re:constitution
Working Paper

Oliver Garner

Bridging Brexit and the Values Crisis: From Constitutional Resistance to Deliberation?

working papers, Forum Transregionale Studien 33/2024

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
c/o Forum Transregionale Studien e. V., Wallotstr. 14, 14193 Berlin

Oliver Garner
Bridging Brexit and the Values Crisis: From Constitutional Resistance to Deliberation?
Working Papers, Forum Transregionale Studien 33/2024
DOI: https://doi.org/10.25360/01-2024-00001

Design: Plural | Severin Wucher

The Forum Transregionale Studien is an institutional platform for the international cooperation between scholars of different expertise and perspectives on global issues. It is funded by the Berlin Senate Department for Higher Education and Research, Health and Long-term Care.

Working Papers are available in open access via *perspectivia.net*, the publication platform of the Max Weber Stiftung.

re:constitution - Exchange and Analysis on Democracy and the Rule of Law in Europe
is a joint programme of the Forum Transregionale Studien and Democracy Reporting International, funded by Stiftung Mercator.

Abstract

This paper considers the creation of new deliberative mechanisms to address the EU's values crisis. The starting point is that recent legal and financial measures may seem to be inducing compliance by Poland and Hungary with EU Rule of Law norms. However, even if these changes are sincere, they will not address the underlying malaise of ideological disagreement. Instead, the paper proposes that the Article 7 TEU mechanism should be reformed to provide a platform for genuine deliberation between all of the Member States, with routes that may lead to EU Treaty amendment, the granting of opt-outs, or pressure upon resistant Member States to consider withdrawal under Article 50 TEU.

Keywords: Rule of Law, Hungary, Poland, EU values, withdrawal, Article 7, reform, amendment

Suggested Citation:

Oliver Garner, "Bridging Brexit and the Values Crisis: From Constitutional Resistance to Deliberation?", re:constitution Working Paper, Forum Transregionale Studien 33/2024, available at https://reconstitution.eu/working-papers.html

Bridging Brexit and the Values Crisis: From Constitutional Resistance to Deliberation?

Oliver Garner[1]

Introduction

It may have seemed that the EU's "Rule of Law crisis"[2] was finally being resolved as 2023 commenced. For the first time since 2015, action by the EU institutions induced both Hungary and Poland to adopt legislation on the organisation of their judiciaries.[3] The decisive factor appears to have been the use of financial pressure through the withholding of EU funds.[4] Nevertheless, problems on a number of fronts suggest that this will not be the silver bullet to solve the values crisis. Domestically, civil society organisations in Poland and Hungary have criticised the draft legislation as insufficient to fulfil the EU's conditions.[5] At the European level, the Court of Justice of the EU has continued to find infringements by Poland of legal provisions manifesting the EU's values.[6] More recently, the European Commission has brought a new infringement action against Warsaw for proposing a committee to examine Russian

[1] Research Leader in European Rule of Law, Bingham Centre for the Rule of Law, BIICL; Post-Doctoral Research Fellow, Managing Editor of the CEU Democracy Institute Working Paper series, and Editor of Review of Democracy, CEU Democracy Institute; re:constitution Fellow 2022-23.

[2] Anna Södersten and Edwin Hercock (eds), 'The Rule of Law in the EU: Crisis and Solutions' June 2023: 1op Swedish Institute for European Policy Studies.

[3] Paola Tamma, 'Hungary Embarks on Judicial Reform Hoping to Unlock EU Cash' (*POLITICO*, 2 May 2023) <https://www.politico.eu/article/hungary-embarks-on-judicial-reform-hoping-to-unlock-eu-cash/> accessed 19 July 2023. Jan Cienski, 'Poland's Rule of Law Legislation Moves Forward — but Fights Remain' (*POLITICO*, 13 January 2023) <https://www.politico.eu/article/poland-european-union-rule-law-legislation-moves-forward-but-fights-remain/> accessed 19 July 2023.

[4] Bernd Riegert, 'Rule of Law: EU Reprimands Poland and Hungary – DW – 07/09/2023' (*dw.com*) <https://www.dw.com/en/rule-of-law-eu-reprimands-poland-and-hungary/a-66165982> accessed 19 July 2023.

[5] 'Anna Wojcik on the EU's Approval of Poland's Recovery Funds | CEU Democracy Institute'. Nagy Bernadett, 'Q&A - Why Super Milestone 215 Is Not Achieved' (*Hungarian Helsinki Committee*, 16 May 2023) <https://helsinki.hu/en/qa-super-milestone/> accessed 16 May 2023; Hungarian Helsinki Committee, Amnesty International, and Eötvös Károly Intézet, 'Assessment of Act X of 2023 on the Amendment of Certain Laws on Justice related to the Hungarian Recovery and Resilience Plan in light of the super milestones set out in the Annex to the Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Hungary (*Hungarian Helsinki Committee*, 22 May 2023) < https://helsinki.hu/wp-content/uploads/2023/05/Assessment_of_the_Judicial_Reform_052023.pdf> accessed 20 November 2023..

[6] Nicolas Camut, 'EU Court Finds Poland Guilty in Rule-of-Law Dispute' (*POLITICO*, 5 June 2023) <https://www.politico.eu/article/eu-court-finds-poland-guilty-in-rule-of-law-dispute/> accessed 19 July 2023. Elisa Braun, 'Top EU Court Whacks Poland on Judiciary's Lack of Independence, Again' (*POLITICO*, 13 July 2023) <https://www.politico.eu/article/eu-judges-polish-courts-ignore-governments-removal-judges/> accessed 19 July 2023.

influence on the internal security of Poland ahead of the October election.[7] The recent victory in Poland by the opposition bloc led by Donald Tusk shows that there are still democratic routes to ending the rule of backsliding governments at the national level.[8] This paper, however, will focus on what can be done at the European level to confront this continuing phenomenon.

The criticism presented in this paper of the recent use of financial instruments is normative rather than focusing on efficacy. The starting proposition is that securing compliance with the values of a polity through financial incentives risks undermining genuine adherence to those foundations. Instead, it may establish and reinforce a transactional relationship.[9] In the specific supranational context of the EU, the danger is the creation of client states of Brussels, replicating "patronal" dynamics from the national level.[10] The recommendation provided here is that values conflicts cannot be solved solely through legal enforcement, but instead should be subject to political deliberation amongst constituent partners. If such mechanisms to facilitate "Voice"[11] in reaction to resistance as a deficit in "Loyalty"[12] are unsuccessful, lessons may be drawn instead from the recent novel experience of "Exit"[13] through the United Kingdom's withdrawal from the EU.

The next section provides an introduction to the "Rule of Law crisis" and the EU's response. The section after presents the Hungarian and Polish positions as resistance to supranationalism *per se*, and argues that the EU's amendment and withdrawal clauses are the mechanisms designed to address such a phenomenon. Consequently, the failures of the Article 7 TEU pre-sanctioning mechanisms are explained through this lens. The penultimate section proposes a pathway to Article 48 TEU and Article 50 TEU through reform of the Article 7 TEU procedure. This draws upon the United Kingdom experience of renegotiation before the eventual decision to withdraw. The concluding sentiment is that if everything is done to

[7] European Commission, 'Commission Launches Infringement Procedure against POLAND' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134> accessed 19 July 2023.

