Predmet Hann-Invest - Demokratizacija mehanizma prethodnog pitanja kao podrška promicanju kulture vladavine prava

Stier, Martin Andrej

University of Zagreb
Faculty of Law

Student:
Martin Andrej Stier

MASTER THESIS

Hann-Invest Case – The Democratisation of the Preliminary Reference Mechanism in Support of Fostering a Rule of Law Culture

Department of European Public Law

Mentor:
dr. sc. Davor Petrić, LL.M. (UMich)

Zagreb, 2024

Table of content

Izjava o izvornosti

Ja, Martin Andrej Stier, pod punom moralnom, materijalnom i kaznenom odgovornošću, izjavljujem da sam isključivi autor diplomskog rada te da u radu nisu na nedozvoljeni način (bez pravilnog citiranja) korišteni dijelovi tuđih radova te da se prilikom izrade rada nisam koristio drugim izvorima do onih navedenih u radu.

Martin Andrej Stier

Authenticity statement

I, Martin Andrej Stier, under full moral, material and criminal liability, declare that I am the sole author of this thesis and that no parts of other works were used in an unauthorised manner (without proper citation) and that during the preparation of the work I did not use sources other than those mentioned in the paper.

Martin Andrej Stier

Abstract

After more than a decade of continuous adjudication on matters pertaining to rule of law violations, Europe's latest crisis has recently garnered even greater attention due the unexpected ruling in *Hann-Invest*. Ever since its landmark *Portuguese judges* judgement, the Court of Justice of the EU has been grappling on how to handle the unexpected consequences of its initial interpretation of Article 19(1) TEU in combination with Article 2 TEU and Article 47 of the Charter. This has, in turn, resulted in an unbalanced response to the entire crisis. However, it appears that a significant shift might soon incur. As will be argued in this thesis, the admissibility ruling on *Hann-Invest* could present the long-awaited turning point in the way in which the entire crisis is being addressed. Basing my thesis on Monica Claes' analysis of the origins of these violations, I will explain why *Hann-Invest* offers a unique opportunity to establish a true "rule of law culture" by its democratisation of the preliminary reference mechanism. While it will ultimately be future case law which will decide if such precedent shall prevail, this judgement could indeed mark the beginning of a new era in European integration, establishing, for the first time, an effective post-accession bottom-up framework able to put an end to any present and future crises of this type. However, to fully comprehend the judgement's significance, it is important to begin by a step-by-step analysis of socialist law, the transition and accession periods, as well as the current rule of law "toolbox". This historical perspective is essential to understanding both the context, as well as the root causes of the current crisis. Each phase gives a better understanding of what this possible solution might entail, particularly in light of the latest *Hann-Invest* judgement.

KEYWORDS: judicial independence, admissibility, preliminary reference, Court of Justice of the European Union, Article 19(1) TEU, Article 267 TFEU, *Hann-Invest*, rule of law culture.

Sažetak

Nakon više od desetljeća neprekidnog presuđivanja o pitanjima koja se odnose na kršenje vladavine prava, najnovija europska kriza nedavno je privukla još veću pozornost zbog neočekivane presude u predmetu *Hann-Invest*. Još od važne presude u predmetu *Portugalski suci*, Sud EU-a se borio s neočekivanim posljedicama prvobitnog tumačenja članka 19. stavka 1. UEU-a u kombinaciji s člankom 2. UEU-a i člankom 47. Povelje. To je pak rezultiralo neuravnoteženim odgovorom na cjelokupnu krizu. No, čini se da bi uskoro moglo doći do značajnog pomaka. Kao što će se tvrditi u ovoj tezi, odluka o dopuštenosti zahtjeva za prethodnu odluku u predmetu *Hann-Invest* mogla bi predstavljati dugo očekivanu prekretnicu u načinu na koji se rješava cijela kriza. Temeljeći svoju tezu na analizi Monice Claes o podrijetlu ovih prekršaja, objasnit ću zašto *Hann-Invest* svojom demokratizacijom mehanizma prethodnog pitanja nudi jedinstvenu priliku za uspostavu istinske "kulture vladavine prava". Iako će u konačnici buduća sudska praksa odlučiti hoće li takav presedan prevagnuti, ova bi presuda doista mogla označiti početak nove ere u europskoj integraciji, uspostavljajući, po prvi put, učinkovit post-pristupni okvir koji funkcionira "odozdo prema gore" te koji može stati na kraj svim sadašnjim i budućim krizama ove vrste. Međutim, kako bi se u potpunosti shvatila važnost ove presude, važno je započeti analizom socijalističkog prava, razdoblja tranzicije i pristupanja, kao i postojećih "alata" za očuvanje vladavine prava kojima raspolažu institucije Unije. Ova povijesna perspektiva ključna je za razumijevanje konteksta, kao i uzroka trenutne krize. Svaka faza pruža bolji uvid u to što bi moguće rješenje moglo uključivati, posebno u svjetlu najnovije presude u predmetu *Hann-Invest*.

KLJUČNE RIJEČI: sudska neovisnost, dopuštenost, prethodno pitanje, Sud Europske unije, članak 19. stavak 1. UEU-a, članak 267. UFEU-a, *Hann Invest*, kultura vladavine prava.

Introduction

In the midst of a severe rule of law crisis that has plagued the European Union (hereinafter: EU) for the last 12 years, three surprising cases emerged at the Court of Justice of the European Union (hereinafter: CJEU) from an unexpected country. In the form of three preliminary references, for the first time, a number of Croatian judges sought refuge in EU law in order to stop a repressive practice which they believed endangered their "judicial independence". While the case was initially expected to clarify some uncertainties in the CJEU's recent case law, it ultimately proved to be far more significant than anticipated, having possible profound implications both at a national and European level.

The case should, for starters, be analysed within the sociopolitical and legal context of the ongoing crisis. Over the span of the last 10 years, the EU has been slowly broadening the content of its so-called "rule of law toolbox" meant to tackle all arising violations. However, the current approach has proven to be deeply flawed. Not only has it demonstrated the ineffectiveness of many of its measures, but most concerningly, it showed a grave misunderstanding in the nature of the crisis itself. Thus far, most measures have targeted only what could be classified as "symptoms" rather than the root cause of a much more concerning reality. This has, in turn, resulted in an inadequate, and often counterproductive approach. At the time of the references, it appeared the EU had reached an impasse. However, as will be argued, the later joined cases C-554/21, C-622/21 and C-727/21 *Hann-Invest* emerged as a perfect opportunity for the CJEU to reassess some of its previous more controversial case law and allow for the further democratisation of its rule of law mechanisms, precisely that of preliminary references.

In this thesis I will aim to elaborate my stance on the current state of affairs, with a strong emphasis on the situation within Croatia, which should have been categorised as one of the states affected by the crisis from the very beginning. Ever since the *Hann-Invest* judgement came out, most articles seem to have focused on the latter *meritum* part of the ruling. While that aspect certainly proves important, I believe its true significance could lie elsewhere – specifically, its decision on the admissibility of the given references. To fully grasp the impact of the Court's recent ruling – both in terms of the EU's possible future approach towards tackling the rule of law crisis, as well as the possibility for the further transitioning of some Member States – three key issues should be analysed priorly.

Firstly, one must begin by understanding the historical socialist underpinnings present in all of the "crisis" states. One of the EU's biggest mistakes has been its failure to account for the underlying origins of such violations. Many implemented measures have, consequently, fallen short in the manner in which they aimed to tackle these problems. A thorough analysis of the period of democratic transition, as well as the process of EU accession negotiations reveal how many of these olden values remain deeply ingrained in the cultural mentality of most citizens, including jurists. Therefore, it is crucial to understand both the logic and philosophy behind the socialist tradition before assessing the nature of the crisis, let alone proposing any viable solution. Any approach which ignores this reality, is bound to fail.

Furthermore, the latter should offer a foundation for better understanding the mentality in such jurisdictions, which will in turn facilitate the analysis of the EU's overall approach since the resurgence of the crisis. While some of the components of the aforementioned "toolbox", such as infringement actions and budget conditionalities, appear to be highly effective at first, little progress can be said to have been achieved since their introduction. As will be discussed later on, most of these measures either fail to properly address the ongoing crisis due to their non-binding nature, or, conversely, unintentionally reinforce the same authoritarian tendencies which have resulted in such a crisis. In other words, by failing to address the root cause, they repeat the same mistake which allowed these practices and values to prevail, ultimately missing the opportunity for long-term change.

Lastly, and most importantly, there is the analysis of *Hann-Invest*. The case emerged at the forefront of an ongoing debate surrounding the admissibility of preliminary references in cases where the questions posed are largely unrelated to the substance of the pending disputes. It is my opinion that the latter mechanism could, due to its unique bottom-up nature, present a fresh new approach to the ongoing crisis as it combines both the advantages of the current legally binding measures, while simultaneously enhancing civic society's role as the main driver for change. However, there has been considerable back-and-forth between the logic presented by the CJEU and that of Advocates General regarding their admissibility, resulting in a grey area of legal uncertainty. As a result, many scholars have dismissed preliminary references as a viable alternative solution, at least for the time being. Even after the Court's ruling in *Hann-Invest*, the answer to such a question still remains somewhat ambiguous due to the Court's lack of explanation. Nonetheless, as I will argue later on, the solution should still be welcomed as it paves the way for a more practical and, more importantly, a legally consistent solution.

