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Article 2 TEU as a Tool for Democratic Transitions: Towards a Criminal Responsibility of Judges who Disrespect the EU Values*

Key words: EU values, rule of law, judicial independence, Court of Justice, Polish Constitutional Tribunal

Summary. With the elections of November 2023 Poland might get a new government. After its victory, this new government would face a crucial dilemma. How should it deal with the messed-up judicial system? Should it take the sledgehammer and simply dismiss all judges appointed in violation of EU law? We suggest a more constrained approach. To restore an independent judiciary and – in a broader perspective – the rule of law, it would suffice to remove the central perpetrators from the judiciary. To achieve this aim, we plead for the criminal responsibility of judges who seriously and intentionally disrespect EU values. Establishing their criminal responsibility would go hand in hand with their removal from office. This proposal, however, relies on one central premise: the judicial applicability of Article 2 TEU values. Ten years ago, this judicial applicability might have seemed legal science fiction. Under the pressure of illiberal developments in several Member States, however, the Court has started to operationalise the values enshrined in Article 2 TEU. Today, it is clear that this provision contains legal obligations. We argue that national judges who seriously and intentionally disregard these obligations must be hold criminally accountable.

Artykuł 2 TUE jako narzędzie demokratycznych przemian: W kierunku odpowiedzialności karnej sędziów, którzy nie szanują wartości UE

Słowa kluczowe: wartości UE, rządy prawa, niezawisłość sędziowska, Trybunał Sprawiedliwości, polski Trybunał Konstytucyjny

Streszczenie. Wyobraźmy sobie, że w listopadzie 2023 roku naród polski wybiera nowy rząd. Po zwycięstwie nowy rząd stanie przed kluczowym dylematem. Jak powinien poradzić sobie z bałaganem w systemie sądowniczym? Czy powinien sięgnąć po młot i po prostu odwołać wszystkich sędziów powołanych z naruszeniem prawa UE? My proponujemy bardziej restrykcyjne podejście. Aby przywrócić niezależne sądownictwo i – w szerszej perspektywie – praworządność, wystarczyłoby usunąć z sądownictwa głównych sprawców tego bałaganu. W tym celu domagamy się odpowiedzialności karnej sędziów, którzy poważnie i celowo nie szanują wartości UE. Ustalenie odpowiedzialności karnej tych sędziów byłoby równoznaczne z usunięciem ich z urzędu. Propozycja ta

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bazuje na jednym zasadniczym założeniu: sądowej stosowalności wartości art. 2 TUE. Dziesięć lat temu owa sądowa stosowalność mogła wydawać się prawniczym science fiction. Jednak pod presją nieliberalnych zmian w kilku państwach członkowskich Trybunał zaczął operacjonalizować wartości zapisane w art. 2 TUE. Dziś jest już jasne, że przepis ten zawiera zobowiązania prawne. Twierdzimy, że sędziowie krajowi, którzy poważnie i celowo lekceważą wynikające z owych wartości obowiązki, muszą zostać pociągnięci do odpowiedzialności karnej.

How to Restore the Rule of Law in Poland: Sledgehammer or Scalpel?

Even though the overhaul of the Polish judiciary[1] has been repeatedly challenged by the Luxembourg and the Strasbourg courts, the PiS-led government did not seem ready to change course. In a legal ping pong between Brussels, Luxembourg, Strasbourg and Warsaw, the Polish government persistently shifted its position between responsiveness and resistance. As a matter of fact, many judges were still appointed in application of procedures that blatantly violate EU law and the ECHR.[2] Eventually, the Polish government sought to complete the overhaul of the Polish judiciary by creating a situation that cannot be undone. What is more, it started to instrumentalise the judiciary for its own ends, namely as a tool for repressing internal resistance from within the Polish judiciary and for shielding its agenda against external interventions from the European courts.

Yet, there is hope. Let's image the following scenario. Imagine that the Polish people is tired of a government that seems ready to isolate the country and sacrifice its European integration. Imagine further that PiS is replaced by the opposition. Finally, imagine, that this new government is ready to lead Poland back to the path of the European rule of law. After its victory, however, it will face a crucial dilemma. How should it deal with the messed-up judicial system? How can it restore the rule of law? What options would a new Polish government face when seeking

[1] On these measures, see European Commission, 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. On the status quo, see the country chapters on Poland in the Commission's 2023 (SWD(2023) 821 final) and 2022 Rule of Law Report SWD (2022) 521 final. For an in-depth assessment, see W. Sadurski, *Poland's Constitutional Breakdown*, Oxford 2019.

[2] These appointment procedures were subject of several decisions, see CJEU, Judgment of 6 October 2021, *W.Z. (Chamber of Extraordinary Control and Public Affairs of the Supreme Court – Appointment)*, C-487/19, EU:C:2021:798, paras. 138-152; Judgment of 15 July 2021, *Commission v. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, paras. 95 ff.; Judgment of 2 March 2021, *A.B. and Others (Nomination des juges à la Cour suprême - Recours)*, C-824/18, EU:C:2021:153, paras. 121 ff.; Judgment of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paras. 123 ff. Finding a violation of Art. 6 ECHR, see also ECtHR, Judgment of 22 July 2021, *Reczkowicz v. Poland*, Appl. No. 43447/19; Judgment of 8 November 2021, *Dolińska-Ficek and Ozimek v. Poland*, Appl. Nos. 49868/19 & 57511/19; Judgment of 3 February 2022, *Advance Pharma sp. z o.o v. Poland*, App. No. 1469/20.

to restore an independent judiciary that deserves the "trust which the courts in a democratic society must inspire in individuals"?[3]

For one, said government could employ the sledge-hammer method and reverse all appointments that were conducted in violation of the European rule of law. In 2023, however, the consequences of such a complete reversal could be severe. Too many judges have already been appointed under the unlawful procedures. Reversing these appointments could create legal chaos. Crucially, it is unclear what should happen with decisions rendered by unlawfully appointed judges. Should they be open to appeal? Further, many judges – though appointed in an unlawful manner – may still be devoted to their mission as independent judges. While some might openly resist, others may reluctantly play along with the current government. Yet others again might truly stand behind the government's agenda and gladly lend themselves to become an instrument of government repression. Hence, a one-size-fits-all solution seems hardly appropriate.

