

Public Goods at Risk: The Crisis of the Rule of Law in the European Union in Light of the Violation of the Fundamental Rights of LGBT Persons

Angela Maria Romito and Aleksandra Szczerba

1 Introduction

The purpose of this chapter is to examine the rule of law crisis in the European Union, using the examples of Polish and Hungarian actions violating the fundamental rights of LGBT persons¹ and to evaluate the efficiency of the institutional mechanisms under EU law to respond to these actions. The issue is not simply theoretical since the recent controversies emerging from human rights and rule of law backsliding in Poland and Hungary have turned this question to one of the core issues of the European project and are critical to the Union's legitimacy.

The analysis particularly considers the approaches adopted by the EU institutions to the protection of the rule of law as the backbone of any modern democratic system. The threat to equality and respect for the dignity and human rights of individuals as core values of the EU will be illustrated with two examples. The first is the “LGBT ideology-free zones” in Poland. The second is the recent law adopted in Hungary that limits access for individuals under 18 to content that promotes or portrays the “divergence from self-identity corresponding to sex at birth, sex change or homosexuality.” Consequently, the first section of this chapter provides an overview of the existing EU mechanisms which aim to guarantee the rule of law and, along with it, fundamental rights. The next section analyzes the EU response to Polish and Hungarian anti-LGBT actions². Finally, in the conclusion the adequacy of the EU's use of financial sanctions to protect EU foundational values will be assessed.

The analysis in this chapter is made in the context of public goods theory. In the view of the authors, both categories under scrutiny, i.e., the rule of law and

1 “LGBT” is used in this chapter as an acronym for lesbian, gay, bisexual, transgender persons, and any other persons of diverse sex, diverse sexual orientation, or diverse gender.

2 Reflecting the state of the art as to the date of the submitting the chapter in April 2022.

human rights (including the right to non-discrimination), may be considered as public goods (Enderle, 2021, pp. 148–158).

2 Rule of Law and Non-Discrimination: Basic Characteristic of the EU Legal System

The concepts of the rule of law and fundamental rights may be said to be dynamic if not “famously elusive” concepts, whose boundaries remain relatively unclear. It is clear, however, that the two concepts – together with democracy – are intrinsically linked with each other in a triangular relationship (European Commission European Parliament, 2014): the absence of democracy is a clear violation of human rights and the respect of the rule of law is the prerequisite for their protection. In other words, democracy relates to the involvement of the people in the decision-making process in a society; human rights seek to protect individuals from arbitrary and excessive interference with their freedoms and liberties and to secure human dignity; the rule of law promotes democracy by limiting and independently reviewing the exercise of public powers.

Therefore, the rule of law constitutes the backbone of every modern constitutional democracy and respect for it is integral to and necessary for any democratic society. Not surprisingly, therefore, it has become a dominant organizational paradigm of modern constitutional law and is commonly recognized as a key principle at national and international levels to regulate the exercise of public power (European Commission, 2014, p. 2).

The rule of law – considered as an overarching notion, encompassing various legal concepts – is central both to the national constitutional orders of European States and to the EU, as respect for it is one of the requirements to join the European Union (Preambles to the Treaty, Article 2 of Treaty on European Union (TEU), and 49 Charter of Fundamental Rights of the EU).³

3 It has therefore played a significant role in the enlargement process of the EU. The so-called Copenhagen criteria (which include compliance with the values in Article 2 TEU), were established in 1993 as a means of assessing whether Candidate States were eligible to accede to the EU, including the rule of law. That notwithstanding, problems arise since no similar method exists to supervise adherence to these foundational principles after accession. In the literature this has been referred to as the “Copenhagen dilemma.” It was only 2021 that, for the first time, the European Union Court of Justice (in *Repubblika v Il-Prim Ministru*, Case C-896/19 ECLI:EU:C:2021:311) established the principle of “non-regression” according to which member states cannot fall beneath the minimum standard of compliance with the Article 2 TEU values which they reached in the course of the

2.1 *Rule of Law: Looking for a Definition*

The rule of law is commonly referred to, but it is seldom defined (Magen, 2016). At first, it seems to be a self-evident and self-explanatory concept: in every legal system, the law must be the rule and without rule of law, rights remain lifeless paper promises. Beside such a tautological definition, at closer inspection it is a complex, flexible, and contested concept, which can be defined in different ways depending on the historical and institutional context. As a first and general approximation, the rule of law ensures that all public authorities act within the constraints of law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts (Craig, 1997).⁴

Although it has become a global ideal and aspiration, internationally there is still no shared notion: it appears in several treaties but also in soft law; the Venice Commission⁵ first addressed the issue in a report adopted in 2011 and it reached the conclusion that the rule of law was indefinable (Craig, 2017; Bartole, 2020). It therefore took a pragmatic and empirical approach and concentrated on identifying the core elements of the rule of law by enumerating its common features in a checklist intended as a comprehensive tool to assess the degree of respect for the rule of law in each state.⁶

In the EU, even before its formal recognition in the founding Treaties, the value of the rule of law was repeatedly affirmed by the Court of Justice of the European Union (CJEU) since 1986.

pre-accession exercise, making them suitable for European Union membership (Leloup, M., Kochenov, D., & Dimitrovs, A. 2021).

