RECONNECT

Strengthening legitimacy and authority in the EU: a new model based on democratic rule of law

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Strengthening legitimacy and authority in the EU: a new model based on democratic rule of law

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Introductory remarks

The deliverable takes full stock of the results obtained during the RECONNECT debates on rule of law as well as the developments in terms of ideas, with specific regard to the tension highlighted by the combination of the ideal and the national understandings of the rule of law and democratic values. The paper presents a literature review of the major scholarship currently dealing with the themes at the heart of the paper and the analytical tools used are mainly those of legal analysis and political science. It reaches out with a proposal for a model whose fundamental meaning is that of enabling the connections between the citizens and the EU to act as a permanent and circular builder of legitimacy. The deliverable will be divided into two sections, which will be interrelated with each other.

Section I analyzes the results obtained so far in the precedent deliverables of the RECONNECT project, which form the basis of the new model. In particular, section I will focus the analysis on the dynamics concerning the rule of law and sovereignty in the EU multilevel legal order and provide the most innovative results in support of the new model.

Section II will be focused on empirical evidence heuristically indicating that the design of a citizen-centered model of legitimacy is indeed promising. This section is outlining a model – named 'compass' – to ensure that the rule of law mechanism, in the format put forth by the European Commission, is enriched and framed further in a more comprehensive pattern which combines representative consultations, responsive and participated design of rules, use and implementation evidence-based assessment (with a cross policy sector approach) and a reappraisal of the rules enlightened by the knowledge we gain through this cycle about the actual freedoms and equalities enjoyed by citizens as well as about the different preferences citizens have in the different Member States. The model will suggest a narrative and relates to the outcomes achieved within RECONNECT.

In conclusion, the paper will produce a handing over for *Next Generation EU*. In the new framework outlined by *Next Generation EU*, the rule of law mechanism will have to transform itself and become a 'rule of law mechanism in action'. In this way, the authors aim to clarify that the increase in monetary and economic policy rules will have to be balanced with a mechanism that verifies the European institutional actions and the quality of the rules, their functioning, and, when necessary, allows appropriate actions to be taken to adjust the game.

Section I: Legitimacy and authority through rule of law and sovereignty in the EU: Bringing RECONNECT results to support the new theory framework

Alessandro Nato

1. Introduction

The legitimacy and authority of the European Union (EU) have been challenged by recent crises. On the one hand, these two concepts have been stressed by the rule of law backsliding underway in Central and Eastern Europe. On the other, by the ongoing sovereignty conflicts between the Member States and the EU. The RECONNECT project analyzed these critical issues in detail, bringing some innovative results. Critically, section I of the paper analyzes the results obtained so far in the precedent deliverables of the RECONNECT project, which form the basis of the new theoretical framework: analysis of the rule of law backsliding; study of the meaning of the EU rule of law; the analysis of the classical practices used in the Union's legal system to protect the rule of law; the study of shared sovereignty between the EU and Member States and how crises change this relationship.

Before going into the analysis of the RECONNECT results, it is suitable to make some clarifications.

The concept of rule of law is not new in European legal framework. The rule of law concept is rooted in the British legal tradition (Stein, 2009). Over the centuries, this notion has evolved to become a polysemous concept with multiple meanings allowing it to be applied in various contexts and legal systems. The evolution of the rule of law in England was radically different from the continental notion of Rechtsstaat (Dicey, 1908; Marmor, 2004; Bedner, 2010). Indeed, rule of law concept is erected on two pillar. On the one hand, the sovereignty of parliament and the government policies of the executive aiming to achieve the common good and, on the other hand, the role of the judge as independent and impartial interpreter, together with the other oversight bodies, which allows the law to underpin the coherence of the system. These two core values of the rule of law must coexist in constant balance (Morlino, Piana, Sandulli, Corkin, 2019).

In Europe after the World War II, the evolution of the rule of law has led to the autonomous establishment of rule of law and rights. In the major Western European States, a concept of rule of law was developed and put into practice with the characteristic feature not only of political representation but of legal certainty, prohibition of arbitrary executive powers, procedural democracy, equality before the law, solidarity, equitable justice, access to an independent and impartial court, and effective judicial review including respect for fundamental rights (Beatty, 2004; Fallon, 1997; Maravall, Przeworski, 2003)

In recent times, another definition of the rule of law has entered the European legal framework. One of the most authoritative definitions of the rule of law given in literature recently is that of Lord Bingham (Bingham, 2007 and 2011): the law must be accessible and so far as possible intelligible, clear, and predictable; questions of legal right and liability should ordinarily be

resolved by the application of the law and not the exercise of discretion. Furthermore, the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. Ministers and public officers exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably. Also, the law must afford adequate protection of fundamental rights. Means must be provided to resolve without prohibitive costs or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. Moreover, adjudicative procedures provided by the State should be fair. The rule of law requires compliance by the State with its obligations in international as in national law.

Through these elements, the rule of law has gained global appeal and recognition, and a political system based on the rule of law is considered paradigmatic of the constitutions of western liberal states and the benchmark of political legitimacy (Waldron, 2008). In particular, States were no longer identified as mere holders of sovereign power, they were also required to implement policies to guarantee the substantial equality of their citizens by safeguarding social rights among other things. Furthermore, to control the power of legislators the constitutions of democratic States introduce a series of instruments to oversee and balance powers with a view to forging a pluralistic balance between them within the legal system (O'Donnell, 2004; Morlino, Piana, Sandulli, Corkin, 2019; Daly, 2019).

From this evolutionary substratum grew the European integration process. It is within the conceptual boundaries drawn above that the rise of the notion of democratic rule of law overcoming the national barriers established by antagonistic sovereigns began to gain importance in the European sphere. While, the modern State was clearly constructed on the exercise of sovereign and absolute power within a closed and native system, the European integration process is much more complex and intricate.

These rule of law also concern supranational integration processes (Weiler, 1991; Chesterman, 2008). It is at the basis of every process that aims to build a complex and multilevel system of rights enforcement (Bingham, 2011; Piana, 2011). The rule of law concerns the relationships between individuals and the public authority, not necessarily within a State. The notion may be referred to national legal orders as well as to a supranational legal system. Indeed, the rule of law did not originate from within a State (Palombella, 2009). Furthermore, the rule of law does not postulate the State, it rather postulates an extra-State right, the existence of an autonomous legal concept, and production of the law (Sartori, 1964). In the supranational legal space, the rule of law normative meaning is permanent, unless one conflates an ideal law into a notion centred upon the State and its specific characters (Palombella, 2014). Furthermore, the Commission offered a comprehensive working definition of the rule of law in a communication published in 2014 and distinguished six key components based on the case-law of the Court of Justice of the European Union (Pech, Grogan, 2020). Within the definition of the EU rule of law provided by the Commission, there is the principle of legal certainty; the prohibition of arbitrariness of executive powers; effective judicial protection by independent and impartial courts; effective judicial review, including respect for human rights; the principle of legality; and equality before the law (Magen, 2016; Magen, Pech, 2018; Coman, 2019).

The European Union is a case-study here. Indeed, the EU constitutes a rule of law in the making, in which the distinctive character is the integration through law (Ovádek, 2018). Indeed, the process of European integration distinguished itself for having achieved integration through

law over the years (Pescatore, 1970). It is a process that, although eminently political, experienced indisputable self-promotion by the Courts of Justice and national courts. According to the literature, the European Union's Court of Justice had a central role, representing the real genuine 'engine' of the integration process (Bifulco, Nato, 2020). In other words, European rule of law has taken root in the EU system, anchored in its genetically hybrid and dual nature: its legitimacy comes not only from *auctoritas* but also from the substantial and procedural rights and principles of justice (Vogliotti, 2013). This is a fundamental shift from the Rechtsstaat to the community of law, founded on the rule of law and represented by Court of Justice, by means of integration through law. Moreover, the exercise of power and its legitimacy are set out in a profoundly different way compared with past configurations in terms of institutional structure, the source for the creation of law, and the ways in which power are attributed and exercised (Morlino, Piana, Sandulli, Corkin, 2019).

From the institutional point of view, the exercise of power is amply spread out, being distributed among a variety of actors in multiple procedural combinations. The supranational institutions, exercising broadly-distributed and multilevel governance, enter into dialogue and negotiate with the national executive and administrative levels as in a public arena. The European rule of law is therefore diluted, not only in terms of the subject legitimacy of the exercise of power but also in terms of the quantitative distribution of the authority among the traditional power: legislative, administrative and judicial. The EU framework is complex and fragmented and needs the equilibration (Morlino, Piana, Sandulli, Corkin, 2019).

As regards the allocation of power, the EU may act only within the limits of the competence conferred on it by the Treaty and Member States. The result is an asymmetric system in which some competences are the direct responsibility of the European institutions, while others are shared, and yet others are the responsibility of the individual Member States. The multilevel structure naturally affects the authority of both the European institutions and Member States, diluting among all these actors.

In this framework, sovereignty takes on a complex meaning. The idea and the claim of sovereignty are experiencing a very problematic phase in the EU. Member States can no longer aspire to sovereignty in the traditional sense. At the same time, even the EU has never had any claims of sovereignty that would come into conflict with that of the States. This causes a disconnection between the two levels (De Giovanni, 2013). And it puts the legitimacy of the European integration project in difficulty. From the analysis of these dynamics, it is clear that in historical periods characterized by the absence of tensions, sovereignty does not appear, it does not seem to be needed. On the other hand, sovereignty re-emerges in moments of crisis and the questioning of institutional and value structures. Despite the criticisms received, the concept of sovereignty persists and has been revived by the crisis that has enveloped Europe in the last decade. It is certainly true that the term 'sovereignty' does not appear in the EU treaties but it is equally true that it is present in many of the constitutions of the Member States, as well as in important decisions of the supreme courts of the Member States concerning relations with the EU (Bifulco, Nato, 2020).

For these reasons, it is appropriate to focus the analysis on the dynamics concerning the rule of law and sovereignty in the EU multilevel legal order and provide the most innovative results in support of the new theoretical framework.

2. The EU rule of law: issues, meaning, and practice

The argued ambiguity in the meaning and scope of the rule of law both at national and supranational level have led to a common criticism that this concept has no core meaning and no aim. Indeed, some Member States of the EU contend that the rule of law has no meaning. For example, Hungary's minister of justice argued that this concept has become a slogan in the European Union, which lacks well-defined rules and remains the subject of much debate. Moreover, Poland's member of government states that there was no definition of the rule of law in the Treaty or any other legally binding EU document (Pech, Grogan, 2020).

This uncertainty about the definition of the rule of law has led to an abuse of the term which has caused a weakening of its impact on the EU multilevel system, contributing to the phenomenon of the rule of law backsliding in the EU. This notion revolves around freedom, non-domination, non-arbitrariness, and so on, abuses occur as is the case with other modern concepts, human rights or freedom, or democracy (Palombella, 2010; Krygier, 2017).

To avoid weakening and combat the abuse, it is necessary to find a clear notion and recover the role of the fundamental parameter that the rule of law has played up to now in European legal systems. This must not only be a political move, but it must also be a legal task. The fact that freedom, rights, and democracy are often used for ideological bias does not imply that they should be ignored or forgotten (Salati, 2019). On the juridical side, moreover, it needed that the law to show its typical resilient character, by determining the criteria for detection and defining remedies that abuse requires (Palombella, 2020). Indeed, the rule of law can and must be considered a central and consensual element of the multilevel European legal framework, but, above all, it is important that a clear definition of the rule of law is identified and reinforce the EU practice to protect the rule of law.

To bring context and gives answers of these problems, first, this part will review the rule of law backsliding in the multilevel European legal framework. Second, it will give a clear definition of the rule of law, and third it will give the practice against the rule of law backsliding.

2.1 Rule of law backsliding in the EU

In the last decade, the deliberate violation of the rules on the rule of law in Hungary and Poland has brought the phenomenon of the rule of law backsliding to the fore on the European scene (Sedelmeier, 2014; Bermeo, 2016). Each case involving a violation of the rule of law has its peculiarities compared to the other, what distinguishes these cases from other violations of treaty law is that the government responsible for dismantling the rule of law does not recognize the problematic legal measures or policies as a violation (Mungiu-Pippidi, 2007; Śledzińska-Simon, Bard, 2019). Instead, the governments of these Member States justify such measures as part of their national constitutional identity (Śledzińska-Simon, Ziółkowski, 2017).

The regression of the rule of law occurs in different ways. The cases of Hungary and Poland are the EU's most significant examples; they suggest a worrying change in the fate of European constitutional democracies (Tismaneanu, 2007; Lacey, 2019; Meijers, van der Veer, 2019). In particular, the literature has identified some key elements that distinguish the regression of the rule of law (Pech, Scheppele, 2017). Initially, the retreat of the rule of law means that with a significant number of citizens they lose confidence in their system of government for a variety

of reasons ranging from rising inequality, persistent unemployment, or predatory practices of the ruling elites (Müller, 2014).

All regressions go through these following steps. After consolidating power, the autocrats act quickly to inhibit institutions that might oppose them as the independent judiciary, the media, and repressive institutions such as the security services, the police, and the public prosecutor's office. In order not to lose their popularity, these autocrats lavish benefits and control public debate by eliminating alternative views by lobbying civil society groups by using all state institutions against their own against their opponents. Another important step is to change the electoral law to push the opposition out of elective assemblies or by suppressing the votes of the latter, or both. By the time citizens become aware of what has happened, it is usually too late to overthrow this autocratic regime. Indeed, the autocrat has now destroyed any institutional channel through which alternative views can be expressed, and the oppositions have few options to resist because their constitutional system has been captured and there is no constitutional way left to effectively challenge the government and the party to the government (Pech, Scheppele, 2017).

If the opposition awakens within the national assembly or outside it, the ruling autocrats can hold partisan referendums to confirm the will of the leader under the guise of the will of the people. In this way, authoritarian populist leaders place themselves above democratic institutions and wipe out those who oppose them. Furthermore, autocrats change democratic rules from within by changing electoral regulations, autocrats can then expect to get the votes they need to win subsequent elections by cornering imaginary enemies or bestowing electoral benefits and promises to citizens to collect votes. Therefore, the interchange in power becomes a thing of the past.

The analysis of these mechanisms has allowed the literature to reach a clear definition of the rule of law backsliding. The literature defines the rule of law backsliding as the process through which elected public authorities deliberately implement governmental plans which aim to systematically weak, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the hegemony party (Pech, Scheppele, 2017).

However, it is necessary not to confuse the regression of the rule of law with the simple structural deficiencies of the rule of law in the Member States suffering from endemic corruption, weak institutional capacities, and weak administration and justice (Iusmen, 2015). Furthermore, it is significant to distinguish the regression of the rule of law from the constitutional conquest. For literature, constitutional conquest occurs when leaders seek to gain control of the political system as a whole, weakening checks and balances to rewrite the constitution (Müller, 2015). Furthermore, the literature shows that constitutional capture has a different impact from pervasive corruption, that is, a serious problem still in Bulgaria and Romania, but it is also different from violations of individual rights, however serious they may be (Perju, 2013). Ultimately, the constitutional conquest aims to systematically undermine checks and balances and, in the extreme case, hinder changes of power (Müller, 2015).

Furthermore, in these Member States, the rule of law had been acquired and was subsequently gradually pull to pieces. This distinguishes them from the other Member States where the rule of law has never been applied and acquired. Indeed, the literature states that regression implies

that a Member State was once better and then regressed (Pech, Scheppele, 2017. This does not mean that the significant problems of the rule of law should not be addressed in the EU Member States where justice is weak and corruption is rampant as in Romania and Bulgaria, but that the EU has a priority: it must address the regression of the state by law in Hungary and Poland (Rech, 2018; Pech, 2019). Indeed, in Hungary and Poland, there is a deliberate strategy pursued by governments to undermine pluralism and create a one-party state in which democratic rules are distorted, justice is no longer independent and society civil cannot oppose (Bugaric, 2014).

To understand how the rule of law backsliding took place in EU, the rule of law crisis in Poland (Konstantinides, 2017) should be examined. In Poland, the democratization process was imperfect and incomplete. Indeed, the Polish liberal elites focused on legal technocracy and the institutional rule of law, neglecting the implementation of the democratic participation of Polish citizens (Puchalska, 2005). In particular, democratization has been one-dimensional and limited to institution building, by technocratic legalism, fundamental rights, and the rule of law. This process did not lead to the creation of the idea of democratic citizenship and participation in political life (Rye, Koncewicz, Fasone, 2019). Furthermore, the push towards entry into Europe has given rise to a spirit of resentment and a need for distinctiveness (Koncewicz, 2018).

After 1989, the rule of law had a prominent place in the democratization process in Poland. The founding fathers of the new Polish state viewed the rule of law as a tool to correct illegality and to limit state power. However, the promotion of the rule of law was slowed by the lack of liberal bases in Polish society. For this reason, the promotion of the rule of law was faster in the legal sphere than in society. The Polish Constitutional Court played a central role in the implementation of the rule of law standards and in holding the state authorities accountable (Garlicki, 2002). After 1989, the Polish Constitutional Court became an esteemed European constitutional court and a concrete example of the success of the democratic transition processes. Specifically, the Polish Constitutional Court helped to strengthen the principles of the separation of powers, the supremacy of the constitution, and the independence of the judiciary. Furthermore, this Constitutional Court recognized that the rule of law is the source and foundation of human rights to be protected (Rye, Koncewicz, Fasone, 2019).

Over the years, the Polish Constitutional Court has strengthened the role of this principle in the democratic order by consolidating the foundations of the new Polish state. Until the beginning of the last decade, the Polish constitution was recognized as the country's supreme law, and the Constitutional Court was recognized as the only institution competent to exercise judicial review to safeguard this principle. Also, the Constitutional Court has repeatedly reaffirmed that all government actions must remain executive and aimed at implementing the laws (Koncewicz, 2018; Sadurski, 2018; Rye, Koncewicz, Fasone, 2019). The literature claims that the gap between the *élite* and civil society explains the ease and dexterity with which the ruling party first gagged and then destroyed the independent judiciary in Poland (Ciampi, 2018; Rye, Koncewicz, Fasone, 2019). The Polish case study reflects the dramatic disconnect between the people and the elites (Koncewicz, 2017). The rest of the citizens are not interested in the fate of the constitutional court, at least as long as the economy continues to grow. Resentment against the courts was used by the majority party to undermine the judiciary and undermine all components of the rule of law (Ciampi, 2018).

Furthermore, the Polish case shows that judicial resentment, populism, and political resentment are linked. Using resentment as a mode of government breaks the status quo and turns into a revolutionary mode (Koncewicz, Strother, 2019). In Poland, the politics of resentment has turned the law into one of the many tools available to politics. The law is now deprived of fixed meaning and changes according to the needs of the ruling party. The literature has pointed out that what truly differentiates the politics of resentment from mere contestation and dissatisfaction with the status quo is the constitutional break with the hitherto prevailing constitutional principles and the total rejection of the existing constitutional order (Niklewicz, 2017). The Polish government's policy of resentment was also aimed at the European Union and its elites. In Poland, the government used the arguments of the EU's lack of legitimacy not only as a simple critique of the European integration project but also as an excuse to justify the dismantling of EU values from within. The new Polish constitutional order is based on extreme majoritarianism, electoral authoritarianism, and the prevalence of the political over the legal. The effects of this transformation are evident and have transformed the Polish constitution into a sounding board for the political expressions of the rules adopted by the majority of the day. For this reason, it must be changed to protect the decision-making process led by the government (Przybylski, 2018; Platon, 2020). All this is very far from the values that allow EU membership and the EU standards that have strengthened democracy within its borders (Rye, Koncewicz, Fasone, 2019).

The consequences of these constitutional changes show that the Polish case-study is a perfect example of how constitutional crisis erodes from within the European consensus built around rule of law (Kochenov, Closa, 2016). On one hand, the Polish Constitutional Court is no longer one of the cornerstones of the liberal-democratic order but is transformed from an ally of the majority and facilitator of the government. On the other hand, this implies that the rule of law loses its main advocate (Landau, 2013). The rule of law no longer guides the decision-making process, but rather facilitates the expression of the will of the political majority. Besides, the rule of law is seen as an obstacle to the protection of the community and the common good. The Polish government has insisted that the rule of law should be interpreted differently from what has been accepted so far. In this way, the simple will of the majority is sufficient to legitimize the law (Koncewicz, 2019b).

The rule of law backsliding not only affects citizens of the country where this phenomenon is occurring, but also affects other EU citizens residing in this illiberal regime. For this reason, the rule of law backsliding applies to the whole of the EU, as these regimes participate in the decision-making process of the EU and in the adoption of laws that bind all Member States. Furthermore, it is worth highlighting the effects that the rule of law backsliding has on the uniform application of EU law in the Member States (Pech, Scheppele, 2017). An authoritarian government that no longer feels bound by the fundamental principles of the EU can create flaws and lead to the uneven application of EU law. In this way, a European citizen cannot rely on EU law in a certain Member State. For instance, the lack of autonomy and independence of justice in an authoritarian Member State poses a threat to the correct, consistent, and effective application of EU law within the legal system concerned. In other words, EU Member States have become too interdependent to limit the effects of the rule of law backsliding to the authoritarian Member State only (Halmai, 2018; Przybylski, 2018).

To avoid the spread of the rule of law backsliding phenomenon, it is appropriate to focus on two remedies. The first is to apply a clear definition of EU rule of law within the European multilevel legal system. The second is to reinforce the EU practices on the rule of law.

2.2 Meaning and scope of EU rule of law

Critics of the EU rule of law and European populist argue that there is no clear definition of it, and its abuse contributes to a proliferation of definitions in several documents of different legal nature in the EU legal framework.