We suggest a much more constrained approach that resembles a scalpel rather than a sledgehammer. To restore an independent judiciary and – in a broader perspective – the rule of law, it would suffice to remove the central perpetrators from the judiciary. To achieve this aim, we plead for the *criminal responsibility of those judges who seriously and intentionally disrespect EU values*. Establishing their criminal responsibility in fair proceedings would then justify – in fact: require – their removal from office. In other words, a criminal responsibility of judges who disrespect EU values can lead to a targeted restoration of the rule of law. Before diving into the specifics of such criminal responsibility, we will briefly explain why violations of EU values are a useful point of reference to determine which judges should be removed from the judicial system. This, in turn, requires us to establish the judicial applicability of Article 2 TEU values and the duties of national judges that flow from these values.

On this basis, Article 2 TEU can become a tool for democratic transitions that supports a Member State's society in overcoming a government, which has systematically violated these values, and in entrenching liberal democracy by removing judges who are instrumental for political repression. The following argument will certainly go beyond the law as it is currently applied. The task of legal scholarship, however, is not only to describe, systematise and criticise the legal status quo but also to show possible paths of legal development. This applies especially to new challenges. At the same time, we strongly hold that the proposed developments remain intra vires, supported by relevant precedents and coherent with the current setup of EU law.

[3] For this formulation, see CJEU, Judgment of 15 July 2021, *Commission v. Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para. 167.

Why We Build our Proposal on EU Values

To start with, one may legitimately ask why we built our proposal on EU values. Indeed, the overhaul of the Polish judiciary has taken place in blatant violation of the Polish constitution itself. Similarly, judges at the Supreme Court's disciplinary chamber who have become a tool of government repression violate national fundamental rights enshrined in the Polish constitution. So why do we suggest EU values as a point of reference?

The answer lies in the fact that the Polish Constitutional Tribunal, the institution tasked with interpreting and enforcing compliance with the constitution, has been captured by the PiS-led government. Importantly, the ECtHR ascertained in *Xero Flor* that, due to its unlawful composition, the Tribunal cannot be regarded as a court "established by law" under Article 6 ECHR.[4] Besides such institutional deficiencies, the Tribunal's decisional practice further indicates its descent to a loyal servant rubberstamping the government's agenda.[5] This leads to a situation, in which there is no independent and trustworthy institution with a mandate to authoritatively interpret the Polish constitution. Against this backdrop, the Polish constitution can hardly serve as yardstick for the criminal responsibility of perpetrators, such as those sitting at the disciplinary chamber.

For these reasons, alternative standards are required to identify and remove perpetrators. These standards, we argue, can be found at the EU level. The Court of Justice has taken up the task to articulate and defend the values enshrined in Article 2 TEU. Since 2018, it has become the central forum to identify and remedy violations of EU values in the Member States.[6] If Polish judges, prosecutors or other public authorities have doubts where to draw red lines, they should look at the jurisprudence of the Luxembourg court.

EU Values Create Legal Obligations

The very premise of the proposed doctrine is the judicial applicability of the values enshrined in Article 2 TEU. Such an applicability is not self-evident. Based on the misleading value semantics, some even doubt their status as being law. In

[4] ECtHR, Judgment of 7 May 2021, *Xero Flor* v *Poland*, Appl. No. 4907/18, paras. 252 ff.

[5] See e.g. W. Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, "Hague Journal on the Rule of Law", vol. 11 (2018), p. 63.

[6] A comprehensive mapping of the Court's rule of law-related case law can be found in the study prepared for the European Commission by J. Barcz, A. Grzelak, R. Szyndlauer (eds.), *Problem praworządności w Polsce w świetle orzecznictwa Trybunału Sprawiedliwości UE (2018–2020)*, Warsaw 2021, and in D. Kochenov, L. Pech, *Respect for the Rule of Law in the Case Law of the European Court of Justice*, Stockholm 2021.

this spirit, the Polish Constitutional Tribunal stated that "[t]he values mentioned in Article 2 of the TEU are merely of axiological significance".[7] Such doubts are hardly convincing.[8] The values of Article 2 TEU are laid down in the operative part of a *legal* text, the TEU. They are applied in *legally* determined procedures by public institutions (see Articles 7, 13(1) or 49(1) TEU) and their disregard leads to sanctions, which are of *legal* nature.

Even if Article 2 TEU values are part of EU law, they are nonetheless vague and open. As such, they fall short of the criteria for direct effect which require a Treaty provision to be clear, precise and unconditional.[9] With deepening legal integration, however, these requirements have been increasingly relaxed. Some even argue for a presumption that provisions of EU law are directly applicable by courts.[10] So far, the Court has avoided the contentious step of applying Article 2 TEU as a free-standing provision.[11] Instead, it has started to combine Article 2 TEU with other Treaty provisions in its seminal *ASJP* judgment.[12] The values in Article 2 TEU gain legal effect through a value-oriented interpretation of a directly applicable Treaty provision. In turn, this Treaty provision is read in an expansive way justified by the respective value. One might speak of a "mutual amplification" of the combined provisions.[13]

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[7] See the press release accompanying the judgment of 7 October 2021 by the Polish Constitutional Tribunal in Case K3/21.

[8] In this sense, see also K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, *EU Values are Law, after All*, "Yearbook of European Law", vol. 38 (2020), pp. 3, 66 ff. From the bench, see M. Safjan, *On Symmetry in Search of an Appropriate Response to the Crisis*, [in:] J. Urbanik, A. Bodnar (eds.), *Περιμένοντας τους Βαρβάρους. Law in a time of Constitutional Crisis. Studies Offered to Mirosław Wyrzykowski*, Warsaw 2021, p. 605; L.S. Rossi, *La valeur juridique des valeurs*, "Revue trimestrielle de droit européen", vol. 56 (2020), p. 639; J. Martín y Pérez de Nanclares, *La Unión Europea como comunidad de valores*, "Teoría y Realidad Constitucional", vol. 43 (2019), pp. 121, 135.

[9] On the state of the art, see M. Bobek, *The effects of EU law in the national legal systems*, [in:] C. Barnard, S. Peers (eds.), *European Union Law*, 3rd edn., Oxford 2020, pp. 143, 159.

