



FACULTY OF LAW
Lund University

Karolina Markusson

Union Values and How to Enforce Them

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws programme
15 higher education credits

Supervisor: Kacper Szkalej

Term: Spring term 2022

Table of Contents

SUMMARY	1
SAMMANFATTNING	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	4
1.2 Purpose and Research Questions	5
1.3 Methodology and Material	6
1.3.1 <i>The Hierarchy of Union Law</i>	6
1.4 Delimitations	8
1.5 Previous Research	8
1.6 Outline	8
2 THE VALUES OF THE EUROPEAN UNION	10
3 THE ENFORCEMENT OF VALUES OF THE EUROPEAN UNION	12
3.1 Article 7 TEU	12
3.2 Options for the Commission and Other Member States	13
3.3 Financial Penalties	14
3.4 Direct Enforcement of Article 2	14
4 THE ENFORCEMENT IN PRACTICE TOWARDS POLAND	16
4.1 Actions Taken by the Commission	16
4.1.1 <i>Recommendations</i>	16
4.1.2 <i>Reasoned Proposal Regarding the Rule of Law in Poland</i>	17
4.2 Case C-216/18 <i>PPU</i>	18
4.3 Actions Taken After 2018	22
5 CONCLUSION	24
BIBLIOGRAPHY	26
TABLE OF CASES	29

Summary

The values of democracy, human rights and rule of law are fundamental to the composition of the EU. Acting in accordance with these values is a prerequisite for joining the Union, but when States already are Members of the Union there are limited options for legal enforcement of the values. The aim of this thesis is however to investigate what possibilities in fact do exist within Union law to hold Member States accountable if they are not acting in accordance with the values.

The main option within Union law is the possibility to determine a risk of, or an existence of, a serious and persistent breach of values by a Member State (Article 7 TEU). The Council may, if a determination has been made, suspend certain rights of that Member State, including voting rights in the Council. This option, however, requires unanimity of the European Council and is therefore unlikely to happen.

Other legal possibilities of enforcement can be taken by other Member States, the Parliament and the Commission, with the possibility of financial penalties issued by the EU Court. Such penalties have, in fact, been issued against Poland, based on Poland not taking sufficient measures to comply with the Court's previous rulings. Poland and Hungary have both been criticized for not meeting the requirements of a rule of law-state. Polish political changes to the judiciary have, amongst other things, resulted in judges being forcibly retired and judgements from the Polish Constitutional Tribunal being hidden from the public. The Commission has, due to these changes, acted by imposing infringement actions to protect the Polish rule of law and independence of the judiciary.

Union law hence provides legal possibilities of enforcement, but it has yet to alter the direction of where the Polish judiciary is headed, and its efficiency can therefore be questioned.

Sammanfattning

Värdena demokrati, rättsstaten och respekt för de mänskliga rättigheterna utgör grunden för EU. För att en stat ska få gå med i EU är det en förutsättning att den följer dessa värden. Är en stat däremot redan medlem i unionen är de legala möjligheterna för att genomdriva värdena färre. Syftet med denna uppsats är därför att undersöka vilka möjligheter som faktiskt existerar inom EU-rätten för att hålla medlemsstater ansvariga om de inte agerar i enlighet med värdena.

Den främsta möjligheten för genomdrivande inom EU-rätten är möjligheten att slå fast att en medlemsstat allvarligt och ihållande åsidosätter värden, eller att det finns en klar risk för detta (art. 7 FEU). Har en sådant fastslående skett får rådet besluta att upphäva vissa rättigheter som medlemsstaten i fråga har, inklusive rösträtten i rådet. Ett fastslående av detta slag kräver dock ett enhälligt beslut från Europeiska rådet och är därmed relativt tandlöst.

Andra rättsliga möjligheter att hålla medlemsstater ansvariga om de inte följer värdena kan tas av andra medlemsstater, Europaparlamentet och kommissionen, där även möjligheten finns att be EU-domstolen belägga medlemsstaten med ekonomiska sanktioner. Sådana domar har utfärdats mot Polen, då Polen underlåtit att vidta tillräckliga åtgärder för att följa domstolens tidigare domar. Både Polen och Ungern har kritiserats för att inte leva upp till kraven på en rättsstat. Politiska förändringar av det polska rättsväsendet har bl.a. resulterat i att domare har tvångspensionerats och att domar från den polska konstitutionella domstolen inte har officiellt publicerats. Med grund i dessa förändringar har kommissionen agerat genom att inleda överträdelseförfaranden mot Polen för att skydda den polska rättsstaten.