- 4 From an academic point of view, at the heart of the struggle for conceptualization of the rule of law lies a fundamental choice between what has been variably called “formal” and “substantive,” “negative” and “positive,” or “rule-book” as opposed to “rights-based” narrow (“thin”) and comprehensive approaches (“thick”). Formal, or thin, conception focuses rather on procedural safeguards of the law, due process principles, and evidence rules, and more generally to all the conditions necessary for law to restrict sheer arbitrariness in the use of public power. In a thick, or “democratic rule of law,” conception, laws enshrine and protect political and civil liberties as well as procedural guarantees: the rule of law cannot be divorced from political morality, fundamental rights, or democracy.
- 5 The Venice Commission, officially named the European Commission for Democracy through Law, is the Council of Europe’s advisory body on constitutional matters (see http://www.venice.coe.int/WebForms/pages/?p=01_Presentation). See also the European Commission for Democracy through Law (Venice Commission) Rule of Law Checklist.
- 6 Those core elements are the principle of legality, which implies that the legislative process is transparent, accountable, democratic, and pluralistic; legal certainty, which requires that the rules be clear and predictable and cannot be changed retroactively; the prohibition of arbitrariness of the executive power; equality before the law; and judicial review that is independent and effective, including as regards respect for fundamental rights.

The first judicial reference to the rule of law in the EU was made in the judgment *Les Verts v Parliament* (Case 294/83, ECLI:EU:C:1986:166, para. 23),⁷ which referred to the EU as a “Community based on the rule of law inasmuch neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them conform with the basic constitutional charter, the Treaty.” Since then, multiple references have been made to the rule of law in the Treaties: at the beginning, these references were largely symbolic, however, subsequent and successive treaty amendments reinforced the constitutional significance of the rule of law and made it clear that this principle was a part of a bigger “package” together with human rights and democracy.

Rule of law has been further clarified by the European Commission (EC) in its Communication to the European Parliament (EP) and the Council of March 11, 2014, “A New EU Framework to Strengthen the Rule of Law” (European Commission, 2014). The EU definition draws on principles set out in the case law of the CJEU and of the European Court of Human Rights (ECHR) and reports written by the Venice Commission. According to the EC, the rule of law entails compliance with the six legal principles that stem from the constitutional traditions common to most European legal systems and define the core meaning of the rule of law within the context of the EU legal order in accordance with Article 2 TEU, namely, the principle of legality, of legal certainty, prohibition of arbitrariness, of equality before the law, of independent and effective judicial control also as regards the respect for fundamental rights.⁸

2.2 *The EU's Current Toolbox*

Several different mechanisms exist at EU levels which aim to protect, safeguard, and promote the rule of law (and fundamental rights and democracy). These include legally binding mechanisms such as Article 7 TEU and the

7 The approach applied by the Court in the judgment was rather formal as this concept was attached mainly to legality. For an analysis of this judgment and its importance as regards the principle of the rule of law in the EU legal framework, see Lenaerts, 2010, 304.

8 The EU Commission's understanding of the rule of law is similar to the understanding of the Venice Commission, but a number of minor differences may be highlighted: the European Commission specifies that it is the executive branch of government that shall be prohibited from demonstrating arbitrariness, whereas the Venice Commission makes no such restriction; the EU Commission refers to fundamental rights while the Venice Commission refers to human rights; and the European Commission leaves out non-discrimination as a component of the rule of law. However, it can be interpreted that equality before the law encompasses non-discrimination. The CJEU and the ECtHR have stated that the abovementioned principles are not purely formal and procedural requirements, but that they are the vehicle for ensuring compliance with and respect for democracy and human rights. Hence, the rule of law may be said to be a constitutional principle with both formal and substantive components.

traditional jurisdictional procedures, in addition to non-binding (or soft law) tools, including annual reports prepared by EU institutions covering matters related to EU values.

A variety of actors tend to be involved in these mechanisms, with different competences and mandates: not only the political and jurisdictional EU institutions and member states but also civil society. The selected EU tools to protect the rule of law are described below.

2.2.1 Article 7 TEU

Article 7 TEU is the only specific EU provision dedicated to the protection of EU values in the EU member states. It is unique in that it established the procedures for stating the threat of a breach of EU values by a member state, the existence of such a breach, as well as a possible sanctioning mechanism to bring the recalcitrant member states back to compliance, while not being confined by the general EU competence limitations. In fact, in the same norm there are two distinct procedures – the preventive mechanism (Article 7(1) TEU),⁹ and the reactive one (Article 7(2)–(3) TEU): both are independent from each other, as they aim to address two different situations, so that the sanctions mechanism can be triggered without going through the preventive mechanism, and the preventive mechanism does not necessarily entail any sanctions.

While the preventive mechanism, set out in Article 7(1) TEU, can be activated only where there is a “clear risk of a serious breach” of Article 2 TEU by a member state, Article 7(2) TEU provides for the eventual adoption of sanctions in a situation where a “serious and persistent breach” by a member state has been established by the European Council. The activation of the preventive mechanism is aimed at sending a warning signal to an offending member state and places the EU institutions under an obligation to maintain constant surveillance. Under the preventive mechanism, the European Council has a discretionary power to determine whether there is a clear risk of a serious breach of the EU fundamental values, that is, excluding “purely contingent risks from the scope of the preventive mechanism.”¹⁰

9 On December 20, 2017, the Commission adopted a reasoned proposal for a Council decision on the determination of a clear risk of a serious breach of the rule of law by Poland (procedure 2017/0360(NLE)), and on September 12, 2018, Parliament adopted a resolution under Article 7(1) TEU, calling on the Council to establish a clear risk of a serious breach of EU values by Hungary (procedure 2017/2131(INL)).