[10] For a detailed analysis, see C. Wohlfahrt, *Die Vermutung unmittelbarer Wirkung des Unionsrechts. Ein Plädoyer für die Aufgabe der Kriterien hinreichender Genauigkeit und Unbedingtheit*, Berlin 2016.

[11] But see for an approach relying directly on Article 2 TEU C. Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, [in:] C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge 2016, pp. 59, 66 ff.; V. Skouris, *Demokratie und Rechtsstaat. Europäische Union in der Krise?*, Munich 2018, p. 50.

[12] CJEU, Judgment of 27 February 2018, *Associação Sindical dos Juízes Portugueses (ASJP)*, C-64/16, EU:C:2018:117. For the first appearance of such an approach, see C. Closa, D. Kochenov, *Reinforcing the Rule of Law Oversight in the European Union: Key Options*, [in:] W. Schroeder (ed.), *Strengthening the Rule of Law in Europe*, Oxford 2016, pp. 173, 182-184.

[13] For the first articulation of this idea, see L.D. Spieker, *Breathing Life into the Union's Common Values: On the Judicial Application of Article 2 TEU in the EU Value Crisis*, "German Law Journal", vol. 20 (2019), pp. 1182, 1204 ff. In this sense, see also Rossi, *La valeur juridique des valeurs*, 2020, p. 650.

This fends off the possible critique that Article 2 TEU is being turned into the freestanding and unpredictable core of a centripetal, Member State-devouring constitution. At the same time, the Court remains on the solid ground of established legal methodology. Interpreting provisions of a legal order consistently with other provisions, in particular in light of its basic principles, is part and parcel of the established method of systematic or contextual interpretation.[14] If this leads to a dynamic evolution of the law, that is to be expected from an apex court in a situation where its legal system faces unprecedented challenges.

How the Court operates can be best demonstrated by reference to its seminal judgment in *ASJP*. That decision concerned salary reductions of Portuguese judges based on a memorandum of understanding concluded in the context of the euro area crisis. A Portuguese court asked the Court of Justice whether this reduction violated judicial independence. Arguably, these measures escaped the scope of EU law as perceived traditionally and thus also the reach of the Charter of Fundamental Rights.[15] In this sense, the Court could have declared the case inadmissible and *ASJP* would have disappeared discreetly as another clarification of the meandering post-*Åkerberg Fransson* case-law. Yet this is not what happened. The Court relied on Article 19(1)(2) TEU, which stipulates that "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law". According to the Court, effective legal protection presupposes an independent judiciary. Read in this light, Article 19(1)(2) TEU contains a general obligation for the Member States to ensure judicial independence in the "fields covered by Union law".[16]

These "fields" are interpreted in broad terms. Importantly, the Court applies Article 19(1)(2) TEU "irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter".[17] While the Charter is limited to situations of actually applying EU law,[18] Article 19(1)(2) TEU has a far broader scope of application.[19] In the Court's reading, it requires the Member States to guarantee the independence of any national court that "*may*

[14] See e.g. S. A. E. Martens, *Methodenlehre des Unionsrechts*, Tübingen 2013, p. 443. More generally, see K. Lenaerts, J.A. Gutierrez-Fons, *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Brussels 2020, pp. 27 ff.

[15] See the subsequent clarification in CJEU, Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para. 51.

[16] CJEU, Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, para. 36.

[17] ibid., para. 29.

[18] D. Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, "Common Market Law Review", vol. 50 (2013), pp. 1267, 1279.

[19] K. Lenaerts, *Upholding the Rule of Law through Judicial Dialogue*, "Yearbook of European Law", vol. 38 (2019), pp. 3, 5; T. von Danwitz, *Values and the rule of law: Foundations of the European Union – an inside perspective from the ECJ*, "Revue du droit de l'Union européenne", no. 4 (2018),

rule … on questions concerning the application or interpretation of EU law."[20] Given the breath of Union law today, it is hard to imagine that any Member State court is outside those "fields". Thus, the entire national judiciary has to comply with the EU requirements of judicial independence.

Two rationales justify the ample scope of Article 19(1)(2) TEU. First, the Court refers to the functioning of the preliminary reference procedure under Article 267 TFEU. Such a system cannot work if Member State courts are not independent. Not without reason, a key criterion for launching preliminary references is an institution's independence.[21] Further, national courts have an indispensable position in the effective and uniform application of EU law.[22] By applying EU law over national law, they are also "Union courts".[23] This explains why EU law entails procedural and institutional requirements for these courts. As judges can hardly split in half (a European and a domestic function), they must meet the EU requirements of judicial independence even in fulfilment of their domestic functions.

Second, a central justification for the ample scope of Article 19(1)(2) TEU can be found in its combination with Article 2 TEU. In a crucial passage, the Court states that "Article 19 TEU … gives concrete expression to the value of the rule of law stated in Article 2 TEU".[24] As mentioned before, the CJEU operationalises the value of the rule of law enshrined in Article 2 TEU through the directly applicable Article 19(1)(2) TEU. At first sight, however, this seems to have no effect on the latter's scope. Even if the values enshrined in Article 2 TEU feature an unrestricted scope of application,[25] they depend on the scope of the operationalising

pp. 263, 268. See also L. Pech, S. Platon, *Judicial Independence under threat: The Court of Justice to the rescue in the ASJP case*, "Common Market Law Review", vol. 55 (2018), pp. 1827, 1837.

[20] CJEU, Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, para. 40 (emphasis added).

[21] For cases in which the CJEU actually assessed the independence of the referring entity, see e.g. CJEU, Judgment of 6 October 2015, *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, para. 19; Judgment of 19 September 2006, *Wilson*, C-506/04, EU:C:2006:587; Judgment of 17 September 1997, *Dorsch Consult*, C-54/96, EU:C:1997:413, paras. 34-36.

[22] See CJEU, Judgment of 5 February 1963, *Van Gend en Loos*, C-26/62, EU:C:1963:1. Regarding the essential position of the preliminary reference procedure in the EU legal order, see e.g. CJEU, Judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, para. 36; Opinion of 18 December 2014, 2/13, *ECHR Accession II*, EU:C:2014:2454, para. 176; Opinion of 8 March 2011, 1/09, *Agreement creating a Unified Patent Litigation System*, EU:C:2011:123, paras. 84-85.