Inom EU-rätten finns alltså rättsliga möjligheter att genomdriva värdena, men hur effektiva dessa möjligheter är kan ifrågasättas eftersom det hittills inte verkar ha påverkat respekten för rättsstaten i Polen.

Abbreviations

CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human rights and Fundamental Freedoms
EU	European Union
PiS Party	Law and Justice Party (Prawo i Sprawiedliwość)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1 Introduction

1.1 Background

Through the Maastricht Treaty from 1992 the European Economic Community transformed into the European Union as we know it today with the freedom of movement, a monetary cooperation and the foundation that is rule of law, democracy, and respect for human rights.¹ The EU thereby developed into a Union, the purpose of which would not only be to seek economic cooperation, but also to uphold values deemed to be fundamental to the Union. For the States entering the Union these values have been clear, and a condition they had to accept before joining. But what happens when States that have already accepted these values when joining the Union no longer want to act accordingly? The purpose of this research is to investigate just that.

The Amsterdam Treaty of 1997 made the values of democracy, rule of law, and respect for human rights a part of the TEU.² Today the values can be found in TEU Article 2, and the possibilities of enforcement of values in Article 7. These core values are fundamental for the organization of the Union and the basis of legal Union documents. Before further examining the values of Article 2, it can be said that the primary focus in this thesis will be the value rule of law.

While two separate Member States have begun to move in a direction opposite of the values mentioned, questions about the level of effectiveness of the current EU law system have been raised. The events taking place in Poland and Hungary showcase the problem of the current EU legislation,

¹ Bignami (2020), pp. 4-5.

² Bignami, (2020), pp. 16-17.

namely that it appears rather ineffective in making the Member States act in line with the core values of the EU.

To understand the problems specific to the Union one must acknowledge the way the Union's institutions work. It seems probable that a reader of this essay would have some background knowledge of the functioning of the EU, but even so, a short reminder of a few important institutions will follow. The European Commission is the politically independent executive arm of the EU with tasks such as proposing new Union laws, managing the EU budget, and enforcing EU law, and it consists of 27 EU citizens.³ The Council of the European Union is together with the European Parliament the EU's main decision-making body. It consists of representatives of each respective EU Member State's government and is made up of different ministers from each Member State depending on the policy area discussed.⁴ The Council must not be confused with the European Council, which instead is made up of the heads of government from each Member State who meet quarterly to set out the policies the EU is to work under.⁵

1.2 Purpose and Research Questions

The purpose of this research is to present what possibilities exist within Union law to enforce the core values of the EU. More specifically the aim is to investigate what legal possibilities there are to hold EU Member States accountable if they do not act in accordance with these values. It will also be discussed whether this system is effective or not. To achieve said purpose, the following question will be used:

- How can Member States who are not following the core values of the Union be held accountable within Union law?

³ 'EU Institution; European Commission', Website of the European Union.

⁴ 'EU Institution; Council of the European Union', Website of the European Union.

⁵ 'European Council', Website of the Council of the European Union.

1.3 Methodology and Material

Since the focus of this essay is to investigate the possibilities within EU law to hold Member States accountable for not acting in accordance with the Union's core values, an EU legal methodology will be used. The EU legal methodology differs from legal methods specific to each Member State but is the relevant method to use for the purpose of this essay. The relevant laws for this investigation are specific to the Union. Furthermore, the essay is written from a legal dogmatic approach. This choice is appropriate as the purpose of this essay is to investigate and interpret Union law.

The EU consists of 27 Member States, where the Union law affects and is common to them all. The Union law is at the heart of this thesis. Hence, the essay is written from an international perspective.

1.3.1 The Hierarchy of Union Law

The Treaties TFEU and TEU today constitute primary EU law together with the EU Charter and the general Union principles as established by the CJEU. The question of which legal documents are to be used to exercise the EU's competence is regulated by TFEU Article 288, and the documents are regulations, directives, decisions, recommendations, and opinions. Regulations, directives and decisions may be categorized as legislative acts, and they are binding towards Member States (Article 289 TFEU). Further down in the legal hierarchy are recommendations and opinions, which are non-binding.⁶ Treaties will be one of the primary sources in this thesis, together with case law, and doctrine from researchers on EU law. These sources compose the material of the research. Case law from the CJEU clarifies and develops Union law and is an important legal source. Not only

⁶ 'European Union (EU) hierarchy of norms' from the EU legal database Eur-Lex.