10 To make such determination, the following conditions have to be met: (1) proposal by one-third of the member states, by the Parliament or by the Commission; (2) the assent of the Parliament (i.e., a two-thirds majority of the votes cast, representing a majority of its members); and (3) a majority of four-fifths of the Council’s members.

In order to apply the “sanctioning” mechanism laid down in Article 7(2) TEU, the breach of EU values must be serious and persistent and must therefore go beyond individual violations of fundamental rights, the rule of law, or other values laid down in Article 2 TEU. This mechanism has two phases: (1) determination of the existence of a serious and persistent breach of EU values by a member state – by unanimity of the European Council after the consent of the EP has been obtained; and (2) suspension of member state rights deriving from the Treaties, including (but not limited to) voting rights (Article 7(3) TEU). As the Council in the preventive mechanism, the European Council has also a wide margin of discretion to determine the existence of a serious or persistent breach under the sanctioning mechanism. Once the European Council has determined the seriousness and persistence of the breach, it enjoys discretion as to the choice of sanctions to be imposed and may even decide not to impose sanctions, but it is not obliged to do so.

The abovementioned procedure shows that the decision to apply Article 7 TEU is in practice almost impossible to use, not only because of the relative incertitude considering what constitutes “a clear risk of a serious breach” or “a serious and persistent breach,” but also for the natural reluctance of the European Council and Council to act against one of the member states.

The fact that the procedure has essentially a highly political nature has also led to the EU being criticized for an apparent lack of political will to effectively uphold EU fundamental values (Besselink, 2017).

Despite the extreme political difficulty in reaching the required majority for activating the mechanism mentioned above, it has a very serious impact both externally and internally: on the one hand, it is likely to discredit the member state on the international scene; on the other, serious consequences can also occur within that country because the activation of the procedure pursuant to Article 7 TEU could trigger social and political reactions against the national government. Moreover, the mechanism may also produce relevant juridical effects: firstly, referring to Protocol (no. 24), on asylum for nationals of member states of the European Union,¹¹ and, secondly, with regard to the European Arrest Warrant (EAW) procedure that can be suspended in the event

11 The asylum application made by a citizen of a member state cannot be taken into consideration in another member state since each EU member state must consider itself a safe country of origin in terms of the level of protection of fundamental rights and freedoms. However, if the procedure referred to Articles 7(1) or 7(2) of the TEU has been initiated in respect of the member state of which the applicant is a national, that Country is no longer considered a safe country and the application for asylum of its citizen may be taken into consideration or declared admissible for processing by another member state. See CJEU case C-411 e 493/10, ECLI:EU:C:2011:610; case C-394/12, ECLI:EU:C:2013:813.

of a serious and persistent violation by the State of the principles enshrined in the TEU¹² (Villani, 2020).

2.2.2 Legally Binding Tools

The legal procedure may be instigated for protecting EU values are those enshrined in the Treaties. First of all, the Commission is empowered to commence infringement proceeding before the CJEU (pursuant to Article 258 of the Treaty on the Functioning of the European Union [TFEU]) in order to have a binding declaration that a member state has violated the EU law in a way that threatens the EU rule of law.¹³ It is strengthened by a financial penalty imposed upon a member state for non-respect of a judgment rendered at the end of an infringement procedure (Article 260(2) TFEU). As a critical remark, it has to be specified that infringement actions are understood to allow for the investigation of specific violations of EU law on a case-by-case basis only and cannot be used to investigate a situation of systemic violation of EU values.

In addition, independent and impartial courts are active guardians of the rule of law, and such a view is presented in the ECJ's decisions on the preliminary ruling procedure: Article 267 TFEU has been largely used by the national judges to assess the conformity of specific national measures with EU law.¹⁴ It is an instrument of indirect control on the correct interpretation of the rules of European law and the validity of the rules of secondary legislation which guarantees the respect of fundamental rights and the rule of law in the member state: the ECJ's ruling is not only binding on the individual referring national court, but as a precedent contains an authoritative interpretation of EU law, binding on all member states and their authorities. It has to be noted, however, that the judicial control exercised by the Court of Justice – when it concerns the respect of the values listed in Article 2 TEU – is still limited to the “material” sphere of EU law: this means that the jurisdiction of the Court is relevant only

12 See the Council Framework Decision 2009/299 of February 26, 2009, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial and case C-404/15 e C-659/15 PPU, ECLI:EU:C:2016:198; case C-554/14, ECLI:EU:C:2016:835.

13 The action taken by the Commission in the infringement procedures can be launched by the Commission only where these concerns constitute, at the same time, a breach of a specific provision of EU law. See the cases CJEU, C-286/12 ECLI:EU:C:2012:687, C-192/18, ECLI:EU:C:2019:924, and Case C-619/18, ECLI:EU:C:2019:531.

14 Specifically in Poland, see CJEU Joined Cases C-585/18, C-624/18 ECLI:EU:C:2019:982 and C-625/18 ECLI:EU:C:2019:982; Joined Cases C-558/18 and C-563/18 ECLI:EU:C:2020:234.

when the case in question falls within the “scope of application of EU law” (Pech & Kochenov, 2021).¹⁵

2.2.3 Monitoring Procedures

Specifically in case of a suspected breach of the rule of law by a member state, the “political” European institutions can activate “monitoring procedures” which do not give rise to legally binding effects.¹⁶ This includes a temporary mechanism, set up in 2007 (for Bulgaria and Romania only) called a “cooperation and verification mechanism”; the annual Council rule of law dialogues, set up since December 2014, in the General Affairs Council, to be prepared by Coreper based on the principles of objectivity, non-discrimination, and equal treatment of all member states;¹⁷ and the “rule of framework” (pre-Article 7 procedure), introduced by the Commission in 2014, providing a space for structured dialogue with member states suspected of rule of law breaches (Kochenov & Pech 2015).¹⁸ The key element is the political persuasion.