[23] See CJEU, Judgment of 9 March 1978, *Simmenthal*, C-106/77, EU:C:1978:49. More recently CJEU, Opinion of 8 March 2011, 1/09, *Agreement creating a Unified Patent Litigation System*, EU:C:2011:123, para. 80. See also M. Bobek, *Institutional Report: National Courts and the Enforcement of EU Law*, [in:] M. Botman, J. Rijpma, J. (eds.), *National Courts and the Enforcement of EU Law. The XXIXth FIDE Congress Publications, Vol. 1*, The Hague 2020, p. 61.

[24] CJEU, Judgment of 27 February 2018, *ASJP*, C-64/16, EU:C:2018:117, para. 32.

[25] This is uncontroversial. See European Commission, 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, p. 5; Council, Opinion of the Legal Service: Commission's Communica-

provision. With regard to Article 19(1)(2) TEU, this means the "fields covered by Union law". Accordingly, this operation does not seem to justify the establishment of obligations for *any* national court.

As indicated before, we argue that the operationalisation of EU values is no one-way street. Instead, both provisions exert a reinforcing effect on each other. While the specific provision operationalises the value enshrined in Article 2 TEU, a value-oriented interpretation of the specific provision justifies its expansive reading. In other words, this interplay leads to a "mutual amplification" of both provisions. As such, Article 2 TEU and its specific "carrier'" can create legal obligations for the Member States even in situations that otherwise would be considered to fall outside the scope of EU law.[26]

Of course, such an interpretation cannot and does not a priori establish the judicial applicability of any Article 2 TEU value to any national measure. Yet it shows how the judicial applicability of EU values can be established in a specific case. It all depends on finding a specific provision that gives expression to a value enshrined in Article 2 TEU. The Court reaffirmed this intrinsic link between Article 2 TEU and a specific provision of EU law in its subsequent case-law. For instance, it repeatedly stressed that "Article 19 TEU … gives concrete expression to the value of the rule of law affirmed in Article 2 TEU".[27]

This "mutual amplification" considerably expands the reach of EU law. For that reason, it must not only be methodologically sound but also respect the order of competences. Indeed, there is an argument that there might be no legal mandate for the courts and, in particular, the CJEU to assess whether Member States respect Article 2 TEU. In fact, Article 269 TFEU limits the Court's role to verifying the procedural stipulations laid down in Article 7 TEU. In this sense, many have argued for the exclusivity of political procedures, especially in situations be-

tion on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, 10296/14, para. 17. See also M. Klamert, D. Kochenov, *Article 2 TEU*, [in:] M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford 2019, pp. 22, 24, para. 4; M. Hilf, F. Schorkopf, *Art. 2 EUV*, [in:] E. Grabitz et al. (eds.), *Das Recht der Europäischen Union*, 74th edn., loose-leaf, Munich 2021, para. 18.

[26] See Spieker, *Breathing Life into the Union's Common Values*, 2019.

[27] See e.g. CJEU, Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, para. 47; Judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924, para. 98; Judgment of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para. 51. See also CJEU, Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, para. 167; Judgment of 20 April 2021, *Repubblika*, C-896/19, EU:C:2021:311, para. 63; Judgment of 18 May 2021, *Asociația "Forumul Judecătorilor Din România"*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paras. 162, 188.

yond the scope of any other EU law.[28] Any interpretation that puts the CJEU in the position that Article 7 TEU attributes to political institutions faces high argumentative burdens.

However, this argument does not preclude Article 2 TEU from playing a role when the Court discharges its mandate to ensure that the law is observed pursuant to Article 19(1)(1) TEU.[29] While the former Treaties have kept the EU's foundational principles beyond the Court's reach,[30] the Lisbon Treaty does not contain any such limitation with regard to Article 2 TEU. Article 269 TFEU is an exception to the CJEU's general competence under Article 19(1)(1) TEU, which, being an exception, has to be interpreted narrowly. Moreover, since *van Gend en Loos,* the CJEU has considered legal proceedings to complement action by political institutions. Today, this judicial innovation is generally recognised to be at the heart of the European legal edifice. Finally, the political Article 7 TEU and the judicial Articles 258 and 267 TFEU procedures have different objects and consequences.[31] Article 7 TEU concerns a political assessment and, as an ultima ratio, entails the suspension of Member State rights. In contrast, the Court adjudicates an individual case and its sanctioning powers are limited to Article 260 TFEU (penalty payments). For example, the Court cannot suspend Member State rights.[32] Thus, there is no identity between the judicial and the political procedures imposing the latter's exclusivity.

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[28] European Commission, 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, p. 5; Council, Opinion of the Legal Service: Commission's Communication on a New EU Framework to Strengthen the Rule of Law: Compatibility with the Treaties, 10296/14, paras. 16 ff.; European Parliament, Resolution on the proposal for a Council decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law (17 September 2020), 2017/0360R(NLE), Rec. B. See also K. Lenaerts, J.A. Gutiérrez-Fons, *Epilogue on EU Citizenship: Hopes and Fears?*, [in:] D. Kochenov (ed.), *EU Citizenship and Federalism*, Cambridge 2017, pp. 751, 774; B. Martenczuk, *Art. 7 EUV und der Rechtsstaatsrahmen als Instrument der Wahrung der Grundwerte der Union*, [in:] S. Kadelbach (ed.), *Verfassungskrisen in der Europäischen Union*, Baden-Baden 2018, pp. 41, 45.

[29] See e.g. M. Schmidt, P. Bogdanowicz, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Art. 258 TFEU*, "Common Market Law Review", vol. 55 (2018), pp.1061, 1069-1073; M. Waelbroeck, P. Oliver, *La Crise de l'État de Droit dans l'Union Européenne: Que Faire?*, "Cahiers de droit européen", vol. 26 (2018), pp. 299, 335; Skouris, *Demokratie und Rechtsstaat*, 2018, pp. 50 ff.