It is important from the outset to emphasize that the rule of law has always been an unspoken part of the European multilevel legal system. Indeed, Article 2 TEU are codifications in recognition of the value rather than the first instance of mention of the rule of law (Alter, 2010; Spieker, 2018). For instance, in the original founding treaties, one may observe the absence of any reference to the rule of law or its core meaning with one exception: the provisions describing the jurisdiction of the European Court of Justice, which arguably condense the core meaning of the rule of law: the reviewability of decisions of public authorities by independent courts (Jacobs, 2006; Schroeder, 2016).

The Lisbon Treaty brought about decisive changes in this regard. To begin with, the Union is no longer described as founded on a set of key principles, but rather as founded on a set of key values. Indeed, Article 2 TEU inserts the rule of law among the fundamental values of the Union, alongside human rights and democracy, respect for human dignity, equality, and rights belonging to minorities (Kochenov, Closa, 2016; Konstantinides, 2017). Furthermore, Article 2 TEU provides that these values are common to the Member States in a society characterized by pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men. Also, the innovation of Article 2 TEU exists in the creation of a homogeneity clause, which can be understood both as an expression of the untouchable core of the EU legal order and the EU's central constitutional identity as a legal-political system (Fisicaro, 2019). However, even Article 2 TEU does not provide a clear definition of the rule of law.

In primary law, the rule of law is recalled among the elements capable of improving the coherence of the EU's external action. According to Article 21 TEU, the EU's external action and its policies must promote democratic principles, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the respect for human dignity, the principles of equality and solidarity, respect for the principles of the United Nations Charter and international law. Furthermore, the analysis of the different legislative instruments dedicated to the external promotion of the fundamental and shared values of the EU shows that the EU promotes an understanding of the rule of law which requires respect for several fundamental principles to ensure that legal systems national rights give full effect to fundamental rights and democratic principles (Pech, 2011 and 2016).

Despite this, the useful elements to reconstruct a clear notion of the EU rule of law comes from recent documents of the European Commission and, above all, from the case-law of the Court of Justice (Lenaerts, 2020). The Court of Justice and the Commission have taken up the challenge and continue to update the definition of the rule of law based on the context and the current crises in Europe (Gremmelprez, 2019). Indeed, based on the jurisprudence of the Court of Justice, the European Commission has been able to offer a complete and convincing

operational definition of the fundamental components of the rule of law since 2014. Through this work of the European institutions, it is no longer possible to argue that the concept of the rule of law in the EU legal order is too vague or would lack a legally binding nature because the EU Treaties would lack a detailed definition (Mader, 2019).

The Commission defending the view that the core meaning of rule of law means that the power of the government and its officials and agents are circumscribed by law and exercised in accordance with law. Additional core elements such the need for an independent and impartial judiciary were consistently mentioned and one may therefore conclude that the Commission's conceptualization of rule of law thus went beyond a minimalist understanding of the rule of law (Janse, 2019).

In particular, the Commission offered a comprehensive working definition of the rule of law in a Communication published in 2014 and it distinguished six core components based on the European Union Court of Justice case-law (Pech, Grogan, 2020). The first element is the principle of legal certainty, which establishes that the effect of EU law must be clear and predictable for those who are subject to it.[1] Second, the Commission mentions the prohibition of arbitrariness of the executive powers, which guarantees the protection against arbitrary or disproportionate intervention.[2] The third component is the effective judicial protection by independent and impartial courts. About this component of rule of law, the European Court of Justice affirms that the EU is based on the rule of law in which any person has the right to challenge before the courts the legally of any decision or other national measure relating to the application to them of an EU act. It follows that each Member State must ensure that national courts meet the requirements of effective judicial protection. For this protection to be guaranteed, maintaining the independence of these courts is essential, as confirmed by Article 47(2) of the Charter, which refers to access to an independent court as one of the requirements linked to the fundamental right to an effective remedy.[3] The fourth element is the effective judicial review, including respect for human rights. Once again the Court of Justice reminds us that the very existence of effective judicial review aimed at ensuring compliance with the provisions of EU law is the essence of the rule of law. Furthermore, the Court of Justice affirms that the purpose of the procedure which allows the court to give preliminary rulings is to ensure that the law is respected in the interpretation and application of the EU law, following the task assigned to the Court by Article 19(1) TEU.[4] The fifth element referred to by the Commission is the principle of legality, which affirms that adherence to legality must be properly ensured in a community governed by the rule of law.[5] The sixth element is represented by equality before the law, which is one of the general principles of EU law, as recognized in Article 21 of the Charter of Fundamental Rights.[6]

These elements that make up the definition of the rule of law given by the European Commission are the result of the interpretative work of the Court of Justice. Indeed, the European Commission itself notes that the recent jurisprudence of the Court of Justice of the

[1] See ECJ Joined Cases 212 to 217/80, Amministrazione delle finanze dello Stato, ECLI:EU:C:1981:270, para 10.
[2] See ECJ Joined cases 46/87 and 227/88, Hoechst, ECLI:EU:C:1989:337, para 19.
[3] See ECJ C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paras 31, 37 and 41.
[4] See ECJ C-72/15, Rosneft, EU:C:2017:236, paras 73 and 75.
[5] See ECJ Case C-496/99 P, CAS Succhi di Frutta ECLI:EU:C:2004:236, para: 63.
[6] See ECJ Case C-83/14, CHEZ Razpredelenie, ECLI:EU:C:2015:480, para. 42

European Union has provided an indispensable contribution to strengthening the rule of law, reaffirming that the Union is a community of values.[7] What the Commission said refers to the significant interpretation given by the Court of Justice in the *Associação Sindical dos Juízes Portugueses* case-law. In particular, in this judgment, the Court of Justice pronounces on some key aspects of the rule of law backsliding and reaffirms which are the fundamental elements for defining national judges and courts (Pech, Platon, 2018). There are good reasons to believe that the Court was obliged to act in the context of the lack of action of the other institutions in addressing the rule of law backsliding. Moreover, in turn, the Court of Justice has developed what has been described as existential jurisprudence, which is extremely significant not only for its practical results and the impact it is having but also for its conceptual impact (Koncewicz, 2018).

Faced with the rule of law backsliding, the Court of Justice had no choice but to specify more explicitly the fundamental nucleus of the EU rule of law read concerning the objectives that the rule of law must achieve (Pech, Grogan, 2020). However, defining the core of such an important concept never means imposing uniformity, but rather making all the components of the European multilevel legal order respect these fundamental characteristics of the legal system which are essential for its functioning and its survival.

Furthermore, in the case-law *Associação Sindical dos Juízes Portugueses* it is possible to identify some components of the EU rule of law which add to and complete those reported by the Commission. In particular, the Court of Justice states that Article 2 TEU is not declaratory but has a substantial dimension and recognizes it as the core of EU law-making it subject to judgment. By doing so, Article 2 TEU not only assumes a political character, but it also imposes legal duties which can be exercised by the Court and before the Court through Article 19 TEU (Pereira Coutino, 2018). Indeed, Article 19 TEU serves as a judicial element regardless of any link with EU substantive law other than Article 2 TEU and the obligation to respect the values set out therein. Hence the legal obligation for Member States to ensure the independence and autonomy of justice from the organization of executive and political power, a general matter of state organization. The general obligation to guarantee the judicial independence of national courts is directly based on the Treaties (Bonelli, Claes, 2018). In other words, the case-law of the Court of Justice defines rule of law as a meta-principle that requires that the right to a fair trial, effective judicial protection, and the independence of the judiciary are considered to be fundamental elements of the EU rule of law. From here on, Article 19 TEU begins to perform two basic tasks (Miglio, 2018).[8] On the one hand, it provides a normative and axiological anchor for the rule of law. On the other hand, this article acts as a judicial trigger to enforce and protect the values of Article 2 TEU (Pech, Grogan, 2020).

Despite this effort of interpretation by the Court of Justice, the Commission had to return to the issue and take a further step to clarify the definition of the rule of law. The multiple references to the rule of law and its fundamental components that can be found in primary and secondary EU law and the growth of provisions that emphasize the different components of

[7] See COM(2019) 163 final, Commission Communication, Further strengthening the Rule of Law within the Union: State of play and possible next steps, (2019), 1-2.
[8] See ECJ Joined Cases C-558/18 and C-563/18, *Miasto Łowicz*, EU:C:2020:234, para 10.

the rule of law have allowed exponents of the rule of law backsliding to advance the criticism of an à la carte definition of the rule of law by the various EU institutions.

To respond to this criticism, the Commission has slightly refined the definition offered in 2014[9] in another communication adopted in 2019.[10] In this definitional effort (Pech, Kochenov, 2015), the Commission states that under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. Furthermore, the Commission adds that the rule of law includes, among others, principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.

However, some core principles are also arguably missing from the Commission's list (Pech, Kochenov, 2015). The Commission argues that the rule of law must be understood as a constitutional principle of the European multilevel legal system, but the rule of law is linked to respect for democracy and fundamental rights. Also, the rule of law is intrinsically linked in practice to the principles and values of democratic governance and the protection of human rights (Pech, Grogan, 2020). The reference to the democratic principle is linked to the involvement of people in the decision-making process in a society. Conversely, human rights refer to the power of such rights to protect individuals from arbitrary and excessive interference with their freedoms and freedoms and to guarantee human dignity. The concept of the rule of law focuses more on limiting and independent review of the exercise of public authority.[11]

In this way, the rule of law protects minorities from the majority by not allowing arbitrary rules to be established. Consequently, democracy is protected when the fundamental role of the judiciary, including the constitutional courts, may guarantee freedom of expression, freedom of assembly, and respect for the rules governing the political and electoral process. The rule of law together with democracy must be understood as interconnected and interdependent principles. This means that they may be interpreted in the light of each other, but also as reciprocally strengthening principles that depend on each other (Pech, Grogan, 2020).

In synthesis, through the work of the European Commission and the Court of Justice has clearly defined the concept of the EU rule of law. Now, it is placed at the center of the European multilevel legal system as a meta-principle with formal and substantive components that guide and limit the exercise of public authority and protect against the arbitrary or illegal use of public authority.

[9] See COM(2014) 158 final/2 (n 2) 3-4., Commission Communication, A new EU Framework to strengthen the Rule of Law (2014).
[10] See COM(2019) 163 final (n 40) 2, Commission Communication, Further strengthening the Rule of Law within the Union. State of play and possible next steps (2019).
[11] Venice Commission, Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016), Study No. 711/2013, CDL-AD(2016)007, 18 March 2016, para 33.

2.3 EU practices to protect the rule of law

Before starting, it should be noted that the rule of law mechanism will be dealt with in detail in section II, in this paragraph the other practices to protect the rule of law will be analyzed. The EU has three main options for addressing the rule of law problems in the Member States: activate an institutional procedure, initiate a legal procedure, and start with a political procedure (Grabowska-Moroz, 2020). Institutional actions against the regression of the rule of law can be promoted by the European Commission, the European Court of Justice, and the Fundamental Rights Agency (hereinafter FRA). The political response can trigger the mechanism of Article 7 TEU, while legal action can take the form of infringement procedures under Article 258 TFEU. There are differences between the tools mentioned. For example, infringement procedures may be both narrower and broader than the procedures under Article 7 TEU at the same time. Indeed, the former must involve an element of the EU law, the latter can also address issues that do not fall within the scope of EU law (Śledzińska-Simon, Bárd, 2019). Furthermore, the infringement procedure can be used to address any breach of EU law of any gravity, while the Article 7 TEU mechanism may be used to address a serious and persistent breach of the values enshrined in Article 2 TEU – including violations concerning the rule of law (Buras, Knauch 2018). Taking into account the nature of this breach, two or more tools may be used simultaneously. Indeed, the literature states that political and legal actions should be initiated at the same time. Although Article 7 TEU alone may not be effective in putting an end to violations of the rule of law, intervention by the Court of Justice through the infringement procedure can be equally effective (Hillion 2016).

All three practices have great potential in putting end to systemic violations of the rule of law in the EU and ensuring compliance with the common values enshrined in Article 2 TEU. For these reasons, it is necessary to analyze the issue of EU practices regarding the protection of the rule of law in detail.

The institutional framework of the European Union respects the principle of separation of powers (Jacqué, 2004). The European Commission represents the executive power of the EU and has the exclusive competence of legislative initiative. It had to reaffirm its role as protector of the rule of law in the EU Member States when problems with it arose (Batory, 2016). The actions of the Commission are not limited to the political sphere only, but also concern legal actions such as the infringement procedure under Article 258 TFEU (Closa, 2019). Unlike the Commission's reasoned proposal to activate Article 7 TEU, the infringement procedure is based on the alleged violation of the obligations of the Member States under the Treaties and the Charter of Fundamental Rights (Kelemen, Blauberger, 2017).

In particular, the main institutional practices for protecting the rule of law in the EU are those dealing with the functioning of independent bodies aimed at ensuring the rule of law and its main components, such as access to judicial review. The Court of Justice has been regarded for decades as the main proof that the EU protects and promotes the fundamental principles of the rule of law by ensuring judicial review of EU law and decisions taken by EU institutions. Member States have tried to slow down the work of the Court of Justice by denouncing the absence of a clear definition of the EU rule of law. However, the Court of Justice has disproved the theories of the Member States by explaining step by step the meaning of the EU rule of

law.[12] Indeed, the Court is free to provide such an independent view of the EU rule of law, often building on the common constitutional traditions of the Member States (Pech, 2009). The previous institutions are joined by the FRA. However, it lacks the competences to effectively intervene in violations of the rule of law in the EU. Indeed, it is only marginally involved in legal and political practices against the rule of law backsliding (Margaritis, 2019), and the institutions most involved in political and legal actions against the regression of the rule of law remain the European Commission and the Court of Justice (von Danwitz, 2014).

The European Commission has a double responsibility. It is both the main guardian of the Treaties and the one responsible for the protection of the values articulated in Article 2 TEU. Its action is not limited to the political sphere, but also includes legal instruments such as infringement procedures, which only confirm that a value is a political concept with procedural-legal elements (Mader, 2019). Among the various tools available to the Commission to ensure the rule of law in the EU, infringement procedures play a very important role (Bard, 2019). For the European Commission, they remain the main tool for ensuring the proper protection of EU law. Even though Article 2 TEU remains largely little used when taken on its own, the infringement procedure is a crucial procedural tool, which allows for resolving the violation of the rule of law in the Member States (Schmidt, Bogdanowicz, 2018). To trigger the infringement procedure, the European Commission has to define which issues could be considered as cases of the rule of law. Unfortunately, previous attempts to address and resolve the recession of the rule of law through the infringement procedure have not always been successful due to the limited scope of the violations, which mostly affected the market and did not directly address the rule of law (Schmidt, Bogdanowicz, 2018; Grabowska-Moroz, 2020).

The potential of the infringement procedure to protect the rule of law is still not realized. To facilitate the impact of the procedure some good practices should be applied (Śledzińska-Simon, Bárd, 2019). First of all, the European Commission must recognize the problem of the rule of law. It should not misinterpret such cases as accidental violations of EU law, but take into account the severity of the damage and the consequences of the violations of the rule of law for the whole legal system. Also, the EU's action against violations of the rule of law must be accelerated. The European Commission should not waste time and postpone its lawsuits while a Member State is openly violating the rule of law. It should not engage in a lengthy discursive process with a Member State committed to reversing the rule of law. Furthermore, again to speed up the action, the Court of Justice should automatically prioritize and accelerate infringement cases involving the rule of law. Indeed, all infringement procedures where the Commission invites the Court of Justice to deal with a systemic problem caused by a violation of the rule of law should be decided in expedited proceedings.[13] Besides, precautionary measures can be used to immediately put an end to violations of the rule of law that can culminate in serious and irreversible damage. In cases where an infringement procedure is ongoing, the European Commission should ask the Court of Justice to order interim measures, in line with the precautionary principle. These good practices could allow the infringement

[12] See ECJ Case C-583/11, *P Inuit Tapiriit Kanatami*, EU:C:2013:625, para. 100-101; C-619/18, *European Commission v Republic of Poland*, EU:C:2019:531, para 48; Case C-216/18, *PPU v Minister for Justice and Equality (Deficiencies in the system of justice)*, EU:C:2018:586, para. 65.
[13] See ECJ Case C-192/18, *Commission v Poland (Independence of ordinary courts)*, EU:C:2019:924.

procedure to have a very positive impact on the protection of the rule of law (Śledzińska-Simon, P. Bárd, 2019).

The political dimension of rule of law practices at the EU level is shaped by actions taken by the European Commission, European Parliament, and the Member States sitting in the Council. The EU and the Member States have developed a continuous dialogue which makes it possible to assess the situation of the rule of law at both national and supranational levels (Grabowska-Moroz, 2020). However, this dialogue requires the good faith of both parties, which is particularly challenging in the case of an obvious rule of law backsliding in a Member State. Dialogue also presupposes that both sides are equal, which excludes hierarchical relationships. Over the past decade, this dialogue has focused on discussing the state of legality and judicial independence in the EU territory.

The procedure set out in Article 7 TEU is the key tool for managing a systemic threat to EU values. Member States have heterogeneous positions that do not allow the procedure to be completed. Indeed, the proceedings were initiated against Poland in 2017 and Hungary in 2018[14] and have so far not led to any final ruling on the rule of law in those Member States (Sedelmeier, 2017). Due to the non-transparent procedure and the lack of strong political will, the practical impact of the Article 7 procedure appears to be limited (Kochenov, 2018).

Worsening the situation is the continuing fragmentation of the positions of the Member States on the choice of suitable actions to strengthen the rule of law through this procedure. By analyzing the collective declarations within specific Council groups issued by the governments of the Member States, it is possible to elaborate on the main categories in which the they are placed (Grabowska-Moroz, 2020). First of all, there is a group of Member States that are pushing for a stronger role for the EU in applying the rule of law and have put forward a specific proposal in the Council for the activation of Article 7 TEU. This group is opposed by that which includes national governments that are subject to the procedures of Article 7 TEU, and also governments which have taken a very harsh critical attitude towards implementation. Amid these two groups, on the one hand, are the Member States pushing for a soft enforcement, which would like to ensure respect for the rule of law through a less proactive stance. On the other hand, the reluctant category is positioned against the Member States that would like more protection of the rule of law and includes national governments that show reluctance to criticize offensive states or support a strong enforcement state. These Member States show a non-belligerent attitude and some of them may be troubled by the same issues relating to the rule of law (Soyaltin-Colella, 2020). This fragmentation restricted the practical application and efficacy of Article 7 TEU procedure (Grabowska-Moroz, 2020). Furthermore, this complicated context stops other actors at the EU level to undertake actions aimed at strengthening the rule of law protection among the Member States. Their effectiveness is also limited since any sanctions mechanism would require the introduction of amendments to the Treaties (Schlipphak, Treib, 2017).

[14] See 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 final – 2017/0360. European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)).

Furthermore, political parties can prove to be important political actors responsible for managing the rule of law. In particular, political parties can limit the presence of autocratic politicians within European political families. Also, the European institutions have established a special procedure to ensure that European political parties adhere to certain democratic standards. According to Regulation 1141/2014/EU[15] on the statute and financing of European political parties and European political foundations, European political parties can receive EU funding if and as long as they comply with Article 2 TEU.

The rule of law dialogue in the Council is another important political practice to strengthen the rule of law in the EU. Since 2014, the Council has committed itself to establish a dialogue between all Member States to promote and safeguard the rule of law within the framework of the EU treaties (Oliver, Stefanelli, 2016). It was organized as a dialogue based on the principles of mutual cooperation and non-discrimination between all Member States and other EU institutions (Bárd, Carrera, Guild, Kochenov, 2016; Hirsch Ballin, 2016). The annual rule of law dialogue has proved to be a useful mechanism. The Council organizes an annual evaluation and stakeholder seminar. The Council also encouraged other Council configurations to organize further and more in-depth discussions on the issues related to the rule of law falling within their competence (Uitz, 2019; Grabowska-Moroz, 2020).

The study of EU practice on the protection of the rule of law highlights the attempts of the EU institutions to address the current crisis of the rule of law. However, numerous critical issues remain. Despite some successes, legal practices concerning infringement actions alone are not able to improve the whole framework of the rule of law. The political debate is blocked by the absence of political will converging on decisive actions for the protection of the rule of law (Kochenov, 2008).

3. EU and sovereignty: meaning, multiple crisis and perspective

On the international scene, the EU represents a unique model of sharing sovereignty. In this multilevel system, the force relationships between the national and supranational levels are constantly evolving and the progressive transfer of powers to the Union by the States has called into question the sovereignty in Europe. Transfers of sovereignty and limitations on sovereignty freely accepted by the Member States have led to a progressive transformation of this fundamental concept. In the EU, sovereignty and competences are inseparably intertwined. Legislation, jurisprudence, and the action of institutions are conditioned by this theoretical and dogmatic aspects from the foundation of the integration project to the current crises. The Member States continue to declare themselves sovereign but they know that in practice various powers that traditionally belong to sovereignty have been transferred to the EU.

Despite the gradual transfer of competences to the Union, the integration process is still far from taking the form of a federal State. Above all, because the Member States retain the competence of competences. They are the 'Master of the Treaties'. In this way, the EU cannot freely determine itself about its existence, its foundation, and its competences. These choices

[15] Regulation (EU, Euratom) 2018/673 of the European Parliament and of the Council of 3 May 2018 amending Regulation (EU, Euratom) No 1141/2014 on the statute and funding of European political parties and European political foundations, OJ L 114I, 4 May 2018, 1-6.

remain in the hands of the Member States. The power of enforcement and the regulatory powers of secondary rank alone are not sufficient to denote the Union as sovereign.

However, the ongoing crises and conflicts of sovereignty are accelerating the processes of erosion of Member State's competencies. The ever-increasing scope of the problems that the EU is facing causes an increasing shift of power from the national to the supranational level. To understand these dynamics, it is necessary to study the division of competences structured by the Lisbon Treaty, the focus on related issues in the macro-economic domain and EU migration and asylum policy, and finally trace some perspectives for sovereignty in the EU.