Moreover, Article 70 TFEU allows the Council, on a proposal from the Commission, to adopt measures for collaboration between the Commission and the member states to conduct so-called “peer reviews” or evaluations of member state implementation of the EU policies in the area of freedom, security, and justice (AFSJ). From the perspective of the protection of Article 2 TEU values, the peer review mechanism can be used to carry out evaluations of member states’ compliance in all of these matters related to the broad area mentioned above which might contribute to assess the situation of democracy, rule of law, and fundamental rights at the national level (Andersen, 2014; Moxham & Stefanelli, 2013; Hirsch-Ballin, 2015).

15 The Court of Justice itself considers that the provision of Article 2 is not sufficient to confer the competence to review the respect of the values contemplated by the member states, but that, for this purpose, it is necessary to identify a link between the same values, in particular the rule of law, and matters already belonging to the scope of EU law.

16 The so-called “soft law” mechanisms can themselves be divided between two categories: there are soft law mechanisms of a general scope which aim to address all member states equally, and soft law mechanisms of limited scope, either because they address a specific topic (fundamental rights, corruption, and effectiveness of justice systems) or because they address a specific country (the Cooperation and Verification mechanism).

17 The peer-to-peer dialogues on the rule of law are conducted on a non-partisan and evidence-based approach and without prejudice to the principle of conferred competences, as well as the respect of national identities of member states.

18 The framework encompasses three stages: assessment, recommendation, and follow-up by the Commission.

Although the specific tool is mentioned among the juridical one, it lacks enforceability since it results in non-binding recommendations and judicial review is therefore not possible.

In addition, due to the EU's worsening rule of law crisis and, more broadly, the unprecedented and expanding attempts by some national authorities to organize the systemic undermining of the EU's shared foundational values, a new process of prevention has been established by the Commission as of 2020: the rule of law mechanism. It provides a process for an annual and inclusive dialogue between the EC, the Council, and the EP together with member states as well as national parliaments, civil society, and other stakeholders on the rule of law.

The key element of the new tool is the early identification of challenges in order to find solutions with the broad and mutual support of stakeholders (including the Council of Europe and the Venice Commission). Differently from the previous mentioned tools, the annual *Rule of Law Report*¹⁹ and the preparatory work with member states are the foundation of this new process, since they are a basis for discussions in the EU as well as a measure to prevent problems from emerging or deepening further. In this way, the purpose of prevention prevails over that of monitoring.

Finally, a new tool is at the disposal of the EU to combat violations of the rule of law in its member states: Regulation 2020/2092 adopted by Parliament and Council on December 16, 2020 (Łacny, 2021). The Regulation introduces a general conditionality regime to protect the EU budget in the event of breaches of rule of law principles (the so-called "rule of law conditionality," that is, a conditionality governing access to European funds). To achieve this goal, the Council, acting on a proposal from the Commission, may adopt safeguard measures, such as the suspension of payments, which are charged to the EU budget, or the suspension of the approval of one or more programs financed by the EU budget. The EU can withhold payments to member states if the violation of the rule of law in the said member state sufficiently directly affects the EU's budget or its financial interests.²⁰ The rationale for these measures is that

19 It takes the form of 27 country chapters and an umbrella report presenting an overview of the situation of the rule of law situation across the EU; it monitors significant developments, both positive and negative, relating to the rule of law in member states and focuses on four pillars: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances.

20 See Articles 4 to 6 of the Regulation Rule of Law Conditionality for Access to European Funds. Following the Commission's proposal to activate the mechanism, the Council would have 1 month (or 3 months in exceptional cases) to vote on such a measure, possibly approving it by qualified majority. The Regulation provides that measures against the

respect for the rule of law is a prerequisite for sound financial management and effective financing of the EU.²¹

Some have considered this to be a necessary instrument and a substantial success, above all because it would apply not only to “direct” violations of the rule of law in the use of European funds (such as, for example, in cases of fraud or corruption), but also to systemic violations of the principles of the rule of law (such as, for example, the independence of the judiciary), should they affect the management of funds.

Others, on the other hand, have strongly criticized it, on the grounds that once again the Union has failed to play an effective constitutional role in protecting the values on which it is founded, and has instead turned its attention to its own economic and financial interests and the disbursement of funds.²² This implies that breaking European values is not sufficient motivation to take action against those responsible, but that there must be a real economic damage, quantifiable and only then “tangible” (Fiscaro, 2019; Halmai, 2019; Kirst, 2021). It seems that the regulation has “hollowed out” the rule of law from a constitutional principle to an expedient policy tool.

2.3 *Public Good Under Scrutiny: the Principle of Non-Discrimination in the EU Legal Order*

The principle of equality and, along with it, the right to equality/non-discrimination are part of the foundation of the rule of law in the EU legal system. They are both, at the same time, EU values. What is important for further consideration is that both non-discrimination and the rule of law may be understood to be public goods (Szczerba-Zawada, 2017).