Thus, *Hann-Invest* could indicate a turning point in the way in which the entire rule of law crisis is being addressed. Although the judgement is far from perfect, some of its conclusions might finally lead to a more viable approach. As mentioned, twelve years have passed and little to no progress was achieved. With the exception of Poland – for which it would be too early to make a definitive judgement – other countries, such as Hungary, have since doubled down on their intention to continue these practices. This small but significant Croatian case might, therefore, prove more impactful than anticipated. Nevertheless, prior to drawing any conclusions on the significance of *Hann-Invest*, and why it might present a fresh start, it is important to first delve into both the history of such a crisis, as well as the EU's overall response. Without this, we risk repeating the same past mistakes which led to this point. Therefore, I shall begin my thesis by analysing the relevant aspects and principles of socialist law, followed by a historical analysis of both the democratic transition and accession negotiations, as well as the post-accession state of affairs. Each of these phases provides insight into the root causes of the current crisis and gives a better understanding of what a possible solution might entail, particularly in light of the latest *Hann-Invest* judgement.

1. Socialism

Before analysing the relevant aspects of socialism in the Member States of Central and Eastern Europe (CEE), it is important to note one thing. While there is not a singular brand of "socialism" – each country added their own unique characteristics – the underlying philosophy remained the same in all. Since I intend to simply offer a foundational understanding of the once prevalent legal philosophy in these states, I will refrain from analysing one system, but rather aim to provide examples from different Member States that are representative of the overarching principles dominant in all, and particularly in Croatia. Through the analysis of Uzelac's and Kühn's papers, my objective is to primarily discern the foundational principles of socialist law as an independent legal tradition and, subsequently, to highlight the elements that continue to hold relevance with regards to the respect for judicial independence as a key element of the rule of law principle. It is my opinion that the present rule of law crisis in the EU, the solutions proposed and the significance of *Hann-Invest* cannot be fully understood without prior knowledge of these elements. Hence, it is imperative that we start the analysis from the very beginning.

According to H. Patrick Glenn, a legal tradition is "an inclusive of a great deal of normative information that may be gathered or captured over a very long period of time".[1] Based on Glenn's theory, we can differentiate between living, submerged (frozen) and suspended legal traditions.[2] While identifying a living legal tradition might be more straightforward as it is actively practised, distinguishing between submerged and suspended legal traditions requires information about their future application, making it practically impossible to declare any tradition as truly extinct.

Most people would agree that there are currently two living traditions in the EU: the common law and the civil law tradition. However, remnants of a third tradition seem to still exist, though diminished. From the emergence of socialist states in the beginning and middle of the 20th century and all the way till the 1990s, this legal tradition was being cultivated in the Eastern and Southeastern European states under the name of "socialist law".[3] Though some scholars may consider socialist law to merely be a subset of the civil law tradition, authors such as John Henry Merryman disagree. In his works, Merryman made it clear that this particular legal system had features so unique and distinct that it should be considered its own category, or in other words, Europe's "third legal tradition".[4]

The philosophical underpinnings of the tradition gave light to particular perspectives on the role of the law, the government and the judiciary. Drawing on Merryman's work, Alan Uzelac outlined some of its main features. The philosophy starts from the understanding that the purpose of the law is instrumental and it is meant to achieve certain economic and social goals.[5] Contrary to other legal traditions, it is very much transparent about its aims, mainly that of ending the ideals of what is perceived as "bourgeois law".[6] As Uzelac notes, such a model can best be explained as a radicalised form of "political-implementation type" justice which views every case through the lens of public interest, which was often found in state guidelines.[7] In the judiciary, this translated into the courts being engaged in political activism, rather than judicial activism, as can be found in the West.[8] Judges would refrain from deciding cases based on their own values and professional beliefs and prioritise the promotion of certain policies in

[1] H. Patrick Glenn, 'A Concept of Legal Tradition' (2008) Queen's Law Journal Vol. 34(1).
[2] Ibid, 435.
[3] Alan Uzelac, 'Survival of the third legal tradition?' (2010) Supreme Court Law Review Vol. 49.
[4] Ibid, 377.
[5] Ibid.
[6] Ibid.
[7] Alan Uzelac, '"Materijalna istina": iskrivljeno ogledalo jedne teorije istine u sudskom postupku' (1992) Zbornik Pravnog fakulteta u Zagrebu Vol. 42.
[8] Ibid.

accordance with the state ideology.[9] This sometimes even meant that cases were decided *contra legem*.[10] For example, in Yugoslavia, in eras of high inflation, the courts would repeatedly violate the principle of monetary nominalism without any legal repercussions.[11]

Such a phenomenon can be further understood by comprehending the meaning of "statute" within socialist legal systems.[12] Liberal-democratic societies perceive laws, not only as mere means for regulating current social processes, but also as specific, non-retroactive and general legal acts which protect individual rights.[13] The latter element is very much missing in the socialist understanding.[14] That is why the judiciary is only bound by the law, while it faithfully conveys the current political will.[15]

In parallel with Uzelac's work, in his analysis of the main elements of socialist law, Zdenek Kühn highlighted three additional elements that differentiate it largely from any other legal tradition. Kühn begins his explanation by emphasising the importance of distinguishing between an authoritative judicial discourse from an authoritarian one. All judicial systems are in principle authoritative.[16] Courts rule as if only one correct answer existed for every presented question and their decisions are final because of their authority within the judicial and legal system.[17] An authoritative system relies on the existence of conflicting opinions and the participation of all competent persons in the decision making process.[18] It is thus for the court to take every relevant opinion seriously and render the "right" decision.[19] Contrary to this, authoritarian discourse rejects almost all of these presuppositions.[20] The authoritarian system's decision making process relies not on the parties participation, but rather on the top-down backing of an institutional power.[21] In other words, the construction of the law is produced from above and the parties are regarded as mere objects of the procedure.[22] We can already see how this perception shows elements reflecting the socialist law foundations emphasised by Uzelac. For courts to "protect" the public interest, it is imperative that its powers be much

[9] Ibid.
[10] Ibid, 421.
[11] Mihajlo Dika and Alan Uzelac. 'Sudački aktivizam u Jugoslaviji' (1990) Zbornik Pravnog Fakulteta u Zagrebu Vol. 40, No. 4.
[12] Uzelac (n 7).
[13] Ibid.
[14] Ibid, 420–421.
[15] Ibid, 421.
[16] Zdenek Kühn, 'All-Pervasive Legacies of Socialist Constitutionalism? The Case of Judiciary' (2021) Russian Law Journal.
[17] Ibid.
[18] Ibid, 32–33.
[19] Ibid, 33.
[20] Ibid.
[21] Ibid.
[22] Ibid.

greater than that of parties.[23] Thus, in a radically implemented socialist model, the parties' dispositions should be insignificant, and all facts, as well as the meaning of the applicable law should be established by the court *ex officio*.[24]

Kühn continues by connecting this phenomenon with the understanding of the principle of *Iura novit curia* within the socialist tradition. The essence of the principle in civil (continental) law procedures implies that the parties are not obliged to raise questions of law, but rather just those of facts, since it is in the court's own responsibility to determine which norm applies.[25] Regardless, in civil law systems, this principle is not taken literally.[26] As Kühn notes, "judges technically 'know' the law, but they often need the party's attorneys to help them find the relevant provisions and to determine its best reading".[27] The same did not apply for socialist countries, where the principle was taken much more strictly.[28] "Knowing the law" implied that this was part of the court's exclusive domain and that parties should refrain from any type of interference.[29] Even more so, this comes as an extension of the socialist perception of the law as an instrument for achieving social goals and dismantling "bourgeois" ideals. It is a known fact that not all parties could have afforded legal representation, therefore, since this should not result in one party gaining an advantage, the court should maintain a social monopoly on determining the meaning of legal language and communicate it downwards.[30]

An authoritarian top-down system of a judiciary should already present a concern to anyone familiar with the dangers of concentrated power. By excluding the possibility of party contribution in proceedings, and to a certain extent, even of lower judges, the legal discourse becomes numb, judges disconnected with reality and the entire judiciary susceptible to political interference. The obvious lack of necessary criticism, which would typically arise through diverse judgments or legal opinions, deprives the entire system of a crucial correcting mechanism needed to ensure the optimal application of the law. It is only natural that the whole judiciary become a reflection of the entire socialist top-down system of governance and, instead of maintaining its independence, it merges with the ruling establishment as just another medium for achieving political goals. As mentioned, such was the case in all of these countries, and Croatia was no exception.[31] Although it is worth emphasising once again that not all

[23] Uzelac (n 7).
[24] Ibid.
[25] Kühn (n 16) 33.
[26] Ibid.
[27] Ibid, 34.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Uzelac (n 7).

socialist systems were equal in structure, all of these practices were very much present in a variety of forms, persisting in some cases even till this day.[32]

2. Transition and accession

a) Transition

The 1990s marked a period of change in the CEE region, as a fresh breeze of freedom and hope swept through the once communist states. With Fukuyama's famously proclaimed "end of history", socialism found itself on the brink of extinction and the formerly communist countries were beginning to wake up from a half-century long slumber.[33] American constitutional theorist Bruce Ackerman, mockingly wrote, "From Warsaw to Moscow, Johannesburg to Beijing, a spectre haunts the world, as if risen from the grave — the return of revolutionary, democratic liberalism."[34] The "Iron Curtain" had fallen, and soon the CEE countries found themselves on a two stage mission: transitioning to liberal democracy, and pursuing accession to the EU.