[30] According to Article 46(d) TEU-Nice the CJEU had only jurisdiction over Article 6(2) TEU-Nice but not for the principles laid down in Article 6(1) TEU-Nice. But even then, those principles were relevant in its case law, see CJEU, Judgment of 3 September 2008, *Kadi*, C-402/05 P, EU:C:2008:461, para. 303.

[31] See especially AG Tanchev, Opinion in *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:325, para. 50.

[32] CJEU, Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paras. 70 ff.

All these arguments justify the Court's recent path in *ASJP*, which applies Article 2 TEU in combination with more specific provisions. Against the backdrop of *ASJP*, the CJEU has held in a series of decisions, that the Polish overhaul of the judiciary infringes Article 19(1)(2) TEU and Article 2 TEU.[33]

What does this mean for national authorities involved in judicial proceedings that violate the Union's values? Their duties flow from the doctrines of direct effect and primacy. Any Member State judge has to interpret and apply domestic law in conformity with EU law.[34] This includes the EU's common values enshrined in Article 2 TEU. Any Member State judge has a duty to heed these doctrines in any national proceeding when an infringement of Article 2 TEU is at stake.[35] Hence, all national law, including domestic criminal and disciplinary law, must be interpreted in light of EU values.[36] This includes, for instance, laws explicitly permitting charges against judges based on the content of their decisions. If domestic courts are called to interpret and apply such laws, they must set them aside to the extent that they stand in conflict with European values.[37] The same applies to judicial decisions that violate EU values – either due to their content or due to the composition of the issuing body. Other courts are under an obligation to disregard such rulings.

By giving such directions to national judges, Union law puts them in a difficult position – especially in Member States where the respect for judicial independence is low. This is especially the case in Poland. On the one hand, Polish judges face *external* pressure from the executive. Many might be intimidated by political pressure or the threat of disciplinary measures.[38] On the other hand, Polish judges face pressure from *within* the judiciary, in particular from the Polish Constitutional

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[33] See e.g. CJEU, Judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531; Judgment of 5 November 2019, *Commission* v *Poland (Independence of ordinary courts)*, C-192/18, EU:C:2019:924; Judgment of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596. See also CJEU, Judgment of 19 November 2019, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, Joined Cases C 585/18, C-624/18 and C-625/18, EU:C:2019:982; Judgment of 2 March 2021, *A.B. (Nomination des juges à la Cour suprême - Recours)*, C-824/18, EU:C:2021:153.

[34] From the plethora of cases, see only CJEU, Judgment of 6 November 2018, *Max-Planck-Gesellschaft*, C-684/16, EU:C:2018:874, para. 59.

[35] See also A. von Bogdandy, C. Grabenwarter, P.M. Huber, *Constitutional Adjudication in the European Legal Space*, [in:] ibid. (eds.), *The Max Planck Handbooks in European Public Law, Vol. IV*, Oxford 2022.

[36] On the value-conform interpretation of *Union* law, see M. Potacs, *Wertkonforme Auslegung des Unionsrechts?*, "Europarecht", vol. 51 (2016), p. 164.

[37] In fact, this holds true for any public authority, see CJEU, Judgment of 4 December 2018, *Garda Síochána*, C-378/17, EU:C:2018:979, para. 38; Judgment of 22 June 1989, *Fratelli Costanzo*, C-103/88, EU:C:1989:256, para. 32.

[38] On the disciplinary measures against Polish judges, see e.g. the country chapter on Poland in the Commission's 2021 Rule of Law Report (SWD(2021) 722 final), pp. 8 ff.

Tribunal. As noted before, the Tribunal has degenerated into a government tool for shielding the overhaul of the Polish judiciary against internal resistance from the domestic judiciary and external intervention from the European courts. In this sense, it declared the CJEU's interim order imposing the suspension of the Supreme Court's disciplinary chamber[39] to constitute an ultra vires act.[40] In a second ruling, the Tribunal went even further by stating that the CJEU's interpretation of Article 2 and Article 19(1)(2) TEU is incompatible with the Polish Constitution.[41] In addition, it declared the domestic implementation of the CJEU's jurisprudence by the Polish Supreme Court unconstitutional too.[42]

This puts Polish judges in a difficult spot. How should they respond to diverging rulings from Luxemburg and Warsaw? Institutional and substantive reasons advocate in favour of disregarding those rulings of the Constitutional Tribunal that disrespect the Union's common values. From an institutional perspective, it seems clear that decisions taken by a captured institution such as the Polish Constitutional Tribunal cannot be regarded as validly issued rulings of a constitutional court. From a substantive perspective, there can be no doubt that a constitutional court cannot rely on constitutional identity arguments – as propounded by the Polish Constitutional Tribunal – to justify violations of the Union's common values.[43] This should be common ground even for national judges who may not accept the unconditional primacy of EU law.

It should be stressed that Polish judges do not stand alone but find a reliable partner in Luxembourg. Indeed, the Court has shown remarkable persistence and demonstrated its willingness to step up the pressure on the Polish government. In this sprit, it consistently reiterated its decisions imposing the suspension of the disciplinary chamber at the Polish Supreme Court[44] and ordered an unprecedented daily penalty payment of 1 million Euro until Poland complies.[45] In addition, the Court of Justice has considerably strengthened the position of national judges vis-à-vis their respective constitutional courts. In *Euro Box Promotion* and *RS*, the

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[39] CJEU, Order of 8 April 2020, *Commission* v *Poland*, C-791/19 R, EU:C:2020:227.

[40] Trybunał Konstytucyjny, Judgment of 14 July 2021, P 7/20.

[41] Trybunał Konstytucyjny, Judgment of 7 October 2021, K 3/21. For a first analysis, see N. Półtorak, *Kilka uwag o skutkach wyroku Trybunału Konstytucyjnego w sprawie K 3/21 dla stosowania prawa unijnego przez polskie sądy*, "Europejski Przegląd Sądowy", no. 12 (2021).

[42] See Trybunał Konstytucyjny, Judgment of 20 April 2020, U 2/20 and Judgment of 21 April 2020, Kpt. 1/20.