3.1 Sovereignty through EU law

The division of competences between the EU and the Member States represents a privileged observation point for the analysis of the evolution of the supranational reality. In the context of multiple crises, the division of competences between the EU and the Member States continues to create political tensions and increase legal problems within the European multilevel system. This is because the main EU rules have been designed with an open structure which leaves ample room for interpretation. Furthermore, the scope of the EU's competences is broad, as it is the result of the stratification of specific provisions of the Treaties that provide the legal basis for the action of the European institutions. The legal framework outlined by the Lisbon Treaty provides for borders both for the existence and for the exercise of the Union's competences.

The limits to the existence of the Union's competences stem from the principle of conferral The Lisbon Treaty strengthened both the wording and references to this principle (Govaere, 2011). According to Article 5(2) TEU, the EU does not have general competence but operates exclusively within the limits of the competences conferred to it by the Member States in the Treaties to achieve the objectives established by them. The competencies that are not conferred to the Union remain in the hands of the Member States. The importance of the conferred principle cannot be underestimated, since it determines the structure, functions, and exercise of EU law. The EU is competent only if the Treaties expressly confer certain competences on it, while the Member States enjoy general competence. This division of competences emphasizes the role of the Member States and emphasizes that only they have the power to grant competences to the EU (De Witte, 2017).

However, the structure of competencies operated by the Treaties is not immutable. Primary law contains two rules that can lead the Union to gain competence in the areas in which the Member States remain owners (Garben, Govaere, 2017). In this regard, Article 114 TFEU gives the EU the competence to harmonize national laws to achieve the objectives related to the functioning of the internal market. The flexibility clause contained in art. 352 TFEU entails the possibility of adding a new objective to those of the Union, exercising a new or wider power than the existing ones, creating new bodies through which EU action can be carried out. This clause can be a means to expand EU competences outwards and erode from within the application of other provisions of the Treaties and the competencies established by them (Konstadinides, 2012).

Three principles rule the exercise of competences in the EU legal framework. Article 5(1) TEU specifies that the delimiting function of the principle of conferral attribution must respect the

principles of proportionality and subsidiarity. Also, Article 4(2) TFEU introduces the identity clause which establishes respect for diversity and the fundamental core of the constitutional identities of the Member States by the EU. (Millet, 2014).

Despite this, the use of the principle of subsidiarity and proportionality and the obligation to respect national identities are not sufficient to clarify the actual scope and exercise of competences. To achieve this objective and understand how EU competences are exercised, it is necessary to refer to the provisions of the Treaties specifically dedicated to each of those competencies (Govaere, 2016). Article 5(6) TEU specifies that the scope and methods of exercising each type of competence derive from the sectoral provisions contained in the Treaties which have a different degree of precision depending on the individual sectors. Identifying the exact scope of each EU competence is not easy (Konstadinides, 2018). This difficulty to identify the specific boundaries of the competences regulated by the Treaties can already make the limit to the ability of institutions to act set by the principle of attribution less stringent. The rigidity of this principle has been mitigated above all by the jurisprudence of the Court of Justice which, when it ruled on competences, favored, in principle, interpretations of the relevant norms capable of broadening the scope of these competencies (Garben, Govaere, 2017).

Within the Treaties, the division of powers was concretely codified through a series of precise and punctual provisions. According to Article 2 TFEU, the competences of the EU are divided into different categories identified according to the relationship between these competencies and those of the Member States. Article 3 TFEU establishes that the EU has exclusive competence in certain areas. The concept of exclusive jurisdiction implies that the Member States can no longer legislate on the related matters. This also applies if the exclusive jurisdiction has not yet been exercised by the EU (De Witte, 2017). Article 258 provides that a Member State that adopts a rule in a matter of exclusive EU competence may face an infringement procedure. Exclusive powers can be brought back to the national level by modifying the Treaties. Article 48(2) and (5) TEU states that through an ordinary revision procedure, Member States may decide to modify the Treaties on which the EU is founded, including to increase or reduce the competences recognized to the EU (De Witte, 2017).

The second area is made up of the shared competences between the EU and the Member States – Article 4(2) TFEU – which constitute the quantitatively largest category. In this case, the pre-emption principle is recalled as a regulatory mechanism. Member States can continue to legislate only until, and to the extent that, the EU has done so (Schutze, 2006). The effective exercise of concurrent competence by the Union progressively empties the national one. Despite this, the result of the pre-emption is reversible, since the act can be repealed.

For these reasons, what matters is the effective exercise of competence by the Union and not the attribution. If the Union subsequently regulates the sector exhaustively over time, the shared competence does not differ from an exclusive one. On the contrary, the insignificant action of the Union does not prevent the regulatory intervention of the Member States (Arena, 2018). Concurrent competences, as well as exclusive ones, generally admit a harmonization of the laws of the Member States. However, it is necessary to consider the limits that arise from other provisions of the Treaties. The reference goes to specific sectors of concurrent competences for which the Treaties exclude the competence of the institutions to harmonize the legislation of the Member States (Schutze, 2006).

The third sector includes the areas in which the Union has the competence to carry out actions aimed at supporting, coordinating, or complementing the action of the Member States – Articles 4(3), and (4) TFEU and Articles 5 and 6 TFEU. The category of support skills has recently emerged within the European supranational order. In the sectors that fall into this category, the European Union has a role limited to completing or merely coordinating the action of the Member States. In these cases, the European institutions cannot harmonize the legislation of the Member States. For these reasons, in the matters in question, there can never be a total substitution of the action of the EU for that of the member countries, much less a pre-emption (Garben, 2017).

These legal bases precisely define both the belonging of each policy to a specific competence and the objectives of each policy, with greater precision even than some federal systems (Schutze, 2008). In the intentions of national negotiators, the idea that each policy was included in a specific competence allows, at least in theory, Member States to better control the work of the European institutions (Garben, 2014). This idea has been disavowed by the practices and interventions necessary to stem the crisis. The measures adopted during the crisis led to a reshaping of the framework of competencies enshrined in the Lisbon Treaty. The European Union has gained competence in areas in which, according to the Treaties, the Member States had to remain firmly in command (Garben, Govaere, 2017), while in others the prevalence of the intergovernmental method has slowed down the action of the European institutions in the attempt of recovery of sovereignty by the Member States within the EU legal framework.

To clarify these passages, it is appropriate to analyze some of the most important conflicts of sovereignty that have affected the Union for a decade now.

3.2 Issues of macro-economic governance and EU migration and asylum policy

From 2008 onwards, the European Union has been hit by repeated crises that have had significant economic and political consequences (Kilpatrick, 2015). The road that leads to the realization of an ever closer union between the peoples of Europe appears blocked today more than ever. The structure of EU competences, not always adequate to the challenges and the increase of decision-making centers, has caused the multiplication of sovereign conflicts. To explain how the relationship between crises and sovereignty conflicts blocks the development of this process, it is appropriate to examine two case studies: the first concerns economic governance; and the second EU migration policy (Börzel, 2016). These two case studies were chosen because they represent two fundamental sectors of state sovereignty. However, the EU is gaining more and more expertise in these areas.

Among these conflicts of sovereignty, the reshaping of macro-economic governance represented a turning point in the process of European integration. At the beginning of the economic crisis, the EU found itself legally and politically unprepared to give a meaningful response, leading European institutions and Member States to open an unprecedented phase of improvisation and regulatory experimentation in the integration process. Macroeconomic governance has undergone interventions to update and strengthen control and management powers concerning the legal framework of competencies enshrined in the Treaties (Fromage, van den Brink, 2020).

It should be noted that the intensity of the Union's competencies and the corresponding obligations of the Member States is not the same in the case of monetary and economic policy. According to the norms of the Treaties, the rigorous and stringent mechanisms envisaged for monetary policy correspond to a less incisive system as regards economic policy. Furthermore, Article 3 TFEU provides that the EU has exclusive competence for the monetary policy of the Member States that use the euro as their currency (Fabbrini, 2018; Waibel, 2017). On the contrary, Article 4 TFEU rule that the EU has a coordination competence for economic policy. However, the Member States must consider economic policy interventions as matters of common interest and implement them in such a way as to contribute to the achievement of the Union's objectives, coordinate them within the Council, and following the indications of the competent Union bodies (Article 2(3) TFEU and Article 5(1) TFEU).

In response to the sovereign debt crisis, this matter has been innovated. In the emergency of the crisis, treaties, regulations, recommendations, European instruments for coordination, monitoring, and sanctioning of budgetary, fiscal, but also economic and social policies of the Member States have not stopped to develop and strengthen (Leino-Sandberg, Saarenheimo, 2017). After these emergency interventions, the division of competences and the division of sovereignty between the Union and the Member States appears more confused, more fragile, and characterized by greater entropy (Tridimas, 2017). The economic and financial crisis that began in 2008 has led to a clear tightening of policies in order to achieve stability in the euro area. In particular, this was the case for the Member States that fall under the financial assistance program targeting Cyprus, Greece, Portugal, Spain and Ireland. Regular visits by the troika made up of representatives of the International Monetary Fund, the European Central Bank and the Commission charged with monitoring the rigorous implementation of the dozens of reforms included in the adjustment programs signed by these Member States revealed a coercive turning point, which it fits well with the image of gradualism and the consensual method that has characterized the European decision-making process until now (Sacriste, Vauchez, 2020).

Simultaneously, the Euro-group has gained considerable power. This political structure is a preparatory committee that brings together the highest public finance officials of the euro area Member States, together with those of the ECB and the European Commission. In essence, this committee anticipates the decisions of the ECOFIN Council. This is where the rescue programs of Member States in difficulty was negotiated, in particular the list of economic, social, and budgetary reforms that affect the granting of loans to Greece, but also to Cyprus, Spain, Ireland, and Portugal, according to a shock strategy budget and tax (Kutter, 2020). Also here, the interpretative tools and the concrete conditions for implementing the various euro governance devices were built, both in terms of monitoring the adjustment programs and the concrete conditions of application of the European Semester (Tesche, 2020). In other words, the Eurogroup has become with the ECB the central hub of euro governance, but it continues to escape the common rules of transparency and legal and political responsibility of the Union (Sacriste, Vauchez, 2020).

However, in the implementation of EMU and during the management of the 2008 crisis, it is not the EU who has gained more power than the Member States, nor the Commission on Governments or vice versa. Instead, a polycentric decision-making system has been structured in which a European financial network has been added - to the classic actors of EU macroeconomic governance -, which has pursued its priorities based on financial stability, fiscal

consolidation, and structural reforms. Current EU economic and financial governance has multiple decision-making centers (Dawson, 2015). On the one hand, the decision-making procedures of the European Semester contribute to strengthening the thesis of polycentrism, which are studded with a series of micro-decisions taken by a multiplicity of committees and institutions, so that the political outcome is progressively solidified through sedimentation and subsequent consents (Haas, D'Erman, Schulz, 2020).

On the other hand, a very active European financial network emerged strongly during the 2008 crisis to carry out its proposals. This network is among the main responsible for European public policies and the conditions of their legitimacy. It is composed of an integrated system through a dense transnational network involving national and European financial bureaucracies: economic-financial DG, ECB, networks of national central banks, treasury directorates, Eurogroup preparatory commissions (Tesche, 2020). Driven by a powerful dynamic of integration connected to the need to find solutions to the crisis, this networked governance has produced team effects, which is a set of common standards of credibility and political legitimacy, which is gathered around the criteria of financial stability, fiscal consolidation, and structural reforms. Furthermore, this network has developed forms of collective discipline capable of competing with national political realities (Sacriste, Vauchez, 2020).

The advance of these interest groups has been facilitated by the weakness of traditional political actors (Franchino, Mariotto, 2020). In a context of the crisis in which European political leaders were convinced of their powerlessness, even of their illegitimacy, to balance the interests of protecting the economic-social system with that of the financial markets, this network of financiers was able to frame the priorities of European public policies and the national agenda on competitiveness and structural reforms (Tesche, 2020). At the supranational level, the growth of this network of financial actors can be seen in the growing power of the Economic-Financial DG within the European Commission and the political role assumed by the European Central Bank in reflecting on the future of the Union. At the national level, this process can be observed in the impact on national administrations, through the redefinition of internal hierarchies in favor of the Ministry of Economy and Finance. As Member States had to rebalance their relations with the Union, the role of economic and financial ministries has grown both in inter-ministerial coordination and in permanent national representations to the EU (Sacriste, Vauchez, 2020). This process goes hand in hand with the marginalization of other types of actors. Indeed, the ministries that produce greater public spending have been relegated to the margins, especially those linked to social policies, but also the actors of representative politics. Together with the European Parliament, the national parliaments are the big losers in this strengthening of the transnational executive pole (Fromage, van den Brink, 2020; Haas, D'Erman, Schulz, Verdun 2020).

. Although national parliaments have tried to regain their ability to influence the course of policies dictated by EU economic governance, their influence has been very limited (Christiansen, 2015). They have to be content with an involvement through consultation and deliberation that intervenes upstream in the best of cases, i.e. when the Commission prepares its annual budget plan within the framework of the European Semester, but more often than not intervenes afterward (Crum, 2017).

In essence, the structuring and decision-making force of these mechanisms of economic governance cannot be identified in a single Member State, a group of interest, or a European

institution. Neither of these decision-making centers prevails over the other and imposes decisions on the others. The macroeconomic decision-making process has turned into a political process of concertation and enhanced co-decision. In short, far from being just one of the many spheres of action of the European institutions, the Economic and Monetary Union has become the basis for economic policies in Europe, and its binding effects are reflected in social and fiscal policies (Maris, Sklias, 2020). However, this powerful governance has grown beyond the EU legal order and is characterized by independent or informal institutions, largely marginalized by national and European political controls (Sacriste, Vouchez, 2020). This process strengthens the hypothesis of a technocratic drift of the European integration process and risks dangerously loosening the field of action of democratic politics (Bickerton, 2012). Without resorting to a formal transfer of sovereignty through the reform of the founding treaties, economic governance is eroding state sovereignty through a system created based on individual international agreements and political choices between multiple actors. A flexible framework that is directly related to the economic solidness and political power of the various actors (Caldarelli, 2019). This process may have marked a de-constitutionalization of supranational law and radically transform the European integration process (Chiti, Texeira, 2013; Joerges, 2012).

The other case study is the EU migration and asylum policy, that are part of the area of freedom, security, and justice (Article 3(2) TFEU). In the field of asylum, Article 4(2)(j) TFEU provides for the Union a competence that is concurrent with the Member States. Article 67(2) TFEU adds that the European Union develops a common policy on asylum, immigration, and external border control through the pursuit of an in-depth integration process and a more EU-friendly division of competences (Pascouau, 2010; de Vries, Vries, 2014). The use of the term common policy is not neutral. The Treaties mention the objective of creating a common European policy of asylum, subsidiary protection, and temporary protection to offer an appropriate status to any third-country national in need of international protection and to ensure compliance with the principle of non-refoulment (Zaun, 2018). EU law establishes minimum measures suitable for the creation of a common European asylum system, the creation of homogeneous procedures for obtaining and losing refugee status or subsidiary protection, the development of criteria and mechanisms for determining the Member State responsible for examining an asylum application, rules concerning reception conditions, partnership and cooperation with third countries (Zaun, 2018). Also, Article 68 TFEU provides that the Member States define the strategic guidelines for legislative and operational planning through the choices made within the European Council (Thym, 2013). According to Article 80 TFEU, EU policies on border control, asylum, and immigration and their implementation are governed by the principle of solidarity and fair sharing of responsibilities between the Member States (Slominski, Trauner, 2020).

In particular, the critical point concerns the sharing of responsibilities and cooperation for the placement of migrants and asylum seekers. At the center of these problems is the so-called Dublin system. In particular, Regulation 604/2013/EU provides for a division of responsibility based on the geographical criterion and does not lead to the fair sharing of responsibilities between the Member States.[16] Article 3(1) of Regulation 604/2013/EU provides that only one

[16] Regulation n. 439/2010 / EU of the European Parliament and of the Council, of 19 May 2010, establishing the European Asylum Support Office, in the OJEU, of 29 May 2010 L 32.

Member State is responsible for examining the asylum application. This system has not been able to manage with the huge flow of migrants that has affected the EU in the last five years.

In 2015, the arrival of a large flood of migrants caused a humanitarian emergency, opening a political crisis that continues to divide the EU today. The data collected by the European institutions show that one million and eight hundred 20.000 people illegally crossed the EU borders between the summer and autumn of 2015. The majority of migrants arrived in Greece crossing the border with Turkey,[17] while the rest landed in Southern Italy sailing along the central Mediterranean route.[18] The huge number of asylum seekers has tightened the positions of several Member States. Invoking a serious risk to internal security and public order represented by the uncontrolled arrival of irregular immigrants, the Member States have built physical barriers at the borders with non-EU countries and reintroduced controls at the internal borders of the EU (Borg-Barthet, Lyons, 2016).

The role of the EASO agency emerged during the migration crisis. The EASO was added to this complex migratory governance framework alongside national authorities and EU institutions. In 2010, the European institutions created the European Asylum Support Office (EASO) to foster administrative cooperation in the field of asylum between the Member States. Based on Articles 74 TFEU and Article 78(1) and (2) TFEU, this agency carries out various operational support activities for national authorities and its contribution has grown a lot in recent years. Although the founding regulation does not provide for the possibility for EASO to influence or intervene directly or indirectly concerning the decisions taken by the competent asylum authorities of the Member States on individual applications for international protection, the officials of the European agency exercise a concrete influence on the competent national authorities (Scipioni, 2018), especially in the most fragile Member States.

In Greece, EASO was involved in the evaluation of asylum applications and provided recommendations, which were formally approved by the national authorities. The agency was involved in the admissibility procedure of asylum applications and in the examination procedure itself, conducting interviews, drafting opinions and recommendations to the Greek authorities on the decisions to be taken (Tsourdi, 2016). In the Greek Member State, EASO has carried out an incisive support activity through continuous and concrete actions.

In 2016, the Greek legislator through the adoption of the Greek law no. 4375 recognized the important contribution of EASO, codifying the practice of joint processing of asylum applications (Tsourdi, 2016; Lavenex, 2016). Article 60(4)(b) of that Greek legislative act provides that, while the Hellenic police or the armed forces are responsible for the registration of applications for international protection, for the notification of decisions and for the detection of appeals at hot spots, EASO can assist the Greek authorities in conducting interviews with applicants for international protection as well as in any other procedure. Continued pressure on the Greek asylum system has allowed the European Asylum Support Office to become responsible for conducting the interviews, assessing the operability of the safe third country clause and the admissibility of the application for international protection.

[17] Frontex, Risk Analysis for 2016, Warsaw, 2016, p. 6. Precisely, the report contains the data of 885.000 and 386 illegally transiting the eastern route.

[18] Frontex, Risk Analysis for 2016, Warsaw, 2016, p. 6. Specifically, the report contains the data of 154.000 people transiting along the southern Mediterranean route.

The emergency situation meant that the European agency replaced the Greek authorities in carrying out various activities. This has also created circumstances of uncertainty due to difficulties in coordination between national authorities and EASO. In some cases, asylum seekers assessed as vulnerable by the Greek asylum service were subjected to a different assessment by the European agency (Tsourdi, 2020).

This difficult situation has highlighted the limits of the implementation of the common European asylum system and the existence of a structural solidarity deficit in the Union (Tsourdi, 2020). The combination of scarce solidarity, obstruction on the part of the competent national authorities and the weakness of European institutions in the management of European migration policy has made the situation increasingly unsustainable (Scipioni, 2018). In addition, the inadequate application of the principle of solidarity and the unequal sharing of responsibilities between Member States have prevented cooperation between the latter and the EU (Thym, Tsourdi, 2017). Most of the Member States have provided technical and financial assistance to the Member States involved in welcoming asylum seekers, but the fair distribution of the huge influx of asylum seekers arriving in the EU has not been taken into consideration. Similarly, actions aimed at promoting mutual recognition and flexible management of transfers of beneficiaries of international protection were excluded (Tridimas, 2017).

In synthesis, the EU migration and asylum governance has proved inadequate and the action of the Union was delayed by the Member States, which took the opportunity offered them by the migration crisis to defend their sovereignty in the matter (Thym, Tsourdi, 2017; Castelli Gattinara, Zamponi 2020). Member States have abused the intergovernmental method, activated exceptions to the procedural rules and the prerogatives of the Union to limit the exercise of concurrent jurisdiction (Scipioni, 2018). The European Parliament has been sidelined, the Council has assumed a predominant role. The functioning of the common European asylum system was further complicated by the establishment of a sovereign alliance between Poland, Hungary, the Czech Republic and Slovakia, the so-called *Visegrad* group. These Member States have tried to reaffirm their sovereignty by closing their national borders and opposing the relocation of citizens of third countries who have arrived in the EU (Slominski, Trauner, 2018; Gladysh, Sychov, 2020).

The migration crisis is an important test for the legitimacy of the European Union. Member States are divided on the measures to be taken, because each national government promotes solutions favorable to its own interests. Within the European institutions, the principles of loyal collaboration and sharing of responsibilities included in the Treaties are left aside in favor of the free choices of each individual Member State on the management of migration issues (Borowicz, 2017). Solidarity between Member States has lost. Instead, citizens and their political representatives have pushed to promote their benefits. Literature states that political elites have ruled that exposure to asylum applications and refugee protection is the parliamentarian's preference only when the possible negative impact is not overestimated (Basile, Olmastroni, 2020). In other words, politicians are in favor of migration policies when migrants can be perceived favorably by the community and not as a danger. Cultural and social integration factors are fundamental. This could suggest that the argument of cultural clash is capable of hindering the cultural integration of migrants into European societies and risks stimulating a strong reaction within Member States (Delcker 2016). This argument contributes to research into the success of the rhetoric of right-wing populist anti-immigrant parties, which tend to frame the migration issue in cultural terms, using identity arguments such as the loss

of tradition, national identity and the threat to national sovereignty (Helbling, 2014), but promoting exclusive and nationalistic approaches to immigration. Furthermore, exaggerating the actual magnitude of the crisis, populist parties are depressing support for intra-EU solidarity by European citizens. In addition, the bad perception of the extent of the crisis leads European citizens to consider supranational integration as the cause of the loosening of borders and the increase in the flow of people, rather than as a possible solution to the problem (Basile, Olmastroni, 2020). To strengthen support for EU approaches to burden-sharing on migration, EU institutions are primarily faced with deep-seated beliefs and misperceptions about immigrants, as well as feelings of insecurity generated by permeability of national borders and loss of identity. In the event that European institutions fail to reverse this trend, political parties will provide abundant ground for those problem entrepreneurs who are building their electoral success by leveraging on citizens' fears and encouraging support for free behavior among Member States (Campesi, 2018). The only solution to successfully address and overcome the migration crisis is to join forces to tackle it collectively. In particular, the EU institutions need to develop a true sense of community and solidarity between its citizens and political actors (Basile, Olmastroni, 2020).