There is much debate surrounding the nature of the famously named "transition" with scholars offering different perspectives. Some simply highlight the elements of democratisation and marketisation and label it a "double transition", while others added the third factor of "statehood", and some even seeing it as a "quadruple transition" separating the national and state-ness questions as two interlinked, however, separate elements.[35] The Croatian example might prove as an outlier in this category since the process of transitioning was indeed affected by the war of independence in the 1990s. It would thus certainly fall under the category of a "triple transition", unlike some other CEE states which already gained their sovereignty beforehand. Regardless, one fact remains clear: in all of these countries socialism was no more, and the newly constituted states were turning towards the West for inspiration. However,

[32] Alan Uzelac, 'Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost' (2020) Novìne u parničnom procesnom pravu (Hrvatska akademija znanosti i umjetnosti).
[33] Francis Fukuyama, 'The End of History and the Last Man' (2012) Penguin Books.
[34] Bruce Ackerman, 'The Future of Liberal Revolution' (1992) Yale University Press.
[35] Taras Kuzio, 'Transition in Post-Communist States: Triple or Quadruple?' (2001) Politics Vol. 21.

compared to former historical revolutions, which were guided by utopian ideals, this was meant to be a "revolution of sober expectations".[36]

The transition CEE countries underwent should primarily be regarded as a "constitutional revolution". Like the name itself suggests, the central role in the process belonged to the newly established constitutional courts, tasked with interpreting and enforcing the recently adopted constitutions. These courts saw themselves as agents of social change towards a liberal capitalist system.[37] Kühn even notes a case decided by the Constitutional court of Hungary where the President of the Court openly declared how the role of the court was to read the "invisible constitution".[38]

The Croatian Constitutional court, on the other hand, was not as transparent. For instance, in 1992, the first president of the newly established Constitutional court formally proclaimed the notion that the role of the court was to simply apply the law, and not to create policies.[39] Nevertheless, his tenure was marked by a number of attempts of judicial activism.[40] Such an example would be the case where, in an attempt to create policies by way of bolstering the rule of law and the protection of human rights, the court decided to repeal certain provisions of the recently adopted Act on Adjustment of Pensions which ceased to adjust pensions according to the inflation rate and cost of living.[41] The court found that these provisions were a violation of the constitutional principles of equality, social justice, and the rule of law since they resulted in the social inequality of citizens.[42] While the mere outcome of this case, like other similar cases at the time, might provide a clearer view of how the court was gradually pushing for the transition, its real significance lies in the statement it conveyed: the judiciary was no longer subject to the control of the ruling political establishment, instead, it proved to be very much independent. In other words, to quote former Advocate General (AG) Michael Bobek, in only a couple of years the judiciary in these countries seem to have jumped from "zero judicial independence, to '200 percent' judicial independence".[43]

---

[36] Branko Smerdel, 'Kriza demokratskog konstitucionalizma i izgledi demokratske tranzicije u Republici Hrvatskoj' (2019) Zbornik Pravnog fakulteta u Zagrebu Vol. 69.
[37] Kühn (n 16) 28.
[38] Ibid, 33.
[39] Sanja Barić, 'The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU' (2016) ANALITIKA Center for Social Research.
[40] Ibid.
[41] The referenced decision is the Constitutional Court of Croatia Decision No. U-I-283/1997, NN 69/1998, as cited in Barić (n 39).
[42] Ibid.
[43] Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2007) European Public Law Vol. 14, No. 1.

While initially perceived as a positive thing (which to a certain extent it was), as I tend to show in this thesis, the mere alteration of formalities does not constitute the alteration of established customs and practices that prove problematic. This case was no different. The liberation of the judicial branch in the 1990s quickly led to what can be defined as the "over-centralization" of the constitutional review.[44] Put simply, the CEE constitutional courts established a self-proclaimed monopoly on the guarantee of the rule of law, disregarding the rest of the judiciary and thus continuing the authoritarian practices.[45] In the case of Croatia, this made the judiciary once again susceptible to political interference, stripping the country of the effective protection of liberal democratic values and thus opening the doors to old practices reminiscent of a tradition believed to be suspended. What is more, such a lack of control allowed for the survival of certain controversial mechanisms for the uniform application of law, which combined with the judiciary's radical attainment of independence, led to the creation of a new hierarchical power structure. However, this time, instead of being directly subordinate to the ruling political class, this seems to have established an internal autocratic hierarchy within the judicial branch with the highest-ranking justices of the Constitutional, Supreme and High courts now at its pinnacle. It is this precise matter that gave rise to the Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest,* as will be noted later on.

Nevertheless, these results should not be attributed solely to this factor. Changing the structure of a judiciary can only be so effective as the changing of the people that serve within it. Most countries tried to solve this issue by implementing lustration laws to assure themselves that people who collaborated with the state apparatus of the communist regime were not permitted to hold positions of power. An exception would be Croatia who, due to war related reasons, did not enact any such regulation.[46] Regardless, the problem was much too deep to be simply solved by replacing a few individuals.

To understand the seriousness of this problem, one must first comprehend the structure of the CEE judiciaries and how judicial careers are formed within these continental legal systems.[47] Both civil law and socialist law countries perceive the judicial career as if it was just another type of civil service.[48] Freshly graduated students start doing their judicial apprenticeship within one of the courts and once they complete a certain amount of years and

[44] Kühn (n 16) 30.
[45] Ibid.
[46] Barić (n 39) 17.
[47] Bobek (n 43) 115.
[48] Ibid, 116–117.

pass the judicial examination, they may become judges.[49] However, since they enter the institution usually in their early twenties and without any prior experience, they are mostly being formed by older judges that, in this case, use to pertain to the old system.[50] In other words, it is the socialisation aspect of such a structure that proves concerning.[51] All of the socialist values, working habits and practices were being transferred to these "judges-in-the-making". In Croatia, responsibilities such as those of appointment, transfer and dismissal of judges, as well as their education, had, for instance, been assigned to the State Judicial Council (Državno sudbeno vijeće) – a body dominated by justices from the highest courts. As a result, the possibility of being appointed as a judge, as well as career advancement was highly dependent on the council's decision, which often led to the promotion of judges based on their loyalty rather than merit.

Furthermore, the legal education most of them received beforehand does not seem to have helped either. The issue, again, lies in the particular way the higher education system was reformed. In most of the newly adopted constitutions the principle of university autonomy was elevated as a constitutional category. In some, this took the form of an individual right pertaining to citizens, while in others as a right of the institution itself. For example, in Article 68 of the Croatian Constitution, the autonomy of the university is guaranteed, allowing them to independently decide on their organisation and activities, in accordance with the law.[52] The same can be found in Article 58 of the Slovenian Constitution, Article 123 of the Finnish Constitution or in Article 38 or the Estonian Constitution.[53] On the other hand, academic freedom can be guaranteed as a "freedom of scientific research and artistic creation". Such provisions are present in the Hungarian, Polish and Slovakian constitutions.[54]

To paraphrase Bobek's statement, in all of these countries, academia went from having "zero independence", to "'200 percent' independence" *de facto* overnight.[55] Once again, while the rules might have changed on paper, even to the extent of being granted constitutional status, the personnel, practices, mentality and values have not. Bobek uses the example of Czech academia to best illustrate this. "The problem was, however, that before granting full academic

[49] Ibid, 117.
[50] Ibid.
[51] Ibid.
[52] Ustav Republike Hrvatske (Narodne novine, br. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14).
[53] Jogchum Vrielink, Paul Lemmens and Stephan Parmentier, 'Academic Freedom as a Fundamental Right' (2011) Procedia - Social and Behavioral Sciences Vol. 13.
[54] Ibid, 119.
[55] Bobek (n 43) 100.

freedom, the Communists members of the law faculties were not asked to leave."[56] "Such regulations, since 1990, have allowed the old communist academic community to elect deans who, to a large extent, protect the status quo, their own jobs, and incompetence within the faculty."[57] Furthermore, the problem seems to get worse insofar as these same people were the ones deciding whom to hire as their successors, the criteria often being loyalty and lack of intellectual challenge to the current incompetent professoriate.[58] In the example of Croatia, while there might be a lack of articles on this, it could be argued that a similar scenario took place. There does not appear to have been a widespread turnover of the professoriate once the country gained its independence, and similarly, a proportion of the old legal textbooks were kept for some time, some even being in use till 2022.[59]

To sum up both Bobek and Kühn's arguments, the mentioned factors played a significant role in, not only the survival of the philosophies of the old socialist legal system, but also their influence in the post-socialist legal and judicial discourse.[60] In all of these countries, the widely awaited "transition" either failed, or can still be considered as ongoing. Which of these two is correct remains a matter of debate. Nonetheless, one thing stands clear: socialist law should not be regarded as a suspended, nor submerged legal tradition, at least not for the time being. The lack of a serious assessment of the philosophical underpinnings of the old system rendered every effort invested towards the establishment of a fully functioning liberal democracy obsolete. The still prevalent socialist practices and values seemed as strong as ever. The universities never changed. The judiciary never changed. And, dare I say, in many cases, the political establishment did not change either. Thus, going back to Glenn's categorization of legal traditions, a conclusion could be drawn that many CEE countries are currently navigating between two living legal traditions, that of civil law, and socialist law. A legal limbo which arose as a result of this failure to fully uproot values and practices of the past, which in turn then prevailed within a newly adopted civil law framework. This has over time intensified, turning many CEE Member States into battlegrounds between these two traditions. Something resulting in, what can now be classified, as a genuine continental crisis.

[56] Ibid, 105.
[57] Ibid, 106.
[58] Ibid.
[59] An example would be the textbook used for Roman Law, which was Marijan Horvat's "Rimsko pravo" from the 1960s, that contained an analysis of Roman law through a socialist lens. It was just recently replaced by the new 2022 edition which was edited by Professor Marko Petrak.
[60] Kühn (n 16) 31.

b) Accession to the European Union

Other than the "constitutional revolution" that was taking place, the transition period should also be analysed from the perspective of the accession to the European Union. These two processes were heavily intertwined and to a certain extent even aimed for the same goal: reaching the ideals of liberal democracy found in Western Europe.