[8] Jan Cienski, 'Poland election results: Opposition secures win, final count shows' (*Politico*, 17 October 2023) < https://www.politico.eu/article/poland-election-results-opposition-donald-tusk-wins-final-count-civic-platform-pis/#:~:text=WARSAW%20%E2%80%94%20Poland's%20opposition%20parties%20won,Electoral%20Commission%20on%20Tuesday%20morning.> accessed 20 November 2023; Oliver Garner, 'Taking Stock: The Polish Opposition Victory and the Rule of Law', (*Review of Democracy*, 26 October 2023) < https://revdem.ceu.edu/2023/10/26/taking-stock-the-polish-opposition-victory-and-the-rule-of-law/> accessed 20 November 2023.

[9] Oliver Garner and Teodora Miljojkovic, 'What Price the Rule of Law? | Review of Democracy' (19 February 2021) <https://revdem.ceu.edu/2021/02/19/what-price-the-rule-of-law/> accessed 19 July 2023.

[10] Balint Madlovics and Balint Magyar, 'Hungary's Dubious Loyalty: Orban's Regime Strategy in the Russia-Ukraine War | CEU Democracy Institute' 2023/07 CEU Democracy Institute Working Paper <https://democracyinstitute.ceu.edu/articles/balint-madlovics-balint-magyar-hungarys-dubious-loyalty-orbans-regime-strategy-russia> accessed 19 July 2023.

[11] Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Illustrated edition, Harvard University Press 1990).

[12] Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 The Yale Law Journal 2403.

[13] Carlos Closa, 'Interpreting Article 50: Exit, Voice and … What About Loyalty?' in Carlos Closa (ed), *Secession from a Member State and Withdrawal from the European Union: Troubled Membership* (Cambridge University Press 2017) 50 <https://www.cambridge.org/core/books/secession-from-a-member-state-and-withdrawal-from-the-european-union/interpreting-article-50-exit-voice-and-what-about-loyalty/638AB5D1336CDE1F38DEC2AFF44B7069> accessed 19 July 2023.

provide a platform for resistant Member States to present their vision of European integration to their constituent partners, and these deliberations fail either to provoke adoption by the EU or adaptation through opt-outs, then that state's government should cease its resistance to integration or else cease its participation in the European Union.

1. The Rule of Law crisis and EU action

After developments in Hungary following the re-election of Viktor Orbán in Hungary in 2010 had attracted criticism from the EU and the Council of Europe,[14] the Rule of Law crisis spread and gathered steam in 2015 following changes made to the Polish Constitution Tribunal by the Law and Justice Party after their general election victory. In October 2015, before the elections, the outgoing lower house of Parliament nominated five new candidate judges for the Tribunal to replace incumbents whose term of office was set to expire after the elections.[15] In reaction, the new Law and Justice majority adopted amendments to the Act on the Constitutional Court regarding the procedure for appointing judges, adopted a resolution nullifying the election of the five judges, and proposed a new group of selections.[16] This irregularity has seen the Law and Justice nominations to the Constitutional Tribunal polemically referred to as "Fake Judges" by critical academics,[17] and claims that the "so-called" court is "captured".[18] Most pertinently for the purposes of the argument here, the Constitutional Tribunal has since delivered judgments that are hostile to supranational constitutionalism. These decisions have challenged any attempts from beyond the state to question the legitimacy of judicial structures, including those by the European Court of Human Rights[19] in addition to the Court of Justice of the EU.

In the K 3/21 decision in October 2021, the Tribunal held that the doctrines of ever closer union, the duty of sincere co-operation, and effective legal protection in Articles 1, 2, 4(3) and

[14] See Rui Tavares, 'Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)' European Parliament Committee on Civil Liberties, Justice and Home Affairs report A7-0229/2013, 24 June 2013 (2012/2130(INI)) < https://www.europarl.europa.eu/doceo/document/A-7-2013-0229_EN.html> accessed 20 November 2023; European Commission for Democracy through Law (Venice Commission) 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary', Opinion 720/2013, CDL-AD(2013)012, 17 June 2013 < https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e#:~:text=A.,-The%20protection%20of&text=Article%201%20of%20the%20Fourth,basis%20of%20the%20nation's%20survival.> accessed 20 November 2023.

[15] *Xero Flor W Polsce Sp Z O O v Poland* [2021] ECtHR 4907/18 [8].

[16] ibid [13]–[21]; Arkadiusz Radwan, 'Chess-boxing around the Rule of Law: Polish Constitutionalism at Trial' [2015] Verfassungsblog <https://verfassungsblog.de/chess-boxing-around-the-rule-of-law-polish-constitutionalism-at-trial/> accessed 3 August 2023.

[17] Laurent Pech, 'Dealing with "Fake Judges" under EU Law – RECONNECT' (14 May 2020) <https://reconnect-europe.eu/blog/dealing-with-fake-judges-under-eu-law/> accessed 3 August 2023.

[18] Tomasz Tadeusz Koncewicz, 'The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux' (2018) 43 Review of Central and East European Law 116.

[19] 'Expert Analysis of the Applicability of Article 6 of the European Convention on Human Rights to the Constitutional Courts of the States Parties, Requested by the Polish Commissioner for Human Rights in the Context of the Case K 6/21' (22 November 2021) <https://binghamcentre.biicl.org/publications/expert-analysis-of-the-applicability-of-article-6-of-the-european-convention-on-human-rights-to-the-constitutional-courts-of-the-states-parties-requested-by-the-polish-commissioner-for-human-rights-in-the-context-of-the-case-k-621> accessed 3 August 2023.

19 TEU respectively are incompatible with the Polish Constitution insofar as they allow the EU to act outside the competences conferred by Poland, undermine the Constitution as the supreme law, and mean that the "Republic of Poland may not function as a sovereign and democratic state".[20] Specifically regarding the judiciary, the Tribunal held that Article 19 TEU and the interpretation thereof by the Court of Justice of the EU is incompatible with the Constitution insofar as it grants national courts the competence to "review the legality of the procedure for appointing a judge…review the legality of the National Council of the Judiciary's resolution to refer a request to the President…to appoint a judge… [and] determine the defectiveness of the process…and refuse to regard a person appointed to judicial office…as a judge".[21] The judgment was regarded by critics as such a fundamental challenge to the precepts of EU law that it was argued to constitute a form of "legal Polexit",[22] with some commentators even making the nebulous assertion that the judgment could be construed as a formal notification of intent to withdraw under Article 50 TEU.[23] The Polish government also intervened in the functioning of the ordinary judiciary. In 2019, the Parliament enacted the Polish Supreme Court Disciplinary Chamber Law. The Chamber had the power to decide that judgments issued by ordinary judges constituted a disciplinary offence, including decisions to make preliminary references to the Court of Justice of the EU.[24] The Disciplinary Chamber was replaced with the Chamber of Professional Liability in 2022,[25] amongst warnings that the problems of the regime would remain despite the formal change.[26]

Unlike Poland, Hungary has not witnessed such a full-frontal assault on the legitimacy of EU law with regard to the organisation of the judiciary. The issue of the governing majority enacting measures affecting judges did in fact arise three years before the Polish constitutional crisis, through a lowering of the retirement age, but it was dealt with before the Court of Justice of the EU as an issue concerning non-discrimination on the basis of age rather

[20] 'Trybunał Konstytucyjny: Ocena Zgodności z Konstytucją RP Wybranych Przepisów Traktatu o Unii Europejskiej' <https://trybunal.gov.pl/en/hearings/judgments/art/11662-ocena-zgodnosci-z-konstytucja-rp-wybranych-przepisow-traktatu-o-unii-europejskiej> accessed 3 August 2023.