The principle of equality is the value on which the European Union is founded (Article 2 TEU) and one of the objectives of the EU and its member states (Article 3 TEU). It places a valid obligation on the EU which in defining and implementing its policies and activities shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 10 TFEU) as well as to eliminate inequalities, and to promote

member state must be concluded within a maximum of 7 to 9 months from the violation of the rule of law.

21 See the Preamble of the Regulation.

22 On February 16, 2022, the ECJ delivered an important ruling on the rule of law conditionality regulation in the two cases of *Hungary v Parliament and Council* (C-156/21) and *Poland v Parliament and Council* (C-157/21), fully dismissing Hungary’s and Poland’s actions for annulment against the general regime of conditionality. Their main objection was based on the fact that the disbursement of funds should depend on virtuousness in their use, rather than compliance with the rule of law.

equality, between men and women (Article 8 TFEU) and on the member states – each of them shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied (Article 157(1) TFEU). They are obliged also to fully implement the EU equality legislation adopted on the basis of Article 19 TFEU. The body of the latter is exemplified by the Framework Employment Directive (Directive 2000/78/EC) against discrimination at work on grounds of religion or belief, disability, age or sexual orientation and the Gender Recast Directive (Directive 2006/54/EC) on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Under the Charter of Fundamental Rights of the European Union (CFR) – that has the same legal value as the Treaties (Article 6(1) TEU) – everyone is equal before the law (Article 20 CFR). The CFR also guarantees freedom from discrimination, stating that any discrimination based on any ground, including sex, shall be prohibited (Article 21 CFR). Article 23 CFR prescribes that equality between men and women must be ensured in all areas, including employment, work, and pay, and confirms the entitlements of the addresses of the Charter to adopt the positive actions.

The normative power of the EU as a promoter of equality and non-discrimination as a public good is realized through the sanctions imposed on the member states in case of a violation of the equality principle. The failure by member states, including Poland, to fulfill their obligations under the equality principle may give rise to a variety of consequences at the EU level, also in connection with the rule of law protection mechanisms. In the next section they are analyzed using, as examples, Polish and Hungarian anti-LGBT laws and resolutions.

3 EU Legal Response to Polish and Hungarian Anti-LGBT Actions

3.1 *The Polish “LGBT Ideology-Free Zone”*

Almost a hundred local authorities in Poland adopted anti-LGBT resolutions. These anti-LGBT resolutions cover two types of acts: resolutions of regional governments (taking place at different levels)²³ declaring “LGBT ideology-free zones” and adopting a “local government charter of the rights of the family.” Not all of them are identical, but they all are homophobic in their wording, suggesting that the so-called “LGBT ideology” was a threat to traditional Polish values, particularly the idea of family based on marriage between a woman

23 In Poland there is a three-tier division in local government: voivodship (*województwo*), county (*powiat*), and municipality (*gmina*).

and a man. They pledge to fight “political correctness” and “homo-propaganda” and to “prevent [...] the early sexualization of Polish children.” They also urge local governments to withhold funding from NGOs and projects considered not to support these values (Florczak, 2022; Adamczewska-Stachura, 2021).

The consequences exceed the purely rhetorical dimension. This is clear in light of the results of the 2020 LGBTI Survey II conducted by the European Union Agency for Fundamental Rights that reveal an increasing intolerance and violence in Poland towards its LGBT minority. It is exemplified by the highest percentage of respondents reporting experiences of physical or sexual attacks due to being LGBT in the past 5 years in Poland across the Union (15%) or avoiding of holding hands in public with a same-sex partner for fear of being assaulted, threatened, or harassed (58%). What is most striking is the high percentage of LGBT respondents in the EU-28+ (83%) who do not believe the Polish government’s combat against prejudice and intolerance has been effective (Fundamental Rights Agency, 2020). These results must be perceived through the prism of more and more complex application of the means of legal protection against progressive rule of law backsliding, enabling Polish authorities to apply discriminatory legal instruments to limit LGBT minority rights more easily (Grabowska-Moroz & Wójcik, 2021).

Not surprisingly, resolutions of this content and results turned out to be non-compliant with the EU value of non-discrimination safeguarded by EU law and policies. As a result of their normativization, the EU member states are obliged to fully respect the EU value of equality and to observe the right to equal treatment and non-discrimination enshrined in numerous EU legal acts. Despite this obligation, discrimination against lesbian, gay, bisexual, transgender, and intersex people persist throughout the EU, taking various forms, including the anti-LGBT declarations of some Polish municipalities. As such, they constitute a threat to the EU rule of law as in a union of law public actors at any level cannot declare itself free from “LGBT ideology.” The opposite course of action in Poland resulted in numerous steps undertaken by the EU institutions aimed at protecting the European public goods: equality and rule of law.

3.1.1 The European Parliament and the “LGBT Ideology-Free Zones”
Against the situation at stake the EP – using soft law instruments – called for the protection of LGBT persons’ rights and for the adoption of a comprehensive, permanent, and objective EU mechanism on the rule of law and fundamental rights.