Though historically, regarding accession, the EU did not pay much attention to the models of court administration, a change occurred in 1993 after the European Council meeting in Copenhagen.[61] Court organisation and administration was set as one of the famous "Copenhagen Criteria" meaning that judicial independence, as an element of the rule of law principle, became of crucial importance for countries to accede.[62] Candidate states were to "achieve stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities".[63] Consequently, this implied that after a non-completed internal transition, the process would be further promoted from the exterior, with the EU now having a direct influence over the attainment of these goals. Various country reports, analytical papers and other documents that further explained this criteria were adopted, however, the steps were considered to be pretty vague and open to interpretation.[64] In addition, much was still left at the discretion of the Commission which resulted in even more confusion as to what the standards really were.[65] James E. Moliterno and others provide a simple structural analysis of the Copenhagen criteria and relevant documents that show what was really being assessed regarding the rule of law criteria. The elements that were being looked at in the late 1990s and early 2000s were: (i) elections, (ii) the functioning of the legislature, (iii) the functioning of the judiciary, (iv) the functioning of the executive, and (v) anti-corruption measures (good governance).[66] Later accession negotiations, such as the case with Croatia, seemed to have followed the same model.[67] Nevertheless, despite the attempt to provide a clear

[61] James E. Moliterno, Lucia Berdisová, Peter Čuroš and Ján Mazúr, 'Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants' (2018) Fordham Int'l L.J. Vol. 42.
[62] Ibid.
[63] Presidency Conclusions of the Copenhagen European Council on June 21 and 22, 1993, EUR. PARLIAMENT https://www.consilium.europa.eu/media/21225/72921.pdf accessed 3 July 2024 [https://perma.cc/SNX9-6VH3].
[64] Moliterno (n 61) 518.
[65] Ibid, 518-519.
[66] Ibid, 519.
[67] Directorate-General for Neighbourhood and Enlargement Negotiations, Screening report Croatia - Chapter 23 - Judiciary and fundamental rights (2007) https://neighbourhood-enlargement.ec.europa.eu/document/download/ba39613b-1486-42f1-b411-f526ddd277cd_en accessed 3 July 2024.

framework of which foundational elements would be considered, as Moliterno and others pointed out, the Commission's reports on individual countries' performances were inconsistent and often contradictory.[68] This lack of predictability and consistency can lead to a conclusion that a country's readiness to meet the initial admissibility criteria was more of a political question rather than a thorough assessment of the actual situation.[69]

We can also mention the Council of Europe (CoE) as another external promoter of the transition. Through its institutions such as the Consultative Council of European Judges and the Commission for Efficiency in Justice, the CoE established mechanisms for examining the independence, impartiality and competence of judges and for promoting quality in the public service of justice.[70] However, as noted, these were all advisory bodies without much, if any, power of enforcement.[71]

To conclude, while the exterior factors of the EU and CoE might have pushed for the further transitioning of these states, the standards that were set ended up being either way too vague, incomprehensible, contradictory, inconsistently applied or just mere recommendations that had no legal effect. Hence, numerous problems still remained unaddressed, with countries having entered the EU by a simple adoption of the corresponding legislation, with poor implementation and, most importantly, without the necessary shift in the foundational values and practices. This by no means implies that the accession negotiations had no effect on changing some aspects of the judicial systems and the respect for the rule of law.[72] However, it is precisely in the unresolved nature of these foundational issues that, what is now being referred to as the "rule of law crisis" in the EU, emerged as this growing and increasingly worrying phenomenon.

3. Post-accession

The phenomenon known as the "rule of law backsliding" can be traced back to the beginning of the early 2010s. Often associated with the election of both Fidesz in Hungary and

[68] Moliterno (n 61) 519–520.
[69] Ibid, 520.
[70] Ibid, 521.
[71] Ibid.
[72] International Monetary Fund, European Dept, '2. Reforming the Judiciary: Learning from the Experience of Central, Eastern, and Southeastern Europe' in Regional Economic Outlook, November 2017, Europe (USA: International Monetary Fund, 2017) https://doi.org/10.5089/9781484319611.086.ch002 accessed 3 July 2024, 54.

Law and Justice in Poland, the term signifies the start of a slow but drastic fall in the respect for the rule of law in, mainly, such countries pertaining to the Eastern bloc. However, as seen beforehand, the use of the word "backslide" might not be the best representative to describe such a process. For there to be a step backwards there must have first been an improvement. And while some might argue that the process of accession, if anything, achieved some necessary reforms in the area, without the proper assessment of the foundational issues, any such formal change was rendered obsolete. Thus, rather than suggest that the situation is one of regression, a more honest approach would be to say that these states were finally showing their true colours. It was Ralph Dahrendorf who notably stated how it takes six months to create new political institutions, six years to create a half-way viable economy, but sixty years to create a civil society.[73] Simply put, true change can only arise from cultivating a true liberal democratic value system within every sector of civil society, starting with the citizens themselves as the very source of sovereignty.

Reflecting on our problem, if the transitional and accession period have taught us anything, the mere changing of formalities achieves little without the existence of what Monica Claes would call a "rule of law culture".[74] To prove her point, in her article, she references James Melton and Tom Ginsburg's thorough research on the relationship between *de jure* and *de facto* judicial independence which showed how the weakest legal guarantees can often be found in some of the more resilient democracies – countries, which in essence, have some of the highest levels of *de facto* judicial independence.[75] The opposite holds true as well.[76] Therefore, such issues might be more a matter of tradition and political culture than of legal and constitutional guarantees.[77] The example of American culture may come to mind to some, where the famous quote of "A democracy is only as strong as its citizens" seems to be enshrined in the very essence of the state's collective consciousness. As mentioned previously, different values seem to have persisted in the CEE Member States.

Returning to the European Union, after a failed transition and an ineffective accession process, states which clearly did not meet the Copenhagen criteria on the respect for the rule of law entered the EU without having to implement the necessary changes. Instead of further encouraging the countries to continue the transition, accession seems to have had the opposite

[73] Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) Columbia Journal of European Law.
[74] Ibid.
[75] James E. Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Re-Evaluation of Explanations for Judicial Independence' (2014) Journal of Law and Courts Vol. 2.
[76] Ibid.
[77] Claes (n 73) 220.

effect. The leverage the EU institutions held over the accession candidates disappeared the moment the countries were given a green light, and due to an obvious lack of effective post-accession controlling mechanisms, everything that had been swept under the rug during the negotiations was starting to surface.[78]

Some of the earliest signs can be traced back to 2012, starting with the famous Case C-286/12 *Commission v Hungary* on the lowering of the retirement age for judges.[79] While the Court of Justice chose to adjudicate the case based on grounds of age discrimination instead of violation of judicial independence, the judgement clearly opened the gates to a plethora of debate on whether or not adjudicating on the basis of infringement of the rule of law was within the powers conferred to the Union. However, the reality was that various EU institutions had already been establishing certain soft law mechanisms to assure that there was some level of compliance with core Union values. For example, the Rule of Law Framework had already been adopted by the Commission in 2014 as a mechanism with the aim of preventing the triggering of the procedure in Article 7 TEU in case of a serious rule of law violation.[80] Regardless, cases kept on resurfacing, and it was finally with the Case C-64/16 *Associação Sindical dos Juízes Portugueses* (the *Portuguese judges* case) that the Court took action and established a new line of precedent.[81] As best explained by Claes, it was through a creative interpretation of Article 19(1) TEU in connection with Article 2 TEU and Article 47 of the Charter that the Court concluded that it was very much competent to adjudicate cases pertaining to this subject matter.[82] The logic was as follows: national courts and tribunals together with the Court of Justice form part of the judicial structure of the EU to which is entrusted the responsibility to jointly ensure that the interpretation and application of the Treaties and the law be effective and uniform.[83] For such a system to function properly, the principle of effective judicial protection of individuals' rights, and with it, the rule of law principle of judicial

[78] It must be noted that the Cooperation and Verification Mechanism (CVM) could, however, prove as a possible exception to this point. Nevertheless, its true effectiveness, in my opinion, should be called into question given the different results it achieved in Romania and Bulgaria. While Romania seems to have profited from such a mechanism, as argued by Corina Lacatus and Ulrich Sedelmeier, 'Does Monitoring without Enforcement Make a Difference? The European Union and Anti-Corruption Policies in Bulgaria and Romania after Accession' (2020) Journal of European Public Policy Vol. 27(8), the CVM showed to have had little effect on the state of affairs in Bulgaria. For further details on the latter, see Radosveta Vassileva, 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism' (2020) European Public Law Vol. 26(3).
[79] Case C-286/12 *Commission v Hungary* (6 November 2012) ECLI:EU:C:2012:687.
[80] Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague Journal on the Rule of Law Vol. 14.
[81] Claes (n 73).
[82] Ibid, 221.
[83] Case C-64/16 *Associação Sindical dos Juízes Portugueses* (27 February 2018) ECLI:EU:C:2018:117, paras 32–34.

independence, must be respected.[84] Thus, the question of whether or not it is in the competences of the Court to adjudicate such cases should be answered affirmatively.

The controversial judgement signified the start of a more aggressive and concrete step in the EU's effort to battle the so-called "backslide". A number of infringement proceedings soon started against the two most affected states, Poland and Hungary, and with time, the EU's small but significant "toolbox" to protect the rule of law expanded.[85] This included a number of instruments starting with the already mentioned Rule of Law Reports, the European Semester, NextGenerationEU, and budgetary conditionalities.[86] However, the true power stayed within the realms of the Court, who now held the power to adjudicate in infringement proceedings brought by the Commission and on preliminary references pertaining to this matter. All of these instruments are relevant to our debate and therefore deserve a more detailed examination.

4. The Rule of Law "toolbox"

As priorly concluded, the mishandling of the crisis should be attributed primarily to a misdiagnosis, which led to the mere handling of the symptoms rather than tackling the root cause. Rather than a rule of law "backslide", the real issue has proven to be the lack of a proper rule of law culture in the affected states. Thus, following Monica Claes' analysis, in this chapter I aim to assess the effectiveness of each of the presently implemented measures pertaining to the so-called "toolbox", and argue why, compared to all other instruments, in my view, the preliminary reference offers a uniquely efficient solution to this crisis.