[43] See e.g. AG Cruz Villalón, Opinion in *Gauweiler*, C-62/14, EU:C:2015:7, para. 61; AG Kokott, Opinion in *Stolichna obshtina, rayon „Pancharevo"*, C-490/20, EU:C:2021:296, paras. 73, 116 ff. See also Safjan, *On Symmetry*, 2021; L.S. Rossi, *2, 4, 6 (TUE) … l'interpretazione dell' "Identity Clause" alla luce dei valori fondamentali dell'Unione*, [in:] *Liber Amicorum Antonio Tizzano*, Turin 2018, pp. 858, 866; A. Voßkuhle, *The Idea of the European Community of Values*, Cologne 2018, p. 117.

[44] CJEU, Order of 14 July 2021, *Commission* v *Poland*, C-204/21 R, EU:C:2021:593.

[45] CJEU, Order of 27 October 2021, *Commission* v *Poland*, C-204/21 R, EU:C:2021:593.

Court stated that Articles 2 and 19(1)(2) TEU do not generally preclude the bindingness of constitutional court decisions for the national judiciary. Yet, this comes with an important caveat: the independence of the respective constitutional court must be guaranteed.[46] This constitutes an important support and should spark hope among those Polish judges, who still resist the overhaul of their judiciary.

Disrespecting EU Values Can Lead to a Criminal Responsibility of Judges

This leads to the question of what happens if judges violate the values enshrined in Article 2 TEU by sanctioning other judges with their decisions? Indeed, quite a few judges owe their position to the recent overhaul of the Polish judiciary and support the government's agenda. We argue that if they seriously and intentionally disrespect EU values, they could face criminal responsibility.

Let's take one step back. Seriously and intentionally exceeding public powers, even as a judge, is sanctioned under most legal orders (see e.g. Section 339 German StGB, Art. 434-7-1 French Code Pénal, Art. 323 Italian Codice Penale, Art. 446 f. Spanish Codigo Penal or Sections 305 f. of the Hungarian Criminal Code).[47] In this spirit, Article 231 § 1 of the Polish Kodeks Karny punishes the general excess of authority: "A public official who, by exceeding his or her authority, or not performing his or her duty, acts to the detriment of a public or individual interest, is liable to imprisonment for up to three years." As judges are considered "public officials" in Article 115 § 13 No. 3 of the Kodeks Karny, Article 231 includes – under strict conditions – also the activity of judges.[48]

Without doubt, judges may err. As such, not every judicial decision that violates the law is per se a perversion of justice. Indeed, non-accountability is a core element of judicial independence. An independent judiciary is not only a manifestation of the separation of powers but also an inherent component of effective judicial protection.[49] At the same time, this independence is in continuous conflict with a judge's obligation to observe the law. A balance must be struck between these competing elements. Even if different standards apply in each Member State, it is

[46] CJEU, Judgment of 21 December 2021, *Euro Box Promotion and Others*, Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, para 230; Judgment of 22 February 2022, *RS (Effet des arrêts d'une cour constitutionnelle)*, C-430/21, EU:C:2022:99, para 44.

[47] For comparative studies, see e.g. G. Canivet, J. Joly-Hurard, *La responsabilité des juges, ici et ailleurs*, "Revue international de droit compare", vol. 58 (2006), pp. 1049, 1052 ff.; M. Cappelletti, *Who Watches the Watchmen? A Comparative Study on Judicial Responsibility,* "American Journal of Comparative Law", vol. 31 (1983), pp. 1, 36 ff.

[48] See also Sąd Najwyższy, Judgment of 30 August 2013, SNO 19/13.

[49] With regard to Article 47 CFR, see CJEU, Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paras. 48, 54, 63-67.

obvious that the criminal responsibility of judges can apply only ultima ratio – it is confined to very exceptional cases. Further, special procedural safeguards must be in place. This is particularly true in Poland, where judicial immunity is explicitly enshrined in the Constitution (see Articles 173, 180(1) and (2) and 181 of the Polish Constitution).[50]

How does this concern EU law? First, EU law is an independent source of law in national procedures. The principles of primacy and direct effect require a domestic judge to directly apply EU law and, eventually, to disapply or re-interpret conflicting national laws. Thus, it does not make any difference whether a national judge disregards national or rather Union law – both can equally trigger the criminal responsibility of a judge. Second, according to an established line of jurisprudence, "infringements of EU law must also – at the very least – be punishable under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance."[51]

This Member State obligation is a specific expression of the principles of effectiveness and equivalence. In short this means: "Member States are required … to penalise any persons who infringe [EU] law in the same way as they penalise those who infringe national law."[52] If it is a criminal offence under domestic law when judges deliberately disregard constitutional law to the detriment of the person subject to the proceedings, the same must apply in cases where a national judge intentionally disregards EU law.

Determining the thresholds for the criminal responsibility of judges – even if they disregard *Union* law – is a matter of *national* criminal law. Yet, EU law can guide its concrete operation. Regarding the Polish disciplinary regime for judges, the Court of Justice noted that judicial independence cannot justify the total exclusion of any disciplinary liability. To prevent disciplinary regimes from becoming an instrument of political pressure, however, they must be confined to entirely exceptional cases that concern "serious and totally inexcusable forms of conduct … which would consist, for example, in violating deliberately and in bad faith, or as

[50] On the importance of judicial immunity in Poland, see Trybunał Konstytucyjny, Judgment of 28 November 2007, Case K 39/07; Judgment of 2 May 2015, Case P 31/12. On the special procedure for lifting the judicial immunity, see A. Bodnar, L. Bojarski, *Judicial Independence in Poland*, [in:] A. Seibert-Fohr, (ed.), *Judicial Independence in Transition*, Heidelberg 2012, pp. 667, 716.

[51] See AG Kokott, Opinion in *Taricco*, C-105/14, EU:C:2015:293, para. 80. See also CJEU, Judgment of 2 May 2018, *Scialdone*, C-574/15, EU:C:2018:295, para. 28; Judgment of 19 July 2012, *Rēdlihs*, C-263/11, EU:C:2012:497, para. 44; Judgment of 3 May 2005, *Berlusconi and Others*, Joined Cases C-387/02, C-391/02 and C-403/02, EU:C:2005:270, para. 65. See also K. Lenaerts, J.A. Gutiérrez-Fons, *The European Court of Justice and fundamental rights in the field of criminal law*, in V. Mitsilegas, M. Bergström, T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, Cheltenham 2016, pp. 7 ff.