CJEU interprets and uses Union law, however. All 27 Member States' courts are also interpreters of it.⁷

The Union law is primary to the national laws of the Member States, and so are therefore also the rulings of the CJEU. The CJEU consist of 27 judges, one from each Member State, and hence from different legal systems and working languages.⁸ The fact that the European Union is supranational has consequences for the interpretive methods of the CJEU. In addition to the 'classical' methods following Savigny that are grammatical, systematic, teleological and historical the Court has also developed supplementary rules of interpretation, which will be accounted for now. Because of the different Member States within the Union an autonomous and uniform interpretation of Union law is crucial for the CJEU. So is interpretation in accordance with international law, especially in regard to international Treaties implemented by the Union. Finally, a comparative method of interpretation is also of importance to the Court, since it juggles legal principles and traditions of all different Member States.⁹

The idea of the Union's internal market is crucial to the whole purpose of the Union. To maintain the internal market the CJEU often use the teleological method of interpretation and make rulings based on Union principles.¹⁰ The CJEU has received criticism for taking matters of judicial development too much into its own hands and performing judicial activism, instead of leaving the law making in the hands of the legislator.¹¹

⁷ Reichel (2018), pp. 115, 122.

⁸ Streinz (2017), pp. 154-155.

⁹ Stotz (2017), pp. 544-547.

¹⁰ Reichel (2018), pp. 122-123.

¹¹ Reichel (2018), pp. 131-132.

1.4 Delimitations

As the purpose of this work is to investigate specifically what possibilities exist within EU law to hold Member States accountable for not respecting the Union values, only EU law will be relevant. Hence no national laws are applicable in this essay. Case law from the European Court of Human Rights, however interesting, will not be relevant as it is not based on Union law.

This research will primarily investigate the EU legal options for enforcing the values, along with the Union's actions towards Poland, as that is where most actions have taken place. When discussing Member States not respecting Union values also Hungary must be mentioned. However, Poland rather than Hungary will be the focus of this essay, and the measures taken by the Union towards Hungary will solely be mentioned briefly. This decision is also made due to the word limitation of the investigation.

1.5 Previous Research

Research of Union law is naturally extensive, as the Union consists of 27 Member States with their respective legal researchers. However, only doctrine written in English and Swedish will be used, as those are the languages familiar to the writer. The subject of the values of the Union and the political development in Poland and Hungary is well researched, as is Union law in general. In the bibliography several articles and books on the subject will be mentioned as sources used in this work.

1.6 Outline

This thesis will begin with an account of the core values of the Union. In the following chapter will the possibilities of enforcement of values be investigated, and the relevant Articles within Union law mentioned. With this background knowledge at hand will a chapter follow which investigates how

the values have been enforced in practice towards Poland, including actions taken by the Commission and rulings from the CJEU. Finally, the thesis will end with some concluding thoughts.

2 The Values of the European Union

This section of the essay will give an account of the values of the European Union.

The core values of the Union are Stated in TEU Article 2 and read as follows:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

These values form the foundation of the Union and are fundamental to the composition of the cooperation that is the EU. What is meant by the word 'values' is in fact 'principles' according to author Kochenov.¹² These values (or principles) were decided upon already at the beginning of the Union. States who did not live up to the principles of rule of law and democracy were not accepted to join the Union, as for example Spain during the dictatorship.¹³

Furthermore, the EU recognizes the rights stated in the ECHR as general principles of Union law, as they reflect the constitutional customs of the Member States (Article 6(3) TEU). This includes the right to a fair trial, as stated in Article 6 of the ECHR. The right to a fair trial can thereby be considered a principle of Union law. This right can also be found in the Charter of the EU, Article 47, where a 'fair trial' is defined as having a public hearing within a reasonable time by an independent and impartial tribunal

¹² Kochenov (2017), p. 9.

¹³ Kochenov (2017), pp. 12-14, 17.

previously established by law. The defendant shall also have a right to be defended and represented.

The cooperation between Member States and the Union is fundamental for the functioning of the EU. Article 4(3) TEU states that the Member States and the Union in mutual respect shall cooperate in matters originating from the Treaties. Member States shall ensure fulfilment of obligations arising from Treaties. Should a Member State undermine the national rule of law, also the EU law is undermined and may no longer function in that State. This effects not only the State where it is happening, but will cause a ripple effect throughout the Union, undermining its functioning.¹⁴

When States already Members of the EU start to undermine the rule of law in its own State they are ‘backsliding’ in terms of the rule of law. ‘Backsliding’ meaning that Member States who previously have been following the EU values of democracy and rule of law now instead develop in a different direction, away from the values.¹⁵ The problem is therefore, since the ‘backsliding’ States are already Members of the Union, how to make them follow the crucial EU principles. To answer this question, we must investigate the possibility of enforcement of values of the Union, which will be done in the following section.