The main problem with the content of the present EU "toolbox" stems from two particular issues: either it consists of non-binding recommendations or involves punitive top-down measures to address the problem. Beginning with the former, the Commission's Rule of Law Reports and the Council's European Semester present two soft law measures established with the aim of maintaining a continuous channel of communication between the Union and the Member States. While not insignificant, much can be said about their ineffectiveness in combating an already existing rule of law crisis. These non-binding recommendations are primarily made for governments and, as such, do not seem to reach the broader public. More

[84] Ibid, paras 36–37.
[85] Claes (n 73) 215.
[86] Ibid.

specifically, the Rule of Law Reports make country specific assessments of both positive and negative developments across all Member States in four particular areas of the rule of law: the justice system, the anti-corruption framework, media pluralism and freedom, and other institutional issues related to checks and balances.[87] However, as mentioned, these recommendations have no binding legal effect. In other words, little to nothing can be achieved if addressed to countries which are already far beyond respecting any kind of core Union principles. As noted by Claes, "the further a State backslides from the foundational values, the less it will be inclined to comply with the law and with decisions of the Court of Justice".[88] "This is the very problem of backsliding: that governments no longer feel bound by the law and the independent institutions requiring them to do so".[89] Thus, if anything, these measures eventually serve as mere preventive warnings for states in which such a crisis has not yet manifested.

The same can be said for the Council's European Semester. While defined as a yearly exercise to coordinate economic, fiscal, employment and social policy within the European Union, the Council can include recommendations related to the independence, efficiency and quality of the justice system thereby achieving the same effect as the Rule of Law Reports.[90] However, once again, these recommendations have no binding legal effect at all.

Therefore, it should come as no surprise that the EU has been slowly turning towards more punitive and legal instruments. Two are in particular worth mentioning at the beginning: the infringement actions and the budgetary conditionalities. Both present a firm and aggressive stance coming from the Union with the intention of a top-down crackdown of any type of disobedience regarding the respect for the rule of law.

Starting with the infringement actions, unlike the preliminary reference mechanism which will be addressed later, this action brought by the Commission, due to less strict admissibility requirements, allows for a more thorough examination of the national system and the compliance of national situations with EU law.[91] After the *Portuguese judges* case, such actions seemed to have become the instrument of choice for the Union. However, when dealing

[87] European Commission, '2023 Rule of Law Report: The 2023 Rule of Law Report monitors significant developments relating to the rule of law in all Member States' (2023) https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2023-rule-law-report_en accessed 10 July 2024.
[88] Claes (n 73) 222.
[89] Ibid.
[90] Council of the European Union, 'The European Semester Explained: The European Semester is a Yearly Exercise to Coordinate Economic, Fiscal, Employment and Social Policy within the European Union' (2024) https://www.consilium.europa.eu/en/policies/european-semester/ accessed 1 July 2024.
[91] Claes (n 73) 223.

with an already existing problem which stems from strong authoritarian tendencies, one would wonder if a top-down mechanism would be the best approach. It could be argued that the necessity for introducing legislation such as Regulation 2020/2092 on the conditionalities for the protection of the Union budget further supports this claim.[92] The infringement approach has already been tried for some time and instead of achieving a total crackdown of rule of law violations, it only gave ground for populist governments to exploit and paint the picture of a power-hungry Union endangering the very sovereignty of their state. Considering that some of the discussed countries might have only recently gained their independence, the issue could not be more sensitive. Consequently, instead of mobilising people to put pressure on their ruling parties, it rallied citizens behind "their own" and allowed for governments to openly reject EU law supremacy and CJEU judgments. An example is Hungary's most recent upright rejection to pay a lump sum of 200 million euros and a penalty payment of 1 million euros per day of delay imposed by the CJEU for failure to comply with a previous judgement.[93]

Accordingly, the failure of the infringement approach forced the Union to introduce the aforementioned budget conditionalities as a new top-down coercive solution. The idea was to establish a regime where, based on the Commission's proposals, the Council could suspend any payments or financial corrections coming from the EU budget if a state refused to take the necessary precautions in order to guarantee the protection of the rule of law. While it might be too early to call, the 2023 election results in Poland could indicate the effectiveness of this new mechanism in putting pressure, and consequently, removing "unruly" governments. Nevertheless, even if proven right, its implementation continues to feed into the authoritarian top-down culture of the society, with the difference being that it now might perceive the Union as the "top dog", instead of its national political establishment. Something which should prove concerning to all. Moreover, a narrative could easily be constructed to portray the punished state as a modern-day martyr for sympathisers around the EU to worship. Once again, traces of this may already be found regarding Hungary.

Hence, both infringement proceedings and the imposing of budget conditionalities, while justified and understandable, repeat the same mistake as prior approaches: they concentrate on the symptoms rather than the disease. Similarly to the problems which arose during the accession negotiations, both discussed measures are left at the discretion of highly

[92] 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 [2020] OJ L433I/1 http://data.europa.eu/eli/reg/2020/2092/oj.

[93] For further information see the Judgment of the Court in Case C-123/22 *Commission v Hungary (Reception of applicants for international protection II)* (13 June 2024) ECLI:EU:C:2024:493.

politicised bodies. Infringement actions can only be brought by the Commission, and budget conditionalities cannot be imposed without its prior proposal. Thus, the use of both measures falls subject to the ever-shifting political dynamic of the Union. For many, the recent controversy of the unblocking of Hungary's funds in order to continue to provide aid to Ukraine may come to mind as an example. Consequently, in both of these approaches, instead of fostering a rule of law culture from the ground up, these two measures achieve the opposite – dividing, polarising and tribalising the sociopolitical landscape within Member States as well as at the EU level.

Claes reaches a similar conclusion. In her own words, "[i]n the current debate, the focus is usually on punitive measures, rather than on positive incentives to foster respect for the Rule of Law or to increase public support for it."[94] As a result, she proposes that more effort be invested in promoting a rule of law culture and preventing backsliding.[95] This could be done through a three-tier strategy aiming at: fostering civil society, strengthening transnational networks, and investing in training and education.[96]

The first proposal stems from the understanding that civil society is the cornerstone to any vibrant liberal democracy governed by the rule of law.[97] It plays a pivotal role in both government scrutiny and driving change. Therefore, it should come as no surprise that there has been a suppression of civic space, journalism, and activism, as well as the independence of educational and academic institutions coming from the affected states.[98] Some steps have already been taken by the EU, as Claes mentions, such as the European Democracy Action Plan, which aims to offer support and safeguard media freedom and pluralism; the anti-SLAPP directive, which protects journalist against strategic lawsuits; the European Media Freedom Act with its rules to protect media pluralism; and finally, the increased funding to support civic society both in the new Multiannual Financial Framework and the NextGenerationEU.[99] However, for Claes, there still seems to be a problem with both ensuring access to smaller organisations which do not have the capacity to deal with the process of attaining European funding, and the prevention of those funds finishing in the hands of organisations which defy the rule of law.[100]

[94] Claes (n 73) 223.
[95] Ibid.
[96] Ibid, 224.
[97] Ibid.
[98] Ibid.
[99] Ibid, 224–225.
[100] Ibid, 225.

The second step consists of strengthening transnational cooperation and enhancing overall communication between national actors.[101] In other words, bolstering a network built on mutual trust with the emphasis on a domestic promotion and adoption of rules and a "rule of law culture", rather than having one be "imposed" from above.[102] Claes gives the examples of various judicial networks, such as the European Judicial Training Network, the European Judicial Network, the European Commission for the Efficiency of Justice (CEPEJ), and the Consultative Council of European Judges (CCJE).[103]

Lastly, none of this would bear fruit if not followed by robust training and education on the importance of respecting the rule of law.[104] Without a population that cares, the system lacks the necessary control imposed by the citizenry and governments can easily defy any core liberal democratic value.[105] This lack of civic engagement and passivity is something for which Croatia has often been criticised, where violations which would spark a plethora of protests in other countries seem to go unnoticed.

To summarise, Claes' analysis provides for a clear overview of which measures have to be implemented to establish grass root change in the prevailing cultures. By offering a long-term strategy centred on education, training and the strengthening of civic society, instead of proposing solutions on how to tackle concrete laws and practices, an emphasis is put on the necessity of addressing the underlying issue of an "anti-rule of law" culture. While I agree with both Claes' overall diagnosis and proposals, I believe the entire strategy is missing a key piece. Within the existing content of the aforementioned "toolbox" there could be one measure with the potential of encompassing both the benefits found in legally binding instruments while simultaneously empowering civil society in the process. I am talking about the preliminary reference mechanism. Much has already been said on the ineffectiveness of the present solutions and their failure to tackle an already existing crisis. However, one thing should stand clear: it was not in the taking of legal action *per se* that the EU institutions erred, but rather in the way in which they executed it. Truth be told, when confronted with such concrete and serious violations, legal action is inevitable if there is to even be a chance at introducing measures which could impact the culture. Hence, while the Union's response is understandable, instead of opting for a top-down approach, a more appropriate solution could have been found in the use of the preliminary reference mechanism. Unlike infringement actions, the entire idea

[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid, 226.
[105] Ibid.

behind preliminary references is to establish a bottom-up structure of judicial protection which empowers both national judges and individuals to advocate for a unified and proper application of Union law. In other words, through the incentive framework it establishes, it strengthens civic society by giving them the necessary legal tools to combat any type of violation themselves. However, this idea is not without criticism. Notably, Claes, as well as others, have highlighted significant problems with such a use. Two are particularly worth mentioning. Firstly, from a legal standpoint, it appears that the Court's gradual narrowing of the admissibility criteria over time had ruled out preliminary references as a viable option, at least till its recent judgement.[106] Secondly, on a more practical note, there is a broader concern regarding the use of such a mechanism in order to assess the compliance of national law with EU law.[107] This could contradict the mechanism's intended purpose.[108] Both arguments are of immense significance regarding the entire development of the rule of law case law and have resulted in a number of contradicting judgements and AG opinions, as well as scientific papers on the topic. Nevertheless, due to their complexity and their relevance to *Hann-Invest*, these matters deserve to be discussed in the following chapter, as it is precisely here that the Court's recent ruling reveals one of its most significant aspects.