The two case studies analyzed above show that the EU can resolve conflicts of sovereignty only through action that includes both legislative and political aspects. On the one hand, the European institutions must collaborate with the Member States to change the division of competences between the EU legal framework. On the other hand, the European institutions must collaborate with national political actors and the European Parliament to establish solidarity and collaborative relationships within the Union to reconcile these conflicts of sovereignty. Only through multi-level actions the European Union may find effectiveness and give strength to its actions.

3.3 Perspectives of sovereignty in the EU

The Member States have progressively transferred to the EU broad competencies. This has been possible because the Member States have bracketed the issue of sovereignty, as has happened in federal States. This idea was taken up in a radical interpretation of federalism according to which the concept of sovereignty should be put aside to think about building a European federation. The crises that have hit the EU in the last decade have revealed the limits of an integration process in which the constitutive elements of a classic federation, i.e. a European *demos* and its representation are not recognized by all the players involved. Various interpretative positions of EU sovereignty have arisen from these critical issues, some of which are extreme others are more moderate.

The existence of full EU sovereignty is not easy to prove. However, it is possible to examine some theories that find in the Union some founding elements of EU sovereignty. A first orientation argues that the claims of the Member States and their respective Constitutional Courts to have the last word end up being in contrast with the structural principles of the supranational legal order and its character as a unitary order (Baquero Cruz, 2008). In truth, as has been observed, the concept of supremacy itself contains an allusion to the sovereignty of the EU (Walker, 1991).

Instead, a second interpretation of the European integration process argues that the holder of sovereignty must be European *demos*. Part of the literature argues that the European *demos*

already exists and that it recognizes itself in common cultural and historical roots (Delanty, 1995). Other literature identifies the elements of European *demos* in the sharing of democratic procedures and some common values. In summary, the very existence of European governance would testify to the existence of a European *demos* (Follesdal, Hix, 2006). However, there is no adequate system of representation, made up of members directly elected by the people and endowed with all the powers necessary to express European popular sovereignty. This supranational parliament would have the general representation of the European *deomos*, but the national assemblies would assume a secondary role (Bifulco, Nato, 2020).

The theory that places the State at the center of sovereignty in Europe supports a position completely opposite to the one just mentioned. The fundamental assumption is that there are no European people, the only political communities in the supranational decision-making process remain those within the Member States (Bellamy, Castiglione, 1997). In particular, this theory holds that the lack of European people is the main reason for the lack of EU legitimacy (Grimm, 1999). Furthermore, it is impossible to consider the EU treaties as a European constitution because they are to be traced back to the will of the Member States and not of the people of the EU (Grimm, 2004).

The constituent power of the Treaties resides minimally in the citizens, but the Member States are the holders of the constituent and modification power. Also, from the analysis of the ordinary amendment procedures and the simplified procedures for the amendment of the Treaties, it is clear that citizens participate little in these procedures. These procedures confirm that the constituent power in the EU resides with the Member States. In the ordinary procedure, it resides entirely, as the States have the competence of competences. In simplified procedures, power is entrusted to the Council, which is however made up of heads of state and government and which decides only unanimously – therefore, the States are still the masters of the treaties. For these reasons, European citizens have a limited power of participation on a limited number of minor issues. The implications of this position are quite simple to configure: national parliaments are the places that express popular sovereignty, national executives must retain the power of veto.

Nevertheless, popular sovereignty may be present both at the supranational and national levels (Habermars, 2012). The two demos, the national ones and the European one, would be on the same level united by the European citizen. In this regard, it possible speak of dualistic sovereignty. In this case, there is a European federal people and it is produced by double sovereignty, the double democracy of the Union and the States, and the double citizenship (Schutze, 2017).

To conclude, it is possible to state that the transfer of competences has been so significant both qualitatively and quantitatively and today it is difficult to speak of full sovereignty of the Member States. If it is true, as the defenders of state sovereignty believe, that the States have not yet disappeared and that they continue to exercise effective power, it is equally true that the thesis that these are still the lords of the Treaties because they retain the competence of competence deserves to be rethought. The strength of this argument remains intact as regards a state context, but loses strength if it refers to a supranational order. Indeed, the assertion that the Member States are the masters of the Treaties because they have the competence of competences is gradually losing strength. *In primis*, because this function is not held by a single entity but by a plurality of State entities, all equal-ordered. Secondly, it is the States as a whole

that holds the competence of competences, with the consequence that the exercise of this function is necessarily a collective exercise. Finally, it is very difficult to establish what the essence of sovereignty is, what are the objects that characterize it, and therefore not transferable in any way. After the multiple crises, it becomes difficult to imagine drawing an ideal line and thinking that the Member States retain the exclusive power over competences. The presence of external pressures to the European context, in new forms compared to the usual ones, could affect the existence of individual Member States and thus represent a push towards greater integration and federal solutions (Bifulco, Nato, 2020).

4. Conclusion

The crises analyzed in this paper undermine the basics of the European integration project. The European institutions have tried to remedy the rule of law backsliding by promoting a clear concept of the rule of law and strengthening the practices to protect this important principle. Indeed, the European Commission and the Court of Justice has clearly defined the concept of the EU rule of law. Now, it is placed at the center of the European multilevel legal system as a meta-principle with formal and substantive components that guide and limit the exercise of public authority and protect against the arbitrary or illegal use of public authority. Nevertheless, legal practices alone are not able to improve the protection of the rule of law, but the political debate is blocked by the absence of political will converging on decisive actions for the protection of the rule of law. Furthermore, the economic and social shocks that the EU has suffered since 2008 demonstrate various competencies must be moved to the supranational level to reinforce the authority and legitimacy of the EU. To do this, it is necessary to overcome the reluctance of the Member States and populist parties that try to keep the powers at the national level by increasing the intensity of sovereignty conflicts. It is time for difficult political choices. Faced with the challenge of the Covid-19 pandemic, which quickly turned into a social and economic crisis, spreading within the EU territory, the European institutions and the Member States are obliged to create a new legal and political framework to allow to strengthen the legitimacy and authority of the EU through the rule of law and sovereignty in the EU.

Section II: From the 'rule of law mechanism' to a reconnecting virtuous cycle: A new compass to reach fairness and solidarity through a democratic rule of law

Daniela Piana

1. Introduction

On July 23rd 2020, in his capacity as President of the European Council, Charles Michel declared: 'we renew our vow of European marriage over 30 years',[19] arguing that the newly signed *Next Generation EU* plan marked an historical turning-point on the long road that is the European integration process. Words count, and in this context they are even more compelling. In his use of the word 'vow', President Michel was not only emphasizing the exceptional commitment he wanted to attach to the '*élan vital*' imprinted upon *Next Generation EU* but also the symbolic and more than merely instrumental meaning of the deal reached by the governments assembled in Brussels to define a shared way ahead in a time of crisis in the health, social, and economic spheres.

In the somewhat lengthy and tortuous path followed by the European venture since the Treaty of Rome, the turning points that mark the more memorable times are often tied in with constitutional momentum: this was the case with the adoption of the Lisbon Treaty or, further back in time, with the signing of the Amsterdam and Maastricht Treaties. These constitutional openings do not only represent leaps and changes of direction. The point made by Jean Monnet is well known and often recurs in the speeches of policy makers when they express their opinions on the crises that have been addressed by the European Union by taking strategic steps whose implications have led to transformation. This has been a characteristic of the constitutional (but also evolutionary) trajectory of the EU since its origins.[20] As a matter of fact, the overall significance of the crisis in European history seems to be much deeper and broader than that attached to the renewal of inter-governmental consensus. If one lesson may be learned from the experience of the economic and financial crisis that hit the Eurozone in 2007-2008, it is precisely the uneasiness with which the European institutions responded to demands for the protection of goods, services, and rights coming from both governments and stakeholders, not to mention the last resort of the democratic legitimacy of the EU: its citizens. The unprecedented breakout of the pandemic and the related systemic long-term effects on the quality of daily life and political equilibrium – within the domestic systems between sub-national and national authorities and among the member States – seems to be an unintentional

[19] Press release at https://www.consilium.europa.eu/fr/press/press-releases/2020/07/23/this-is-historic-we-renewed-our-marriage-vows-for-30-years-europe-is-there-strong-standing-tall-report-by-president-charles-michel-at-the-european-parliament-on-the-special-european-council-of-17-21-july-2020/

[20] The trajectory along which the European legal system has been developing over the decades is, no doubt, the matter of a fairly broad and not consensual scholarship. Scholars diverge in many ways, but the aspect that turns out essential for our purpose here is the role played by European case law as an endogenous lever of (incremental) change. Unquestionably, case law has played the role of a policy window, standing as a possible option for the different actors willing to challenge domestic legal provisions or to open the European norms that establish a common ground for the fundamental rights of the European citizens to enjoy. See de Burca, 2011; Craig, de Burca, Weiler (2012), The Worlds of the European Constitutionalism, Cambridge, Cambridge University Press.

and unpredictable opportunity to question the model of legitimacy that has been *de facto* put in place over the decades through European integration and *de dicto* endorsed as referential – in the institutional narrative – to justify and recount the positive story of the EU in comparison to other competitive systems of regional integration and to oppose the rising populist discourse.

This work takes full stock of the results obtained during the RECONNECT debates on rule of law as well as the developments in terms of ideas, with specific regard to the tension highlighted by the combination of the ideal and the national understandings of the rule of law and democratic values. It reaches out with a proposal for a model whose fundamental meaning is that of enabling the connections between the citizens and Europe itself to act as a permanent and circular builder of legitimacy.

The work will stem from the following premises:

i) Freedoms play a vital and overall foundational role in both the European and the domestic democratic rule of law

ii) Equalities of citizens before the European law are grounding devices for the design and promotion of most European policies

iii) Communalities and differences have been repeatedly highlighted by the crises experienced within the European Union and have marked different cleavages both in cultural and strategic terms.

iv) Communalities and differences may be portrayed in terms of gaps and tensions within the solidarity and reciprocity that citizens may reasonably – and ultimately do – expect.

Despite its essentially analytical approach, the argument developed here will also refer, in paragraph 2 and 3, to empirical evidence heuristically indicating that the design of a citizen-centered model of legitimacy is indeed promising. The last paragraph of this section II outlines a model – named 'compass' – to ensure that the rule of law mechanism, in the format put forth by the European Commission, is enriched and framed further in a more comprehensive pattern which combines representative consultations, responsive and participated design of rules, use and implementation evidence-based assessment (with a cross policy sector approach) and a reappraisal of the rules enlightened by the knowledge we gain through this cycle about the actual freedoms and equalities enjoyed by citizens as well as the different preferences citizens have in the different Member States. The model will suggest a narrative and relates to the outcomes achieved within RECONNECT.

2. The primacy of the rules we made altogether

The rule of law is both a principle and a desirable living condition, enabling individuals and social groups with different values, visions of the good life and good society, interests, origins, and prospects to live together in a peaceful and predictable context. If the ancient understanding of the term posed the illegitimate standing of any person outside the boundaries of the laws as a first ranked priority, the subsequent evolution of the notion and its *corolarium* binding any instance of power – no *legibus solutus* – may be portrayed as a long and never-ending journey

revolving around the same theme: to bind humankind by means of impersonal rules (Hart, 1971). And yet this aspect of the rule of law as a principled ideal underpinning the design of the organisation of powers must be conjoined to a second one – no less important than the first – that of the rule of law as a socially embedded notion.

Independently of the way power has been circumscribed, judicial institutions have always been placed in a critical position with respect to implementing the constitutional principle. On the one hand, courts are of paramount importance in keeping public officials accountable to the law. On the other, the judicial branch is crucial in implementing the principle of the separation of powers (Bellamy 2005). To summarize a centuries-long and convoluted story, the rule of law posits the primacy of the rules produced through transparent and politically legitimate means, fully respecting equality and freedoms, equally positing that in order to ensure the capital role of the primacy of the rules within the actual workings of power, instances of the exercise of power can never impinge on authority as a whole but will be mutually circumscribed and balanced. Accordingly, legitimacy seen as a whole comprises both *auctoritas* and *ratio juris*, where 'ratio juris' should refer to both the creation of the rules and their implementation/enforcement by means of impersonal powers/branches.

When the European dream came into being, and the founding fathers of the European Community stepped into the political arena after World War II, this abstract and perennial principle took the shape of an inspiring principle of institutional design:

From the institutional point of view, the exercise of power is amply spread out, being distributed among a variety of actors in multiple procedural combinations: the Commission, the Council, the European Parliament, and the European Court of Justice. These supranational institutions, exercising broadly-distributed and multilevel governance, enter into dialogue and negotiate with the national executive and administrative levels as in a public arena. Thus, there no longer exists a sovereign, a holder of absolute power, authoritatively exercising power as in the past. Underlying that of the production of law, we no longer find the primacy of a source such as the law of the State: in the first place, the European institutions operate through a variety of instruments of a contractual nature; not only hard but also soft law. Secondly, as far as hard law is concerned, these instruments favour acts that leave room for transposition by the Member States, respecting the general principles of the Union, including those of subsidiarity and proportionality.

Although proper analysis of the cultural heritage deserves greater space to do justice to its depth, it is worth recalling here the extent to which diversities and commonalities have always represented the building blocks of European history and, not too surprisingly, this is also the case in the contexts of the evolution – and the involution – of the European integration process.

Despite the essentially common ground portrayed in the mainstream narrative concerning the European rule of law being one of the pillars of European history and, therefore, of European identity, differences between the ways the different Member States approach the entrenchment of the rule of law in their constitutional design are patently evident. Not only does this touch directly on the role assigned – as aptly highlighted in Kochenov, 2016 – to the constitutional review of legislative acts which is mirrored in the overall pattern of the separation of powers and the consequent scope of action granted by the constitution (whether written or not, as in the UK, for example) to the ordinary court system, which, in the rule-of-

law-inspired European dream still plays a vital role as a rule enforcing mechanism, but also and above all in the differential patterns of democratic processes that unfold in between the different instances of power (Kochenov, Pech, 2016). Alongside the argument made in Rye, Koncewicz, Fasone, examining the specificities of the Italian and the Polish cases, domestic systems feature a wide range of variations when it comes to observing the dynamics of democracy, the mechanisms through which the representative (and elected) institutions are held answerable to the law and the public, and through which legitimacy is built up through consensus when the institutions engage in the process of rule-making and, lastly, when one observes the *de facto* autonomy enjoyed and the independence granted *de jure* to the oversight institutions, such as courts and technocratic bodies, namely central banks, administrative authorities, etc.

Why are these differences so important to our argument? Because they are interposed as (crucial) intervenient variables within the complex process of the legitimisation of European rule creation. In fact, the core business of constitutionalism is that of circumscribing power and thereby making fundamental rights effective and having them enforced beyond any specific conditions determined by time and space. In short, constitutionalism intimately relates to impersonal rules. As a 'theory and history-laden' concept (Laudan, 1977, Palombella, 2010; Piana, 2011), it describes the normative principle (the 'ought to be') whereby any power should be limited. Limits may equally come from different sources of norms, which should, however, be capable of ensuring both rule enforcement and legitimacy.[21] In the European space, the idea of constitutionalism has taken on different meanings and different emphases; these depend on several factors, such as the role granted to written laws in checking the exercise of power, the status granted to parliamentary sovereignty as opposed to the primacy of the constitution (even in cases where the majority could be overruled), and the role judicial institutions are expected to play in imposing limits on the actions of the public institutions (the ordinary and administrative courts).

One of the axes along which the *European norms* limit the exercise of power is the one that links the European level of rights enforcement with the national level of policy-making. In most cases, these norms are of a legal nature. They thus embody the ideal type of 'hard law' (Abbott, Snidal, 2000). However, more recently, starting from the early 2000s, the European institutions have embarked upon a comprehensive process of rule-making, the nature of which is not statutory but practical. The norms shaped through this process belong to the ideal type of 'soft law'. Despite the variegated nature of soft law – encompassing several different sub-types of normative tools – one may safely argue that soft laws are not legally binding, so their capacity to impinge upon institutional decision making is intimately related to the will of the actors endorsing these norms as normative principles or behavioural models.

Although soft law and its concrete exemplars, such as standards, guidelines, policy recommendations and so on have become the object of a flourishing scholarship, very little has been said regarding the kind of constitutionalism found where soft law stands alongside, or in the place of, hard law. In general, it may easily be argued that soft law comes from a process of rule-making that features salient differences compared with the traditional processes of

[21] This explains why societal constitutionalism is a genus of constitutionalism. This also explains why the limits do not necessarily lie within the national structure of the State. They can come from sources located outside the borders of the national legal-socio-political systems.

rule-making used to produce hard laws. If hard law is produced in the legislative arena from the interplay between the executive and the legislative, soft law is mostly unlikely to derive from the legislative rule-making process. Soft law instruments – and standards in particular – are shaped by specialised bodies, whose ties with the democratic institutions traditionally vested with the responsibility of adopting the laws are indirect if not totally absent. In some cases, standards are set by explicitly independent bodies, namely bodies whose legitimacy is substantially technocratic. In some other cases, standards and soft law instruments in general are adopted by networks of experts, partly appointed by the domestic institutions represented in these networks (Dallara, Piana, 2015). The relationship between a traditional type of constitutionalism, where power was limited through hard laws, and a new type of norm, such as soft law instruments, is therefore far from being clear and unquestionable.

Hand in hand with the entrenchment of the notion of rule of law in the European process of integration, democracy and democratic principles played an equally important role in 1) outlining the scope of action of the European institutions under recurrent waves of European renewal, and 2) setting the core identity of the European understanding of the democratic rule of law in stone when the last great enlargement came knocking at the door of the Club of the 15.

The differential functioning of democracies within the Member States – which was already a reality before the great enlargement – must be assessed in terms of a multi-dimensional analytical grid, such as the one proposed by RECONNECT to provide a comprehensive angle of observation to critically assess – without *a priori* preferences to one model of democracy – the different combinations of the same functional 'ingredients' as they featured in each member State. Two dimensions seem to be more salient than others: the balance between representative legitimacy versus technical legitimacy and the balance between freedoms and equality. This leads us to the matter of legitimacy by rules as opposed to legitimacy by results.

More than being a useful category to provide a normative framework for the process of integration – 'the ought to be game' – the distinction between legitimacy by rules and legitimacy by results is fairly meaningful to grasp the logic of action narrated by the European policy makers to justify to their stakeholders the direction and effort of the exercise of power – notably, the path and the mechanism by means of which they create the rules. This does not represent a perfect overlap with the distinction between 'input' and 'output' legitimacy, as stated in popular – but still widely debated – scholarship. Legitimacy based on compliance with the procedures is a different way of phrasing one of the several facets of the rule of law: the idea that policies gain legitimacy at their nascence insofar as they are set up and regulated in accordance with the primacy of European law – both the law *de jure condito* and the law *de jure condendo*. Legitimacy based on results is tightly linked to the experience of supranational and national institutions in the aftermath of the new public management turn, which may be equally phrased as a shift towards a more prominent role for efficiency and effectiveness as criteria to set the azimuth of the exercise of power. As rightly highlighted by Maurizio Ferrera, the European integration process, shifting toward an almost overriding focus on the results – and related normative criteria such as efficiency and effectiveness – ended up losing its soul, i.e. the 'sense of being together', one may say, recalling a well-known Weberian focus on sense-building rationality (Ferrera, 2020). This shift did not take place in concomitance with the economic crisis. Rather, it can be traced back to the mid-1990s, as a shadow cast on the future

by the imminent White Paper on Governance released by the European Commission in 2001[22] and the quest for a new governance based on good regulation, transparency, more control, more assessment, and more evidence-based policy making. The press release stresses a crucial nexus in the justification of a paradigm shift: 'Democratic institutions and the representatives of the people, at both national and European levels, can and must try to connect Europe with its citizens. This is the starting condition for more effective and relevant policies'. Distrust was rapidly to become a recurrent reason to call for a renewal of the European approach in policy making.[23] The new approach deserves a nuanced and critical appraisal: the European Commission, fully taking stock of the experience gained during the first two waves of pre-accession strategies (Cremona, 2003; Grabbe, 2005; Piana, 2006) is not going to opt for either legitimacy by rules or legitimacy by results. It is the emphasis on the second aspect – legitimacy by results – that stands as a new entry to the European discourse and relates directly to a number of further interventions in the realm of soft law that focuses on better policies, better regulation, and impact assessment. One of the recurrent points raised by the European Commission since then has been to stress the importance of continued assessment of rule implementation processes. This testifies to the shift of the promise from the pure protection of fundamental rights as entrenched in the European constitutional architecture towards a more composite set of rights and goods, delivered through a better set of methods of governance (Lebessis & Paterson, 2001; Cram, 2001a, 2001b; Wallace, 2001).