¹⁴ Scheppele (2020), pp. 414-415.

¹⁵ Kochenov (2017), pp. 12-14, 17.

3 The Enforcement of Values of the European Union

This chapter will begin with an account of the core option for enforcing the values in EU law which can be found in Article 7 TEU. Additional options for other Member States and the Commission of bringing a Member State before the Court will furthermore be discussed, as well as the possibility of enforcement through financial penalties.

The Member States are obligated to ensure effective legal protection in the fields covered by Union law, as stated in the second subparagraph of Article 19(1) TEU, meaning that the national courts shall implement and comply with Union law.

3.1 Article 7 TEU

The possibility of enforcing the Union's core values is clearly stated in Article 7 TEU. The Article provides two options: first, in 7(1), an option for the Council to determine a clear *risk of serious breach* of the values in Article 2 under the conditions that it has been proposed by either one third of the Member States, the Parliament, or the Commission. The Council must be acting by a majority of four fifths of its members and with the consent of the Parliament, as well as having a hearing with the Member State in question. Second, in 7(2), the European Council may unanimously, with the consent of the Parliament, determine the *existence of a serious and persistent breach* of the values in Article 2 on a proposal from either one third of the Member States or the Commission, after inviting the Member State in question to submit its observations. Furthermore, when a determination has been made, the Council, acting by a qualified majority, may suspend certain rights of the Member State, including voting rights in the Council. However, the obligations under the Treaties remain for the Member State.

Hence, Article 7 TEU provides possibilities for holding Member States that breach the values stated in Article 2 accountable for their actions. However, for the European Council to determine the existence of a serious and persistent breach of the values it must be acting unanimously, meaning that it is enough for one State to disagree with the others for the process to come to a halt. Since a determination of breach of values must be made for a suspension of rights to be possible it is difficult for such a suspension to in fact happen.

The Member State Hungary made changes to the judiciary and removed some of the restrictions to the role of the Prime Minister in 2010, but the EU did not activate the Article 7 procedure towards the State.¹⁶

3.2 Options for the Commission and Other Member States

Article 258 in TFEU States the Commission's possibility of so-called infringement actions, meaning ways to hold Member States accountable if they have failed to fulfil obligations under the Treaties. If doing so the Commission shall first give the Member State an opportunity to defend itself, and then give its reasoned opinion. If, despite these measures, the Member State still does not comply, the Commission may bring the matter before the CJEU. In the following chapter this option will be further investigated.

The Member States have an option similar to the one of the Commission to bring the matter of another Member State not fulfilling its obligations under the Treaties to the CJEU. This is regulated in Article 259 TFEU, and states that before the matter is brought before the Court, the Commission shall be informed and deliver a reasoned opinion. As with the section above, this option will be investigated further in the following chapter.

¹⁶ Scheppele (2020), p. 419.

3.3 Financial Penalties

There is an option for financial penalties against Member States who do not fulfil obligations under the Treaties stated in TFEU Article 260. The Article proclaims that if the CJEU finds that a Member State has not fulfilled its obligations under the Treaties, the State shall obey the judgement of the Court. If the Commission finds that the State has not done this, it can bring the State before the Court once again. If the Court finds that the State has not complied with the Court's first ruling, it may impose a lump sum or penalty payment on it.

3.4 Direct Enforcement of Article 2

Article 19(1) TEU states, as previously mentioned, that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. In the EU Charter, Article 47 also touches upon the topic of judicial rights for EU citizens, as it states the right to an effective remedy and to a fair trial. Both articles were relevant in the CJEU preliminary ruling from 2018 *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas* (hereafter the *Portuguese Judges* case).¹⁷ The question posed to the EU Court was whether Article 19(1) TEU and Article 47 of the EU Charter regarding judicial independence must be interpreted as hindering the measures taken to reduce the Portuguese judges' remunerations. The remunerations were a result of the Portuguese State's attempt at saving money as a prerequisite for receiving financial support from the EU. The remunerations were reduced also for other groups of employees outside the courts, such as various public office holders and employees in the public sector. In its ruling, the CJEU stressed the importance of mutual trust and shared values between Member States, and in particular, their courts and tribunals.¹⁸ To ensure compliance with Union law in the Member States effective judicial review is necessary,

¹⁷ Judgement of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16.