[21] ibid.

[22] 'Polish and EU Courts Clash as Critics Warn of Legal "Polexit"' (*www.euractiv.com*, 15 July 2021) <https://www.euractiv.com/section/politics/short_news/polish-and-eu-courts-clash-as-critics-warn-of-legal-polexit/> accessed 3 August 2023.

[23] Herwig CH Hofmann, 'Sealed, Stamped and Delivered: The Publication of the Polish Constitutional Court's Judgment on EU Law Primacy as Notification of Intent to Withdraw under Art. 50 TEU?' [2021] Verfassungsblog <https://verfassungsblog.de/sealed-stamped-and-delivered/> accessed 3 August 2023; for the counter-argument see 'Op-Ed: "Poland's Withdrawal from the 'Community of Law' Is No Withdrawal from the EU" by René Repasi' (*EU Law Live*, 15 October 2021) <https://eulawlive.com/op-ed-polands-withdrawal-from-the-community-of-law-is-no-withdrawal-from-the-eu-by-rene-repasi/> accessed 3 August 2023.

[24] 'CJEU: The Disciplinary Chamber of the Polish Supreme Court May Not Conduct Disciplinary Proceedings against Judges – Rule of Law' <https://ruleoflaw.pl/cjeu-the-disciplinary-chamber-of-the-polish-supreme-court-may-not-conduct-disciplinary-proceedings-against-judges/> accessed 3 August 2023.

[25] Daniel Tilles, 'Poland Closes Judicial Disciplinary Chamber at Heart of Dispute with EU' (*Notes From Poland*, 15 July 2022) <https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/> accessed 3 August 2023.

[26] Wojciech Sadurski, 'The Disciplinary Chamber May Go – but the Rotten System will Stay' [2021] Verfassungsblog <https://verfassungsblog.de/the-disciplinary-chamber-may-go-but-the-rotten-system-will-stay/> accessed 3 August 2023; Pawel Marcisz, 'A Chamber of Certain Liability: A Story of Latest Reforms in the Polish Supreme Court' [2022] Verfassungsblog <https://verfassungsblog.de/a-chamber-of-certain-liability/> accessed 3 August 2023.

than a systemic threat to the Rule of Law.[27] Illegitimate interference with judicial independence appears to be more insidious in Hungary, with claims being made by the spokesman for the National Judicial Council that the ruling *Fidesz* party use backdoor channels to influence judges, particularly in politically sensitive cases.[28] Regarding the constitutional court, the argument has been made that the bench has adapted itself to the regime's expectations to create "abusive constitutionalism",[29] rather than an explicit intervention in its composition being required as in Poland. Nevertheless, more recently the EU institutions have identified a number of issues that pose a challenge to the Rule of Law in Hungary. These issues include the President of the National Office for the Judiciary holding too much power over appointments, transfer, and removal of judges; insufficient suitability criteria for the President of the Supreme Court; inappropriate rules on case allocation; obstacles to judges making preliminary references such as review by the Supreme Court of the legality of such a referral; and the possibility for public authorities to challenge the finality of Constitutional Court judgments.[30]

The political response of the EU institutions to developments in Hungary and Poland was criticised for inertia. Before the pre-sanctioning mechanism for risk of breaches to the EU values in Article 7(1) TEU was activated against Poland and Hungary in 2017 and 2018 respectively, the EU procrastinated through the construction of "pre-Article 7" procedures.[31] The interventions of the Court of Justice of the EU, and the Commission in bringing infringement actions, have been regarded as more robust than the political response. The *Portuguese Judges* case set the stage for the Court to impose active obligations for the Member States to maintain the independence of their national courts and tribunals in order to ensure effective legal protection in the fields of EU law under Article 19 TEU.[32] Since 2019, the Court of Justice has found a near comprehensive range of Rule of Law violations by Poland regarding its judiciary. This includes violations of the obligation to ensure effective legal protection with regard to the independence of the Supreme Court[33] and the independence of

[27] C-286/12, *Commission v Hungary,* Judgment of 6 November 2012, ECLI:EU:C:2012:687; Gábor Halmai, 'The Early Retirement Age of the Hungarian Judges' (12 June 2017) <https://papers.ssrn.com/abstract=2985219> accessed 3 August 2023.

[28] Flora Garamvolgyi and Jennifer Rankin, 'Viktor Orbán's Grip on Hungary's Courts Threatens Rule of Law, Warns Judge' *The Observer* (14 August 2022) <https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge> accessed 3 August 2023.

[29] Nóra Chronowski and others, 'The Hungarian Constitutional Court and the Abusive Constitutionalism' (Research Center for Social Sciences of the Hungarian Academy of Sciences 2022) Working Paper <https://cadmus.eui.eu/handle/1814/74522> accessed 3 August 2023.

[30] European Commission, '2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary' SWD(2023) 817 final, 5 July 2023 < https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf> accessed 20 November 2023; 'Rule of Law-Related "Super Milestones" in the Recovery and Resilience Plans of Hungary and Poland | Think Tank | European Parliament' <https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2023)741581> accessed 3 August 2023.

[31] Dimitry Kochenov and Laurent Pech, 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction' <https://www.robert-schuman.eu/en/european-issues/0356-upholding-the-rule-of-law-in-the-eu-on-the-commission-s-pre-article-7-procedure-as-a-timid-step> accessed 8 August 2023.

[32] Case C-64/16, *Associaçáo Sindical dos Juízes Portugueses v Tribunal de Contas,* Judgment of the Court 27 February 2018, EU:C:2018:117.

[33] C-619/18*, Commission v Poland,* Judgment of the Court of 24 June 2019, ECLI:EU:C:2019:531.

the ordinary courts,[34] and through the disciplinary regime for judges[35] and the "Muzzle Law".[36] In February 2023, the Commission decided to refer an infringement proceeding concerning the Constitutional Tribunal to the Court of Justice,[37] which means that the institution in which the Rule of Law crisis in Poland began will finally be subjected to supranational scrutiny.

