EU's foreign policy aimed at promoting human rights protection and strengthening democracy worldwide. The elaboration of standardized benchmarks and indicators aligned with the best practices elaborated at the international level is evidently considered to be a priority.

Final remarks

The EU embraces the rule of law as a founding value and offers a high level of protection to individuals. In accordance with the findings of the CJEU in its seminal *Kadi* ruling,⁵² the rule of law can claim a supra-constitutional status in the sense that all other principles should be read and applied in conformity therewith.⁵³ However, a thorough examination of its constitutional legal order reveals some important shortcomings, mainly ascribable to the

⁵¹ Ibid., p. 31.

⁵² Joined Cases C-402/05 P and C-415/05, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461. See further Juliane Kokott and Christoph Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?", *The European Journal of International Law* Vol. 23 no. 4 (2012), p. 1015 and Enzo Cannizzaro, "Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case", *Yearbook of European Law*, Vol. 28, No 1 (2009), p. 593. See also Joined Cases C-584/10P, C-593/10P and C-595/10P *European Commission and Others v Kadi* [2013] ECLI:EU:C:2013:518 and the comments by Niamh Nic Shuibhne, "Being Bound", *European Law Review*, Vol. 38, No 4, p. 435 and Giuseppe Martinico, *The Autonomy of EU Law, Kadi on Trial*, London, Routledge, 2014, at 157.

⁵³ However, not all commentators would agree with this reading. See, in particular, Laurent Pech, "A Union Founded on the Rule of Law...", p. 365.

nature of this complex supranational entity, which – at the end of the day – remains an international organization.

To begin with, the absence of any specific competence in the field of fundamental rights explains the lack of a special remedy available to individuals. The issue has been advocated and extensively discussed during the Convention which led to the signature of the Constitutional Treaty in 2004⁵⁴ and is even more topical now that the Court of Justice has rejected the agreement on the accession of the EU to the ECHR.⁵⁵

Furthermore, the Court of Justice lacks jurisdiction over CFSP measures (besides those directly impinging on individuals). Taking in due account the (long-lasting effects) of Opinion 2/13, this is particularly alarming as it risks jeopardizing the overall legitimacy of the EU's external action. In this regard, it is worth insisting on the circumstance that the rule of law is not only essential in shaping and upholding the very identity of the European Union; it is also crucial for economic development. If coherently observed and promoted, it is capable of creating a favorable business environment and investment climate.

With specific reference to what we identified as the internal dimension, Art. 2 TUE postulates the avoidance of any systemic

54 The European Convention, Final Report of Working Group II 'Incorporation of the Charter/accession to the ECHR', CONV 354/02, 22 Oct. 2002, p. 15. A similar proposal had already been advanced in the Report by Mr. Tindemans to the European Council, Bulletin of the European Communities, Supplement 1/76, p. 26.

55 Opinion 2/13 of 18 December 2014 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454. For a critical assessment of the Opinion, see Jean-Paul Jacqué, "Non à l'adhésion à la Convention européenne des droits de l'homme?", <www.droit-union-europeenne.be/412337458> (access date: 23 July 2015); Editorial comments, "The EU's Accession to the ECHR – a "NO" from the ECJ!", Common Market Law Review, Vol. 52, No 1 (2015), p. 1 and Sarah Lambrecht, "The Sting Is in the Tail: CJEU Opinion 2/13 Objects to Draft Agreement on Accession of the EU to the European Convention on Human Rights", European Human Rights Law Review, Vol. 20, No. 2 (2015), p. 185.

deficiency within the Member States while observing the principles of equality and national identity affirmed in Art. 4(2) TEU, as well as the principle of conferral stated in Art. 5(1) TEU. Although for legal and political reasons Art. 7 TEU is far from effective, it remains the best option and there are ways to ensure compliance independently of structural reforms that would require treaty amendments.⁵⁶ Nevertheless, the current discrepancies between pre- and post-accession assessments must be eliminated, and it appears that the CJEU might, once again, be called upon to play a major role in securing the *effet utile* of EU law.

On the other hand, the Union has not followed a linear path in its foreign relations, which is very difficult to combine with the principle of coherence stated in Art. 21(1) TEU. Indeed, in the absence of a comprehensive instrument to objectively ascertain the observance of the rule of law, the institutions have developed a country-specific approach in pre-accession negotiations and human rights conditionality for association agreements and other international trade and cooperation agreements. In this regard, although it will be conceded that the EU can only play a regional, and therefore limited, role in the current international environment (as opposed to the Council of Europe and the United Nations⁵⁷), the adoption of indicators and minimum legal requirements – possibly modelled on the Venice Commission's 'Checklist for evaluating the state of the rule of law in single states'⁵⁸ – seems to be essential. These of course could (and

56 Cf. Federico Casolari, "L'Unione europea e la 'questione ungherese': taking rights seriously?", <<http://www.sidi-isil.org/sidiblog/?p=287>>, (access date: 23 July 2015).

57 Indeed, both organizations have long been active in the promotion of the rule of law and have also developed benchmarks and indicators for the relative assessments. Cf. The United Nations, Rule of Law Indicators. Implementation Guide and Project Tools, <<http://www.un.org/en/ruleoflaw/>> and Council of Europe, State of Democracy, Human Rights and Rule of Law in Europe. A shared responsibility for democratic security in Europe, <<http://www.statewatch.org/news/2015/apr/coe-ann-report.pdf>>.

58 European Commission for Democracy through Law (Venice Commission), Report on the Rule of Law, Study No. 512 / 2009,

should) vary depending on whether the interested third countries want to conclude a commercial agreement or apply for accession. But a case-by-case approach must be avoided for the sake of credibility. As indicated, the recent adoption of the EU Action Plan for 2015-2020 seems to point in the right direction.

Be it as it may, future developments should be encouraged, promoted and monitored attentively. Indeed, it appears that a lot still needs to be done in order to fully comply with the ambitious goals declared in Lisbon just over five years ago.

Strasbourg, 4 April 2011. The Report includes six assessment chapters (legality, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, respect for human rights, non-discrimination) with specific questions to be addressed/answered. In relation to prohibition of arbitrariness, for instance: are there specific rules prohibiting arbitrariness? Are there limits to discretionary power? Is there a system of full publicity of government information? Are reasons required for decisions?