¹⁸ Judgement of 27 February 2018, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, C-64/16, paragraph 30.

and crucial to the principle of rule of law. The conclusion of the Court was that the measures taken by the Portuguese State could not be considered to impair the independence of the judges, since the measures were general, temporary and had the purpose of granting the State financial aid from the Union. In conclusion the Court found that Article 19(1) TEU and Article 47 of the Charter did not hinder the remuneration reduction.

Scheppele and Kelemen argue that the *Portuguese Judges* case indicate that the CJEU now views the Article 2 values as enforceable in combination with Article 19(1), as the latter guarantees effective legal protection of Union law in the Member States.¹⁹ Through *Poland v Parliament and Council*, which will be discussed further down, the CJEU definitely established that the Article 2 values can be enforced in ways exceeding that of through Article 7, for example through the Charter's proclamation of the right to a fair trial (Article 47) and TEU Article 19(1).²⁰

¹⁹ Scheppele (2020), p. 437.

²⁰ See Chapter 4.3 "Actions Taken After 2018".

4 The Enforcement in Practice towards Poland

This chapter will investigate the measures taken by the EU institutions towards the Member State Poland. First, there will be a short background on the judicial development in Poland, followed by what actions have been taken by the Commission towards the Member State. Additionally there will be summaries of a few relevant rulings by the CJEU.

A brief background on Polish politics showcase a change since 2015 when the general election was dominated by the PiS Party who gained an absolute majority of seats in both houses of parliament. A candidate of the Party was later elected president, which granted the Party complete power over the law-making process. To prevent the Polish Constitutional Tribunal (Trybunał Konstytucyjny) from declaring the actions of the Party unconstitutional were judges appointed politically (and illegally) and some of the Tribunal's rulings were never published. Through these measures, the Party solidified its power.²¹

Based on these changes to the Polish constitutional composition, the EU sprang into action.

4.1 Actions Taken by the Commission

4.1.1 Recommendations

As changes to the Polish judiciary were brought about the Commission engaged in discussions with the Member State about the rule of law, which culminated in several recommendations from the Commission between 2016 and 2017. Despite the pressure from the Commission, Poland did not stop

²¹ Scheppele (2020), pp. 420-421.

‘backsliding’. The first recommendation from the Commission towards Poland came on 27 July 2016, where the Commission found that there was a systematic threat to the rule of law in Poland and recommended Polish authorities to take urgent action to prevent this.²² As the issues addressed in the first recommendation had not been solved by the Polish authorities, the Commission issued a second Recommendation on 21 December 2016 and urged action to be taken.²³ By the time of the third Recommendation on 26 July 2017, the Commission still deemed the threat on rule of law in Poland imminent.²⁴ The concerns were regarding the lack of an independent and legitimate constitutional review, and newly adopted laws limiting the judicial independence.²⁵

4.1.2 Reasoned Proposal Regarding the Rule of Law in Poland

As the Recommendations issued by the Commission towards Poland had negligible effect in protecting the rule of law in the State, the Commission went further in its efforts. In December 2017, the Commission made a Reasoned Proposal regarding the rule of law in Poland, where it recommended the Council to vote on determining a “clear risk of serious breach” of the Union values in Poland, in accordance with Article 7(1) TEU.²⁶

In the Reasoned Proposal the Commission argued that the key issues with the recent Polish judicial reforms were the lack of an independent and legitimate

²² Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland.

²³ Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374.

²⁴ Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146.

²⁵ Reasoned Proposal of 20 December 2017 regarding the rule of law in Poland, paragraph 2(56).

²⁶ European Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland. 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) 835 final (December 20, 2017).

constitutional review and the threats to the independence of the judiciary. The Commission based its conclusions on certain changes to the Polish judicial system, which in summary consisted of changes to the constitutional role of the National Council for the Judiciary in protecting judicial independence, as well as the invalid appointments to the Polish Constitutional Tribunal (Trybunał Konstytucyjny) made by the national Government, and the Tribunal refusing to publish certain judgements. Also, the politically appointed Minister for Justice in addition was given the role as the Public Prosecutor with the possibility of acting in prosecutions, while also being in a disciplinary position towards the presidents of the courts. This change put the presidents in a vulnerable position and could thereby impact their decision making. Another change was the compulsory retirement of judges in the Supreme Court (Sąd Najwyższy) and the fact that the new Members of the National Council for the Judiciary primarily would be political candidates. Lastly, the integrity and effectiveness of the Constitutional Court (Trybunał Konstytucyjny) had been meddled with to the point that Polish laws no longer could be sure to comply with the Constitution.²⁷

4.2 Case C-216/18 PPU

A different reaction to the state of rule of law in Poland came with the ruling in case C-216/18 *PPU*, which was delivered on 25 July 2018 as a result of the Irish High Court requesting the EU Court to make a preliminary ruling. The relevant question of the case was whether the Irish court could choose not to surrender a Polish national, LM, to Polish courts based on him not being granted a fair trial there, as was his right according to Article 6 of the ECHR.