5. *Hann-Invest* and the debate surrounding preliminary references

The end of 2021 marked an interesting period for the functioning of the Luxembourg Court. After nearly five years of back-to-back adjudication on matters pertaining to the rule of law violations in Hungary, Poland, and to a lesser extent Romania, suddenly three preliminary references appeared from an unexpected Member State, which up until that point, had not been considered as one of the "crisis" countries: Croatia. These three, later joined, cases consisted of pending appeals before the Croatian Commercial Court of Appeal (Visoki trgovački sud). In Cases C-554/21 and C-622/21, the appeals were related to orders dismissing claims by the Financial Agency for reimbursement of costs regarding its activities in the context of insolvency proceedings, while the appeal in Case C-727/21 dealt with an order rejecting the application to open court-supervised administration proceedings. In other words, all three regarded disputes of insolvency procedural law, an area with little to no connection with EU

[106] Ibid, 223.
[107] Ibid.
[108] Ibid.

law. However, the questions brought up before the CJEU had nothing to do with the substance of the cases, and rather concern certain procedural issues pertaining to the appeal procedure before courts of second instance. In essence, the issue relates to two "uniformity mechanisms" commonly used in order to facilitate the harmonisation of case-law – a challenge with which the Croatian judiciary has long struggled. However, as noted by Nika Bačić Selanec and Davor Petrić, these mechanisms are relics pertaining to the country's socialist past, originally designed as tools to advance the interests of the Communist Party.[109] Simply put, measures which perfectly reflect the aforementioned authoritarian judicial culture fostered by the prevailing legal tradition of "socialist law". Thus, while being branded as tools to help further the harmonisation, many of its intrusive aspects proved highly concerning in regards to the protection of the rule of law. Therefore, believing that such measures threatened their "judicial independence", the three panels of Croatian judges chose to seek refuge in Union law.

Hann-Invest's significance is multi-layered to say the least. Firstly, from a national perspective, this marked the first time Croatia's judicial system fell under the scrutiny of the Court of Justice regarding a violation of the rule of law principle. Despite the fact that there were various reports, papers and surveys indicating that the country often ranked bottom of the EU in this matter,[110] the Commission never brought an infringement action against the state, and it was only upon request for a preliminary ruling that the issue got to the Court's attention. While much can be speculated on why this was the case, it undeniably serves as another compelling argument in favour of the use of preliminary references as a viable solution to address the crisis.

Secondly, as already hinted, *Hann-Invest* presents the culmination of the debate surrounding the use of preliminary references as the main instrument for combating the rule of law crisis. The question is one of admissibility of preliminary references in cases in which there is no substantive connection with EU law. As nicely summed up by Advocate General Pikamäe in his Opinion,[111] prior to the *Hann-Invest* judgement, the Court evaluated the admissibility in the given cases based on the "connection" criteria and distinguished three particular scenarios in its case law. First are the situations with a "direct" connecting factor, meaning that an interpretation of EU law is sought in order to determine a substantive solution to the main

[109] Nika Bačić Selanec and Davor Petrić, 'Editorial Comment: Internal Judicial Independence in the EU and Ghosts from the Socialist Past: Why the Court of Justice Should Not Follow AG Pikamäe in Hann Invest' (2024) Croatian Yearbook of European Law and Policy Vol. 20.
[110] For example: The World Justice Project, WJP Rule of Law Index 2023 (World Justice Project 2023).
[111] Joined Cases C-554/21, C-622/21, and C-727/21 *Hann Invest*, Opinion of AG Pikamäe (26 October 2023) ECLI:EU:C:2023:816.

dispute.[112] This would be the scenario in the *Portuguese judges* case where the disputed national law was a result of the Portuguese government following requirements from an EU financial assistance programme.[113] Secondly, the connecting factor can be seen as indirect so that it concerns procedural requirements which require an interpretation.[114] However, there is a distinction to be made between references requesting an interpretation of procedural provisions of EU law which national courts are required to apply in order to give judgement, and references seeking an interpretation of EU law which would allow them to resolve procedural questions of national law necessary for resolving the substantive issue in the dispute before them.[115]

In the former, as decided in *Weryński,* the references are deemed admissible. On the other hand, the solution for the latter has remained rather unclear for some time, with arguments raging from claims that they should be deemed inadmissible due to the lack of necessity, connectivity, or because they are too hypothetical, to assertions that they are clearly admissible. While various factors have contributed to this uncertainty, I believe it is safe to say that much of the confusion has started ever since the infamous *Miasto Łowicz* judgement.

In short, the case centred around two Polish judges that were concerned with being subject to disciplinary proceedings if they rendered an unfavourable judgement against the state. Seeking refuge in EU law, they asked the Court if the existence of such disciplinary proceedings, which may be conducted under political influence, undermines their judicial independence, and with it, the principle of effective legal protection in the fields covered by EU law. The referred question had nothing to do with the substance of the cases pending before the Polish courts, thus falling under the third category mentioned by AG Pikamäe. Nevertheless, in the case itself, both the Court and the Advocate General strongly disagreed on the reasoning which should prevail. For Advocate General Tanchev, the problem was not one of connectivity with EU law, but rather one of lack of information thus making the question too hypothetical since the disciplinary proceedings mentioned have not yet manifested at the time of the reference.[116] In contrast, the Court went the opposite direction. Through paragraphs 49 to 52, it examined prior case law distinguishing the given scenario with the *Portuguese judges* and *Weryński* cases, and concluded how it should be due to the lack of a connecting

[112] Ibid, para 32.
[113] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* (26 March 2020) ECLI:EU:C:2020:234, para 49.
[114] Opinion of AG Pikamäe (n 111) para 32.
[115] Ibid.
[116] Joined Cases C-558/18 and C-563/18 *Miasto Łowicz*, Opinion of AG Tanchev (24 September 2019) ECLI:EU:C:2019:775, para 119.

factor between the provision of EU law in the question referred and the disputes in the main proceedings that these types of cases could never meet the required admissibility criteria.

The judgement came as somewhat of a surprise. As noted by Sébastien Platon, the Court's logic ran opposite to its initial interpretation when it rendered its landmark judgement in the *Portuguese judges* case.[117] There, Article 19 TEU was understood as prohibiting any measure which would undermine the independence of national judges who may apply EU law.[118] In other words, this meant that Article 19 TEU was to be interpreted as having a broader scope than Article 47 of the Charter, which can only be applied in proceedings with a connection to EU law.[119] Consequently, any national dispute should automatically fall under the scope of Article 19 TEU.[120] Stated differently, the very essence on which the Court established its jurisdiction was the logic that national courts are to be seen as bodies of the EU judiciary in the broader sense, and thus matters pertaining to the judicial independence of national judges which could hypothetically adjudicate on matters of EU law, fell inherently under EU law. Therefore, to state that such matters are not connected to EU law, such as in *Miasto Łowicz*, is to deny the logic established in the *Portuguese judges* case, and with it, the Court's jurisdiction over such issues. Both cannot hold true simultaneously, and it was only a matter of time for the Court to overturn either one of these judgments.

To make matters even more complicated, other than the *Miasto Łowicz* conundrum, further confusion had been spurred on the entire debate as more and more of the CJEU's case law showed a concerning pattern that suggested there might be more than meets the eye regarding the Court's contradictory stances.[121] Ever since the *Portuguese judges* case, the Court has hesitated to find a breach of judicial independence *in casu*, regardless of the fact that it acknowledged systemic deficiencies.[122] For instance, in Case C-216/18 PPU *LM*, throughout the judgement, it underscored the relevance of certain information related to the systemic issues present in the reasoned proposal addressed by the Commission to the Council regarding Poland.[123] However, instead of declaring the existence of a violation, it remanded the case to the referring court.[124] Similarly, in the Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.*,

[117] Sébastien Platon, 'All Bark and No Bite. Another Case of Mixed Signals From the Court of Justice Regarding the Independence of National Courts (CJEU, Grand Chamber, 26 March 2020, Miasto Łowicz, Joined Cases C-558/18 and C-563/18)' (2020) Common Market Law Review Vol. 57.
[118] Ibid, 13.
[119] Ibid.
[120] Ibid.
[121] Ibid, 20.
[122] Ibid.
[123] Platon (n 117); Case C-216/18 PPU *LM* (25 July 2018) ECLI:EU:C:2018:586.
[124] Platon (n 117) 21.

the Court proceeded to provide the referring court with the necessary guidance needed to determine whether the Disciplinary Chamber was independent or not, rather than decide the matter itself.[125] Nevertheless, in between the lines, the Court's instructions clearly read in favour of ruling against the Disciplinary Chamber.[126]

Patterns such as these beg the question of whether the Court itself is admitting that the line of precedent established with the *Portuguese judges* case has spiralled beyond its control, leading to unforeseen consequences on the nature of preliminary references and the bringing of national judicial structures under the umbrella of Union law – an outcome it was not ready to address, and which could, understandably, result in a possible constitutional crisis. It appears as if it is in light of this that many of the recent cases had been adjudicated – *Miasto Łowicz* being no exception. Thus, at the time, many national judges reasonably relied on the Court's initial logic when they sought refuge in EU law. However, the latter judgement made clear that the Court refused to acknowledge the possible implications of this line of precedent and, as a result, the entire question on whether or not preliminary references could be seen as a viable mechanism against rule of law violations has been put on hold ever since.