The resolution of December 18, 2019, on public discrimination and hate speech against LGBT people, including “LGBTI free zones” (European Parliament, 2019), underlined the urgent need for such a mechanism. The EP

reiterated the need for an impartial and regular assessment of the situation with regard to the rule of law, democracy, and fundamental rights in all the member states and called on the EC and the Council to use all the tools and procedures at their disposal to ensure the full and proper application of Treaty principles and values, such as infringement procedures, budgetary procedures, the rule of law mechanism, and the Article 7 procedure. The EC was also summoned by the EP to monitor fundamental rights violations in the framework of its announced rule of law review cycle, assess whether Poland has failed to fulfill an obligation under the Treaties and whether it should deliver a reasoned opinion on the matter, in accordance with Article 258 TFEU, monitor the use of all EU funding streams, including EU Structural and Investment Funds, and to hold regular dialogues with national, regional, and local authorities to remind stakeholders of their commitment to non-discrimination and that such funds may under no circumstances be used for discriminatory purposes and to take concrete measures to address clear and direct breaches of anti-discrimination rules, in particular, the prohibition of the instruction to discriminate under Directive 2000/78/EC, by local councils adopting regulations that attack LGBT rights (European Parliament 2019).

This confirms the wide range of different tools at the disposal of the EU – from political through financial to legal ones – as described briefly earlier in this chapter, which might be used to protect the EU public goods – the rule of law and human rights, especially – right to non-discrimination. Nevertheless, the EP kept underlining the meaning of the procedure envisaged in Article 7 TEU to protect the rule of law against the situation in Poland.

The resolution of September 17, 2020, on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (European Parliament, 2020) referred to the deterioration of human rights protection in Poland, typified by the declarations of zones free from so-called “LGBT ideology” and the adoption of “regional charters of family rights,” discriminating in particular against LGBTI peoples. The Parliament stated that along with a malfunctioning of the legislative and electoral system and problems with the independence of the judiciary and the rights of judges, this amounts to a systemic threat to the values of Article 2 TEU and constitutes a clear risk of a serious breach thereof. Hence, the EP called on the Council to use the procedure under Article 7(1) TEU to its full potential by addressing the implications of the Polish government’s action for all the principles enshrined in Article 2 TEU, including democracy and fundamental rights. It also called on the EC to make full use of the tools available to it, to address a clear risk of a serious breach by Poland of the values on which the Union is founded, in particular, expedited infringement procedures and

applications for interim measures before the Court of Justice, as well as budgetary tools (European Parliament, 2020).

The EP repeated its call on Article 7 TEU as well as any other tools at the disposal of the EU institutions, including infringement procedures, the Rule of Law Framework, and the conditionality mechanism in order to address violations of the fundamental rights of LGBTIQ people everywhere in the Union, including Poland, in the resolution of March 11, 2021, on the declaration of the EU as an LGBTIQ Freedom Zone (European Parliament, 2021). In the context of the public goods analyzed in this chapter, the EP highlighted that the backlash against LGBT people is often coupled with a broader deterioration in the situation of democracy, the rule of law, and fundamental rights (European Parliament, 2020).

3.1.2 The European Commission and the “LGBT Ideology-Free Zones”
The EC confirmed that anti-LGBT zones in Poland are on a collision course with the EU legal order as they may violate EU law regarding non-discrimination on grounds of sexual orientation. LGBTIQ-free zones (in essence, humanity-free zones) have no place in the “Union of equality,” as declared by President of the EC Ursula von der Leyen in her speech on September 16, 2020 (European Commission, 2020b).

The issue of “LGBT ideology-free zones” turned out to be particularly relevant in the context of EU cohesion policy. In its letter dated May 27, 2020, addressed to marshals of several Polish voivodeships, the EC recalled the obligation stemming from the principle of equal treatment and non-discrimination for authorities managing EU funds. The EC pointed to Article 6 of Regulation (EU) no. 1303/2013 requiring that operations supported by European Structural and Investment Funds (ESIF) must comply with applicable EU law, including respect for Article 2 of the TEU as well relevant provisions of the CFR as well as to Article 7 of the Regulation (EU) no. 1303/2013, obliging member states to take appropriate steps to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, during the preparation and implementation of ESIF programs. In the Commission’s view, the adoption branding LGBTI community postulates as “ideology” and declaring their territories as “LGBT unwelcome,” put into question the capacity of these regional managing authorities to ensure compliance with the horizontal principle of non-discrimination in the implementation of ESIF programs. What is important in the perspective of the aim of this chapter, the Commission highlighted that declaring “LGBT free” or “LGBT unwelcome” territories, workplace, or services constitutes an action that is against the values set out in Article 2 TEU rights (European Commission, 2020a).

As the situation did not change, in July 2021 the EC decided to launch infringement procedure under Article 258 TFEU against Poland related to equality and the protection of fundamental rights, and in particular in response to the declaration of “LGBT ideology-free zones.” In the Commission’s view the Polish authorities failed to fully and appropriately respond to its inquiry regarding the nature and impact of this type of discriminatory resolutions against LGBT persons voted by several Polish regions and municipalities (INFR(2021)2115).

Being worried that the principle of non-discrimination in the implementation of ESIF was not ensured by the regional and local authorities which adopted anti-LGBT resolutions, the EC, in a letter of September 3, 2021 referring to the instigated infringement procedure, encouraged authorities of regions that declared themselves as “LGBT ideology-free zones” to undertake any possible corrective measures with regard to the resolutions in order to eliminate the risk that the fundamental values enshrined in Article 2 TEU as well as provisions of the Charter of Fundamental Rights are violated. Therefore, the EC put on hold the REACT-EU program amendments in relation to relevant regional operational programs (European Commission, 2021b).