The independence of Hungary's judiciary has not been subjected to such extensive adjudication before the Court of Justice. The sites of open values conflict between the EU and Hungary have been over minority rights, including asylum seekers[38] and members of the LGBTQI+ community.[39] The latter infringement action may mark an important development in the EU's juridical response to the Rule of Law crisis. In the grounds for the infringement, the Commission claims that a Hungarian law that censures content that "promotes or portrays…divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for children violates not only fundamental rights contained within the Charter but also "violate[s] the common values laid down in Article 2 TEU".[40] This suggests that the Commission is attempting to "mobilise Art. 2 TEU as a standalone provision",[41] thus removing the step of determining that certain defined Treaty obligations – such as Article 19 TEU – act to instrumentalise values found in Article 2. If the Court follows the Commission's argument then this would confirm the direct justiciability of the EU's values clause.[42] Expansion into evoking Article 2 TEU values other than the Rule of Law in infringement actions has most recently been witnessed in the claim that Poland's proposed committee on Russian influence would violate the principle of democracy as enshrined in both Article 2 TEU and Article 10 TEU.[43]

In tandem with the deepening of judicial mechanisms to address Rule of Law backsliding, the most recent and significant qualitative development has been the use of financial mechanisms against Hungary and Poland. Academic proposals for sanctioning under Article 260 TFEU through the withholding of EU funding were proposed as early as 2016.[44] In May 2018, the

[34] C-192/18*, Commission v Poland,* Judgment of the Court of 5 November 2019, ECLI:EU:C:2019:924.
[35] C-791/19*, European Commission v Poland,* Judgment of 15 July 2021, ECLI:EU:C:2021:596.
[36] Case C-204/12*, Commission v Poland,* Judgment of the Court of 5 June 2023, ECLI:EU:C:2023:442.
[37] 'Commission Decides to Refer Poland' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842> accessed 8 August 2023.
[38] 'Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy' (*European Law Blog*, 2 October 2017) <https://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/> accessed 25 July 2023.
[39] Daniela Obradovic, 'Commission Refers Hungary to the Court of Justice of the EU' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2689> accessed 3 August 2023.
[40] ibid.
[41] Lena Kaiser, 'A New Chapter in the European Rule of Law Saga?: On the European Commission's attempt to mobilise Art. 2 TEU as a stand-alone provision' [2023] Verfassungsblog <https://verfassungsblog.de/a-new-chapter-in-the-european-rule-of-law-saga/> accessed 8 August 2023.
[42] Kim Lane Scheppele, Dimitry Vladimirovich Kochenov and Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union' (2020) 39 Yearbook of European Law 3.
[43] 'Commission Launches Infringement Procedure against POLAND for Violating EU Law with the New Law Establishing a Special Committee' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3134> accessed 8 August 2023.
[44] Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge

Commission first proposed a regulation on the protection of the Union's budget in the case of generalised deficiencies as regards the Rule of Law in the Member States.[45] Budgetary concerns have always been a feature of the EU's real "material constitution",[46] with one example being the United Kingdom's rebate under Margaret Thatcher.[47] However, this instrument marks an explicit recognition of these dynamics and their interrelation with the elements of the EU's "ideal constitution", such as its foundational values. The regulation in its final form was agreed on 16 December 2020,[48] yet its coming into force was delayed for more than a year following a challenge to its legality by Poland and Hungary. The framing of the "Regulation on a general regime of conditionality for the operation of the Union budget" indicates a move away from a specific instrument for targeting Rule of Law breaches. However, Article 3 of the Regulation is specific in defining breaches of the principles of the Rule of Law: endangering the independence of the judiciary; failing to prevent, correct, or sanction arbitrary or unlawful decisions by public authorities; and limiting the availability and effectiveness of legal remedies. Article 2 of the Regulation significantly marks the first comprehensive definition of "the rule of law" as enshrined in Article 2 TEU.[49]

Article 3 outlines eight conditions for when "breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way".[50]

University Press 2016) <https://www.cambridge.org/core/books/reinforcing-rule-of-law-oversight-in-the-european-union/enforcing-the-basic-principles-of-eu-law-through-systemic-infringement-actions/7266DCF95749F8DB244A87A58FE92328> accessed 8 August 2023.

[45] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States Brussels,2.5.2018 COM(2018) 324 final 2018/0136(COD) 2018.

[46] Marco Goldoni and Michael A Wilkinson (eds), *The Cambridge Handbook on the Material Constitution* (Cambridge University Press 2023) <https://www.cambridge.org/core/books/cambridge-handbook-on-the-material-constitution/FA8886C066F9757CD1AED7C94C54E68D> accessed 10 August 2023.

[47] 'The UK "rebate" on the EU Budget: An Explanation of the Abatement and Other Correction Mechanisms | Think Tank | European Parliament' <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2016)577973> accessed 10 August 2023.

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

[49] "It includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law."

[50] "(a) the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures; (b) the proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems; (c) the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union; (d) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (b) and (c); (e) the prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities; (f) the recovery of funds unduly paid; (g) effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation; (h)

Article 5 crucially outlines the measures that can be taken in reaction to such a breach, following the formal procedure under Article 6. The two situations are when the Commission engages in direct or indirect management, and where the budget is implemented under shared management with Member States. The measures include the suspension of payments; the suspension or termination of legal commitments; prohibition on entering into new legal commitments; suspension of the disbursement of instalments of loans or early repayment; suspension or reduction of economic advantage; prohibition on entering into new agreements on loans; suspension of the approval of one or more programmes; suspension of commitments; reduction of commitments; reduction of pre-financing; and interruption of payment deadlines. The Court of Justice of the EU found the Regulation to be legally valid in February 2022,[51] allowing the Commission to adopt guidelines for its use the following month.[52] The Commission officially launched a procedure against Hungary on 27 April, in September 2022 it proposed measures to the Council,[53] and in December 2022 the Council decided to impose measures due to "breaches of the principles of the rule of law in Hungary, concerning public procurement, the effectiveness of prosecutorial action and the fight against corruption in Hungary".[54]

The setting of the new EU budget in 2020, coupled with the disbursement of pandemic recovery funds, provided the necessary context of financial renewal to enable consensus between the Member States and the institutions on sanctions for Hungary and Poland.[55] Through the Regulation on the Recovery and Resilience Fund (RRF),[56] the Rule of Law budget conditionality regulation, the EU-Hungary Partnership Agreement, and the Common Provisions Regulation[57] the EU has withheld nearly 30 billion euro from Hungary.[58] Additionally, the measures adopted under the budget conditionality regulation ban Hungary

other situations or conduct of authorities that are relevant to the sound financial management of the Union budget or the protection of the financial interests of the Union.

[51] C-156/21, *Hungary v Parliament and* Council, Judgment of 16 February 2022, ECLI:EU:C:2022:97.

[52] 'EU Budget: Commission Publishes Guidance on the Conditionality Mechanism' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1468> accessed 9 August 2023.

[53] 'EU Budget: Commission Proposes Measures to the Council under the Conditionality Regulation' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5623> accessed 9 August 2023.

[54] 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion given Only Partial Remedial Action by Hungary' <https://www.consilium.europa.eu/en/press/press-releases/2022/12/12/rule-of-law-conditionality-mechanism/> accessed 9 August 2023.

[55] 'EU Budget for 2020' (11 September 2020) <https://www.consilium.europa.eu/en/policies/eu-annual-budget/2020-budget/> accessed 9 August 2023.

[56] Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility [2021] OJ L 57.

[57] Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy [2021] OJ L 231.