[52] CJEU, Judgment of 21 September 1989, *Commission* v *Greece*, C-68/88, EU:C:1989:339, para. 22.

a result of particularly serious and gross negligence, the national and EU law".[53] This must apply minori ad maius to the criminal responsibility of judges. In this light, the threshold for criminal responsibility will probably be reached where a judge *seriously and intentionally* violates the applicable law to the detriment of a party in the proceedings.

When is this threshold of seriousness reached at EU level? A serious infringement is unlikely to occur in the day-to-day application of EU law. Some have discussed the criminal responsibility of judges for disregarding their obligation to refer to the Court of Justice under Article 267(3) TFEU.[54] This would imply the criminal accountability of many national apex courts, such as the German Bundesverfassungsgericht, the French Conseil d'État or the Italian Corte Suprema di Cassazione. Others might think of penalising national judges for disregarding the primacy of EU law. This would include, for instance, the Bundesverfassungsgericht's second senate after rendering its *PSPP* judgment or the Danish Højesteret for its decision in *Ajos*. Yet, such a far-reaching criminal responsibility is hardly desirable. It would not only encounter severe doubts in terms of legitimacy, but also undermine Luxembourg's central aim to foster the spirit of cooperation within the union of European courts.

For that reason, we plead for a much narrower conception. A serious infringement could occur when national judges disrespect the values enshrined in Article 2 TEU. Admittedly, these values are vague and thus difficult to apply. Some might therefore doubt whether disregarding such indeterminate notions can justify the criminal responsibility of judges. Holding judges accountable for disregarding the value of "democracy" or the "rule of law" would hardly be compatible with the principle of nulla poena sine *lege certa*.

However, this is not what we suggest. The point of reference for determining the criminal responsibility of judges should be the meaning that the values of Article 2 TEU have acquired in the interpretation of the Court of Justice. During the past 5 years, the Court has fleshed out especially the value of the rule of law and the principle of judicial independence in much detail. As such, the "rule of law" in its specific expression as principle of judicial independence under Article 19 (1)(2) TEU has become a very concrete standard.[55] Further, the Court's interpretation of EU

[53] CJEU, Judgment of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, paras. 137-140.

[54] T. Rönnau, *Rechtsbeugung durch (beharrliche) Verweigerung der Pflichtvorlage an den EuGH?*, [in:] B. Hecker et al. (eds.), *Festschrift für Rudolf Rengier zum 70. Geburtstag*, Munich 2018, p. 313.

[55] For an overview, see supra note 6. See also R. Bustos Gisbert, *Judicial Independence in European Constitutional Law*, "European Constitutional Law Review", vol. 18 (2022), p. 591; L.D. Spieker, *The conflict over the Polish disciplinary regime for judges – An acid test for judicial independence, Union values and the primacy of EU law: Commission v. Poland*, "Common Market Law Review", vol. 59 (2022), p. 777.

law – irrespective of whether it is given in preliminary reference or infringement proceedings – has binding force.[56] Therefore, disregarding a consolidated CJEU jurisprudence is unlawful unless it is referred again to the Court.[57] Accordingly, the values of Article 2 TEU, as interpreted by the CJEU, become relevant for national procedures establishing the criminal responsibility of judges.

What does that mean for Polish judges who decide in disciplinary proceedings as in the case of Judge Tuleya? By interpreting the respective legal basis for such proceedings in a way that blatantly violates judicial independence protected under Article 2 and 19 TEU, a judge sitting in the disciplinary chamber might reach the threshold for criminal responsibility. It should be noted that such a judge would not only violate the rule of law but probably also the essence of human rights protected by Article 2 TEU. Indeed, initiating disciplinary or criminal proceedings as a tool of repression might also violate the principle of nulla poena sine lege. This principle is enshrined in Article 7 of the ECHR, Article 49(1) of the Charter and Article 42(1) of the Polish Constitution. Its importance for the EU legal order has recently been stressed by the *Taricco* saga.[58] The nulla poena principle is not only infringed when a legal basis is missing (i.e. non-existent or non-applicable) but also in cases of arbitrary judicial interpretation of said basis. According to the ECtHR, "Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal responsibility through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen".[59] An interpretation of national provisions as allowing disciplinary proceedings against judges who take decisions that are inconvenient for the government would not meet these requirements. If there is, on top of that, a CJEU decision declaring that these national provisions violate EU values, the respective judge's criminal responsibility suggests itself.

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[56] M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice,* 3rd edn., Oxford 2021, pp. 406 ff.; B. Schima, *Das Vorabentscheidungsverfahren vor dem EuGH*, 3rd edn., Vienna 2015, p. 114. See already A. Trabucchi, *L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes*, "Revue trimestrielle de droit européen", vol. 10 (1979), p. 56.

[57] This is undoubtedly the case for courts of last instance, such as the Polish Supreme Court, while a similar binding force (together with an obligation to refer) is discussed for lower courts, see K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2014, para. 3.61.

[58] CJEU, Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, EU:C:2017:936, paras. 51 ff. See alreadyJudgment of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, EU:C:2007:261, para. 46. See further M. Timmerman, *Legality in Europe: On the Principle Nullum Crimen, Nulla Poena Sine Lege in EU Law and Under the ECHR*, Antwerp 2018, pp. 147 ff.

[59] See ECtHR, Judgment of 17 October 2017, *Navalnyye* v *Russia*, Appl. No. 101/15, para. 55 (emphasis added). The CJEU employs a similar conception ("reasonably foreseeable"), see CJEU, Judgment of 20 December 2017, *Vaditrans*, C-102/16, EU:C:2017:1012, para. 52; Judgment of 22 October 2015, *AC-Treuhand*, C-194/14 P, EU:C:2015:717, para. 41; Judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, Joined Cases C-189/02 P and Others, EU:C:2005:408, paras. 217 ff.

Finally, any conviction requires proving the intention of the judge concerned, i.e. substantiating that he or she knew the relevant law and deliberately disregarded its effects. Determining this intention falls to the trial judge. But here again, actions by EU institutions will be important. If a Polish judge intentionally disrespects a CJEU decision which unequivocally declares that the respective national law, such as a disciplinary regime for judges, violates EU values and is henceforth no longer applicable in the case at hand, a red line and, in all likelihood, the threshold of criminal responsibility are crossed. This is even more the case if the parties to the proceedings base their pleas on such CJEU judgments. Hence, pronouncements from Luxembourg are key.