Apparently, the risk of loss of EU funding seemed to be – at least partially – an effective incentive: some local authorities withdrew their anti-LGBT resolutions. Nevertheless, as long as some of the anti-LGBT declarations have not been revoked, the problem still exists.

3.2 *The Hungarian Case*

The EC’s determination to use all available instruments to defend the core EU values of equality and respect for individual dignity and human rights has resulted in the instigation of infringement procedures to protect the right not to be discriminated against. This can be seen in letters of formal notice sent to Hungary in two cases.

The first one addresses a law adopted on June 23, 2021, which stipulates a number of discriminatory measures in Hungary. In particular, the law prohibits or limits access to content that promotes or portrays the so-called “divergence from self-identity corresponding to sex at birth, sex change or homosexuality” for individuals under 18. As Hungary failed to explain why the exposure of children to LGBTIQ content as such would be detrimental to their well-being or not in line with the best interests of the child, the Commission found this action to violate many EU norms. In particular, this includes the violation of human dignity (Article 1 of the Charter), freedom of expression and information (Article 11), the right to respect of private life (Article 7), as well as the right to non-discrimination (Article 21). As the EC highlighted explicitly, because of

the gravity of these violations, the contested provisions also violate the values laid down in Article 2 TEU.

The second Hungarian case in which the EC decided to apply Article 258 TFEU concerns the obligation set by the Hungarian Consumer Protection Authority on the publisher of a book for children presenting LGBTIQ people to include a disclaimer that the book depicts forms of “behaviour deviating from traditional gender roles.” In terms of equality principle, the EC found this as discrimination based on sexual orientation. As Hungary did not justify the restriction of the right to non-discrimination as enshrined in Article 21 of the Charter, the Commission has decided to send Hungary a letter of formal notice.

It must be pointed out that in those cases, differently from the ones referred to Poland, the rule of law conditionality would not be applied, since – as Commissioner Jourova explained – this mechanism allows the EU to suspend or limit a member state’s access to EU funding in the event of a violation (of the rule of law) that has a “sufficiently direct” impact on the EU budget, particularly in cases of corruption and tax evasion.

The abovementioned examples illustrated that the new mechanism of protection of LGBT+ persons emerged under which Article 258 TFEU may be used a tool of defense of the EU core value of equality and discrimination in the context of the rule of law and other EU values (INF_21_3440).

4 Conclusions

As the above-mentioned examples show, the crisis of the rule of law – marked by several infringement procedures instigated by the EC against Poland as well as against Hungary – goes hand in hand with the decline in the level of protection of human rights, especially the right to non-discrimination. It must be highlighted that action of all public authorities within the limits set by law, in accordance with the values of democracy and fundamental rights, including the right to non-discrimination and under the supervision of an independent and impartial judge constitutes the merit of the rule of law. Threat to any of these components implies – inevitably – erosion of the latter principle.

To prevent transmitting this destructive trend to the EU level and to protect the EU rule of law being a public good in the community based on law, the EU undertook several steps. It proved that despite the body of EU instruments and processes to uphold Article 2 TEU values, the effectiveness of the EU actions requires the adoption of “hard” financial instruments. This has twofold consequences. Firstly, it shows that the EU public goods (such as right to non-discrimination) might be priced. Secondly, it shows that the conditionality

mechanism, linking EU funds to the rule of law, is in fact a tool of last resort to convince member states to fully comply with EU values. In the process of creating an ever closer union among the peoples of Europe, the economic union has gained axiological foundation.

Note: A. M. Romito, Associate Professor of European Union Law at the University of Bari Aldo Moro, is the author of Sections 2, 2.1, and 2.2 of this chapter. A. Szczerba, Associate Professor at the Jacob of Paradies University in Gorzów Wielkopolski, is the author of Sections 2.3 and 3. The introduction and the conclusions express the views of both authors. The writing of this chapter has been funded by the European Union under the project “Between Hate and Equality: The EU as a Guard of Human Rights and Non-discrimination” (EUHatEq), project no. 101047948. The views and opinions expressed here are those of the authors only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor the granting authority can be held responsible for them.

References

- Adamczewska-Stachura, M. (2021, January 13). Combating “anti-LGBT” resolutions in Poland: Stories from behind the scenes [blog post]. *Equinet*. <https://equineteurope.org/combating-anti-lgbt-resolutions-in-poland-stories-from-behind-the-scenes/>
- Bartole, S. (2020). *The internationalisation of constitutional law: A view from the Venice Commission*. Hart Publishing.
- Besselink, L. (2017). The bite, the bark and the howl: Article 7 TEU and the rule of law initiatives. In A. Jakab & D. Kochenov (Eds.), *The enforcement of EU law and values: Ensuring member states' compliance* (pp. 128–144). Oxford University Press.
- Craig, P. (1997). Formal and substantive conceptions of the rule-of-law: An analytical framework. *Public Law*, 467–487.
- Craig, P. (2017). Transnational constitution-making: The contribution of the Venice Commission on Law and Democracy. *UC Irvine Journal of International, Transnational, and Comparative Law*, 2, 57–85.
- Council of the European Union. (2000, November 27). Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
- Enderle, G. (2021). *Corporate responsibility for wealth creation and human rights*. Cambridge University Press.
- European Commission. (2014, March 19). Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the rule of law. COM(2014) 158 final/2.