[58] 'Hungary's EU Cash at Risk after European Commission Concludes Reforms Fell Short – POLITICO' <https://www.politico.eu/article/brussels-eu-funds-hungary-reforms-von-der-leyen-viktor-orban-commision/> accessed 9 August 2023.

from entering into new commitments with Hungarian public interest management foundations which affects Erasmus+ funding for universities.[59]

Although the budget conditionality regulation has not been triggered against Poland, over 100 billion euro has been withheld under the RRF Regulation, the Common Provisions Regulation, and Poland's own partnership agreement.[60] Ostensibly, this monetary pressure has proven more successful than the political or legal mechanisms for addressing values breaches. In January 2023, the Polish Parliament brought forward legislation on reforming the disciplinary procedures against judges,[61] and in May 2023 the Hungarian Parliament voted for a Bill strengthening the powers of the National Judicial Council.[62] Although these measures have been criticised by civil society actors in Hungary and Poland, for example for not addressing milestones such as facilitating preliminary references,[63] this still represents the first time that EU action has provoked direct changes to Hungarian and Polish policies on Rule of Law issues, succeeding where court orders had failed despite sanctions for non-compliance.[64]

2. Values backsliding as supranational resistance?

A key assumption of this paper, which may be open to contestation, is that Poland and Hungary's rhetoric against the EU has not been just a smokescreen for the consolidation of power at the domestic level. [65] Instead, it may be presumed that the resistance of these illiberal governments to aspects of supranational integration is grounded in genuine ideological disagreement.[66] Such contestation cannot be resolved solely through financial or legal enforcement. Instead, there must be genuine political deliberation amongst constituent partners on the disagreement over foundations. Otherwise the source of the ideological

[59] 'Rule of Law Conditionality Mechanism: Council Decides to Suspend €6.3 Billion given Only Partial Remedial Action by Hungary' (n 54).
[60] 'EU Withholds All Funds from Poland, Not Just National Recovery Plan. The Government Is Silent on That Matter' (*Stowarzyszenie Sędziów Polskich Iustitia*, 8 February 2023) <https://www.iustitia.pl/en/4631-eu-withholds-all-funds-from-poland-not-just-national-recovery-plan-the-government-is-silent-on-that-matter> accessed 9 August 2023.
[61] Daniel Tilles, 'Judicial Bill Aiming to Unlock Poland's EU Funds Passes to President for Final Decision' (*Notes From Poland*, 9 February 2023) <https://notesfrompoland.com/2023/02/09/judicial-bill-aiming-to-unlock-polands-eu-funds-passes-to-president-for-final-decision/> accessed 9 August 2023.
[62] Tamma (n 3).
[63] 'Hungary's EU Cash at Risk after European Commission Concludes Reforms Fell Short – POLITICO' <https://www.politico.eu/article/brussels-eu-funds-hungary-reforms-von-der-leyen-viktor-orban-commision/> accessed 9 August 2023.
[64] 'Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute – POLITICO' <https://www.politico.eu/article/poland-record-1-million-euros-daily-fine-eu-rule-of-law-dispute/> accessed 24 July 2023.
[65] For compelling analyses of these power acquisition dynamics, see Madlovics and Magyar (n 10); 'Edit Zgut-Przybylska: Tilting the Playing Field Through Informal Power in Hungary and Poland – How Did Russia's War in Ukraine Change the EU's Approach? | CEU Democracy Institute' <https://democracyinstitute.ceu.edu/articles/edit-zgut-przybylska-tilting-playing-field-through-informal-power-hungary-and-poland-how> accessed 24 July 2023.
[66] For further discussion of the plausibility of "illiberal democracy" as a form of "constitutional identity" see Julian Scholtes, *The Abuse of Constitutional Identity in the European Union* (Oxford University Press, 2023), 136-142.

conflict will not be addressed, and instead any compliance may be insincere and secured purely through instrumental incentives.

An early and prominent example of Hungary and Poland's ideological position was provided by Viktor Orbán in a 2014 speech: "the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, [such] as freedom, etc… But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead."[67] This stands in contrast to the EU's position that the Article 2 TEU values of "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities…pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men" do indeed constitute the "central element" of constitutional organisation. The EU's approach is evident in the dicta of the Court of Justice of the European Union that "[t]he values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order."[68]

Orbán's speech also provided an early indication that illiberal Member States would not pursue withdrawal from the EU as a policy option in reaction to this disagreement, but instead believed that accommodation is possible: "When I mention the European Union, I am not doing this because I think it is impossible to build an illiberal nation state within the EU. I think this is possible. Our EU membership does not rule out this option."[69] A vision of European integration benefitting from the primary of the nation-state is also evident in a recent speech by the former Polish Prime Minister Mateusz Morawiecki in Heidelberg, Germany: "a democratic community of nations, based on an Ancient Greek, Roman and Christian heritage, one which fosters peace, freedom and solidarity, is the bedrock of European values."[70] He also issued a warning to Brussels regarding the conditions for further resistance: "If EU elites stubbornly insist on the vision of a centralized superstate, they will face the resistance of more European nations. The more they persist, the fiercer this rebellion will be."[71] From the perspective of political legitimacy, these Member States may be claiming that the EU institutions have transformed the legal orders beyond the boundaries of the competences conferred by the High Contracting Parties without sufficient input from the constituent units of the Union.

The "rebellion" of Hungary and Poland may be regarded as evident in both states' "a-legal"[72] resistance to the imposition of certain norms of EU law since 2015. The reaction by these

[67] Csaba Tóth, 'Full Text of Viktor Orbán's Speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014' (*The Budapest Beacon*, 29 July 2014) <https://budapestbeacon.com/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/> accessed 24 July 2023.
[68] Case C- 156/21, *Hungary v Council* ECLI:EU:C:2022:97, Judgment of 16 February 2022 para 127.
[69] Tóth (n 67).
[70] 'Mateusz Morawiecki at Heidelberg University - "Europe at a Historic Turning Point" - The Chancellery of the Prime Minister - Gov.Pl Website' (*The Chancellery of the Prime Minister*) <https://www.gov.pl/web/primeminister/mateusz-morawiecki-at-heidelberg-university---europe-at-a-historic-turning-point> accessed 24 July 2023.
[71] ibid.
[72] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013) <https://doi.org/10.1093/acprof:oso/9780199601684.003.0006> accessed 24 July 2023.

governments to EU action regarding domestic judicial reform and further substantive issues, such as LGBTQI+ rights,[73] represents more than simple disagreement with claims of breaches of EU law. Instead, the reaction indicates resistance to the legitimacy of supranationalism *per se* in these areas of public policy. An example is Poland's refusal to implement judgments of the Court of Justice of the European Union that would have required the suspension of the disciplinary chamber, leading to fines of 1 million EUR per day in 2021 that were then reduced to 500,000 EUR per day.[74] This episode may also be forwarded as an argument that the apparent compliance by the Law and Justice government with milestones formulated in line with the RRF Regulation before the election was insincere and that the domestic legislation proposed would not ensure adherence to supranational values. In an area which would require direct compliance with the orders of an EU institution, financial punishment has not been a strong enough incentive for Poland to implement these judgments.