Four fundamental objections could be raised against this proposal. First, the criminal responsibility of judges for infringements of Union law could be understood as an inadmissible harmonisation of the Member States' substantive criminal law.[60] Yet, criminal justice firmly remains in national hands. The proposed criminal proceedings are part of a national process to restore the rule of law. These trials are conducted before national courts in accordance with national criminal law.

Secondly, the Polish Constitutional Tribunal prohibits national courts from following the CJEU's verdicts and rather confirms the constitutionality of the provisions at issue. Thus, one could argue that such diverging pronouncements create a situation of legal uncertainty that excludes criminal liability. Under normal circumstances, this would probably be the case. Yet, as noted before, the European Court of Human Rights (ECtHR) has recently ascertained that the several constitutional judges were appointed in manifest violation of Polish law. Hence, panels that include such judges can no longer be considered a "tribunal established by law".[61] The decisions taken in this composition must therefore be disregarded.[62]

Third, Polish criminal lawyers might object that Article 231 of the Kodeks Karny has been interpreted by the Polish Supreme Court in an extremely restrictive fashion. The Sąd Najwyższy declared that Article 231 requires – beyond disregarding the law – the "intentional abuse of judicial procedures to commit a crime".[63] Hence, one could argue that the principle of non-retroactivity prevents any broader application of that provision to the cases suggested by us. As German lawyers we do not claim to know the Polish law sufficiently well to provide an authoritative answer to this objection. This we leave to the Polish legal community.

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[60] Especially the German Constitutional Court expressed strong reservations in this respect, see BVerfG, Judgment of 30 June 2009, Lisbon, 2 BvE 2/08, para. 252 and considered substantive and formal criminal law to be "particularly sensitive for the ability of a constitutional state to democratically shape itself".

[61] ECtHR, Judgment of 7 May 2021, *Xero Flor* v *Poland*, Appl. No. 4907/18, paras. 252 ff.

[62] See above note 46.

[63] Sąd Najwyższy, Judgment of 30 August 2013, SNO 19/13.

Still, two thoughts might be taken into consideration. On the one hand, it does not seem entirely excluded that judges sitting in the Supreme Court's Disciplinary Chamber might fulfil even this high threshold when they willingly become an instrument of government repression. On the other hand, it is highly disputed whether the principle of non-retroactivity applies only to changes of the law itself or also to changing judicial interpretations of the law.[64] The Court of Justice noted that Article 49(1) of the Charter "may preclude the retroactive application of a new interpretation of a rule establishing an offence". However, that is only the case under very narrow conditions, especially when the respective judicial interpretation was not reasonably foreseeable at the time.[65] Whether the suggested interpretation of Article 231 remains within the realm of the reasonably foreseeable must be judged against the respective national horizon.

Finally, many might feel a strong uneasiness with respect to the criminal responsibility of judges. And so it should be, considering the importance of judicial independence. However, it should also be recalled that our proposal is conceived as a middle way between doing nothing and the sledgehammer method of removing all judges appointed under unlawful circumstances. In this sense, the approach advanced in this contribution targets few chief perpetrators who have become crucial tools of government repression. Further, it cannot be emphasised enough that the criminal responsibility only applies under extremely narrow conditions.

No Government Lasts Forever

Ten years ago, the idea of bringing Article 2 TEU values to life in judicial proceedings against Member States seemed almost legal science-fiction.[66] Under the pressure of illiberal developments in several Member States, this has radically changed. Today, the judicial applicability of Article 2 TEU has become established jurisprudence. The values enshrined in Article 2 TEU are operationalised through specific provisions of EU law. This leads to the duty of national courts to interpret their laws in conformity with EU values and to set these laws aside in the event of

[64] In Germany, such an extensive application is rejected, see H. Schulze-Fielitz, *Art. 103 Abs. 2 GG*, [in:] H. Dreier (ed.), *Grundgesetz Kommentar*, 3rd edn., Tübingen 2018, para 53. See also BVerfG, Order of 23 June 2010, 2 BvR 2559/08, 105, 491/09, para 82.

[65] CJEU, Judgment of 10 July 2014, *Telefónica and Telefónica de España v Commission*, C-295/12 P, EU:C:2014:2062, paras. 147 f; Judgment of 8 February 2007, *Groupe Danone v Commission*, C-3/06 P, EU:C:2007:88, paras. 88 f; Judgment of 28 June 2005, *Dansk Rørindustri and Others v Commission*, Joined Cases C-189/02 P et al., EU:C:2005:408, paras. 218 f.

[66] See e.g. A. von Bogdandy, M. Kottmann, C. Antpöhler, J. Dickschen, S. Hentrei, M. Smrkolj, *Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States*, "Common Market Law Review", vol. 49 (2012), p. 489.

irreconcilable conflict. If they intentionally disregard these duties and inflict harm in a manner that violates a value of Article 2 TEU, they may face criminal charges.

The Polish elections of November 2023 demonstrate that no government lasts forever. Biased public officials can be held accountable once the political landscape has changed. Such criminal proceedings do not constitute an unacceptable "victor's justice" if they are pursued in a manner that itself respects the EU's common values.[67] Drawing again on the CJEU's jurisprudence, such proceedings must be conducted before an independent institution and in procedures that respect the rights under Articles 47 and 48 of the Charter.[68] If these standards are guaranteed, the criminal responsibility of judges, who have violated Article 2 TEU values, might be an important tool to clear the courts and re-establish a judicial system in line with the rule of law. In this spirit, Article 2 TEU can become a tool to support democratic transitions.

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[67] On the risks of instrumentalising such procedures, see I. Müller, *Die Verwendung des Rechtsbeugungstatbestands zu politischen Zwecken*, "Kritische Justiz", vol. 17 (1984), p. 119.

[68] CJEU, Judgment of 15 July 2021, *Commission* v *Poland (Régime disciplinaire des juges)*, C-791/19, EU:C:2021:596, para. 61.

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