A further entry in the European legitimizing narrative is represented by the open method of coordination: 'With regard to opening up the policy process the White Pape places considerable emphasis on the 'open method of coordination …The OMC has largely been developed with reference to economic policy-making … the OMC could be part of a new approach to the process of EU governance, one which is less rule bound and 'heavy handed' and which is '... hierarchical, decentered and dynamic ...' while also giving new energy and direction to the notion of subsidiarity' (Atkinson, 2002).

Subsidiarity plays a double-sided role here. First and foremost, it calls for shared responsibility by (ideally) redistributing authority among the levels of governance (Hodson and Maher, 2001) bringing greater weight to bear on the regions and sub-national institutions in general. Secondly, it is injected into the system of governance in relation to the capacity of the local authorities to engage in policy implementation with clearer – and more demanding – responsibility in the exercise of impact assessment. The European financial programs released since 2001 incorporate this view. Rather than investing purely in solidarity, subsidiarity is a means of leverage to legitimise the European Union's method of rule-making and rule enforcement.

Certainly, during the entire first decade of the 2000s the focal points of the European narrative on the legitimacy of the method comprise several building blocks, some of them updating the foundation pillars and others new-comers. Among the new-comers we find the space for the authority left to the sub-national institutions and the burden of legitimacy on the results in

[22] See COM (2001) 428 final (n 40) C 287, Commission Communication, Further strengthening the Rule of Law within the Union. State of play and possible next steps (2001).
[23] See press release https://ec.europa.eu/commission/presscorner/detail/en/DOC_01_10

terms of goods and services provided to citizens and businesses, assessed objectively through new and structured tools of impact assessment and better regulation.

The shift towards legitimacy by results has brought about a sort of paradox. On the one hand, it creates a promising institutional window for the European Commission and related agencies that contribute to the policy-making process and project management at the European level to act as driving mechanisms for more convergence and supranational standards, on the other hand it has revealed and cast new light upon the differential capacities of the Member States and their State-centred actors to manage the policies and set up strategic projects. In a nutshell, legitimacy built on the basis of conformity to the rules appeared an easy and peaceful avenue to overcome different national interests once consensus is achieved and respect of fundamental rights is entrenched in the European constitutional architecture. But legitimacy by results seemed to be a way to strengthen European integration, providing stakeholders and strategic actors on the market with goods and services whose delivery was nonetheless made too dependent on the administrative skills of the member States and domestic patterns of decision making. The first, in fact, intervene in the policy implementation process, while the second intervene in the way the European rules – those against which legitimacy by rules would be assessed – enter the domestic legal systems and set the agenda of the national governments. The importance assumed by the results-oriented approach went hand in hand with the increasing glamour of transparency, management, and objectivity as criteria for assessing the quality of the policy making processes.

Two consequences arise from this transformation, which first took place in the Nordic Member States and continental Europe, and then, not without difficulties, in the Southern European and new Member States that adopted this approach after accession.

The first consequence stems from the higher expectations related to the result-oriented narrative. Once the core business of the European Union is worded in terms of capacity to deliver, to ensure market benefits and economic growth, the gap between the expected outcome and the results actually obtained has become an easy foothold for anti-European discourse. The strategy that consists in increasing the consensus against a Europe that does not deliver as it should – and was expected to do – suddenly becomes an easy avenue for linking Euro-scepticism to an over-simplified but not totally untruthful story that describes the quality of life of European citizens as being increasingly marked by inequalities.

If the democratic rule of law turned out to be a sufficient rationale to legitimate *ab initio* the core business of the European Union during the years spanning from the Treaty of Rome to the Treaty of Amsterdam, the governance of the entire system made by the European Union and the domestic democracies later came under the spotlight. To this should be added the discourse developed at European level and within the Member States: competitiveness, labour market mobility, and the single currency to play the role of global actor in a globalising market.

The gap between promises and delivery has had a boomerang effect on the legitimacy of the European Union, casting a dark shadow upon the very same set of rules thanks to which the EU functions. What use is the European rule of law if the life of the citizens is not improved because of it?

The second critical issue is set in the DNA of managerial universalism. The universalism of abstract principles such as the rule of law and democratic principles was meant to be rooted in the common history of the European Member States. This has also been extended to the new members and was meant to represent the core of the European model of democracy in the enlargement process – and because of it. The universalism attached to the new paradigm based on governance by results is grounded in the objectivity of managerial rationality, which measures in number and standards the quality of the goods and services offered to the citizens and the businesses by the European system – at all levels. A cognitive trap lurks in this second story, especially when a comparison between contexts, trajectories, countries, regions, and cities starts to become possible on the basis of this set of 'objective' standards. The German baker, the Polish plumber, and later slogans about Italian ports being holes in the European borders, or the claim that the Italians stand alone in the fight against illegal migration and smuggling are easily sold in the political marketplace to raise consensus by playing on the leverage of comparative discrimination or deprivation. Why is Europe so unfair? Not so much in the rules but in the resulting outcomes of the processes of policy making.

The story of the 2000s is well known: as previously mentioned, 'Only in the face of impending enlargement and a feeling of failed reform after the 2000 Intergovernmental Conference (IGC) did Europe embark on a brief phase of formal, explicit constitutionalisation' (Reh, 2009). Despite the on-going process of constitutionalisation claimed by several scholars, the very notion of a constitution structuring the European architecture once and for all has been slightly remodelled into an incremental vision where the very point is the question of what should be included in a constitution for the EU (Weiler, Wind, 2003).[24] The Lisbon Treaty, ratified after the economic crisis by means of a long process of inter-governmental negotiation and an equally demanding matrix of domestic ratifying processes through referenda or parliamentary adoption, aimed to merge the many different building blocks that have been left pending in the European discourse on legitimacy for many years:

i) The role played once again by the principled ideals of the rule of law and democracy, especially in the aftermath of the great enlargement and the need to reaffirm 'what keeps us together'.

ii) The revived role of the democratic *loci* of legitimacy through the role of the national parliaments coupled with the designed or reinforced role of the European parliament.

iii) The focus on the need for further positive integration in the former second and third pillars, which disappeared with this notion.

iv) The need to regain the trust of citizens by committing to develop a renewed ability to deliver both rights and goods.

As a matter of fact, the veneer of legitimacy initially built upon the rule of law and the rights entrenched in the law by the European Communities and subsequently by the European Union has been shown to be inadequate: on the Procrustean bed expanding the spectrum of rights,

[24] The widely known 'Does Europe need a constitution' by Juger Habermas represents a milestone in the debate. (Habermas, 2006).

enlarging the wide range of *loci* of the authorities, developing the integration of the decision-making processes followed to create the rules and dilute the target of impact; all together they represent a strong challenge to the solidity and compactness of overall legitimacy.

A promising way to detect the nodes of disruption in terms of legitimacy, clashing with the emphasis on unity in diversity that is one of the slogans attached to the momentum set in play by the Lisbon Treaty, is to investigate the policies that, for the most part, emphasize the gap between the potential enforcement of rights in terms of freedoms and equality – as assured by the rule of law and democracy – and the type of response the national and sub-national communities have received. In the following section, the policies are used as heuristic images from which the third section, referring to the results from RECONNECT, takes shape, and in which a new model is proposed.

3. Assessing the gap in the implementation of the rule of law: is it a question of a lack of legitimacy?

If any promise stands at the basis of the European project it is that of more freedom and more equality for all. This promise is entrenched in the foundational acts through which the European rule of law has been gradually built up over the decades. The same promise recurs within the narrative deployed by the European Union notably in opposition to other possible or actual models of governance – alternative models or ones that find themselves in a steady tension with the European approach, such as the Russian or American models. In short, what the European Union stands for is – in the words endorsed by the EU – a social, institutional, and cultural project promoting freedoms and equalities among citizens. Of course, this wording must find a compromise with the widely different states on the matter found in the Member States. Despite the European level of rights and safeguards, domestic systems not only differ with regard to institutional design, with specific reference to the institutions of the rule of law, but they vary considerably in terms of ability, willingness, and degree of sustainability with regard to the delivery of freedoms and equality. If one considers the empirical evidence from comparative monitoring exercises carried out by the international organisations and the European institutions themselves on the actual degree and scope of freedoms and equalities enjoyed by citizens within the different domestic systems, one cannot help but acknowledge the existence of a diversified rule of law in the experience of citizens. The normative premise underlying this paper may be worded in these terms: a fully legitimized rule of law is one that responds to citizens' demands for freedoms and equalities under conditions of inter-generational solidarity and cultural responsiveness – which means that it has to fully take into account the different lexicographic order that citizens feel must exist among different dimensions of freedoms and different equalities in the balance of security and social solidarity.

The focus suggested below zooms into the most critical aspects related to four sectors which are for different reasons crucial for the legitimacy of the European institutions. More specifically they are critical to the effectiveness of the degree of freedom and equality citizens feel to be enabled to enjoy. Justice is vital for the perceived guarantee of being treated as equal and under the highest standard of fair trial protection. Migration has a potential impact on the perception citizens have with regard to the risk of being deprived of some portion of quality of life which is measured in terms of perceived equal access to goods and services. Education and health care are core functions of the welfare state and they have gained an unprecedented importance at the EU level at the aftermath of the pandemic.

3.1 Enforcing the right to a fair trial: from the rule of law to the quality of justice

Historically, the 'rule of law-equality' matrix has been addressed by international practitioners and policy makers actively promoting the rule of law (Merryman, 1977; Sen, 2000; Scott, Trubek, 2002; Carothers, 2006; Ghai and Cotterell, 2009).[25] The link between the two sides of the coin – rule of law and equality – has been observed from different normative and methodological perspectives. Even recently, an interesting work (Pinzon Rondon et al., 2016) has pointed to the correlation between the rule of law and individual wellbeing, this being assessed against standards of life expectancy, child mortality rate, and health. This quantitative analysis follows the same line already traced by previous studies aiming to show that a fair and transparent legal environment is strongly correlated to economic development and, by this means, to better living standards (Rigobon, Sack, 2004; Haggard et al., 2008; Botero and Ponce, 2011). Although these works are not uncontested, they reveal a widespread interest in the relationship that exists between rule of law and equality. Yet, very little empirical investigation has been carried out on the connection between access to justice and equality.[26] Naturally, on the normative and prescriptive level, the link between the two (formal and institutional guarantees of equality before the law and equal access to the justice system) is accepted worldwide. In practical terms, citizens should be equal before the law and consequently in terms of access to court systems, through which laws are enforced.

Empirical observations of trials and qualitative analysis of what happens in court, as well as at the entrance to the 'castle of the law', to quote a metaphor of Kafka's, seem to reveal however that this relationship is far from genuine. To put it another way, even in sociopolitical contexts where the formal guarantees of an impartial and impersonal application of the law are well established, there is no assurance that citizens really have equal opportunities to obtain an equal answer from the justice system. In this case, 'equal' means equally predictable, equally certain in terms of timeframe and readability, and equally promptly and certainly executed (Agrast et al., 2008; Piana, 2016). For citizens, this dimension of equality is as important as the formal dimension. It is even more so for citizens who find themselves in less favourable conditions (Barendrecht, 2014; UNDP, 2013; Ostermann, 2016).

In the EU, the move towards soft law has happened in the fields where European institutions do not enjoy strong legitimacy, such as the quality of justice and the governance of the judicial systems. This may explain the rise of the 'quality of justice discourse', where the EU, together with the Council of Europe, is intensively involved in the definition of inputs that are not legally

[25] It goes without saying that the scholarship on both rule of law and the equality principle is vast: it is beyond the focus and aim of this article to address it critically and comprehensively. The authors here referred to represent different perspectives adopted to frame and observe the "equality-law" issue. The perspectives offered to international readers are plural both because of their normative premises and because of their level of analysis (national systems, transnational systems, groups, etc.).

[26] As a matter of fact, the concept of "equal access to justice" merges two principles: equality before the law and equality of opportunity. Equality before the law is the pivotal principle of the rule of law: laws have their primacy over the will of men if they hold each individual equal to any possible other. This applies (and has to apply) also to individuals who rule. Equality of opportunity points to a different principle and refers, on the other hand, to the possibility for everyone to have access to the same set of opportunities, regardless of the economic, social, cultural, and linguistic conditions under which they act. If, on the one hand, equality before the law is a procedural principle – reflected in a range of institutional mechanisms conceived to ensure that individuals are equal before the law – conversely, equality of opportunity is a substantial principle that constitutes a door the people can open and through which they may pass.

binding but normative in nature, such as recommendations, policy guidelines, standards, and so on. These inputs cast a new and comprehensive light upon the definition of the 'quality of justice'. The quality of justice (QoJ) goes beyond the constitutionalism defined above and yet requires it. If we imagine a society where justice, as delivered to the citizens, scores highly in terms of quality, we can easily guess that this means more than just the equal and impartial application of the laws, highly desirable though this may be. A citizen who interacts with a judicial institution – let's say a court – expects prompt, clear, transparent, and responsive treatment. If we want quality, we want a trial held in due time; we want courts to be managed applying appropriate rational management tools; we want access to justice ensured by means of efficient and effective mechanisms available to any right-holder. In this context, although constitutional ideals such as the right to a fair trial and limits on power, represent a *necessary condition,* they are not *sufficient* to produce 'quality justice' (Albers, 2012; Trubek, 2006).

Once the level of the ideals and the models are assessed from the citizens' point of view, alongside an evaluation of access to justice as experienced in the Member States, the issue of equality of treatment can be grasped with all its criticalities. The recently launched monitoring exercise focusing on the trajectories adopted by States to approach the standards set by the United Nations Agenda 2030 provides some useful insights.[27] Whereas data show that perceived judicial independence remains – comparatively – stable (with the exception of Poland, after 2017) in terms of differences among the Member States, the budgets that governments allocate to the justice sector vary in terms of time and country, especially in Southern European countries after the 2007 crisis. However, the most important dimension to impinge upon the quality effectively enjoyed by citizens relates to the barriers they encounter in access to justice institutions. The last World Justice Project report, based on data collected using the legal needs survey shows that cases coexist within the European Union area where access is assured by a set of services offered to citizens and business – especially in the settlement of economic and commercial disputes – but with high barriers to access, mostly though a lack of information and public awareness rather than a lack of structural conditions. Moreover, within the States themselves there are striking differences in terms of the legal services offered to citizens at subnational level. This has an uneven impact on the population, mostly affecting vulnerable groups.

3.2 Enforcing migration policy: the backsliding of the domestic Leviathans sitting at the table of King Arthur

Although authority in the justice sector is largely held by domestic institutions, under an overall umbrella of European and international soft law, migration represents a much more complex and composite area where hard law intervenes at different levels, bringing different mechanisms of influence and different competences into play, such as to actually have an impact on real and concrete situations.

Migration has been concerning industrialised societies for decades. However, only recently has its increase in numbers and pace accentuated its impact on politics. This has come about in the European Union for three related reasons. First, migrants reaching the European borders tend to move across the internal European borders and thereby affect the distribution of non-EU residents through the Member States. Secondly, the local populations do not display an even

[27] See https://ec.europa.eu/eurostat/web/sdi/peace-justice-and-strong-institutions.

attitude toward migrants: residents who feel their economic situation is at risk due to external uncertainties – in the labour market, for instance – are more inclined to associate incoming non-residents with comparative deprivation of earning opportunities, housing services, etc.[28] Thirdly, migration has created a demand for administrative services whose effectiveness and timeliness are intimately related to the overall administrative capability of the central and – even more importantly – local authorities. Migration thus challenges the distribution/legitimacy of authority connection insofar as the authorities that are expected to implement policy and enforce rules may not, by the same token, be able to deliver at the expected level of efficiency.

In practical terms, the experience of the Member States records a high degree of differentiation. According to the Eurostat dataset, of the six largest European democracies, the arrival of immigrants has mostly affected Spain and Germany, albeit at different times and at a different pace. As data show, while most of the curves are flat, there are two peaks: one in Spain around 2006/7, and, most famously, the large number of migrants accepted by Germany in 2015. These data do not include illegal migration and the subsequent waves following the peaks in smuggling waves suffered on the Italian ports and coasts over the last decade.[29] Sticking to factual analysis, the trends in international migration show different levels in Europe's major democracies, with Germany at one extreme, totaling more than 12 million migrants in 2017, and Poland at the other, with just 640.000 migrants; b) the current situation, which in Germany, France and the United Kingdom is on the rise (albeit with different intensities) while Italy and Spain have seen a slowdown, if not a slight reversal, in recent years, and in Poland where the negative trend goes on.

Moreover, flow resulting from the humanitarian crisis that has affected the Mediterranean harbors and coasts gradually reduced from around 360.000 in 2016 to 172.000 in 2017, and little more than 139.000 in 2018.[30] In 2019 (April 1st) total landings in the EU amounted to around 11,200, 524 of which in Italy, 4,866 in Greece, and over 5,546 in Spain. In addition, over 1,200 arrivals by land in Spain and over 2,500 in Greece have also to be considered. According to the European Asylum Support Office, in 2018 about 635,000 applications were registered in the member States, 593,000 of these for the first time, registering a decrease of 10 percent compared to 2017. In 2018, for the sixth consecutive year, Germany received the highest number of applications, amounting to more than 130,000, followed by France, with over 116,000 applications. In 2018, Italy received approximately 54,000 applications for asylum. In

[28] The following point has been given particular emphasis: "In addition to this diversification, immigration also has effects on other forms of (in)equality: in terms of economic equality (see above), migration poses the risk of an increase in precarious working situations. There is also a constant fear among populations that migrants might benefit too much from social protection and that, in a redistributive social system, a country's native inhabitants would have to pay for social benefits for migrants.

[29] In brief, immigration data tell us that around the year 2006/7 Spain and then, around 2015, Germany saw a certain rise in inequality since higher than usual numbers of migrants had to be integrated into these societies. Apart from these two peaks, the similarity in the percentages is striking: the six countries under consideration seem to be characterised by very similar patterns of immigration. It should also be mentioned that the curves usually stay between 0.5% and 1% of the added population through newly arriving migrants.

[30] Of these, 25,000 entered over land: about 7,000 in Spain and 18,000 in Greece.

January 2019, member States recorded about 59,000 asylum applications, of which 52,500 were submitted for the first time.[31]

Despite the facts presented above, the perception of the population seems to reveal an over-estimation of the threat of migration to the economic and social conditions of living. Data collected through the European Social Survey offered a sound empirical basis to support the interpretative hypothesis that lay behind the claim made here, i.e. the legitimacy gap arising from the lack of a fully-fledged European method to deal with the complex link between migration and the perception citizens have to run the risk of reduced access to public services (as elaborated by the author in Morlino 2020). If factual and perceived aspects are coupled, evidence of misperception emerges alongside an uneven distribution of alarm across the Member States. A dual comparative appraisal provides significant results in this respect, first looking at the same country over time and secondly in the same timeframe across different countries. Poland reveals the greatest variation combined with the highest degree of sensitiveness to the issue of migration, whereas in the UK the reaction to the presence of non-citizens residents on the national territory witnessed marked asperity from 2014, later mirrored in one of the key political issues on the basis of which the pro-Brexit wing mobilised the public and catalysed consensus. It is also worth noting that the countries experiencing the highest migration flow did not have a proportionate perception of non-resident threat. From this it may be said that pseudo-facts and misleading descriptions spread by policy makers and opinion leaders through the media have played a key role in the image European citizens have perceived with regard to the capability of the European Union to adequately govern the migration phenomenon without undermining the perception citizens have and the consequent fear of being deprived of services and goods.

The point at issue here however does not so much concern the factual data but the mismatch between the *auctoritas* and the *gubernaculum* brought to light by migration and the related phenomena. From the legal point of view, the European Union and the Member States share jurisdiction regarding border control. From the point of view of the rule of law, migration is a complex phenomenon, which calls for a combination of different legal provisions, partly drawn from the international regime of human rights and refugee protection – the well-known Dublin Convention – and partly from the constitutional guarantees protecting dignity, human rights, and protection from physical threat as laid down in the ECHR and thus binding in the European and domestic legal orders. These provisions are closely tied to the provisions that set the standard of rights protection in the sphere of freedom and equality for European citizens – dignity and protection from physical threat and inhuman treatment, which hold for them as well. Moreover, European citizens enjoy – by mere virtue of being citizens of Member States – specific rights of access to services and goods that are concrete manifestations of their enjoyment of universal rights – such as health care. In this complex matrix, there is an interplay of concomitant factors: legal provisions create both expectations of the enforcement of rights and windows for policy adoption and implementation. These are in the hands of national governments and in some crucial cases – such as on the borders of Spain and Italy along the coasts of the Mediterranean – of sub-national authorities. As aptly illustrated by Alagna, multi-level governance applied to migration policy leads to jeopardising both the freedoms actually enjoyed by EU residents and non-EU migrants, as well as equality of treatment. If this does not

[31] According to the UNHCR, in 2019 (April 1st) people who died or are considered lost in the Mediterranean totalled 288.

correspond to fact, such is the perception among laypeople and, with even more dramatic effects, that of the most vulnerable groups.