Arguably, a contributing factor to why the situation has deteriorated so drastically is the fact that there has been no connection to the ultimate Treaty mechanisms designed to cope with supranational resistance: Article 48 TEU on amendment, opt-outs to create differentiation in the event of a failure to secure unanimity on Treaty change, and finally Article 50 TEU on withdrawal if the resistance remains unresolved. Instead, both Hungary and Poland have been subjected to the mechanism contained within Article 7 TEU, which was first activated against the former in December 2017[75] and the latter in September 2018.[76] Article 7 TEU is distinct from the legal and financial enforcement mechanisms used against Poland and Hungary because it mandates a political process: the relevant decision makers are the Council and the European Council, following a reasoned proposal by the supranational institutions of the Commission or the European Parliament, or 1/3 of the Member States.[77] The political process that commences is dialogical in nature: "the Council shall hear the Member State in question and may address recommendations to it".[78] However, Article 7 is designed to address certain symptoms and consequences of supranational resistance, through its focus on "a clear risk of a serious breach by a Member State of the values referred to in Article 2".[79] Although the provision does provide space for the accused Member State to present its arguments in response to such claims of breach, it does not focus on the root causes, and it does not create any pathway for the Member States to deliberate upon and initiate possible change in reaction to such resistance.

[73] Petra Guasti and Lenka Bustikova, 'Explaining the Varieties of Illiberal Backlash in Central Europe' (*Authlib*, 3 August 2023) <https://www.authlib.eu/explaining-the-varieties-of-illiberal-backlash-in-central-europe/> accessed 3 August 2023.
[74] 'Poland Hit with Record €1M Daily Fine in EU Rule-of-Law Dispute – POLITICO' (n 64); 'EU Court Slashes Daily Fine against Poland to €500K in Rule-of-Law Dispute – POLITICO' <https://www.politico.eu/article/court-justice-eu-reduce-fine-against-poland-e500k-rule-law-dispute/> accessed 24 July 2023.
[75] 'Rule of Law: European Commission Acts to Defend Judicial Independence in Poland' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367> accessed 25 July 2023.
[76] 'Texts Adopted - The Situation in Hungary - Wednesday, 12 September 2018' <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html> accessed 25 July 2023.
[77] Article 7(1) TEU.
[78] ibid.
[79] ibid.

Despite rhetoric from the executive level, neither the Hungarian nor Polish government have ever provided detailed proposals for Treaty reform. The opportunity has not presented itself because there have been no ordinary revision procedures in the 16 years since the Treaty of Lisbon in 2007, concluded three years before Viktor Orbán started his current tenure as Prime Minister of Hungary. By contrast, there were four Treaty amendments – the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, and the Treaty of Nice – in the 15 years between 1986 and 2001. The last of these came three years before Hungary and Poland acceded to the EU in 2004. These full-scale revisions of the EU's foundations enabled the United Kingdom's resistance to certain aspects of the deepening of integration to be channelled into opt-outs from the Schengen free movement zone, Economic and Monetary Union, and the Area of Freedom, Security and Justice.[80] The potential for resistance in these areas in a manner comparable to Poland and Hungary if opt-outs had not been granted did exist: before the opt-out from the Schengen *acquis* the United Kingdom advanced a legal argument that the free movement rules agreed in the Single European Act did not apply to Third Country Nationals.[81] This argument is not dissimilar to Hungary's challenges to the application of rules on asylum protection since 2015,[82] albeit in the 1980s the situation had not been settled in EU law for decades.

The similarity between Poland and Hungary's resistance and the United Kingdom's recalcitrance that was accommodated through opt-outs before its withdrawal is evident in Steve Peers' claim that "the UK…maintained for some time that the abolition of internal border controls was not part of the European integration process at all".[83] However, by contrast to the United Kingdom, Poland and Hungary have not been provided with the opportunity to carve out concessions to protect their position through the bargaining power that is afforded by the requirement of unanimity to conclude Treaty revisions. The only "hearings" that have been provided to these Member States to present their position have come through the Article 7 TEU procedure. Not only does this provision not provide a means of genuine deliberation on arguments forwarded by resistant Member States, but its design also means that it may be regarded as failing in its role as a pre-sanctioning and sanctioning mechanism to deter activity that poses a risk to the EU's foundational values.

3. The pathway to amendment and withdrawal

The failings of the Article 7 TEU procedure have been well-publicised.[84] Despite the pre-sanctioning mechanism under Article 7(1) TEU being triggered against both Hungary and Poland, the unanimity requirement under Article 7(2) in the European Council for a determination of the existence of a breach means that Hungary and Poland would have been

[80] A New Settlement for the United Kingdom within the European Union - Extract of the conclusions of the European Council of 18-19 February 2016 (1) (OJ 2016/C 69 I/01) 3.
[81] Steve Peers, *EU Justice and Home Affairs Law: Volume I: EU Immigration and Asylum Law* (Fourth Edition, Oxford University Press 2016) 70.
[82] 'Cases C-643 and C-647/15: Enforcing Solidarity in EU Migration Policy' (n 38).
[83] Peers (n 81) 68.
[84] Tom Theuns, 'The Need for an EU Expulsion Mechanism: Democratic Backsliding and the Failure of Article 7' (2022) 28 Res Publica 693.

able to engage in vetoes in respect of one another.[85] The Council has been stuck in the process of "hearings" without even moving to the step of addressing "recommendations" to either Hungary or Poland despite 6 hearings each. These hearings have been criticised for their lack of transparency as they take place behind closed doors within the Council with no obligations of publication.[86] Nevertheless, there may be some merit to this opacity due to the fact that the Member States are forced into a genuine deliberation with each other on the claimed risks of breach of values, rather than the hearings being hijacked as a means of playing to domestic audiences. Furthermore, a counter to the claims of failure could be that we may not be fully aware of the dissuasive effect that being subject to the Article 7 procedure has had upon Hungary and Poland concerning the policies that may have been adopted in the counterfactual situation that they were not subject to such proceedings.[87] The Article 7 TEU procedure has incipient promise regardless of whether its deterrent functions may be regarded as a success or a failure. The hearings under the provision allow, and indeed compel, Member States that have been accused of posing a risk to the EU's values to forward defences in a deliberative forum. However, there is no traction within the current structure of Article 7 for these hearings to be channelled into any result other than the Council seeking to adopt a recommendation, and/or press towards a vote on the existence of the risk of breach.

The proposal presented here is to reform the Article 7 TEU procedure to create a pathway to the other Treaty provisions that deal with challenge and change – Article 48 TEU and Article 50 TEU. Instrumentalising the pre-sanctioning mechanism in this way would provide it with renewed promise. A more ambitious and a more pragmatic approach may be envisaged. The former approach would be revision of the provision itself to provide a power for the Member States to agree to a fast-track amendment procedure in reaction to a Member State that has engaged in policies that may constitute a "clear risk" to the values of the EU. The latter more pragmatic approach could rely upon intergovernmental forums for discussion of and deliberation upon such resistance, which therefore would not require a prior amendment of the Treaties.

The more ambitious proposal would require unanimous approval from the Member States at the next revision of the EU Treaties to amend Article 7 TEU. Such revision could take place during the next "ordinary revision procedure" under Article 48(2)-(5) TEU. There is also precedent for a limited amendment of the Treaties in response to an emergency situation. During the Eurozone crisis the "simplified revision procedure" in Article 48(6) and (7) TEU was utilised to amend Article 136 TFEU to provide a competence to establish the European Stability Mechanism.[88] This reform was prompted by the European Council adopting the European Central Bank's "whatever it takes" mentality to ensure the economic stability of the

[85] Kim Lane Scheppele, 'Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too' [2016] Verfassungsblog <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> accessed 25 July 2023.