The background of the case was that Polish courts had issued several European arrest warrants against LM that he would be arrested and surrendered to said courts to stand trial there.²⁸ LM was later arrested in

²⁷ Reasoned proposal of 20 December 2017 regarding the rule of law in Poland.

²⁸ Judgment of 25 July 2018, *PPU*, C-216/18, paragraph 14.

Ireland and should on basis of the European arrest warrant issued have been extradited to the Polish courts. However, LM disputed the extradition claiming that the recent Polish legislative reforms would risk denying him the right to a fair trial and thereby violate his rights Stated in Article 6 of the European Convention on Human Rights.²⁹ LM based his concern largely on the Commission’s Reasoned Proposal of 20 December 2017³⁰ regarding the rule of law in Poland. In the Proposal the Commission investigated the Polish judicial reforms beginning in 2015 and their conformity with rule of law, which as previously Stated is one of the EU values Stated in TEU Article 2.³¹ Based on said Proposal and the information presented there the Irish Court concluded that the rule of law had been breached in Poland.

Hence, the Irish Court reached the conclusion that said changes to the Polish judicial system meant that the system no longer was consistent with the rule of law. After establishing this, the Court consequently argued that the surrender of the person to Polish courts for prosecution would breach his rights as stated in ECHR Article 6 because there was a real risk he would be subject to arbitrariness during his trial. Surrendering him to Poland would thereby violate both Irish law as well as Article 1(3) of Framework Decision 2002/584 read with recital 10.³²

The Framework Decision regulates the European arrest warrant and the surrender procedures between Union Member States. Article 1(3) States that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in TEU Article 6, which in turn refer to the fundamental rights in ECHR as constituting general principles of EU law. Hence, the European arrest warrant and its surrender procedures between Member States shall not hinder the respect for the fundamental rights found in ECHR, such as the one found in

²⁹ *PPU*, paragraph 16.

³⁰ The Reasoned Proposal is mentioned above in chapter 4.1.1.

³¹ *PPU*, paragraphs 20-21.

³² Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

ECHR Article 6 – the right to a fair trial. Returning to recital 10 of the Framework Decision it says that the system for the European arrest warrant is based on a high level of trust between Member States to function. The only time it may be overlooked is if a Member State has continuously breached the right to a fair trial, as Stated in Article 6(1) TEU, meaning in this case that the Irish Court had to determine a serious and continuous breach of the right to a fair trial in Poland to be able to refuse surrender of the person in question, - and so they did.³³

When answering the questions posed by the Irish Court the CJEU makes the statement:

[...] it should be recalled that EU law is based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the European Union is founded, as Stated in Article 2 TEU.³⁴

This quote implies two core principles of the Union, those of mutual trust and recognition between Member States. This is a necessary prerequisite for the functioning of the Internal Market, and thereby the entire premiss of the Union. An example of mutual recognition is the European arrest warrant. Based on how crucial the principles of mutual trust and recognition are to the functioning of the Union, the CJEU clarifies that surrender in accordance with the European arrest warrant is the rule, and refusal to surrender only an exception when said circumstances are at hand.³⁵

The CJEU stresses the importance of judicial independence for the possibility of a fair trial in a State:

The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law.³⁶

³³ *PPU*, paragraph 22.

³⁴ *PPU*, paragraph 35.

³⁵ *PPU*, paragraph 41.

³⁶ *PPU*, paragraph 51.

The principles of mutual trust and recognition are built on the notion that all Member States will implement and follow Union law. When States do not comply, the entire system fails. A Member State not being up to the standards of rule of law is not able to guarantee its citizens a fair trial. This is enough for it to be an acceptable exception from the rule of surrender according to the European arrest warrant, the CJEU say. More so, if the person pleads systematic judicial problems in the Member State to which he opposes the surrender, the court in the Member State trying the case is required to investigate the circumstances.³⁷

In the relevant EU law precedent *Aranyosi and Căldăraru* concerning surrender resulting in a breach of the prohibition of torture (Article 3 of the ECHR) the CJEU established a two-step procedure for the national court to consider. First, the authority must find general or systematic deficiencies in the protections provided by the Member State, and thereafter, investigate further information from the Member State's judicial authority regarding the protection of the person in question.³⁸

The CJEU concludes in *PPU* that if there is a real risk that the person will not get a fair trial if extradited, it is acceptable for the national court to not surrender them, although surrender according to the European arrest warrant is the rule.