3.3 Health care: between rights and services

For many years' health care systems have been considered to come strictly under the scope of action of national governments (Aldis, 2008). If not completely neglected, they have at most been left at the wayside of the European spectrum. It may sound strange to recall this point today, when we are in the grip of a pandemic, and the European Union is calling loud and clear for integrated and coordinated action precisely in the field of the health care. However, as always, history is meaningful. The state of the health-care sector bears the scars of the long periods of initial privatisation and subsequent public budget rationalisation that took place in the 1990s and in the wake of the economic crisis. This statement holds true in different ways and with different effects for the various Member States. Once again, the first cleavage is found between the continental and the Southern European countries. In most of the Northern European countries, public expenditure on health – as illustrated in the Eurostat dataset – did not undergo marked reduction, while investment in health in the Southern European countries, under the conditions set by the austerity approach, has been considerably curtailed. Governments did not show particular interest in a long-term approach to policy making and opted more readily for the distribution of resources, reducing inequalities to access to those services and goods whose enjoyment would have a positive impact on the overall quality of life of the population across the generations – both in the health-care sector and in education. A further point that creates a differential among Member States is the adoption of a combination of private and public actors in the field of medical services. Under conditions of poorly developed standards across the national borders, health care represented a sector where inequalities had dramatic impact on the individual quality of life in many countries. The introduction of the new European directive on cross-border mobility did not solve these problems entirely. Directive 24/2011 assumes that the 'health systems in the Union are a central component of the Union's high levels of social protection, and contribute to social cohesion and social justice as well as to sustainable development. They are also part of the wider framework of services of general interest'. It also 'respects and is without prejudice to the freedom of each Member State to decide what type of healthcare it considers appropriate. No provision of this Directive should be interpreted in such a way as to undermine the fundamental ethical choices of Member States'. In this respect it does not enter into the scope of action of the domestic authorities or, in most cases, of the subnational authorities that handle the management and use of health care providers within each member State, such as medical centres, hospitals, etc. The directive 'aims to establish rules for facilitating access to safe and high-quality cross-border healthcare in the Union and to ensure patient mobility in accordance with the principles established by the Court of Justice and to promote cooperation on healthcare between Member States, whilst fully respecting the responsibilities of the Member States for the definition of social security benefits relating to health and for the organization and delivery of healthcare and medical care and social security benefits, in particular for sickness'.[32]

[32] On health care mobility with and without prior authorisation, see: https://ec.europa.eu/health/sites/health/files/cross_border_care/docs/2018_msdata_en.pdf.

After several years, however, the overall impact of the directive on access to health care has turned out to be something of a *chiaroscuro*. As shown by the Eurobarometer,[33] the information flow still remained strongly centered on the national ties between the territory and the citizens. Whereas 49% of EU nationals feel well informed about healthcare reimbursement in their own country, only 17% feel equally well informed about reimbursement in a foreign country. Essentially, health care policies have not been effectively integrated, or at the very least, coordinated. Rather, they have remained within the scope of action of the national governments. Among the member States, the varying quality of health care services delivered to citizens still exists and persists. According to the data provided by the Eurostat dataset on the approximation of the European Member States to the benchmarks set by Agenda 2030, access to medical services remains uneven, and medical needs are unmet in some countries more than in others – returning a particularly high differential. In many respects, the experience of the pandemic that hit the EU Member States in early 2020 revealed and made the evidence for the persistence of a differential Europe from the standpoint of the healthcare sector even more striking. Whereas this has not traditionally been framed as an institutional issue, citizens today dramatically feel the coexistence of different styles of policy and different paradigms of policy making in a sector whose capacity to deliver and whose access is going to impact widely and deeply on the quality of life of Euro-citizens (Morlino, 2020).

3.4 Education rights in crisis

Despite holding a marginal place in the early narrative around the promised land of a social Europe, education is unquestionably becoming a critical part of the overall system of welfare set up and carried on within the member States. Historically, this has been seen as a purely national sector, where the European Union started to work – with the introduction of the Erasmus programme, one of the most powerful and successful financial tools ever set up by the EU – as a facilitator of European mobility for students and teachers. The promotion of a European understanding of education is therefore framed in terms of access to an opportunity to strengthen curricula and to gain in terms of networking and access to the placement market once degrees are awarded. Educational trajectories, albeit still mostly defined at the national – if not at the sub-national level, as in the case of Spain or Germany, or, with regard to higher education, at the level of universities that continue to manage training design and deliver with ample room for manoeuvre – have experienced quite a high level of integration in terms of mutual recognition of the ECTS and subsequent recognition of university degrees. Despite this effect – which makes a case for the Erasmus programme as one of the more successful examples of Europeanisation – differences are still experienced by citizens both in terms of access and modernisation, especially considering the most recent digital developments. Overall impact in terms of equality is often underestimated. Education is a major factor when it comes to creating opportunities for the future: 'The underlying logic is that the more public money is spent on education, the less important different family backgrounds and parents' economic opportunities will be for children's future careers and economic possibilities. Investments in the education system thus always point to governments' attempts to curb inequalities induced by different opportunities that future generations may or may not enjoy. This also ties in with Sen's (1992) notion of looking at (in)equality not only in terms of results, but also of opportunities. Secondly, this opportunity is not only provided for the native population, but also for migrants' (Morlino, 2020). Indicators of this difference are both structural and

[33] European special issue 425.

cognitive. The national governments of the six largest democracies invest different quotas *per capita* in the educational sector: 'Poland is growing although it still has the lowest *per capita* expenses in Euro, and Italy and Spain (and to some extent also the United Kingdom) show a substantive negative trend for education after the crisis years. Looking more closely, we see the start of a decline in Italy already slightly before the economic crisis…investments in future generations were not intensified and, as a consequence, existing inequalities have not been addressed through expenditures on education'. This differential situation catalyses an exponential gap in terms of digital skills: 'In Europe, a gap between the demand for skills and the actual digital skills of European citizens remains. Such a gap is primarily caused by low skills levels, since connectivity and access to basic ICT infrastructure are widely available in Europe: 85.4% of households have access to the internet at home, 86.5% of individuals in the EU are frequent Internet users, and there are 83.9 mobile broadband subscriptions per 100 people'. As promptly highlighted by Sabine Verheyen 'It has also prompted a kind of ad-hoc digitisation, showing which countries that had invested in digital teaching and literacy and were therefore able to adapt quickly and resume teaching earlier, and those where we urgently need to upgrade. These differences in part result from the fact that the EU has few competences when it comes to education; these lie with the member States. For example, in Germany the education system is organised at federal level, with each federal state possessing legislative and administrative competences. As a result, the education systems of each federal state can be very different. In France, meanwhile, the Ministry of Education and Youth organises education policy centrally.' Once again, the pandemic of 2020 and the shift towards the digital, enhanced to ensure a minimum access to education at all levels has raised public awareness of the different conditions of citizens, especially the younger generations in the different countries (Morlino, 2020).

The three cases briefly presented here are instrumental to our argument as they exemplify a similar dynamic. The three cases refer to policy sector where the integration and the supranationalisation of the competences are all but complete. Rather, the quality of justice entered into the scope of action – even if based on soft law – only through the spilling over of the competences gained through the big enlargement and subsequently in a dialectic interaction with the European institutions; the migration policy is a new domain which emerged within the European Union at the crossroad of the border control policy, human rights protection, and humanitarian aid; health care represents a paradigmatic case of shared competence where the European voice is expressed through coordination, cross borders recognition and sharing of data, standards. However, for different reasons, the three policy sectors are all touching upon the freedoms and the equalities that are 1) promised to the citizens and 2) actually enjoyed by Euro-citizens. Therefore, the adoptions of the rules, the implementation of those rules, within the contexts where the citizens are living, and the actual responsiveness about the effects originated through the implementation process undergone by these rules are, altogether, crucial for the legitimacy of the European Union. The underlying assumption that underpins the argument put forth here refers, once again, with emphasis to the freedoms and the equalities that citizens are enjoying de facto – rather than de jure – and to the gaps that citizens are contextually experiencing when they expect their demands of rights enforcement to be met. This perspective is explicitly based on a theoretical assumption that draws two premises from different, but deeply interconnected, lines of scholarship. First and foremost, the hiatus that intrinsically and constitutively separates rules from facts occupies a distinctive position within the analytical perspective suggested here due to the impact this

hiatus has upon the life of citizens. If rules are promising a high level of rights protection and the implementation process turns out not only inefficient but more importantly uneven, the legitimacy that is expected to be built upon the quality and the value-oriented understanding of the rules ends up by being hollowed out by the gap between expected results and actually delivered outcomes. Within the functional space that divaricates rules and facts a complex matrix of factors intervenes, among which the structural configuration of power as it is distributed within each member State and across the different levels of governance within the European Union as a whole. It is telling the analysis of the migration policy and of the strategies set up by the European Union to contrast both illegal migration and smuggling waves. Who is responsible for what? And to what extent the gap between rules and facts is to be counted as the responsibility of one institution? The complexity of the implementation process undermines a clear and readable – i.e. predictable – pattern of responsibilities which may be afterward subjected to a process of accountability through the rule of law. This first point has already been recalled by scholars who pointed to the vital role played within the legitimization of the European Union by the policy implementation process. Still a further point deserves our consideration with regard to that. It is the uneven state of the Union in the very core meaning of the rule of law, not meant as a value or principle, but meant as a principled idea entrenched into the domestic constitutional politics. At the dawn of the economic crisis in several different ways the interconnection between the primacy of the rules and the democratic institutions has been reshaped. Countries experienced and still are experiencing different paths toward a 'de facto' constitutional change, where constitutional changes are here to be meant in the empirical and behavioral sense of 'changing the actual ways by means of which actors vested with authoritative powers are mutually holding themselves accountable and limited through the endorsement of the primacy of the rules principle'. This change may happen – and in fact happens – through a shift of power toward two poles of authorities: 1) the executive branches; 2) the technocratic agencies. Despite both poles may be perfectly tuned with the overarching principle of the primacy of the rules, the method by means of which rules are made turns out different in the member States, ranging from a more political centered to a more technocratic centered method. At the European level this difference finds hardly a way to figure out, at the end, a European method. More dramatically, in some countries the subversion of the rule of law itself, by means of the promulgation of rules that are fabricated through the democratic method is seriously undermining the very possibility for all the member States to find themselves on the same page when they are called to take decisions on their common destiny. The next section is going to address these points by fleshing out a concrete proposal.

4. May our cement tear us apart? The strange destiny of the rule of law in emergency times

A famous book written by Jon Ester was entitled 'The cement of society': it claimed that norms function as cement in a society only when they are fully endorsed and internalized by the individuals. Said in different terms, this is to say that 1) between norms and facts a hiatus exists and it calls for actions addressing it in a proper manner and 2) the internalization of the normative tissue that ties up individuals into a societal system may take place in different manners in different contexts. Applied this hypothesis to the European Union one may have good reasons to question whether the rule of law is the cement of the European Union to the extent to which the patterns of rule-making responsibilities that is featured by the member States – who does what for which purpose and under which conditions of formal legitimacy –

is reflecting the expected (or preferred) pattern of authority as it is experienced by citizens and stakeholders. Who must be in charge, worded in short terms, for the implementation of the rule of law according to the different citizenries that are living in the European Union?

Rephrased in these terms, this is the same question that sounds as 'what holds us together?' or more properly 'What makes each of us, singular fragments of a whole that is badly perceived and not seen, representatives of a human nature that manifests itself with uniqueness in every moment and in everywhere, instead of being scattered splinters in a sidereal space of anomia, are we vibrant actors in a system of interdependencies, which is precisely held together'?

The answer that scholars give is: 'these are the rules'. Rules or regularities of behavior? Montesquieu would say both, given that the latter can also anticipate the formalization of the former, even if the golden rule that holds societies together in peace appears to be the rule of law, indeed the rule of law. It is in that method that the rule becomes ensured by a meta-rule, which establishes the primacy, associating itself with a set of guarantees on the way in which the rules are manufactured, applied and possibly restored when they are subject to violation.

When the Berlin Wall fell and the voice of the European institutions was addressed in the countries that were approaching the experience of constitutional democracy, the rule of law played both the role of a decisive condition for entry into the European Union (we called it membership conditionality) is an identity brand of the model that the European Union felt it could adopt, also engaging in reputation in front of the global scene on what keeps us united and on what makes us Europeans precisely 'we Europeans': respect for the rule of democratic law, that is the combination of the primacy of the rules with the mechanisms of participation and representation that can be subjected to the scrutiny of the dialectic of the majority opposition and to the electoral sanction in a periodic and transparent way.

An institutional device characterizing the twentieth century was also dedicated to the primacy of the rules, also in a perspective, where necessary, against the majority, to protect it from a possible majority capable of democratically making rules detrimental to the durability of the rule of law. It was the constitutional courts. As always happens when you have to convey a message about having to be, you have to pay attention to who you are. There is no stronger message than that which is transmitted with one's actions. The need to outline our identity to say in short what the European Union is about was converging into the promotion of an ideal embedded into a set of institutional models, designed mostly on the basis of the Western European experiences, all binding to the rule of law.

When the European Union accepted, always at a negotiating table of high geopolitical value, to embark on accompanying and promoting the democratization of the countries that were leaving the Soviet bloc at the time of the fall of the Berlin Wall, an 'intangible participant' from then on he presented at the pre-accession negotiating tables: the principle of the rule of law and good governance. Technically it is called conditionality: a mechanism, already widely used within the policies to promote economic development initiated by the World Bank and the International Monetary Fund in the 1980s in order to establish a close connection between the disbursement of funds or subsidies and loans and the gradual approach of beneficiary countries to more or less defined standards of respect for the rule of law and good governance. In the case of the European Union, conditionality touched and still touches a vital issue for the national politics of countries: membership of the Union itself. That process of great

enlargement was observed as a *unicum*: a long journey in which each country faced processes of approaching the *acquis communautaire* - the law of the European Union - committing to do so at the same time as the adoption of institutional and constitutional reforms. Then the membership of the European Union arrived. For a long time, there has been debate about how much conditionality can really affect national elites: in the face of the incentives, however strategic the European Union may be - such as the promise of membership, for example - how committed can national elites be? And how deeply can these commitments bind those who will come after them in the alternation of the democratic game? That question received a strongly and dramatically negative response as Poland and Hungary, after the first decade of the 21st century, came dangerously close to forms of government that put a lot - and more and more - the guarantees of the rule of law.

Today the anchoring mechanism of the architecture - not so much of the internal spaces of the *res publica* - is linked to the forms of appeal of the Commission against a Member State before the Court of Justice of the Union or to the forms of moral suasion and blaming that the various international and supranational are legitimately able to operate. But what to do if a state exercises sovereignty in the sense of democratically protected freedom to follow what is decided by an elected majority?

The trading days of the Recovery Fund brought the issue of conditionality back to the table. Basically, linking the provision of *Next Generation EU* to respect for the rule of law would have meant creating a strong conditionality mechanism, which could have its own instrumental significance. But at the same time, linking the expected benefit of European funding to respect for the rule of law and good governance would have been an affirmation that that principle cannot be protected, promoted and defended within the European Union for other mechanisms than are those of sanctions. Even if that were the case, which institution is responsible for enforcement? And finally, what cost should be properly associated with the violation of a principle?

Posed in this way, the question makes us jump and perhaps it is wrongly posed, but the basic question remains: it would have been appropriate to connect the disbursement of funds to the respect of the principle of the rule of law in a mandatory way right from the start without delegating this part to the exercise of the implementing powers that are within the jurisdiction of the European Commission? Probably the even stronger question to ask ourselves is: even if we had connected with this principle the disbursement of funds of which effective and effective instruments is it legitimate for citizens to intervene in those national policies that have such a high value to touch their own the constitutional nerve of democracy?

The pandemic emergency has forced us to ask ourselves many new questions that will accompany us for a long time (Anderson et al, 2020; Kollias, 2020).[34] But perhaps one has arisen in these days in a clear way also in front of public opinion: in a world where we clearly share a common destiny which, as it did not happen since the postwar period, appears to be the experience of each and every one, the principles we take for granted suddenly fragile and delicate. If the protections of individual freedoms do not apply to one country, with what guarantees will citizens of other Member States feel protected as European citizens? Given that the consequences appear to be clearly affecting everyone? How porous have national borders

[34] See also the Annual Lecture of the European Integration Journal, 15th October 2020.

become so jealously protected by sovereignty, when they were crossed - and in a period of time that lasted only an instant - by the pandemic emergency? Reasoning about the relationship that can exist between the Recovery Fund and respect for the rule of law means imagining mechanisms to measure the gap between the principle and reality and tools to define to what extent that gap can be tolerable.

The lesson to be drawn in time of crisis dates back to the economic crisis undergone by the Eurozone in 2007 and 2008. By that time, the European Union based the 'cement' upon a strong and comprehensive strategy made of legal rules, procedures, and constraints – such as the Growth Pact (Heipertz and Verdun, 2010) – to ensure that the crisis would have been overcome. However, the gap between the expectations and the actual outcomes started to urge a renewal exactly because of the lack of strong mechanisms of solidarity and fairness among the member States and, consequently, among the citizenries that are living in the EU. If common rules are necessary, an empirical and participative process of assessment of the real consequences generated by the rule implementation processes unfolding within the domestic systems is equally necessary – if not more.

Instead of starting from the abstract standards, this emergency seems to have triggered a different approach, which is already mirrored into the speech delivered by the European Commission President Ursula von der Leyen.[35] The State of the Union delivered before the European Parliament in one of the most historically significant moments of the integration trajectory of the European Union are much more than the simple communicative reflection of a usual exercise of an institutional nature. In fact, in that speech there are set as in a mosaic of which we will be able to better grasp the nuances and the result in the near future new elements that the historical conjuncture of 2020 forced us to see. It has offered the opportunity, however dramatic, to rediscover what's keep us united.

Although all the conditions are in place to be able to stimulate emotions in a Europe that is crossed by both the tension and fear that derive from it connected with the difficulty of keeping the pandemic trend under control or at least under reasonable predictability, the tone adopted seeks to draw an intermediate line between empathy - the references to the difficult conditions of the people who worked in the care sectors - and the vision of the statesman - the clear reference to the inevitable game to be played and won on the international chessboard in terms of environmental protection also and above all with the most complex and elusive interlocutor, China. A tone that connects linearly with the rhythm of the discourse, marked by the great themes referring to universalism of values, the environment, solidarity, the unanimous sacrifice and the ability - precisely discovered in a period of lockdown - to go beyond consideration of one's individual life condition to contribute and ensure a sustainable condition for society as a whole. The rhythm of the speech that willingly lingers on some crucial steps that open up to what is in effect a method, not so much an assignment of policy priorities, even if this is achieved through the choice of referring to the green deal, digital and to the protection of personal data, to social and economic growth together.

The method is in fact described in terms of make change happen by design and, again, creating opportunities, not building on contingencies. These are crucial steps and are intimately linked to our way to fabricate the rules, to make the rules significant for the domestic elites and to

[35] See https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655

make the rules drivers of fairness and solidarity for the citizens. This has been said that often the political choices and strategies adopted both at European and national level - and certainly during the post-crisis 2007 period at both levels, so strongly interpenetrated - were made in reaction to contingencies. An unexpected event, the black swan effect, and in the face of the unpredictable you react by defending yourself. We defend ourselves by saving resources, saving, retreating precisely into a trench that before being practical is cognitive. We protect ourselves. But this has not per se built 'a cement', even if formally the rule of law is there, entrenched into the Lisbon Treaty and into the domestic constitutions (Sangiovanni, 2019).

Institutions should be able to do what a person alone does not have the strength, sustainability and the ability to do: instead of being on the defensive, institutions must revive. We protect ourselves by projecting ourselves into the future. And that's the point. In order to be saved, it is necessary to have the courage of vision, to know how to see the possible, not only the real. Because in the real lies the risk, in the possible lies a future that contains the seed of improvement and above all of the solutions that do not yet exist, which are in potential, which are in the world of ideas. Make the change a project done together.

This is a methodological step that must be taken up again. Making a change project together is a very difficult, exciting, but very rare thing. It is good that we tell each other sincerely. It is difficult because it requires a commitment. In short, it is the constituent method, but said in another way, to engage in architecture because then the concrete realization of what will be done along the way also depends on the road and the travel conditions, but the commitment remains and acts as a glue, even when there it confronts something that all projects have: their fragility.

A word used in the speech and which must be taken seriously. For a long time, we have perhaps believed that the limit to development lies in the allocation of resources and above all in the machines capable of managing them.

What is happening today? The rule of law seems to divide us. Precisely the role assigned to the condition of respect for the rule of law within countries that are substantially experiencing an authoritarian drift or the progressive dismantling of constitutional guarantees is generating a deadlock in the decisions that should lead to the adoption of *Next Generation EU*. This is *an impasse* that appears almost like a paradox. To sort out a way to deal with it, it would be profitable to distinguish the different aspects. The rule of law is a principle but also a set of institutional facts which together are the structural, orderly, but also functional and cultural precipitate of that principle. It is not on the principle that the question is turning. It is on the implementation of the same, not only on the formal level, but also on the cultural level. On the formal level, two levels must be distinguished: the first concerns the norms of constitutional rank and those of primary rank that govern the relationship between powers and the relationship between bearers of values and interests; the second concerns the use of those rules by the political, judicial and administrative elite. It is striking and alarming that a country like Poland which, upon entry into the European Union, qualified itself as a bulwark for the defense of constitutionalism in the eastern continental area is today the space of lacerating tensions regarding the appointment and immovability of the high judiciary, to that high magistracy we owe pronouncements in the 90s which testified to a strong and persistent dialogue with the high judges of the other European countries. It is striking that democratically elected institutions are catalysts for subversions of the rule of law that the European Union,

with the mechanisms no longer of membership conditionality, but of internal sanctions, appears to be having difficulty in arresting.

Here comes the cultural dimension, perhaps less easy to grasp with tools of numerical objectivity, but not less salient. Empirical research on the dynamics of political systems has shown in an undisputed way how much the quality of the political elite as well as the widespread culture of society can and do make a difference in the maintenance of those rules that are often introduced on the basis of decision-making logics that are of the moment but which aim to last over time. Well, the tension we feel today about the rule of law concerns what we are able to detect on the factual level - because it is then capable of giving rise to decisions on the merits - in the matter of the principle of the rule of law in effect. No problem, it could be said, it would be enough to measure the existence of the formal rules that relate precisely to the relationship between powers, to procedural guarantees, legal independence regulations of the judiciary, etc. Instead, this existence has proved necessary but far from sufficient. And perhaps, it is time that we deal with the detection of the state of health not so much with the principle as with the implementation of the principle, which depends so much on the culture and profile of those who implement those rules (Bastos and de Ruijter, 2019). In short, even if it is clear to us what the ideal cement of our societies is, it is not without importance the fact of engaging in a path where behaviors, orientations, expectations and forms of de-legitimization derived from the lack of correspondence between demand and supply of rights are measured, reported, studied and made to become a subject of public debate.[36]

Perhaps what holds us together is living in compliance with the rules and recognizing the rules as a silent and often implicit inspiring principle of our daily actions. When this is not the case, it must be detected promptly.