Here lies, in my opinion, the most significant factor of the *Hann-Invest* judgement. For the first time after *Miasto Łowicz,* the Grand Chamber of the Court set the record straight with a plain and straightforward answer: the request for a preliminary ruling posed by the three Croatian judges, which fell under the "third category", was admissible. A striking answer to say the least. On the one hand, it marked the first instance where the Court provided some clarity on the issue by unequivocally stating that such references are no longer to be deemed inadmissible. However, on a more concerning note, no explanation was provided to support this claim other than the fact that, based on the Court's conclusions, the "answers to the questions referred for a preliminary ruling were necessary to enable the referring court to close the three cases in the main proceedings definitively".[127] This lack of a reasoned decision leaves us with little more than speculation about the Court's reasoning, which, given the long-standing need for clarification, proves troubling for any future predictions on how the Court might proceed in the coming cases. So, what possible arguments might have influenced the Court's most recent stance?

[125] Platon (n 117); Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.* (19 November 2019) ECLI:EU:C:2019:982.
[126] Platon (n 117).
[127] Joined Cases C-554/21, C-622/21 and C-727/21 *Hann Invest* (11 July 2024) ECLI:EU:C:2024:594, para 41.

Advocate General Pikamäe's Opinion focused extensively on this question and ended with him concluding the opposite. Following the structure established in *Miasto Łowicz*, the AG proposed to tighten the admissibility criteria even further, suggesting that if the Court were to accept that a question may be referred to it concerning a provision of EU law in order to resolve a question of national procedural law, so that the main proceedings may be conducted in compliance with EU law, it should only be with a view to a decision by the referring court regarding the substance of a dispute in the main proceedings relating to EU law.[128] Simply put, questions falling under the third category, as were the ones in *Hann Invest*, should not satisfy the criteria and should be deemed inadmissible due to a lack of "necessity".[129]

While the AG's Opinion was obviously not followed, both it and the Court's conclusions hint to an interesting observation made right after *Miasto Łowicz*. As Platon noted, the Court may have incorrectly framed in its ruling that the main issue was one of a "disconnect" from Article 19 TEU, rather than one of a lack of "necessity".[130] And while different, both the Opinion and judgement do interestingly highlight this criterion rather than that of "connectivity" when addressing the (in)admissibility of the references. The problem with considering questions referred under the third scenario as "disconnected" with EU law has already been addressed beforehand. If the main issue was, however, one of "necessity", that would be an entirely different debate. In essence, the AG's Opinion concluded that all matters of national procedural law which have little to do with the substance of the pending cases should never be considered as "necessary" for resolving the given disputes. However, this perspective is not without its issues, and while we are indeed left to speculate, there might be two arguments that come to mind on why the Court may have disagreed. Firstly, to generalise in such a manner does prove imprudent, as the answer would depend on national procedural provisions which could hypothetically require judges to refuse to rule on cases on grounds of non-independence.[131] Thus, if "necessity" was the concerning criterion, it should always be assessed *in concreto* in relation to each individual case. However, while plain and simple, such an argument limits itself to tackling some of the wording used by the AG, and does not delve into any broader issues beyond that. On the other hand, there is another, much more radical, argument to be made which holds that "necessity" should never be used as an excuse to dismiss such cases. As, once again, noted by Platon, prior case law of the Court

[128] Opinion of AG Pikamäe (n 111) para 42.
[129] Ibid, para 46.
[130] Platon (n 117) 14.
[131] Ibid.

indicates that even when such cases fail to fulfil the "necessity" criteria, they are still considered to be admissible.[132] An example would be the mentioned *Weryński* case. The issue centred around the refusal of an Irish court to examine a witness requested by a Polish court due to the fact that the latter would not pay for the expenses. Here the CJEU followed the AG's "general interest" argument concluding that taking of a broader interpretation of the concept "give judgement" within the meaning of the second paragraph of Article 267 TFEU would prove beneficial as it would allow for the clarification of issues which have hindered cooperation between courts and which would remain an obstacle if not resolved.[133] Platon highlighted the similarities between *Weryński* and *Miasto Łowicz*, concluding that the reasoning would easily be transposed if the debate were one of "necessity" rather than "connectivity". While the Court refused to elaborate on this issue, I believe the same could have been argued for *Hann-Invest.*

Nevertheless, such an argument is not as straightforward as it seems, as it encompasses both promising aspects and problematic issues. Starting with the latter, a case can be made that the "general interest" argument arose in *Weryński* precisely because it was a procedural matter of Union law, which is exclusively in the CJEU's jurisdiction to interpret. Therefore, if not addressed through the preliminary reference procedure, such issues would forever remain unresolved. This is obviously something which cannot be said about our "third category" references. Rule of law matters, such as that of judicial independence, both fall under national and European law, meaning that there is always a national court with the power to adjudicate. Thus, if the Court were to have embraced the *Weryński* precedent, it would imply a significant broadening of the "general interest" argument. If this were the case, the extent and basis for such an interpretation should be considered carefully.

On the other hand, the *Weryński* logic, if leveraged effectively, might be the only one to give a definitive answer to the frequently raised argument that declaring such references as admissible contradicts the very nature of the preliminary reference mechanism. This argument has never been fully elaborated by the Court, other than it stating that such references are "unnecessary", and it is rather something which emerged, throughout the debate, from academia, as many scholars warned about this possible legal contradiction. In essence, they argued that if the latter interpretations were to be accepted, instead of assisting the referring court in resolving the specific dispute pending before it, preliminary references would become a mechanism that would grant the Court access into the entire judicial structure of any Member

[132] Ibid.
[133] Ibid.

State by letting it assess the facts in the pending case and interpret and apply national law. However, in light of the conclusions reached in *Weryński,* as well as that of *Portuguese judges*, not much of this argument would hold. Firstly, the *Portuguese judges* case has clearly indicated that any rule of law matter inherently falls under the umbrella of Union law, rather than being confined to national law. Meanwhile, the broadening of the interpretation of "give judgement" in *Weryński*, could imply that any questions which would resolve matters of procedural law would inherently fall under the scope of Article 267 TFEU. Thus, if a "general interest" argument were to be accepted, the admissibility of "third category" references would not represent a legal contradiction, but rather a natural evolution of the preliminary reference mechanism.

Lastly, before concluding, it is worth noting that the Court's broadening of the admissibility criteria in *Hann-Invest* might have given an answer to a whole other issue. There is an ongoing debate regarding whether the concept of 'independence', used for the purposes of assessing the admissibility of references, should account for the same 'independence' as used for the purposes of answering the merits of the references. This issue arises from a logical, as well as a practical standpoint, where by declaring such rule of law references admissible, a paradox may entail if the ruling results in the finding of a violation of judicial independence. As important as the requirements for "necessity" and "connectivity" are, without the referencing body being considered a court or tribunal as understood under Article 267 paragraph 2 TFEU, the entire debate is useless. For it to be classified as such, certain requirements must be met, one notably being "judicial independence" itself. In other words, if the Court were to answer as to having found a violation of such principle, the judgement would indicate that such referring court should not be considered a "court" under Union law, therefore failing to fulfil the admissibility criteria. Thus, without going into too much detail on the possible implications of the Court's ruling, one of the unexpected outcomes of *Hann-Invest* might just be the Court's answering to such a question, where by declaring the references admissible, it subtly acknowledged that there might be two separate concepts of 'independence' in the context of the preliminary reference procedure. However, as this issue also remained unaddressed by the Court, it is only in future case law that we will know the definitive answer.

In conclusion, the relaxation of the criteria on admissibility established in *Hann-Invest* carries with it many consequences. While true that many issues remain unaddressed, whether the problem be one of "connectivity" or "necessity", there can still be a coherent rationale for this ruling which would align with previous case law and, most importantly, leave a path for the continuation of such precedent. However, though it is important that there is a legally

consistent framework for future adjudication, in our particular debate, *Hann-Invest's* true significance lies in its potential to encourage a more frequent usage of the preliminary reference procedure in combating rule of law violations, thereby enabling to simultaneously address both superficial and root level concerns. If the latter were to hold, this could manifest in a more proactive way, finally allowing civic society to legally challenge problematic practices, or in a more reactive manner as a refuge for national judges whose independence is at stake. Nevertheless, by bolstering this bottom-up structure, the burden of being the primary guardian of the rule of law principle is likely to shift from the Commission to the Court of Justice, as all of the EU's citizenry becomes engaged in identifying rule of law violations.[134] Regardless, if the Union were serious about combating the crisis, every case should be welcomed, and if the volume of cases were to start overwhelming the Court, the solution should be found in legislative reform of the Court's structure and functioning, rather than the denial of legal protection through restrictive interpretations.