For it to be possible for courts to deny surrenders to Poland generally the Council would have to determine the Framework Decision non-binding in regard to Poland. Hence, as long as the Framework Decision continues to be binding to Poland must the national courts make assessments in every individual case, and only under exceptional circumstances can an extradition based on the European Arrest Warrant be overlooked.³⁹

³⁷ *PPU*, paragraph 60.

³⁸ Judgement of 5 April 2016, *Aranyosi and Căldăraru*, joined cases C-404/15 and C-659/15 *PPU*.

³⁹ *PPU*, paragraphs 70-72.

To summarize it can be said that *PPU* has clarified that surrender in accordance with the European arrest warrant is the rule, but that exceptions can be made if there is a real risk that the person up for surrender may risk their right to a fair trial. An individual assessment must be made in every case.

4.3 Actions Taken After 2018

Since the *PPU*-case the Commission has continued to take actions against Poland. Infringement procedures were launched in both 2019 and 2020 with the aim to safeguard the independence of Polish judges.⁴⁰ A ruling from CJEU came on 15 July 2021 on case C-791/19, *Commission v Poland*, where the Court declared that Poland had failed to fulfil its obligations to ensure effective legal protection in the fields covered by Union law as stated in Article 19(1) TEU.⁴¹ This because the Polish judiciary does not ensure the judicial independence of judges. In July 2021 the CJEU imposed interim measures on Poland to suspend national measures preventing Polish judges from applying Union law that protects judicial independence, and suspend decisions taken to lift the judicial immunity.⁴² After considering that Poland had failed to fulfil the interim measures imposed on them by the previously mentioned ruling, the Court imposed financial penalties on the State.⁴³ In addition to this came a ruling from the CJEU on 16 February 2022 in the case *Poland v Parliament and Council*.⁴⁴ Poland (supported by Hungary) sought annulment of the adopted regulation meant to protect the Union budget by making the receipt of Union funding dependent on the Member State's respect for rule of law.⁴⁵ The annulment was however dismissed in its entirety

⁴⁰ 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' 3 April 2019, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland', 29 April 2020.

⁴¹ Judgement of 15 July 2021, *Commission v Poland*, C-791/19.

⁴² Judgement of 31 March 2021, *Commission v Poland*, C-204/21, not yet published.

⁴³ Judgement of 27 October 2021, *Commission v Poland*, C-204/21.

⁴⁴ Combined judgements of 16 February 2022, *Poland v Parliament and Council*, C-157/21, and *Hungary v Parliament and Council* C-156/21.

⁴⁵ 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.

by the CJEU based on rule of law being a core value to the EU, and to which the Member States agreed when entering the Union. With the values being fundamental to the Union and its functioning, the Court found that using withdrawn funding as an instrument to encourage following rule of law was acceptable. Through this case, the Court established that the values of Article 2 TEU can be enforced, not only through Article 7, but also for instance through the Charter's right to a fair trial (Article 47) and Article 19(1) TEU.⁴⁶ This brings clarity as it was previously uncertain if the only way of enforcing the values was through the Article 7-procedure.

⁴⁶ *Poland v Parliament and Council*, 16 February 2022, paragraphs 191-199.

5 Conclusion

In summary there are legal possibilities within Union law to hold Member States accountable if they do not act according to the Union values. Article 7 TEU may be used to both declare a risk of breach of values, but also to declare that values already have been broken and impose sanctions on the Member State responsible. Such sanctions could include revoked voting rights in the Council which would have great effect on the Member State. The problem with the Article 7-procedure is, however, the requirement of unanimity between Member States, as it is enough for just one State to disagree for the whole procedure to come to a halt. The possible sanctions would impact the affected Member State considerably but given how easy the procedure is to block is it unlikely for any sanctions to happen at all.