5. From the rule of law consultation to a permanent 'method' to regain the legitimization momentum

The rule of law mechanism has been introduced by the European Commission following upon the path sketched out since 2014 with reference to Article 7 TEU and to the subsequent political statements endorsed in 2019: 'As part of the reflections linked to the Sibiu informal European Council of 9 May 2019 and the next Strategic Agenda of the European Council, this Communication takes stock of the experience of recent years and sets out some possible avenues for reflection on future action. It draws on the existing public debate on the rule of law in the European Union and invites Union institutions and Member States, as well as other stakeholders, to contribute ideas to how the rule of law toolbox could develop in the future'. The need to strengthen the rule of law in the Member States has gained rapidly the top of the political agenda in relationship to the acknowledgement of the risky turns experienced by the Polish and the Hungarian domestic constitutional architecture as well as of the shortcoming rule of law implementation in key policy sectors, among which certainly the justice sector.

[36] The demand/response gap has recently gained the first rank in the international agenda both in terms of monitoring and policy design recommendation in the justice systems. See https://www.oecd.org/gov/building-a-business-case-for-access-to-justice.pdf and https://europeansting.com/2020/09/30/rule-of-law-first-annual-report-on-the-rule-of-law-situation-across-the-european-union/.

The importance of this must not be underestimated. The exercise that the European Commission has structured on monitoring the degree of respect for the rule of law in member countries, including a moment of listening to stakeholders, must be taken with great care and scientific and civic consideration. As a matter of fact, the link set up between the rule of law mechanism and the rule of law reporting is opening a new window where a more structured method to ensure that fairness and solidarity is effectively delivered may enter and get entrenched. The reports made available for free access on the European Commission's website show a plurality of points of view which is a fact and at the same time testifies to the need to protect a value: living in common rules and in the awareness that they are respected by all those which are parts of an interdependent system and autonomous protagonists responsible for transforming a normative principle into institutional and behavioral facts.

The proposal put forth here is inspired by two principles: on the one hand, the need to keep stakeholders, States, and media, as actors primarily involved in the rule of law implementation, engaged already at the first step of the rule of law mechanism, which is monitoring; on the other hand, the hiatus between the law and the actual state of the matter in key policy sectors such as health, education, justice, public procurement, to recall but the most critical of those, requires a cycle of monitoring, assessment, and feedback to the rule of law adoption stage which has not been fully put in place – yet. The mutual engagement of the governments in supporting *Next Generation EU* is necessary but not sufficient to ensure that fairness among the States and their citizens is effectively delivered and experienced by laypeople. Fairness means that inequalities in the real access to the opportunities, to the services, to the goods, and to the rights, if not accepted as legitimated, will jeopardize the legitimacy of the renewal of the EU through the rule of law. Fairness of the rule implementation and solidarity in the outcomes are matters of empirical monitoring. This will lead to a path-breaking proposal that takes stock of the lessons drawn from previous crisis, which casted a new light on the interplay between 'quality of the rule adoption momentum' and 'quality of rule implementation process'. *The impact assessment will be a crucial building block of a more comprehensive mechanism, where both the standard setting process and the stakeholders' participation are ensured on the principle that fairness and solidarity have to be taken into consideration into a dynamic governance process – where rule adoption, rule implementation, and feedback to the rule readjustment are tied up together into a virtuous circle.* Despite the positive side of the consultation, a clear distinction between the stage of 'listening' and the stage of the 'decision' appears necessary. Equally, the governments must be bound to take the outcomes of the reporting exercise when they adopt new rules.

In terms of a possible institutional design, this may take the shape of a triad, associated to the *mise en oeuvre* of the rule of law mechanism:

1. the academic function setting up menu of methods to assess the state of the Union from the rule of law implementation point of view. This may be done by assessing a sample of particularly sensitive policy fields, which regularly subjected to rotation.

2. the observatory function opens a dialogue to be built between the associative partners, socioeconomic and industrial perimeter;

the authority function turns on the knowledge built through the two previous pillars in institutions involved in the certification, validation and regulation and feed the outcomes of the academic and observatory functions back into the rule adoption process.

6. Conclusion: Handing over for *Next Generation EU*

To conclude, the deliverable will propose a handing over for *Next Generation EU*. The European institutions proposed harnessing the potential of the EU budget to mobilize investment and focus European financial support to revive the recovery after the pandemic.[37] This proposal includes a European emergency instrument called *Next Generation EU* which will temporarily complement the EU budget with new funding from the financial markets. The funds raised, channeled through EU programs, will support urgent measures needed to protect livelihoods, get the economy back on track, and foster sustainable and resilient growth.

At the same time, as the arguments developed in these pages encourage us to claim, the deepest root of the European renaissance after the COVID-19 emergency stands in the treasure that is named 'trust'. This is to say trust among the member States and trust among citizens. The more responsive, prospective, and courageous response that the Europe will offer to this crisis the more Europe will receive back in terms of systemic trust – trust not related to this or that leader, but trust to the European Union as the 'only game in town' that appears as the viable solution to the interdependence that characterizes our living together (Piana, 2020).

Next Generation EU is a suitable tool to promote a tight common economic policy capable of encouraging reforms that allow the Member States, once the program is over, to resume the path of growth. In particular, *Next Generation EU* is based on three pillars. The first is composed by tools to support the efforts made by the Member States to recover from the crisis, overcome its effects, and reemerge stronger. The second provides measures aimed at stimulating private investment and supporting companies in difficulty. The third is a strengthening EU strategic programs to learn from the crisis and make the single market stronger and more resilient and accelerate the dual green and digital transition. The conditions for the disbursement of funds and the rules for the subsequent supervision of their use are crucial issues. The first question concerns the relationship between grants and loans in which the instrument is divided. The second is crucial because the instrument provides conditions for the disbursement of funds and control over their use.

Among the criteria to which access to *Next Generation EU* funds should be conditioned, it was proposed to include compliance with the rule of law. Consequently, the rule of law issue has become the major political obstacle to unlock *Next Generation EU* and the EU budget funds. Indeed, negotiations have stalled due to divisions between those who reject the budget rule link - Hungary and Poland - and those who are in favor of a strong instrument, namely the Netherlands, Finland, Denmark, Sweden, Belgium and Luxembourg. For these reasons it is difficult to find a compromise. The idea of subordinating funds to comply with the rule of law could help improve the current status of the rule of law in the EU. In 2020, the annual report[38]

[37] See Conclusion of European Council of the 21 July 2020, EUCO 10/20CO EUR 8CONCL 4

[38] See COM (2020) 580 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Rule of Law Report The rule of law situation in the European Union, (2020).

of the rule of law highlighted shortcomings in the various Member States and criticized Poland in particular, pointing out that judicial independence is in danger in this Member Statetes. Furthermore, the report found that Hungary, Bulgaria, Romania, Croatia, and Slovakia have insufficiently ensured the independence of the courts. The Commission also reported corruption scandals and shortcomings in anti-corruption efforts in Bulgaria, Slovakia, Croatia, the Czech Republic, Hungary, and Malta.

Also, the Commission closely monitored the application of emergency measures during the first phase of the Covid-19 pandemic.[39] The Commission stressed that crisis response measures owe the principles and values on which the EU is founded and which are enshrined in the Treaties. Concerning emergency measures, it mainly assessed whether they were limited in time, whether their strict necessity and proportionality were guaranteed by safeguard mechanisms and whether they could be subject to parliamentary and judicial scrutiny and the surveillance of the media and civil society. Besides, the Commission has faced the problem of verifying how these powers have been attenuated or gradually removed once the first phase is over.

The Commission's report shows that the various reactions to the crisis demonstrate a strong resilience of national systems. A first consideration on the results of the report relating to pandemic measures highlights how the various bodies of the Member States have emphasized how the importance of ensuring that the urgent and effective decision-making process necessary for the protection of public health does not override the consolidated balance of powers, especially when the measures introduced affect the freedoms and fundamental rights of the population as a whole. A second consideration concerns the implications of emergency measures on the work of the media and civil society in the exercise of democratic control. In some Member States, these components of society have not had enough space and this has contributed to spreading disinformation and undermining trust in public authorities, which is damaging the rule of law. A third consideration concerns the resilience of the judicial system. The partial closure of national courts, which also act as EU courts in applying EU law, has highlighted a serious vulnerability. Some Member States have taken steps to reduce the impact of the pandemic and have been able to restart hearings. Furthermore, covid-19 crisis has given an impetus to the digitization of judicial proceedings in the several Member States.

From these considerations it is evident that the pandemic has shown that the rule of law directly affects the daily life of European citizens. For these reasons, it is necessary to take a further step to legitimize the actions of the EU and strengthen the rule of law. In the new framework outlined by *Next Generation EU*, the rule of law mechanism will have to transform itself and become a 'rule of law mechanism in action'. In this way, the authors aim to clarify that the increase in monetary and economic policy rules will have to be balanced with a mechanism that verifies the quality of the rules, their functioning, and, when necessary, allows appropriate actions to be taken to adjust the game.

This instrument could ensure further impact compared to the current rule of law mechanism. This can give us a real picture of what the current rule of law situation is like in the EU and will allow us to take the necessary actions to improve European legislation. The increasing impact

[39] See COM (2020) 580 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Rule of Law Report The rule of law situation in the European Union, (2020), 6-7.

that EU rules have on the lives of European citizens also requires a focus on the action of European institutions and European standards. In other words, it is appropriate to expand the exercise that the European Commission has structured on monitoring the degree of respect for the rule of law in the Member States and to understand when listening to the interested parties, it must be carried out with great scientific attention and consideration and supranational actors, such as financial institutions, are also civic. In this way, the link established between the rule of law mechanism and the rule of law signal can open a new window in which a more structured method can enter and entrench itself to ensure that fairness and solidarity are effectively provided. Moreover, it is opportune to enhance the reports of the European Commission trying to reach civil society and European citizens. The method suggested in this deliverable, which is inspired by the research carried on as to the 'resilience' of the notion of sovereignty, democracy, and rule of law in front of the paradigmatic transformation undergone by politics and society in the recent times – and certainly still in the next future -, suggests that a cycle made by rule crafting, rule adopting, rule implementation monitoring, social audit and scientific assessment, are tied up in a virtuous pattern of engagement where the effective capacity to deliver is checked.[40] If solidarity and reciprocity actually delivered to the European communities depend on uncertain conditions, the method adopted to deliver must be certain, predictable, and readable to citizens. The rule of law mechanism may therefore be enhanced and made into a rule of law in action mechanism merged with a scientifically rigorous assessment exercise, open to citizen, and grounded in empirical evidence. It is not a way to the heaven, but we claim that it will be promising as a way out of hell.

[40] This model is presented in Piana, 2020, chapter 6.

References

Abbott, K. W., Snidal, D. (2000), Hard and Soft Law in International Governance, *International Organization*, 54(3), 421-456.

Agrast et al., (2008), The World Justice Project Rule of Law Index: Measuring Adherence to the Rule of Law around the World, *Working Paper World Justice Project*, 2(1), 36.

Alagna, F. (2020), Shifting Governance, PhD Thesis. Enshede: Ipskamp Printing.

Albers, P. (2012), Models for time management of court procedures and managing backlog of court cases, *Report for the High Judicial Council of the Palestine's territories*.

Aldis, W. (2008), Health security as a public health concept: a critical analysis, *Health Policy and Planning*, 23(6), 369-375.

Alter, K. J. (2010), Establishing the supremacy of European law: The making of an international rule of law in Europe. Oxford: Oxford University Press.

Anderson, J. et al. (2020), Reconstructing EU after Covid 19, *Intereconomics*, 55(4), https://www.intereconomics.eu/contents/year/2020/number/4/article/reconstructing-the-eu-after-covid-19.html.

Arena, A. (2018), The Twin Doctrines of Primacy and Pre-emption. In: R. Schütze, T. Tridimas (eds.), Oxford Principles of European Union Law, vol 1: The European Union Legal Order (pp. 300-349). Oxford: Oxford University Press.

Atkinson, T. (2002), Social inclusion and the European Union, *Journal of Common Market Studies*, 40(4), 625-643.

Baquero Cruz, J. (2008), What's Left of the Law of the Integration?: Decay and Resistance in European Union Law. Oxford: Oxford University Press.

Bárd, P. (2019), The puissance of infringement procedures in tackling rule of law backsliding. *Verfassungsblog*.

Bárd, P., Carrera S., Guild E., Kochenov, D. (2016), An EU mechanism on democracy, the rule of law and fundamental rights, *CEPS Paper in Liberty and Security in Europe*.

Barendrecht, M. et al. (2014), Legal aid in Europe: Nine different ways to guarantee access to justice, *Hague Institute for the Internationalisation of Law*, 40(2), 1-121.

Basile, L., Olmastroni, F. (2020), Sharing the burden in a free riders' land: The EU migration and asylum policy in the views of public opinion and politicians, *European Journal of Political Research*, 59(4), 669-691,

Bastos, F., De Ruijter, A. (2019), Break or Bend in Case of Emergency? Rule of Law and State of Emergency in European Public Health Administration, *European Journal of Risk Regulation*, 10(4), 610-634.

Batory, A. (2016), Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU, *Public Administration*, 94(3), 685-699.

Beatty, D. M (2004), The ultimate rule of law. Oxford: Oxford University Press.

Bedner, A. (2010), An elementary approach to the rule of law, *Hague Journal on the Rule of Law*, 2(1), 48-74.

Bellamy, R. (2005), The Rule of Law and the Separation of Powers. London: Routledge.

Bellamy, R., Castiglione, D. (1997), Building the Union: The Nature of Sovereignty in the Political Architecture of Europe, *Law and Philosophy*, 16(2), 421-445.

Bermeo, N. (2016), On democratic backsliding, *Journal of Democracy*, 27(1), 5-19.

Bickerton, C. (2012), European Integration: from Nation States to Member States. Oxford: Oxford University Press.

Bifulco, R., Nato, A. (2020), The concept of sovereignty in the EU – past, present and the future, *RECONNECT Deliverable*, D4.3, https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf.

Bingham, L. (2007), The rule of law, *Cambridge Law Journal*, 66(1), 67-85.

Bingham, T. (2011), The Rule of Law, London: Penguin.

Blauberger, M., Kelemen, R. D. (2017), Can courts rescue national democracy? Judicial safeguards against democratic backsliding in the EU, *Journal of European Public Policy*, 24(3), 321-336.

Bogdanowicz, P., Schmidt, M. (2018), The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU, *Common Market Law Review*, 55(4), 1061-1100.

Bonelli, M., Claes M. (2018), Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary, *European Constitutional Law Review*, 14(3), 622-643.

Borg-Barthet, J., Lyons, C. (2016), The European Union Migration Crisis, *Edinburgh Law Review*, 20(2), 230-235.

Borowicz, A. (2017), The European Migration Crisis–Economic and Political Factors and Challenges for the Future, *European Integration Studies*, 11(1), 89-97.

Börzel, T. A. (2016), From EU governance of crisis to crisis of EU governance: Regulatory failure, redistributive conflict and Eurosceptic publics, *Journal of Common Market Studies*, 54(1), 8-31.

Botero, J. C., Ponce A. (2008), Measuring the rule of law, *Working Paper World Justice Project*.

Bugaric, B. (2014), Protecting democracy and the rule of law in the European Union: The Hungarian challenge, *Leqs Paper*.

Buras, P., Knaus, G. (2018), Where the law ends. On the collapse of the rule of law in Poland and what to do about it, *IDEA FORUM, Policy Paper*.

Burca, G. (2011), The Evolution of EU Law. Oxford: Oxford University Press.

Caldarelli, S. (2019), La sovranità statale alla prova della crisi economica e finanziaria, *Rivista AIC*, 10(1), 1-25.

Campesi, G. (2018), Crisis, migration and the consolidation of the EU border control regime, *International Journal of Migration and Border Studies*, 4(3), 196-221.

Carothers, T. (2006), The Backlash Against Democracy Promotion, *Foreign Affairs*, 6(1), 55-68.

Castelli Gattinara, P., Zamponi, L. (2020), Politicizing support and opposition to migration in France: the EU asylum policy crisis and direct social activism, *Journal of European Integration*, 42(5), 625-641.

Chesterman, S. (2008), An international rule of law?, *The American Journal of Comparative Law*, 56(2), 331-362.

Chiti, E., Texeira, P. G. (2013), The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis, *Common Market Law Review*, 50(5), 683-708.

Chronowski, N., Varju, M. (2016), Two Eras of Hungarian constitutionalism: from the rule of law to rule by law, *Hague Journal on the Rule of Law*, 8(2), 271-289.

Ciampi, A. (2018), Can the EU Ensure Respect for the Rule of Law by Its Member States? The Case of Poland. The Case of Poland (March 2, 2018), *Osservatorio sulle fonti*.

Closa, C. (2019), The politics of guarding the Treaties: Commission scrutiny of rule of law compliance, *Journal of European public policy*, 26(5), 696-716.

Closa, C., Kochenov, D. (eds.) (2016), Reinforcing Rule of Law Oversight in the European Union, Cambridge: Cambridge University Press.

Coman, R. (2016), Strengthening the Rule of Law at the Supranational Level: The Rise and Consolidation of a European Network, *Journal of Contemporary European Studies*, 24(1), 171-188.

Craig, P., de Burca, G., Weiler, J. (eds.) (2012), The Worlds of the European Constitutionalism, Cambridge: Cambridge University Press.

Cram, L. (2001a), Governance 'to Go': Domestic Actors, Institutions and the Boundaries of the Possible, *Journal of Common Market Studies*, 39(4), 595-618.

Cram, L. (2001b), Whither the Commission? Reform, renewal and the issue-attention cycle, *Journal of European Public Policy*, 8(5), 770-786.

Cremona, M. (2003), The Enlargement of the European Union. Oxford: Oxford University Press.

Crum, B. (2018), Parliamentary accountability in multilevel governance: what role for parliaments in post-crisis EU economic governance?, *Journal of European Public Policy*, 25(2), 268-286.

Dallara, C., Piana, D. (2015), Networking the Rule of Law. London: Routledge.

Daly, T. G. (2019), Democratic Decay: Conceptualising an Emerging Research Field, *Hague Journal on the Rule of Law*, 11(1), 9-36.

Dawson, M. (2015), The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance, *Journal of Common Market Studies*, 53(5), 976-993.

De Giovanni, B. (2013), Sovranità: il labirinto europeo, *Lo Stato*, 8(1), 11-37.

De Vries K., Vries K. M. (eds.) (2014), Migration and EU Law and Policy. Oxford: Oxford University Press.

De Witte, B. (2017), Exclusive Member State Competence – Is There Such a Thing? In: Garben, S., Govaere, I. (eds.), The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future (59-73). Oxford: Hart.

Delanty, G. (1995), Inventing Europe: Idea, Identity, Reality. Houndsmill & London: MacMillan Press.

Dicey, A. V. (1908), Introduction to the Study of the Law of the Constitution. London: Macmillan.

Elster, J. (2010) The Cement of the Society, Cambridge: Cambridge University Press.

Fabbrini, F. (2018), The Principle of Subsidiarity. In: Schütze, R., Tridimas, T. (eds.), Oxford Principles of European Union Law (pp. 221-242). Oxford: Oxford University Press.

Fallon, R. H. (1997), The rule of law as a concept in constitutional discourse, *Columbia Law Review*, 97(1), 1-56.

Feld, L. P., Voigt, S. (2003), Economic growth and judicial independence: cross-country evidence using a new set of indicators, *European Journal of Political Economy*, 19(3), 497-527.

Ferrera, M. (2020), Mass democracy, the welfare state and European integration: A neo-Weberian analysis, *European Journal of Social Theory*, 23(2), 165-183.

Fisicaro, M. (2019), Rule of Law Conditionality in EU Funds: The Value of Money in the Crisis of European Values, *European papers: a journal on law and integration*, 4(3), 695-722.

Follesdal, A., Hix, S. (2006), Why There Is A Democratic Deficit in the EU: A Response to Majone and Moravcsik, *Journal of Common Market Studies*, 44(3), 533-562.

Franchino, F., Mariotto, C. (2020), Politicisation and economic governance design, *Journal of European Public Policy*, 27(3), 460-480.

Fromage, D., van den Brink, T. (eds.) (2020), Parliaments in EU Economic Governance: Powers, Potential and Practice. London: Routledge.

Garben, S. (2017), Supporting Policies. In: Amtenbrink F. et al (eds.), The Handbook of European Union Law (153-170). Alphen aan den Rijn: Kluwer.

Garben, S. and Govaere, I. (2017), The division of Competence between the EU and the Member States: Reflection on the Past, the Present and the Future. In: Garben, S. and Govaere, I. (eds.), The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future (pp. 3-18). Oxford: Hart.

Garben, S. (2015), Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers, *Oxford Journal of Legal Studies*, 35(1), 55-89.

Garlicki, L. (2002), The experience of the Polish Constitutional Court. In Sadurski, W., (ed.), Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective, (pp. 265-282). New York: Kluwer Law International.

Ghai, Y., Cottrell, J. (2009), The rule of law and access to justice, in Cbe, Y. G., & Cottrell, J. (eds.), Marginalized communities and access to justice, (pp. 11-32). London: Routledge.

Gladysh, M., Sychov, V. (2020), The Influence of the Migration Crisis of 2015 on the EU Migration Policy, *Studia Europejskie-Studies in European Affairs*, 30(3), 9-23.

Goudappel, F., Hirsch Ballin, E. (eds.) (2016), Democracy and rule of law in the European Union: Essays in honour of Jaap W. de Zwaan. The Hague: Asser Press.