[86] Laurent Pech, 'From "Nuclear Option" to Damp Squib? – A Critical Assessment of the Four Article 7(1) TEU Hearings to Date – RECONNECT' (18 November 2019) <https://reconnect-europe.eu/blog/blog-fourart71teuhearings-pech/> accessed 25 July 2023.

[87] I thank an official of the European Commission during private discussions for this point.

[88] European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) OJ L 91/1.

Eurozone.[89] If the Member States were minded to regard the resistance to the EU's values as a similarly existential crisis today, then the simplified revision procedure provides a pathway to attempting a deliberative resolution.

The Member States could choose a short-term approach of utilising the simplified revision procedure directly to engage with the resistant Member State's arguments if these pertain to Part Three TFEU. Alternatively, the Member States could take a longer-term approach and choose to amend Article 7 TEU itself to provide a sustainable mechanism for deliberation on values clashes for the future. The structure of the pre-sanctioning provision could be altered so that the hearings whereby an accused Member State "submit[s] its observations" in order to present their position on the clear risk of breach of the Article 2 TEU values can be transformed into a forum for these states not only to provide a defence reactively, but also to advance pro-actively their arguments for how the Treaties or other provisions of EU law should be altered. The amended Article 7 could go further and impose an obligation upon these states to present detail on how their vision would be implemented in order to call the bluff on attempts to advance unsubstantiated assertions as a smokescreen of legitimacy for illiberal policies that are contrary to the EU's values.

The triggering of a formal amendment procedure means that the forum would be created within which opt-outs from EU law have been created in the past. However, unlike the situation in which the United Kingdom, Ireland, and Denmark received their derogations, such an amendment would have been commenced purely to deal with the situation of the resistant Member States. Therefore, they would not benefit from the capacity to veto changes coming into force that were desired by the other Member States as has been the case with past revisions of the Treaties. This would enable the other states more control over whether to grant opt-outs to the reticent Member States, and whether to impose strict forms of conditionality, such as the requirement to prove certain objective factors causing detriment to aspects of national constitutional identity as is the case for certain derogations from secondary law. For example, the narrowly defined circumstances enabling measures equivalent to quantitative restrictions on the free movement of goods under Article 36 TFEU could provide inspiration,[90] with an analogous role for the Court of Justice for the EU to determine whether such conditions have been fulfilled.

The more pragmatic model draws inspiration from the Brexit case study. The United Kingdom's attempted renegotiation of its membership of the EU in February 2016 demonstrated how intergovernmental procedures can be used to make legally binding commitments to change outside the framework of formal EU Treaty amendment. The "New Settlement for the United Kingdom within the European Union" took the form of a simplified international agreement concluded by the heads of state or government of the EU Member States acting within the European Council.[91] It was deposited with the United Nations, and it

[89] European Central Bank, 'Verbatim of the Remarks Made by Mario Draghi' (*European Central Bank*, 26 July 2012) <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> accessed 21 July 2023.
[90] These grounds are: "public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property."
[91] A New Settlement for the United Kingdom within the European Union - Extract of the conclusions of the European Council of 18-19 February 2016 (1) (OJ 2016/C 69 I/01).

would have come into force, along with the draft declarations of various EU institutions, if the United Kingdom had notified a decision to remain on 23 June 2016.[92] This indicates how an informal bridge can be constructed between proposals for amendment and decisions to remain within or leave the European Union. In a similar vein, any hypothetical future use of an *inter se* international agreement to enshrine the results of deliberation with a resistant Member State could create an analogous bridge to formal amendment of the Treaties through a condition that the revisions would come into force upon the date of a future ordinary Treaty revision under Article 48 TEU. This could allow grievances to be addressed without the need for the practical upheaval of the full amendment process.

The United Kingdom's doomed renegotiation of its membership is valuable for this debate beyond providing a template for informal change. It also demonstrated the substantive limits of the EU-27 in accommodating the demands of a recalcitrant Member State. The heads of state or government refused to grant the Prime Minister David Cameron his initial request "to reduce the current very high level of population flows from within the EU into the UK" by proposing that "people coming to Britain from the EU must live [t]here and contribute for four years before they qualify for in-work benefits or social housing" and that "we should end the practice of sending child benefits overseas".[93] Instead, the New Settlement only establishes an "emergency brake" derogation from this EU law: "an alert and safeguard mechanism that responds to situations of inflow of workers from other Member States of an exceptional magnitude over an extended period of time, including as a result of past policies following previous EU enlargements" that a Member State would only have been able to avail itself of if "such an exceptional situation exists on a scale that affects essential aspects of its social security system, including the primary purpose of its in-work benefits system, or which leads to difficulties which are serious and liable to persist in its employment market or are putting an excessive pressure on the proper functioning of its public services."[94]

The crucial normative lesson is that the EU-27 and the institutions were not willing to compromise upon one of the four freedoms of European integration, and a means of manifesting citizenship of the EU. As stated in the Decision, "Free movement of workers within the Union is an integral part of the internal market which entails, among others, the right for workers of the Member States to accept offers of employment anywhere within the Union."[95] One may assume that, in the hypothetical situation of deliberation on reforms proposed by resistant Member States in the future, the constituent partners would similarly safeguard core tenets of the EU legal order that serve as a manifestation of its values. This is particularly pertinent in light of the fact that immigration, as with the United Kingdom, has been one of the key nodes of dissatisfaction for the Polish and Hungarian governments. The New Settlement indicated that the EU will only provide a tailored regime if justified by objective and specific factors: "Host Member States may also take the necessary restrictive measures

[92] ibid, para 2.
[93] 'EU Reform: PM's Letter to President of the European Council Donald Tusk' (*GOV.UK*) <https://www.gov.uk/government/publications/eu-reform-pms-letter-to-president-of-the-european-council-donald-tusk> accessed 21 July 2023.
[94] A New Settlement for the United Kingdom within the European Union - Extract of the conclusions of the European Council of 18-19 February 2016 (1) (OJ 2016/C 69 I/01) section 2.(b).
[95] ibid Section D.

to protect themselves against individuals whose personal conduct is likely to represent a genuine and serious threat to public policy or security."[96] It is crucial that any accommodation of recalcitrance is tightly limited to circumstances that are specific to a state and threaten its ability to protect core state functions as guaranteed by Article 4(2) TEU on national constitutional identity in order to ensure that the EU is not compromising its foundational values in its attempt to keep the structure together.[97]

The reward of trusting the Member States and institutions to safeguard the values during genuine deliberation upon the resistant states' vision of integration is that it would neutralise claims that Brussels is imposing a satellite or colony status comparable to Soviet occupation. The former Prime Minister of Poland made allusion to such an imperial interpretation of the European Union during his Heidelberg speech: "The alternatives [to the nation-state] are either a technocratic utopia, which some in Brussels seem to envision, or a neo-imperialism, which has already been discredited by modern history."[98] Opening up a dialogue on the shape of European integration with a viable route to processes of Treaty amendment would undermine claims that any nation-state has been disempowered from exercising control over the supranational construct. This would ensure that both the narratives of neo-imperialism and unelected technocracy could be combated effectively.