The Commission does furthermore have the possibility to bring Member States before the CJEU if they have failed to fulfil their obligations under the Treaties (Article 258 TFEU), and other Member States have a similar option (Article 259). There is additionally an option to impose financial penalties on Member States who have not fulfilled their obligations under the Treaties, and if they have not complied with the rulings of the CJEU (Article 260 TFEU). The Commission or a Member State could therefore argue that another Member State has breached Union values, and hence failed to fulfil their obligations under the Treaties and bring the Member State in question before the CJEU. If the Court finds that the Member State in fact has broken Union values and does not comply with the Court's ruling to change, a financial penalty could be imposed on that State. This is a quite tangible way of holding Member States accountable for not fulfilling their obligations under the Treaties.

The CJEU also established in 2022 through *Poland v Parliament and Council* that the TEU Article 2 values can be enforced, not only through Article 7, but also through the Charter's proclamation of the right to a fair trial (Article 47)

and TEU Article 19(1), for example. Additionally, it increases the legal possibilities for EU institutions to hold Member States accountable, as it is fair to say that the main Article for enforcing the Union values (7) is quite inefficient. As it requires unanimity is it enough for just one Member State to block the vote for the mechanism to be fruitless. It is therefore possible that the ruling does make for easier ways of enforcement.

Consequently, several different legal possibilities of enforcement of the Union values do exist within EU law. A different question is, however, if these legal measures are enough to actually enforce the values in practice. Both Hungary and Poland have been ‘backsliding’ in terms of rule of law for several years, and for now there are few indications of change. But as shown by *Poland v Parliament and Council*, existing legal options may be easier to use than previously expected.

Bibliography

Legal Documents

EU Regulations

Charter of Fundamental Rights of the European Union

Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland.

Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374.

Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146.

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

European Commission Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland.

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) 835 final (December 20, 2017).

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 2020 L 433I, p. 1).

Treaty on European Union.

Treaty on the Functioning of the European Union.

Other

European Convention for the Protection of Human rights and Fundamental Freedoms

Literature

Bignami, Francesca, 'Introduction: EU Law, Sovereignty and Populism', in: Bignami, Francesca (ed.), *EU Law in Populist Times, Crises and Prospects*. Cambridge, 2020.

Kochenov, Dimitry, 'The Acquis and Its Principles: The Enforcement of the "Law" versus the Enforcement of "Values" in the EU' in *The Enforcement of EU Law and Values*, Jakab, András & Kochenov, Dimitry, Oxford, 2017.

Reichel, Jane, 'EU-rättslig metod' in Nääv, Maria & Zamboni, Mauro (eds.), *Juridisk metodlära*, Lund, 2018.

Scheppele, Kim Lane & Kelemen, R. Daniel, 'Defending Democracy in EU Member States: Beyond Article 7 TEU', in: Bignami, Francesca (ed.), *EU Law in Populist Times, Crises and Prospects*. Cambridge, 2020.

Stotz, Rüdinger, 'The Case Law of the CJEU' in Riesenhuber, Karl (ed.), *European Legal Methodology*, Cambridge, 2017.

Streinz, Rudolf, 'Interpretation and Development of EU Primary Law' in Riesenhuber, Karl (ed.), *European Legal Methodology*, Cambridge, 2017.

Electronic Sources

‘EU Institution; Council of the European Union’, Website of the European Union. <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/council-european-union_en> Viewed on 16 May 2022.

‘EU Institution; European Commission’, Website of the European Union. <https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en> Viewed on 16 May 2022.

‘European Council’, Website of the Council of the European Union. <<https://www.consilium.europa.eu/en/european-council/>> Viewed on 16 May 2022.

‘European Union (EU) hierarchy of norms’ from the EU legal database Eur-Lex. <<https://eur-lex.europa.eu/EN/legal-content/glossary/european-union-eu-hierarchy-of-norms.html>> Viewed on 17 May 2022.

‘Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control’, 3 April 2019 <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1957> Viewed on 19 May 2022.

‘Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland’, 29 April 2020, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772> Viewed on 19 May 2022.

Table of Cases

Combined judgements of 16 February 2022, *Poland v Parliament and Council*, C-157/21, EU:C:2022:98 and *Hungary v Parliament and Council* C-156/21, EU:C:2022:97.

Judgement of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 EU:C:2016:198.

Judgement of 27 February 2018, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, C-64/16, EU:C:2018:117.

Judgment of 25 July 2018, *PPU*, C-216/18, EU:C:2018:586.

Judgement of 31 March 2021, *Commission v Poland*, C-204/21, not yet published.

Judgement of 15 July 2021, *Commission v Poland*, C-791/19, EU:C:2021:596.

Judgement of 27 October 2021, *Commission v Poland*, C-204/21, EU:C:2021:878.