Govaere, I. (2011), Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations post-Lisbon, *Cambridge Yearbook of European Legal Studies*, 13(1), 87-111.

Govaere, I. (2016), To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon. London: Hart.

Grabbe, H. (2005), Regulating the flow of people across Europe. In: Schimmelfennig, F., Sedelmeier, U., The Europeanization of Central and Eastern Europe, (pp. 112-134). New York: Cornell University Press Ithaca.

Grabowska-Moroz, B., Kochenov D., Closa C. (2020), Understanding the Best Practices in the Area of the Rule of Law, *RECONNECT Deliverable*, D8.1, https://reconnect-europe.eu/wp-content/uploads/2020/05/D8.1.pdf.

Gremmelprez, F. (2019), The legal vs. political route to rule of law enforcement, *Verfassungsblog*.

Grimm, D. (1999), Constitutional Adjudication and Democracy, *Israel Law Review*, 33(2), 193-215.

Grimm, D. (2004), Integration by Constitution, *International Journal of Constitutional Law*, 3(2), 193-208

Grossi, P. (2017), L'invenzione del diritto. Bari-Roma: Laterza.

Guarnieri, C., Piana, D. (2011), Judicial Independence and the Rule of Law: Exploring the European Experience. In: Shetreet S., Forsyth, C. (eds.), The Culture of Judicial Independence, (pp. 113-124). Leiden: Martinus Nijhoff.

Haas, J. S., D'Erman, V. J., Schulz D. F., Verdun A. (2020), Economic and fiscal policy coordination after the crisis: is the European Semester promoting more or less state intervention?, *Journal of European Integration*, 42(3), 327-344.

Habermas, J. (2006), Why Europe needs a Constitution. In Rogowski R., Turner C. (eds.), The Shape of the New Europe, (pp. 25-45). Cambridge: Cambridge University Press.

Habermas, J. (2012), Questa Europa è in crisi. Roma: Laterza.

Haggard, S., MacIntyre, A., Tiede, L. (2008), The rule of law and economic development, *Annual Review of Political Science*, 11(2), 205-234.

Halmai, G. (2018), The possibility and desirability of economic sanction: Rule of law conditionality requirements against illiberal EU Member States, *EUI Department of Law Research Paper, (2018/06)*.

Hart, H. H. (1971), Bentham's of laws in general, *Rechtstheorie*, 2(1-2), 55-66.

Heipertz, M., Verdun, A. (2010), Ruling Europe: The Politics of the Stability and Growth Pact. Cambridge: Cambridge University Press.

Helbling, M. (2014), Framing immigration in Western Europe, *Journal of Ethnic and Migration Studies*, 40(1), 21–41.

Hillion, C. (2016), Overseeing the rule of law in the European Union Legal mandate and means, *European Policy Analysis*, 1(1), 1-16.

Hodson, D., Maher, I. (2001). The open method as a new mode of governance: the case of soft economic policy co-ordination, *Journal of Common Market Studies*, 39(4), 719-746.

Iusmen, I. (2015), EU Leverage and Democratic Backsliding in Central and Eastern Europe: The Case of Romania, *Journal of Common Market Studies*, 53(3), 593-608.

Jacobs, F. (2006), The sovereignty of law: The European way (The Hamlyn Lectures 2006). Cambridge: Cambridge University Press.

Jacqué, J-P. (2004), The Principle of Institutional Balance, *Common Market Law Review*, 41(2), 331-356.

Janse, R. (2019), Is the European Commission a credible guardian of the values? A revisionist account of the Copenhagen political criteria during the Big Bang enlargement, *International Journal of Constitutional Law*, 17(1), 43-65

Joerges, C. (2012), Recht und Politik in der Krise Europas: Die Wirkungsgeschichte einer verunglückten Konfiguration, *Merkur*, 66(11), 1013-1024.

Kelemen, R. D., Blauberger, M. (2017), Introducing the debate: European Union safeguards against member states' democratic backsliding, *Journal of European Public Policy*, 24(3), 317-320.

Kilpatrick, C. (2015), On the rule of law and economic emergency: The degradation of basic legal values in Europe's bailouts, *Oxford Journal of Legal Studies*, 35(2), 325-353.

Kochenov, D. (2018), Article 7 TEU: A Commentary on a Much Talked-About 'Dead' Provision, *Polish Yearbook of International Law*, 18(1), 165-187.

Kochenov, D., Pech, L. (2016), Better Late than Never: On the European Commission's Rule of Law Framework and its First Activation, *Journal of Common Market Studies*, 54(5), 1062-1074.

Kollias, C., Zouboulakis, M. (2020), COVID-19 as a Potential Accelerator. A Euro-Centric Perspective, *Peace Economics, Peace Science and Public Policy*, 26(3), 1-9.

Koncewicz, T. T. (2018), The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux, *Review of Central and East European Law*, 43(2), 116-173.

Koncewicz, T. T. (2016), National courts Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond, *Common Market Law Review*, 53(6), 1753-1792.

Koncewicz, T. T. (2019), 'Understanding Polish pacted (r)evolution(s) of 1989 and the politics of resentment of 2015–2018 and beyond', *International Journal of Constitutional Law*, 17(2), 695-715.

Koncewicz, T. T., Strother, L. (2019), The Role of Citizen Emotions in Constitutional Backsliding – Mapping Out Frontiers of New Research, *Verfassungsblog.*

Konstadinides, T. (2012), Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual limits of the Treaty's Flexibility Clause, *Yearbook of European Law*, 31(1), 227-262.

Konstadinides, T. (2018), The Competences of the Union. In: Schütze R., Tridimas, T. (eds.), Oxford Principles of European Union Law, The European Union Legal Order (pp. 105-121). Oxford: Oxford University Press.

Konstantinides, T. (2017), The Rule of Law in the European Union. The Internal Dimension. London: Hart Publishing.

Krygier, M. (2017): Why the rule of law matters, *Jurisprudence*, 1(1), 3-15.

Kutter, A. (2020), Legitimation in the European Union. A Discourse- and Field-Theoretical View. London: Palgrave.

Lacey, N. (2019), Populism and the Rule of Law, *Annual Review of Law and Social Science*, 15(1), 79-96.

Landau, D. (2013), Abusive Constitutionalism' FSU College of Law, *Public Law Research Paper No. 646*.

Laudan, L. (1977), Progress and its Problems: Toward a Theory of Scientific Growth. Berkeley: University of California Press.

Lavenex, S. (2016), Multilevelling EU external governance: the role of international organizations in the diffusion of EU migration policies, *Journal of Ethnic and Migration Studies*, 42(4), 554-570.

Leino-Sandberg, P. S. M., Saarenheimo, T. (2017), Sovereignty and subordination: On the Limits of EU Economic Policy Coordination, *European Law Review*, 42(2), 166-189.

Lenaerts, K. (2020), New Horizons for the Rule of Law Within the EU, *German Law Journal*, 21(1), 29-34.

Mader, O. (2019), Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law, *Hague Journal of Rule Law*, 11(2), 133-170.

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.

Magen, A., Pech, L. (2018), The rule of law and the European Union, in May C., Winchester A. (eds.), Handbook on the rule of law, (pp. 114-127). London: Edward Elgar Publishing.

Maravall, J. M., Przeworski, A. (2003), Democracy and the Rule of Law. Cambridge: Cambridge University Press.

Margaritis, K. (2019), Strengthening the founding values of the EU: The potential role of the Fundamental Rights Agency, *European View*, 8(1), 97-104.

Maris, G., Sklias, P. (2020), European integration and asymmetric power: dynamics and change in the EMU, in Publication Cover, *Journal European Politics and Society*, 21(5), 634-649.

Marmor, A. (2004), The rule of law and its limits, *Law and Philosophy*, 23(1), 1-43.

Meijers, M. J., van der Veer, H. (2019), MEP Responses to Democratic Backsliding in Hungary and Poland. An Analysis of Agenda-Setting and Voting Behaviour, *Journal of Common Market Studies*, 57(4), 838-856.

Merryman, J. H. (1977), Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement, *The American Journal of Comparative Law*, 25(3), 457-483.

Miglio, A. (2018), Indipendenza del giudice, crisi dello stato di diritto e tutela giurisdizionale effettiva negli Stati membri dell'Unione europea, *Diritti umani e diritto internazionale*, 18(3), 421-431.

Millet, F.-X. (2014), Respect for National Constitutional Identity. In: Azoulai L. (2014), The question of Competence in the European Union (pp. 253-266). Oxford: Oxford University Press.

Morlino, L. (2020), Equality, Freedom, and Democracy: Europe After the Great Recession. Oxford: Oxford University Press.

Morlino, L., Piana, D., Sandulli, A., Corkin, J. (2019), Working Paper on legitimacy and authority regarding the rule of law, democracy, solidarity and justice, *RECONNECT Deliverable*, D4.2, https://reconnect-europe.eu/wp-content/uploads/2020/01/D4.2.pdf.

Müller, J. W. (2014), Europe's other democracy problem: The challenge of protecting democracy and the rule of law within EU member states, *Juncture*, 21(2), 151-157.

Müller, J. W. (2015), Should the EU Protect Democracy and the Rule of Law inside Member States?, *European Law Journal*, 21(2), 141-160.

Mungiu-Pippidi, A. (2007), Is East-Central Europe Backsliding? EU Accession Is No 'End of History', *Journal of Democracy*, 18(4), 8-16.

Niklewicz, K. (2017), Safeguarding the rule of law within the EU: lessons from the Polish experience, *European View*, 16(2), 281-291.

O'Donnell, G. (2004), The quality of democracy: Why the rule of law matters, *Journal of democracy*, 15(4), 32-46.

Oliver, P., Stefanelli, J. (2016), Strengthening the Rule of Law in the EU: The Council's Inaction, *Journal of Common Market Studies*, 54(5), 1075-1084.

Ostermann, S. L. (2016), Rule of law against the odds: overcoming poverty and the high cost of compliance in the developing world, *Law & Policy*, 38(2), 101-123.

Ovádek, M. (2018), The rule of law in the EU: many ways forward but only one way to stand still?, *Journal of European Integration*, 40(4), 495-503.

Palombella, G. (2009), The Rule of Law and Its Core. In Palombella G., Walker N., (eds.), Relocating the Rule of Law. London: Hart. Available at SSRN: https://ssrn.com/abstract=1021228.

Palombella, G. (2020), The Abuse of the Rule of Law, *Hague Journal on the Rule of Law*, 12(2), 387-397.

Palombella, G., (2014), The EU's Sense of the Rule of Law and the Issue of its Oversight, *Robert Schuman Centre for Advanced Studies Research Paper No. 125*.

Palombella, L. (2010), The Rule of Law, *Comparative Sociology*, 1(1), 4-39.

Pascouau, Y. (2010), La politique migratoire de l'Union européenne : de Schengen à Lisbonne. Paris: LDGJ Publisher.

Paterson, J. B., Lebessis, N. (2001), Developing new modes of governance. In: De Schutter, O., N. Lebessis N., & Paterson J. (eds.), Governance in the European Union, (pp. 259-294). Luxemburg: Cahiers of the Forward Studies Unit.

Pech, L. (2009), The Rule of Law as a Constitutional Principle of the European Union (April 28, 2009). *Jean Monnet Working Paper Series No. 4*, Available at SSRN: https://ssrn.com/abstract=1463242 or http://dx.doi.org/10.2139/ssrn.1463242.

Pech, L. (2010), 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*, 6(3), 359-396.

Pech, L. (2016), The EU as a global rule of law promoter: the consistency and effectiveness challenges, *Asia Europe Journal*, 14(1), 7-24.

Pech, L. (2019), How to Address Rule of Law Backsliding in Romania, *Verfassungsblog*.

Pech, L., Grogan, J., et al. (2020), Unity and Diversity in National Understandings of the Rule of Law in the EU, *RECONNECT Deliverable*, D7.1, https://reconnect-europe.eu/wp-content/uploads/2020/05/D7.1-1.pdf.

Pech, L., Platon, S. (2018), Court of Justice. Judicial independence under threat: the Court of Justice to the rescue, *Common Market Law Review*, 55(6), 1827-1854.

Pech, L., Scheppele, K. (2017), Illiberalism Within: Rule of Law Backsliding in the EU, *Cambridge Yearbook of European Legal Studies*, 19(1), 3-47.

Pereira Coutinho, F. (2018), Associação Sindical dos Juízes Portugueses: judicial independence and austerity measures at the Court of Justice, *Quaderni costituzionali*, 16(3), 510-512.

Perju, V. (2013), Cosmopolitanism in Constitutional Law, in Cardozo, *Boston College Law School Legal Studies Research Paper No. 315*, available at SSRN: https://ssrn.com/abstract=2365891.

Pescatore, P. (1970), International Law and Community Law: A Comparative Analysis, *Common Market Law Review*, 7(1), 167-183.

Piana, D. (2006), Costruire la democrazia. Ai confini dello spazio pubblico europeo. Liviana, Grugliasco.

Piana, D. (2011), Rule of Law, in Badie B., Berg-Schlosser D., Morlino, L. (eds.), International Encyclopedia of Political Science, (pp. 2336-2346). Washington DC: Sage.

Piana, D. (2016), Quality of Justice as an Institutional Game. Insights from the Italian Case, *Journal des Économistes et des Études Humaines*, 22(2), 165-189.

Piana, D. (2020), Legal Services and Digital Infrastructures. A New Compass for Better Governance. London: Routledge.

Pinzon-Rondon, A. M. et altri (2016), How, When and Why Do Governance, Justice and Rule of Law Indicators Fail Public Policy Decision Making in Practice?, *Hague Journal on the Rule of Law*, 8(1), 51-74.

Platon, S. (2020), A. Court of Justice Preliminary references and rule of law: Another case of mixed signals from the Court of Justice regarding the independence of national courts: Miasto Lowicz, *Common Market Law Review*, 57(6), 1843-1866.

Przybylski, W. (2018), Explaining Eastern Europe: Can Poland's Backsliding Be Stopped?, *Journal of Democracy*, 29(3), 52-64.

Puchalska, B. (2005), Polish Democracy in Transition, *Political Studies*, 2005, 53(4), 816-832.

Rech, W. (2018), Some remarks on the EU's action on the erosion of the rule of law in Poland and Hungary, *Journal of Contemporary European Studies*, 26(3), 334-345.

Reh, C. (2009), The Lisbon Treaty: De-Constitutionalizing the European Union?, *Journal of Common Market Studies*, 47(3), 625-650.

Rigobon, R., Sack, B. (2004), The impact of monetary policy on asset prices, *Journal of Monetary Economics*, 51(8), 1553-1575.

Russel, P., O'Brien, D. (2001), Judicial Independence in the Age of Democracy. New York: University of Virginia.

Rye, L., Koncewicz, T. T., Fasone, C. (2019), Ideas of democracy and the rule of law across time and space: Developments in the EU, Poland and Italy, *RECONNECT Deliverable*, D4.1, https://reconnect-europe.eu/wp-content/uploads/2019/12/D4.1.pdf.

Sacriste, G., Vauchez, A. (2020), L'euroizzazione dell'Europa. Dall'emergere del governo dell'euro alla nuova politica europea, In: Fasone C., Lupo N., Vauchez A., Parlamenti e democrazia in Europa. Federalismi asimmetrici e integrazione differenziata, (pp. 199-218). Bologna: il Mulino.

Sadurski, W. (2018), How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding (January 17, 2018). Sydney Law School Research Paper No. 18/01, available at SSRN: https://ssrn.com/abstract=3103491 or http://dx.doi.org/10.2139/ssrn.3103491

Salati, C. (2019), The Copenhagen Dilemma Still Unsolved: Could Citizens Help in Addressing Rule of Law Backsliding? The Case of Romania. International Journal on Rule of Law, *Transitional Justice and Human Rights*, 10(10), 31-44.

Sangiovanni, A. (2019), Debating the EU's Raison d'Être: On the Relation between Legitimacy and Justice, *Journal of Common Market Studies*, 57(1), 13-27.

Sartori, G. (1964), Nota sul rapporto tra Stato di diritto e Stato di giustizia, *Rivista internazionale di filosofia del diritto*, 1(2), 310-325.

Schlipphak, B., Treib, O. (2017), Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding, *Journal of European Public Policy*, 24(3), 352-365.

Schmidt, M., Bogdanowicz, P. (2018), The infringement procedure in the rule of law crisis: how to make effective use of Article 258 TFEU, *Common Market Law Review*, 55(4), 1061-1100.

Schroeder, W. (ed.). (2016), Strengthening the rule of law in Europe: From a common concept to mechanisms of implementation. London: Bloomsbury Publishing.

Schuetze, R. (2006), Co-operative Federalism Constitutionalized: The emergence of Complementary Competence in EC Legal order, *European Law Review*, 31(2), 167-184.

Schuetze, R. (2008), Lisbon and the federal order of competences: a prospective analysis, *European Law Review*, 33(5), 709-722.

Schutze, R. (2017), Parliamentary Democracy and International Treaties, *Global Policy*, 56(8), 7-13.

Scipioni, M. (2018), Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis, *Journal of European Public Policy*, 25(9), 1357-1375.

Scott, J., Trubek, D. (2002), Mind the gap: Law and new approaches to governance in the European Union, *European Law Journal*, 8(1), 1-18.

Sedelmeier, U. (2014), Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession, *Journal of Common Market Studies*, 52(1), 105-121.

Sedelmeier, U. (2017), Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure, *Journal of European Public Policy*, 24(3), 337-351.

Sen, A. (1992), Inequality Reexamined. Oxford: Oxford University Press.

Sen, A. (2000), Social justice and the distribution of income, Handbook of income distribution, 1(1), 59-85.

Śledzińska-Simon, A., Bárd, P. (2019), The Teleos and the Anatomy of the Rule of Law in EU Infringement Procedures, *Hague Journal on the Rule of Law*, 11(4), 439-445.

Śledzińska-Simon, A., Ziółkowski, M. (2017) Constitutional identity in Poland: Is the emperor putting on new clothes of sovereignty? In: van der Schyff G., Callies C.H. (eds.) Constitutional identity in a Europe of multi-level constitutionalism, (pp. 121-134). Cambridge: University Press.

Slominski, P., Trauner, F. (2018), How do member states return unwanted migrants? The strategic (non-) use of 'Europe' during the migration crisis, *Journal of Common Market Studies*, 56(1), 101-118.

Slominski, P., Trauner, F. (2020), Reforming me softly – how soft law has changed EU return policy since the migration crisis, *West European Politics*, 20(1), 1-21.

Soyaltin-Colella, D. (2020), The EU's 'actions-without-sanctions'? The politics of the rule of law crisis in many Europes, *European Politics and Society*, 21(1), 1-17.

Spieker, L. D. (2018), From Moral Values to Legal Obligations–On How to Activate the Union's Common Values in the EU Rule of Law Crisis, *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper*, (2018-24).

Stein, R. (2009), Rule of Law: What Does it Mean?, *Minnesota Journal of International Law*, 18(2), 293-303.

Thym, D. (2013), EU migration policy and its constitutional rationale: A cosmopolitan outlook, *Common Market Law Review*, 50(3), 709-724.

Thym, D., Tsourdi, E. L. (2017), Searching for solidarity in the EU asylum and border policies: Constitutional and operational dimensions, *Maastricht Journal of European and Comparative Law*, 24(5), 605-621.

Tismaneanu, V. (2007), Is East-Central Europe Backsliding? Leninist Legacies, Pluralist Dilemmas, *Journal of Democracy*, 18(4), 34-39.

Tridimas, T. (2017), Competence, Human Rights, and Asylum: What Price Mutual Recognition? In: Garben, S., Govaere, I. (2017), The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future (pp. 151-170). Oxford: Hart.

Trubek, D. (2006), The Rule of Law, Development Assistance: Past, Present, and Future, in D. Trubek & A. Santos (eds.), The New Law and Economic Development: A Critical Appraisal (pp. 74-94). Cambridge: Cambridge University Press.

Tsourdi, E. L. (2016), Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation, *European Papers*, 2(4), 1023-1034.

Tsourdi, E. L. (2017), Solidarity at work? The prevalence of emergency-driven solidarity in the administrative governance of the Common European Asylum System, *Maastricht Journal of European and Comparative Law*, 24(5), 667-686.

Uitz, R. (2019), The Perils of Defending the Rule of Law Through Dialogue, *European Constitutional Law Review*, 15(1), 1-16.

UNDP (2013), Annual Report United Nations Development Program.

Vogliotti, M. (2013), Legalità, *Enciclopedia di diritto Annali*, 6, 371-391.

von Danwitz, T. (2014), The Rule of Law in the Recent Jurisprudence of the ECJ, *Fordham International Law Journal*, 37(5), 1314-1316.

Waibel, M. (2017), Monetary Policy: An Exclusive Competence only in Name? In: S. Garben and I. Govaere (2017), The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future (pp. 90-111). Oxford: Hart.

Waldrom, J. (1984), Theories of Rights. Oxford: Oxford University Press.

Waldron, J. (2008), The Concept and the Rule of Law (September 24, 2008). Georgia Law Review, NYU School of Law, Public Law Research Paper No. 08-50, Available at SSRN: https://ssrn.com/abstract=1273005

Walker, N. (2003), Late Sovereignty in the European Union. In: N. Walker (ed.), Sovereignty in Transition (pp. 3-32). Oxford: Hart.

Wallace, N. (2001), Whither Monetary Economics?, *International Economic Review*, 42(4), 847-869.

Weiler, J. H. H. (1991), The Transformation of Europe, *Yale Law Journal*, 100(8), 2403-2483.

Weiler, J. H. H., Wind, M. (2003), European Constitutionalism Beyond the State. Cambridge: Cambridge University Press.

Zaun, N. (2018), States as Gatekeepers in EU Asylum Politics: Explaining the Non-Adoption of a Refugee Quota System, *Journal of Common Market Studies*, 56(1), 44-62.

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