- European Commission. (2020a). Responsibility of the Managing Authorities and beneficiaries of EU cohesion policy funds to comply with the principle of non-discrimination based on sexual orientation and gender identity. EMPL/REGIO/JC/db (2020)8845638.
- European Commission. (2020b). State of the Union 2020 – President von der Leyen's speech. https://ec.europa.eu/info/strategy/strategic-planning/state-union-addresses/state-union-2020_en
- European Commission. (2021a). Infringement decisions – INFR(2021)211. Retrieved April 21, 2022. <https://ec.europa.eu/eurostat/data/database>
- European Commission. (2021b). Responsibilities of the regional Managing Authorities to provide comprehensive answers to the letter of formal notice of 14 July 2021 and to undertake corrective measures. REGIO/MG/(2021)6136636.
- European Parliament. (2000, December 7). Charter of Fundamental Rights of the European Union. https://www.europarl.europa.eu/charter/default_en.htm
- European Parliament. (2019, December 18). European Parliament resolution of 18 December 2019 on public discrimination and hate speech against LGBTI people, including LGBTI free zones (2019/2933(RSP)).
- European Parliament. (2020, September 17). European Parliament resolution of 17 September 2020 on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (COM(2017)0835 – 2017/0360R(NLE)).
- European Parliament. (2021, March 11). European Parliament resolution of 11 March 2021 on the EU's declaration as an LGBTIQ Freedom Zone (2021/2557(RSP)).
- European Parliament & Council of the European Union. (2006, July 5). Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
- European Parliament & Council of the European Union. (2013, December 17). Regulation (EU) no. 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) no. 1083/2006. Arts. 6, 7, in OJ L 347, 20.12.2013, pp. 320–469.
- European Parliament & Council of the European Union. (2020, December 16). Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433, 22.12.2020.

- European Union. (2012, October 26). Treaty on the Functioning of the European Union. *Official Journal of the European Union*, C 326/47.
- Fiscaro, M. (2019). Rule of law conditionality in EU funds: The value of money in the crisis of European values. *European Papers*, 4(3), 695–722.
- Florczak, A. (2021). Reakcja instytucji Unii Europejskiej na strefy anty-LGBT+ w Polsce. In B. Orłowska, A. Szczerba, & K. Wasilewski (Eds.), *Od stereotypów do nienawiści. Hejt w perspektywie interdyscyplinarnej* (pp. 125–150). Akademia im. Jakuba z Paradyża w Gorzowie Wielkopolskim.
- Fundamental Rights Agency. (2020). A long way to go for LGBTI equality. <https://fra.europa.eu/en/publication/2020/eu-lgbti-survey-results>
- Grabowska-Moroz, B., & Wójcik, B. I. (2021). Reframing LGBT rights advocacy in the context of the rule of law backsliding Intersections. *East European Journal of Society and Politics*, 7(4), 85–103. <https://doi.org/10.17356/ieejsp.v7i4.852>
- Halmaj, G. (2019). The possibility and desirability of rule of law conditionality. *Hague Journal on the Rule of Law*, 11, 171–188.
- Hirsch-Ballin, E. (2015). Mutual trust: The virtue of reciprocity – Strengthening the acceptance of the rule of law through peer review. Tilburg Law School Legal Studies Research Paper Series, no. 14/2015.
- Kirst, N. (2021). Rule of law conditionality: The long-awaited step towards a solution of the rule of law crisis in the European Union? *European Papers*, 6(1), 101–110.
- Kochenov, D. (2017). The *acquis* and its principles: The enforcement of “law” versus the enforcement of “values” in the European Union. In A. Jakab & D. Kochenov (Eds.), *The enforcement of EU law and values* (pp. 9–27), Oxford: Oxford University Press.
- Kochenov, D., & Pech, L. (2015). Monitoring and enforcement of the rule of law in the EU: Rhetoric and reality. *European Constitutional Law Review*, 11(3), 512–540. doi:10.1017/S1574019615000358
- Łacny, J. (2021). The rule of law conditionality under Regulation no. 2092/2020 – Is it all about the money? *Hague Journal on the Rule of Law*, 13, 79–105. <https://doi.org/10.1007/s40803-021-00154-6>
- Leloup, M., Kochenov, D., & Dimitrovs, A. (2021, June). Non-regression: Opening the door to solving the “Copenhagen dilemma”? All the Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*. Working Paper no. 15. Reconnect. https://reconnect-europe.eu/wp-content/uploads/2021/06/WOP15_June2021.pdf
- Lenaerts, K. (2010). The basic constitutional charter of a community based on the rule of law. In M. Poiras Maduro & L. Azoulai (Eds.), *The past and the future of EU law: The classics of EU law revisited on the 50th anniversary of the Rome Treaty* (pp. 295–315). Oxford: Hart Publishing, 304.
- Magen, A. (2016). Cracks in the foundations: Understanding the great rule of law debate in the EU. *Journal of Common Market Studies*, 54(5), 1050–1061. doi:10.1111/jcms.12400

- Moxham, L., & Stefanelli, J. (2013, November 15). Safeguarding the rule of law, democracy and fundamental rights: A monitoring model for the European Union. Bingham Centre for the Rule of Law.
- Pech, L. (2016). The EU as a global rule of law promoter: The consistency and effectiveness challenges. *Asia Europe Journal*, 14(1), 7–24. <http://hdl.handle.net/10.1007/s10308-015-0432-z>
- Pech, L., & Kochenov, D. (2021). Respect for the rule of law in the case law of the European Court of Justice: A casebook overview of key judgments since the Portuguese Judges case. Swedish Institute for European Policy Studies (SIEPS). <https://ssrn.com/abstract=3850308>