Conclusion

Hann Invest emerged during a period of uncertainty, where it seemed that the EU had exhausted most of its options in tackling the so-called "rule of law crisis". Twelve years in, and little progress had been made. What is more, it appears the deeper one delved, the more issues would come to surface. Croatia, in this case, serves as a prime example. As concluded, much of the turmoil should be blamed on what seems like an overall mishandling of the crisis. Ever since the fall of the Iron Curtain, EU institutions have been grappling with how to address the challenges posed by these newly independent "liberal democracies", which sought EU membership. The European Council was first to act with its Copenhagen criteria in 1993, which provided guidelines to the Commission in assessing each State's readiness. The Commission, however, influenced by political considerations, was anything but objective in this regard, leading to many countries being admitted without undergoing the necessary societal change. It was thus left for the CJEU to establish a certain degree of order in this post-accession set of affairs. A partial solution was crafted through the (in)famous *Portuguese judges* case, naming

[134] The latter statement should nonetheless be taken with a grain of salt, as every court case does inevitably come with its procedural issues such as costs and duration (more so considering the fact that only last instance courts are obliged to refer preliminary references). For example, it took more than two years for the CJEU to render a judgement in *Hann-Invest*.

the Court as the main arbiter in matters pertaining to the rule of law milieu. However, such a radical judgement opened the doors to a plethora of questions, one notably being who was to enforce these principles. Two possibilities emerged: the main role was either going to fall on the Commission, in its role as a prosecutor, or the EU's ever growing civil society. Ever since its landmark ruling, it appears that the former had been favoured. This was mainly achieved through gradual narrowing of the admissibility criteria for preliminary references, making infringement actions the *de facto* mechanism of choice. A solution which proved to be, not only ineffective, but also legally inconsistent. In my opinion, it seems obvious that such an approach had been taken as a result of the backlash created by what can only be considered as one of the most controversial "competence creeps" in the Court's recent history. However, if there is no intention in overruling the landmark *Portuguese judges* judgement, and there appears not to be, as I have argued throughout this thesis, I do not see the harm in trying to make the most of it, rather than awkwardly backtracking in order to appease certain interests.

It is precisely in this context that *Hann-Invest* reveals its true significance. From the perspective of Member States, for the first time the Court empowered Union citizens, enabling them to hold their governments fully accountable for any such violations – a mechanism essential to the existence of any liberal democracy, yet often absent in many CEE states. On the other hand, from a broader European level, the Court's decision on the admissibility of the references opens up the door to a more viable approach to any rule of law crisis, present and future. Instead of opting for a top-down crackdown, the democratisation of the preliminary reference mechanism establishes a bottom-up incentive structure for citizens to use in order to further the transition of their respective Member State – something which could prove essential in regards to the EU's future enlargements to the East. This could, however, have a downside, resulting in a possible overburden of the Court, as there might be much more on which to adjudicate than meets the eye. Thus, this paper implicitly also advocates for the introduction of necessary legislative reform of the Court's structure and functioning which should accompany this new line of precedent. As already noted, if there is no intention in overturning the entire rule of law case law, the number of cases should in no way serve as motivation or excuse for the upright rejection of references. Otherwise, the latter could prove far more harmful than all that has been discussed.

Everything stated should, however, be taken with a pinch of salt. The Court is known for its sudden shifts in opinion, and until there are several cases which seem to follow the logic established in *Hann-Invest*, this solution should not be considered definitive. We have already seen the numerous questions which arise from this unexplained decision, leaving us to only

speculate about the rationale behind the Court's precedent. Therefore, it is future adjudications that will ultimately shape the course of this debate. However, to aptly quote a Croatian author, "The very fact that such hope could exist is worth so much more than what could dearly be paid for by one disappointment, no matter how difficult that may be".[135] It is in this light that *Hann-Invest* should be embraced. Although the judgement indeed has its flaws, it nonetheless opens up a window of opportunity for anyone seeking refuge from the injustices posed by authoritarian practices. For the first time CEE citizens might have the power to decide if they wish to partake in the necessary change and push for the long-awaited democratic transition. And so, it is in light of this that I ask: has the time finally come when the whole of Europe is ready to embrace this project called liberal democracy, or shall it continue to be haunted by its socialist past?

[135] The quote is taken from Croatian nobelist author Ivo Andrić from his work "Roadside Signs" ("Znakovi pored puta").

Bibliography

Books, journals, blogs, and websites

Alan Uzelac, 'Jedinstvena primjena prava u hrvatskom parničnom postupku: tradicija i suvremenost' (2020) Novìne u parničnom procesnom pravu (Hrvatska akademija znanosti i umjetnosti).

Alan Uzelac, '"Materijalna istina": iskrivljeno ogledalo jedne teorije istine u sudskom postupku' (1992) Zbornik Pravnog fakulteta u Zagrebu Vol. 42.

Alan Uzelac, 'Survival of the third legal tradition?' (2010) Supreme Court Law Review Vol. 49.

Branko Smerdel, 'Kriza demokratskog konstitucionalizma i izgledi demokratske tranzicije u Republici Hrvatskoj' (2019) Zbornik Pravnog fakulteta u Zagrebu Vol. 69.

Bruce Ackerman, 'The Future of Liberal Revolution' (1992) Yale University Press.

Corina Lacatus and Ulrich Sedelmeier, 'Does Monitoring without Enforcement Make a Difference? The European Union and Anti-Corruption Policies in Bulgaria and Romania after Accession' (2020) Journal of European Public Policy Vol. 27(8).

Council of the European Union, 'The European Semester Explained: The European Semester is a Yearly Exercise to Coordinate Economic, Fiscal, Employment and Social Policy within the European Union' (2024) Link, accessed 1 July 2024.

Directorate-General for Neighbourhood and Enlargement Negotiations, Screening report Croatia - Chapter 23 - Judiciary and fundamental rights (2007) Link, accessed 3 July 2024.

European Commission, '2023 Rule of Law Report: The 2023 Rule of Law Report monitors significant developments relating to the rule of law in all Member States' (2023) Link, accessed 10 July 2024.

Francis Fukuyama, 'The End of History and the Last Man' (2012) Penguin Books.

H. Patrick Glenn, 'A Concept of Legal Tradition' (2008) Queen's Law Journal Vol. 34(1).

International Monetary Fund, European Dept, '2. Reforming the Judiciary: Learning from the Experience of Central, Eastern, and Southeastern Europe' in Regional Economic Outlook, November 2017, Europe (USA: International Monetary Fund, 2017) Link, accessed 3 July 2024, 54.

James E. Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter? A Re-Evaluation of Explanations for Judicial Independence' (2014) Journal of Law and Courts Vol. 2.

James E. Moliterno, Lucia Berdisová, Peter Čuroš and Ján Mazúr, 'Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants' (2018) Fordham Int'l L.J. Vol. 42.

Jogchum Vrielink, Paul Lemmens and Stephan Parmentier, 'Academic Freedom as a Fundamental Right' (2011) Procedia - Social and Behavioral Sciences Vol. 13.

Laurent Pech, 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law' (2022) Hague Journal on the Rule of Law Vol. 14.

Michal Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries' (2007) European Public Law Vol. 14, No. 1.

Mihajlo Dika and Alan Uzelac, 'Sudački aktivizam u Jugoslaviji' (1990) Zbornik Pravnog Fakulteta u Zagrebu Vol. 40, No. 4.

Monica Claes, 'Safeguarding a Rule of Law Culture in the Member States: Engaging National Actors' (2023) Columbia Journal of European Law.

Nika Bačić Selanec and Davor Petrić, 'Editorial Comment: Internal Judicial Independence in the EU and Ghosts from the Socialist Past: Why the Court of Justice Should Not Follow AG Pikamäe in Hann Invest' (2024) Croatian Yearbook of European Law and Policy Vol. 20.

Presidency Conclusions of the Copenhagen European Council on June 21 and 22, 1993, EUR. PARLIAMENT Link, accessed 3 July 2024.

Radosveta Vassileva, 'Threats to the Rule of Law: The Pitfalls of the Cooperation and Verification Mechanism' (2020) European Public Law Vol. 26(3).

Sanja Barić, 'The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU' (2016) ANALITIKA Center for Social Research.

Sébastien Platon, 'All Bark and No Bite. Another Case of Mixed Signals From the Court of Justice Regarding the Independence of National Courts (CJEU, Grand Chamber, 26 March 2020, Miasto Łowicz, Joined Cases C-558/18 and C-563/18)' (2020) Common Market Law Review Vol. 57.

Taras Kuzio, 'Transition in Post-Communist States: Triple or Quadruple?' (2001) Politics Vol. 21.

The World Justice Project, WJP Rule of Law Index 2023 (World Justice Project 2023).

Zdenek Kühn, 'All-Pervasive Legacies of Socialist Constitutionalism? The Case of Judiciary' (2021) Russian Law Journal.

Case law of the Court of Justice of the European Union

Case C-123/22 *Commission v Hungary* (13 June 2024) ECLI:EU:C:2024:493.

Case C-64/16 *Associação Sindical dos Juízes Portugueses* (27 February 2018) ECLI:EU:C:2018:117.

Case C-216/18 PPU *LM* (25 July 2018) ECLI:EU:C:2018:586.

Case C-286/12 *Commission v Hungary* (6 November 2012) ECLI:EU:C:2012:687.

C-283/09 *Weryński* (17 February 2011) ECLI:EU:C:2011:85.

Joined Cases C-554/21, C-622/21 and C-727/21 *Hann-Invest* (11 July 2024) ECLI:EU:C:2024:594.

Joined Cases C-554/21, C-622/21 and C-727/21 *Hann Invest* (26 October 2023), ECLI:EU:C:2023:816, Opinion of AG Pikamäe.

Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* (26 March 2020) ECLI:EU:C:2020:234.

Joined Cases C-558/18 and C-563/18 *Miasto Łowicz* (24 September 2019), ECLI:EU:C:2019:775, Opinion of AG Tanchev.

Joined Cases C-585/18, C-624/18 and C-625/18 *A. K.* (19 November 2019), ECLI:EU:C:2019:982.

Legislation

Consolidated Version of the Charter of Fundamental Rights of the European Union [2012] OJ C 326, 26.10.2012/391–407 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/391–407 (GA).

Consolidated Version of the Treaty on European Union [2020] OJ C 202 7.6.2016, 13.

Consolidated Version of the Treaty on the Functioning of the European Union [2007] OJ C 326, 26.10.2012/47–390 (BG, ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, MT, NL, PL, PT, RO, SK, SL, FI, SV) OJ C 326, 26.10.2012/47–390 (GA).

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 [2020] OJ L433I/1 http://data.europa.eu/eli/reg/2020/2092/oj.

Ustav Republike Hrvatske (Narodne novine, br. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14).