The looming background context of Brexit that hung over the United Kingdom's renegotiation of membership in February 2016 could also inform a crucial strategic benefit for the EU side. The institutions and the other Member States could present a gambit whereby the recalcitrant Member State would be required to make a political commitment to considering their membership of the European Union in return for the opportunity to persuade the other Member States of their desired changes. In the event that these amendments were rejected, and the other states also refused any subsequent requests for opt-outs, the government of the resistant Member State would commit to making a decision in accordance with their constitutional requirements under Article 50 TEU. The withdrawal clause would retain its telos of providing a sovereign and unilateral right to withdraw in accordance with an orderly procedure, per *Wightman*,[99] because the recalcitrant Member State would be choosing to make this bargain. For the European Union, such a commitment would enable the institutions and other Member States to engage in a form of *Realpolitik* brinkmanship that is currently unavailable. The European side could induce a zero-sum game for the resistant Member State whereby if it cannot persuade its constituent partners to adapt European integration to its vision then it should either cease its resistance, or cease participation in the European project.

These proposals can be subject to a number of criticisms that are both pragmatic and principled.[100] The most obvious criticism of these proposals is that they would reward illiberal

[96] ibid Section D1.(c).
[97] Oliver Garner, 'Squaring the PSPP Circle: How a "declaration of incompatibility" can reconcile the supremacy of EU law with respect for national constitutional identity' [2020] Verfassungsblog <https://verfassungsblog.de/squaring-the-pspp-circle/> accessed 21 July 2023.
[98] 'Mateusz Morawiecki at Heidelberg University - "Europe at a Historic Turning Point" - The Chancellery of the Prime Minister - Gov.Pl Website' (n 70).
[99] Case C-621/18, *Wightman v Secretary of State for Exiting the European Union,* Judgment of 10 December 2018, ECLI:EU:C:2018:999.
[100] I thank the participants in the European Policy Centre Lunch & Learn meeting on 25 May 2023 and the re:constitution fellows talk on 8 June 2023 for informing these criticisms.

policies by providing Member States with an opportunity to pursue their agenda through Treaty change. Connecting the procedures for addressing a risk of breach of the EU values to the means for amending the Treaty may send a message that the values of the EU are not only violable, but may be subject to negotiation. The broader consequentialist risk is that such a mechanism would open a Pandora's box whereby Member States may deliberately seek to engage in behaviour contrary to the letter and spirit of the EU Treaties as a means to try and induce change in the system. This could set up a clash with the Court of Justice if Member States were tempted to interfere with foundational principles such as primacy and direct effect. The possibility of any resistance opening up amendment procedures could also create further incentives for non-backsliding Member States to pursue derogations and opt-outs.

Further pragmatic concerns may be raised over whether there would be sufficient political will among Member States to engage in a negotiation process that could be regarded as sanctioning, given the reticence over the Article 7 proceedings. Furthermore, any informal connection to withdrawal may be rejected for fear by the other Member States that this could jeopardise their position in the EU if they were to find themselves in a resistant position in the future. This pragmatic critique could be summarised in the argument that the potential incentives for the Member States to create such an amendment procedure arising out of Article 7 TEU do not outweigh the potential risks. One may also criticise the proposals for assuming that the resistant Member States wish to engage in a good faith process of initiating change towards their vision of integration. If this is not a genuine preference, and these governments are simply advancing such arguments as a means of cementing their position at the national level, then they would not have a motivation to initiate a risky process of supranational change. Again, the criticism may be summarised as a lack of incentives for these Member States to engage with such a mechanism.

A substantive safeguard to address the criticisms of jeopardising EU values would be to impose strict conditions and limitations on what areas could be subject to amendments and possible opt-outs, excluding certain areas from deliberation such as the Charter of Fundamental Rights.[101] One could also envisage limited triggering conditions for when opt-outs may be granted, such as when there is a proposal for an area to move from unanimity to Qualified Majority Voting. This would replicate the context behind the United Kingdom's opt-outs, when the resistance was to deepening of integration rather than attempts to renege upon commitments the state had already entered into.[102] A further procedural mechanism to ensure that any such reforms do not compromise the integrity and autonomy of the EU legal order could be the creation of a fast-track and/or automatic Opinion mechanism to the Court of Justice of the EU analogous to the Opinion mechanism when entering into international agreements as established by Article 218(11) TFEU.

[101] See proposals for imposing conditions upon the creation of opt-outs in Oliver Garner, 'Constitutional Disintegration and Disruption : Withdrawal and Opt-Outs from the European Union' (Thesis, European University Institute 2020) <https://cadmus.eui.eu/handle/1814/67670> accessed 27 July 2023; Oliver Garner, 'Reforming Withdrawal and Opt-Outs from the European Union: A Dual-Constituent Perspective' (19 December 2018) <https://papers.ssrn.com/abstract=3303938> accessed 27 July 2023.

[102] With the partial exception of Protocol (No 36), which allowed the UK to engage in a wholesale opt-out from judicial and police co-operation measures that had previously applied when this area moved away from unanimity voting.

A more modest form of the proposal would abandon the idea of reforming Article 7 TEU to create a constitutional mechanism with conditions to trigger deliberation and reform; instead, the proposal could be made that the heads of state or government should initiate such discussions purely at the European Council level in a manner similar to the United Kingdom's New Settlement, and with any results to be enshrined in an *inter se* international agreement that could create binding commitments for the next Treaty reform. The use of international law in this way could also enshrine political commitments regarding withdrawal if the other heads of state or government wished to impose pressure upon the resistant Member States, without any general duties being imposed through the EU Treaties. The use of international agreements in relation to the Treaties may be subject to criticism as a less constitutional means of commitment building that excludes the supranational institutions and individuals as EU citizens. Ultimately, however, the objective is to ensure that there is genuine deliberation on the resistance by certain Member States rather than the imposition of sanctioning that may undermine equality between constituent partners. With regard to the incentives for the other Member States, however, it could be posited that if deliberation does fail and resistant Member States continue with such policies then this would enable the conscience of the other Member States and EU institutions to be clear in pursuing harsh punitive measures.

Conclusion

The use of financial pressure by the European Union to prevent values backsliding may secure what appear to be the right results, but for the wrong reasons. The only way to boil the lance of supranational resistance is to take the gamble of allowing real consideration and deliberation upon the arguments presented by illiberal Member States. This would display faith in the notion that deliberation and consent are indeed the foundations of the European Union, and remain the best way to safeguard its values. The informal connections to withdrawal may also arm the EU with a strategic means to induce resistant Member States to commit to participation in integration. The history of the EU has shown that enabling such Member States to present their position may end up with a compromise position which all parties can tolerate. Ultimately, such a mechanism would be valuable for the other Member States and the institutions as it would expose any insincere argumentation by the illiberal states, and compel them to make an argument that is persuasive to all. If these states continue with their resistance following such a deliberative procedure, then the rest of the Member States and the EU institutions would have full impunity to pursue further harsh sanctioning having exhausted all attempts at compromise.

Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de